Nos. 16-1436 and 16-1540

In the Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF MEMBERS OF THE CLERGY; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; PEOPLE FOR THE AMERICAN WAY FOUNDATION; THE RIVERSIDE CHURCH IN THE CITY OF NEW YORK; AND THE SOUTHERN POVERTY LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

GILLIAN B. GILLERS
KRISTI L. GRAUNKE
NAOMI R. TSU
Southern Poverty Law Center
150 East Ponce de Leon Ave., Ste. 340
Decatur, GA 30030
(404) 521-6700

RICHARD B. KATSKEE
Counsel of Record
ERIC ROTHSCHILD†
ANDREW L. NELLIS‡
Americans United for Separation of Church and State
1310 L St. NW, Ste. 200
Washington, DC 20005
(202) 466-3234
katskee@au.org

(Additional caption and counsel on inside cover)

† Admitted in Pennsylvania; supervised by Richard B. Katskee of the D.C. Bar.
‡ Admitted in New York; supervised by Richard B. Katskee of the D.C. Bar.

DONALD J. TRUMP, *et al.*,

Petitioners,

v.

STATE OF HAWAIʻI, *et al.*,

Respondents.

SUSAN L. SOMMER
Lambda Legal Defense and Education Fund, Inc.
120 Wall St., 19th Fl.
New York, NY 10005
(212) 809-8585

CAMILLA B. TAYLOR
Lambda Legal Defense and Education Fund, Inc.
105 W. Adams St., 26th Fl.
Chicago, IL 60603
(312) 663-4413

SHARON M. MCGOWAN
Lambda Legal Defense and Education Fund, Inc.
1875 I St. NW, 5th Fl.
Washington, DC 20006
(202) 740-0914

ELLIOT M. MINCBERG
DIANE LAVIOLETTE
People For the American Way Foundation
1101 15th St. NW, Ste. 600
Washington, DC 20005
(202) 467-4999

JENNIFER C. PIZER
Lambda Legal Defense and Education Fund, Inc.
4221 Wilshire Blvd., Ste. 280
Los Angeles, CA 90010
(213) 382-7600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

MISCELLANEOUS

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

BRIEF OF MEMBERS OF THE CLERGY; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; PEOPLE FOR THE AMERICAN WAY FOUNDATION; THE RIVERSIDE CHURCH IN THE CITY OF NEW YORK; AND THE SOUTHERN POVERTY LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF THE *AMICI CURIAE*

Amici are members of the clergy, a house of worship, and religious and civil-rights organizations that represent diverse beliefs, experiences, and faith traditions but share a commitment to preserving constitutional protections for all.[1]

The issues presented in this case affect individuals and families living across the United States and around the world. If the challenged Executive Order is upheld, parents and children, grandparents and grandchildren will be kept apart; universities will lose students, faculty, and visiting scholars; and employers will be denied the skills and perspectives of a diverse workforce. And all Americans, Muslim and non-Muslim alike, will know that our government officially denigrates Muslims as outsiders by virtue of their faith.

Amici have a strong interest in ensuring that the Executive Order remains enjoined, lest we betray our constitutional commitments to religious freedom,

[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to fund the brief's preparation or submission. The parties' letters consenting to the filing of this brief are on file with the Clerk's office.

equal rights, and equal dignity for all without regard to faith or belief.

The *amici* are:

- The Reverend Dr. Amy Butler, Senior Minister, The Riverside Church, New York, New York.
- Michael Hidalgo, Lead Pastor, Denver Community Church, Denver, Colorado.
- The Reverend Bertram Johnson, The Riverside Church, New York, New York.
- The Reverend Jim Keat, Associate Minister, The Riverside Church, New York, New York.
- Brian D. McLaren, Board Chair, Convergenceus.org, Marco Island, Florida.
- Pastor George Mekhail, Director of Partnerships & Innovation, The Riverside Church, New York, New York.
- Pastor Doug Pagitt, Solomon's Porch, Minneapolis, Minnesota.
- Americans United for Separation of Church and State.
- Bend the Arc: A Jewish Partnership for Justice.
- Lambda Legal Defense and Education Fund, Inc.
- People For the American Way Foundation.
- The Riverside Church in the City of New York.
- The Southern Poverty Law Center.

More detailed descriptions of the *amici* appear in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

Our constitutional order admits of no official denigration of religious minorities or official disfavor toward anyone based on faith or belief. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion * * *." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). Hence, the Religion Clauses of the First Amendment and the Fifth and Fourteenth Amendments' guarantees of equal protection "all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Bd. of Educ.* v. *Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment). "[T]he Establishment Clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause." *Id.* at 728 (Kennedy, J., concurring in the judgment).

This "essential commitment to religious freedom" (*Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 524 (1993)) was no accident. "The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs." *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962). Accordingly, the Framers drafted the First Amendment with "awareness of the

historical fact that governmentally established religions and religious persecutions go hand in hand." *Id.* at 432.

The challenged Executive Order reneges on our Nation's commitment to religious freedom by targeting Muslims for opprobrium, denigration, and discrimination based solely on their faith. This marking of one religion for official disfavor—this ban on Muslims—cannot be justified by the government's asserted interest in combating terrorism, because the Muslim ban is woefully ill-suited to achieving that interest.

The Muslim ban has also unleashed and placed the government's imprimatur on persecution and violence that endanger lives and rip communities apart. Consequently, attacks on mosques and other anti-Muslim hate crimes have nearly doubled since the Muslim ban was instituted. The Establishment Clause protects against this official incitement of prejudice and cruelty.

The government's casting of one group as the object of fear, disrespect, and maltreatment is invidious discrimination and an unconstitutional religious preference that cannot withstand scrutiny. This Court should affirm the preliminary injunctions to preserve the "profound commitment to religious liberty" "that has served [this Nation] so well." (*McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 882, 884 (2005) (O'Connor, J., concurring)).

ARGUMENT

The Challenged Executive Order Violates the First Amendment.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). Yet by design and in actual effect the challenged Executive Order denigrates, maltreats, and fuels discrimination against Muslims, just for being Muslim. This official denominational preference and the harms that it causes cannot be squared with the First Amendment's guarantees of religious freedom.

A. The First Amendment forbids the government to disfavor and denigrate one faith.

"[T]he Framers of the First Amendment forbade" any "official denominational preference." *Larson*, 456 U.S. at 255 (holding that state statute treating some religious denominations more favorably than others violated Establishment Clause). They thus mandated the strict "principle of denominational neutrality." *Id.* at 246; see also *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) ("[T]he First Amendment means at least this: * * * No person can be punished for entertaining or professing religious beliefs * * *."). For nothing more plainly violates the Establishment Clause than when government favors one religion over another. *Larson*, 456 U.S. at 244.[2]

---

[2] Accord, *e.g.*, *Lee* v. *Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) ("[O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington * * * down to the present day, has * * * ruled out of order

The Framers crafted the First Amendment's Religion Clauses against the backdrop of "centuries * * * filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy." *Everson*, 330 U.S. at 8–9. "These practices of the old world were transplanted to and began to thrive in the soil of the new America," with members of disfavored denominations being "jail[ed]," "hounded," and "persecuted." *Id.* at 9–10. The oppression "became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence." *Id.* at 11. "It was these feelings which found expression in the First Amendment." *Ibid.*; accord *Lukumi*, 508 U.S. at 532–533. The Framers thus "emphatically disclaimed th[e] European legacy" of "official denominational preference" that had denied equality to persecuted religious minorities. *Larson*, 456 U.S. at 244–245; see also George Washington, *To the Jews (August 18, 1790)*, *in* THE SEPARATION OF CHURCH AND STATE: WRITINGS ON A FUNDAMENTAL FREEDOM BY AMERICA'S FOUNDERS 110 (Forrest Church ed., 2004) ("the government of the United States * * * gives to bigotry no sanction, to persecution no assistance").

Accordingly, this Court's "Establishment Clause cases * * * have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion." *Lukumi*, 508 U.S. at 532 (citing *Bd. of Educ.* v. *Mergens*, 496 U.S. 226, 248

---

government-sponsored endorsement of religion * * * where the endorsement is sectarian * * *."); *Wallace* v. *Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("The [Establishment] Clause was * * * designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others.").

(1990) (plurality opinion); *Sch. Dist.* v. *Ball*, 473 U.S. 373, 389 (1985); *Wallace*, 472 U.S. at 56; *Epperson* v. *Arkansas*, 393 U.S. 97, 106–107 (1968); *Sch. Dist.* v. *Schempp*, 374 U.S. 203, 225 (1963); *Everson*, 330 U.S. at 15–16).

So fundamental is the prohibition against denominational preferences that courts "apply strict scrutiny in adjudging [their] constitutionality." *Larson*, 456 U.S. at 246. On this score, the Establishment and Free Exercise Clauses speak with one voice. See *Lukumi*, 508 U.S. at 546.

Nor may the government skirt the prohibition by clothing denominational preferences and disfavor toward minority faiths in a secular rationale, for the Establishment Clause "extends beyond facial discrimination" to "'forbid[] subtle departures from neutrality' and 'covert suppression of particular religious beliefs.'" *Lukumi*, 508 U.S. at 534 (basing Free Exercise Clause analysis on parallel Establishment Clause jurisprudence) (quoting *Gillette* v. *United States*, 401 U.S. 437, 452 (1971); *Bowen* v. *Roy*, 476 U.S. 693, 703 (1983) (opinion of Burger, C.J.)). "Facial neutrality is not determinative," because the First Amendment forbids "governmental hostility which is masked, as well as overt." *Ibid.* Hence, religious preferences require a nonreligious justification that is "genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864; see *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 308 (2000) ("it is * * * the duty of the courts to 'distinguish a sham secular purpose from a sincere one'") (brackets omitted) (quoting *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring in the judgment)); *Larson*, 456 U.S. at 254 (striking

down law "drafted with the explicit intention of including particular religious denominations and excluding others").

What is more, the Establishment and Equal Protection Clauses "mirror[]" and reinforce each other, together safeguarding against governmental targeting of minorities based on religion or belief. *Grumet*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment); see also *id.* at 715 (O'Connor, J., concurring in part and concurring in the judgment). "When the government puts its *imprimatur* on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs." *Lee*, 505 U.S. at 606 (Blackmun, J., concurring). The Clauses thus share the common purpose of prohibiting government from denigrating minority groups and thereby coercing adherence to "state-created orthodoxy." *Id.* at 592 (opinion of the Court).

"In determining if the object of a law is a neutral one," therefore, this Court employs an "'equal protection mode of analysis.'" *Lukumi*, 508 U.S. at 540 (plurality opinion) (basing free-exercise analysis on Establishment Clause jurisprudence) (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). The Court evaluates governmental action by considering "both direct and circumstantial evidence," including, "among other things, 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 decisionmak[er]." *Ibid.* (citing *Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–268 (1977)). "These objective factors bear on the question of discriminatory object." *Ibid.* (citing *Pers. Adm'r*

v. *Feeney*, 442 U.S. 256, 279 n.24 (1979)); see also *McCreary*, 545 U.S. at 862–863 (determination of discriminatory object turns not on "judicial psychoanalysis of a drafter's heart of hearts" but on "readily discoverable fact" and "openly available data support[ing] a commonsense conclusion that a religious objective permeated the government's action").

The upshot is that governmental action targeting disfavored groups for special legal disabilities cannot be reconciled with the Establishment Clause's mandate of equal treatment by government. "Respect for this principle explains why laws singling out a certain class * * * for disfavored legal status or general hardships are rare." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996). Here, the discriminatory object is plain and unambiguous.

B. The Executive Order disfavors and denigrates Muslims.

1. The Executive Order is the Administration's promised Muslim ban.

Born as a political maneuver designed to spark and capitalize on religious and racial animus, a ban on Muslims was entrenched into law at the first opportunity after the current Administration took office in January 2017 (see Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017)). The challenged Executive Order (No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017)) is just the latest step in implementing that official policy.

a. From the very beginning, a pledge to ban Muslims was central to the President's campaign. See, *e.g.*, Amy Davidson Sorkin, *Donald Trump's First, Ugly TV Ad*, NEW YORKER (Jan. 4, 2016), http://bit.ly/1PH9tp5. Starting in December 2015, and consistently from

then on, Mr. Trump called for the "total and complete shutdown of Muslims entering the United States." *Donald J. Trump Statement on Preventing Muslim Immigration*, DONALD J. TRUMP FOR PRESIDENT (Dec. 7, 2015), http://bit.ly/2tODc9U). That message remained on the Trump website long after the election and inauguration, including after the enactment and subsequent invalidation of the first Executive Order and the enactment of the revision currently under review. See Cogan Schneier, *Removal of Trump's Muslim Comments Raises Travel Ban Questions*, NAT'L L.J. (May 11, 2017), http://bit.ly/2rRhzcB.[3]

Mr. Trump explained: "we're having problems with Muslims coming into the country." Steve Guest, *Trump: 'We're Having Problems with the Muslims,'* DAILY CALLER (Mar. 22, 2016), http://bit.ly/2sBoYtz. "Islam hates us, * * * [a]nd we can't allow people coming into this country who have this hatred." Theodore Schleifer, *Donald Trump: 'I Think Islam Hates Us,'* CNN (Mar. 10, 2016), http://cnn.it/1RBk6Z4. So "we have to have a ban. * * * It's gotta be a ban." *Presidential Candidate Donald Trump Town Hall Meeting in Londonderry, New Hampshire*, C-SPAN 28:00 (Feb. 8, 2016), http://cs.pn/2kY4f1T.

Mr. Trump pledged that, if elected, he would act within his first 100 days in office to ban Muslims from entering the United States. See, *e.g.*, Patrick Healy, *'President Trump?' Here's How He Says It Would Look*, N.Y. TIMES (May 4, 2016), http://nyti.ms/2uFaEmg. When the time came, he did it in seven. See Exec. Order No. 13,769 § 3(c).

---

[3] The message was abruptly removed on the day of the *en banc* argument in the Fourth Circuit in No. 16-1436. See Schneier, *supra*.

b. Executive Order No. 13,769 immediately and categorically banned all travel to the United States by nationals of seven countries with populations that are overwhelmingly (most more than 99%) Muslim. See Exec. Order No. 13,769 § 3(c); see also PEW RES. CTR., THE GLOBAL RELIGIOUS LANDSCAPE 45–50 (2012), http://bit.ly/2k4Us8B (reporting population statistics). The Order barred entry by all non-U.S. citizens from the seven countries, whether students, workers, or tourists; it applied even to legal permanent residents for whom the United States was and is their only home. See Exec. Order No. 13,769 § 3(c); Michael Edison Hayden & Benjamin Siegel, *Green Card Holders Fall Under Trump's Executive Order*, ABC NEWS (Jan. 28, 2017), http://abcn.ws/2kzvWdV.

Though the Executive Order did not come bearing the name 'Muslim ban,' the President made clear both before and after taking office that labels are fungible: "[C]all it whatever you want." *The Republican Ticket: Trump and Pence*, CBS NEWS (July 17, 2016), http://cbsn.ws/29NrLqj. That approach is official policy: "[T]he lawyers and the courts can call it whatever they want, but I am calling it * * * a TRAVEL BAN!" @realDonaldTrump, TWITTER (June 5, 2017, 3:25 AM), http://bit.ly/2rWPMHa.[4]

At the signing ceremony for the first Executive Order, the President publicly announced the Order's title (unchanged for the revised Order), "Protecting the Nation from Foreign Terrorist Entry into the United States," and intimated: "we all know what that

[4] The Administration has confirmed that the President's tweets are official statements. See Elizabeth Landers, *White House: Trump's Tweets Are 'Official Statements,'* CNN (June 6, 2017), http://cnn.it/2s58bOs.

means." *Trump Signs Executive Orders at Pentagon*, ABC NEWS (Jan. 27, 2017), http://abcn.ws/2kbeqPu. He further confirmed the policy objective later that day, announcing that the government would henceforth give Christian refugees priority over Muslim refugees. See David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees*, CBN NEWS (Jan. 27, 2017), http://bit.ly/2kCqG8M. And Rudolph Giuliani, vice chair of the President's transition team, confirmed that the Executive Order was the implementation of the President's directive to "do" a "Muslim ban" "legally." Amy B. Wang, *Trump Asked for a 'Muslim Ban,' Giuliani Says—and Ordered a Commission to Do It 'Legally,'* WASH. POST (Jan. 29, 2017), http://wapo.st/2jLbEO5.

c. Despite some official protestations to the contrary, the proponents, critics, and observers of the first Executive Order all understood that the Order was the long-promised Muslim ban. See, *e.g.*, Matthew Nussbaum, *Flynn's Son Says 'Muslim Ban' Is 'Necessary,'* POLITICO (Jan. 29, 2017), http://politi.co/2k6e2jr (noting that supporter recognized Executive Order as "Muslim ban"); Jane C. Timm, *Advocacy, Aid Groups Condemn Trump Order as 'Muslim Ban,'* NBC NEWS (Jan. 28, 2017), http://nbcnews.to/2sV0YVc (same for critics).

So did the federal courts, which therefore enjoined it. See *Aziz* v. *Trump*, 234 F. Supp. 3d 724, 736 (E.D. Va. 2017) (Executive Order was product not of "rational national security concerns" but of "Trump's desire for a Muslim ban"); *Washington* v. *Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir. 2017).

d. The first Order having been enjoined, the Administration endeavored to revise it (Adam Liptak, *Trump Will Issue New Travel Order Instead of Fighting Case in Court*, N.Y. TIMES (Feb. 16, 2017), http://nyti.ms/2kP0qso), updating the lyrics without changing the tune. Declaring, "I keep my campaign promises," the President announced that the Administration would redraft the Executive Order in a way "very much tailored to what I consider to be a very bad decision" from the Ninth Circuit, explaining: "[W]e can tailor the order to that decision and get just about everything, in some ways, more." *Full Transcript and Video: Trump News Conference*, N.Y. TIMES (Feb. 16, 2017), http://nyti.ms/2kXcFW4.

Other Administration officials underscored this ongoing commitment. For example, White House Senior Policy Adviser Stephen Miller stated that the revised Executive Order would include only "minor technical differences" and would produce the "same basic policy outcome." Matt Zapotosky, *A New Travel Ban with 'Mostly Minor Technical Differences'? That Probably Won't Cut It, Analysts Say*, WASH. POST (Feb. 22, 2017), http://wapo.st/2mmmECm.

e. After prolonged delays, the revised Executive Order was finally issued in March 2017. As promised, it "expressly excludes * * * categories of aliens that have prompted judicial concerns" (Exec. Order No. 13,780 § 1(i)), to sidestep the Ninth Circuit's ruling that the original Executive Order likely violated the due-process rights of lawful permanent residents and aliens with a connection to the United States (see *Washington*, 847 F.3d at 1166). See generally Exec. Order No. 13,780 § 3(a)–(b); Jeremy Diamond, *Trump Rails Against Court Ruling Blocking Travel Ban*, CNN (Mar. 15, 2017), http://cnn.it/2rG3oGD (quoting

President's statement that "[t]his new order was tailored to the dictates of the 9th Circuit's—in my opinion—flawed ruling"). Otherwise, "'[t]he principles of the executive order remain the same.'" William Gallo & Victoria Macchi, *Trump Signs New Travel Ban Order*, VOA (Mar. 6, 2017), http://bit.ly/2rZksTy (quoting White House Press Secretary).

f. To the reasonable observer the discriminatory object is likewise the same: The government continues to ban immigrants, visitors, and refugees from six overwhelmingly Muslim countries. Compare Exec. Order No. 13,780 §§ 2(c), 3, with Exec. Order No. 13,769 § 3(c). In doing so, it continues to use nationality as a proxy for religion. See Pet. App. 49a ("As a candidate, Trump also suggested that he would attempt to circumvent scrutiny of the Muslim ban by formulating it in terms of nationality, rather than religion."); *The Republican Ticket*, *supra* (quoting then-candidate Trump's announcement of this strategy). Hence, reviewing courts have similarly recognized the revised Executive Order as a second attempt to enact the "long-envisioned Muslim ban," and they have enjoined it accordingly. Pet. App. 246a; see also, *e.g.*, *id.* at 51a ("EO-2's purpose is to effectuate the promised Muslim ban * * *.").

g. They were right to do so: The President has officially stated time and again that the revised Executive Order is: "a watered-down version of the first one," "the Travel Ban," "the TRAVEL BAN," and "the watered down Travel Ban."[5] "People, the lawyers and

---

[5] Alexander Burns, *2 Federal Judges Rule Against Trump's Latest Travel Ban*, N.Y. TIMES (Mar. 15, 2017), http://nyti.ms/2np9Kbh; @realDonaldTrump, TWITTER (June 3, 2017, 4:17 PM), http://bit.ly/2rzYrwd; @realDonaldTrump, TWITTER (June

the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!" @realDonaldTrump (June 5, 2017, 3:25 AM).[6]

Indeed, in describing the revised Executive Order as a "watered down, politically correct version" of the original, the President has bemoaned the watering down, complaining: "The Justice Dept. should have stayed with the original Travel Ban." @realDonaldTrump, TWITTER (June 5, 2017, 3:29 AM), http://bit.ly/2svraEu. "'[W]e ought to go back to the first one and go all the way, which is what I wanted to do in the first place.'" Diamond, *supra* (quoting President Trump). Most recently, he has declared: "The travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be politically correct!" @realDonaldTrump, TWITTER (Sept. 15, 2017, 3:54 AM), http://bit.ly/2wh0o66.

h. Petitioners appear to concede that if the Executive Order had banned Muslims by name rather than by proxy, it would not withstand judicial review. See *International Refugee Assistance Project v. Trump*, C-SPAN 30:29 (May 8, 2017), http://cs.pn/2j4kM4h. But

---

13, 2017, 3:44 AM), http://bit.ly/2vJj4Lw; @realDonaldTrump, TWITTER (June 5, 2017, 3:37 AM), http://bit.ly/2uKjVYU.

[6] See also @realDonaldTrump, TWITTER (Apr. 26, 2017, 3:30 AM), http://bit.ly/2gN1HDe (calling Case No. 16-1540 "the 'ban' case"); @realDonaldTrump, TWITTER (Apr. 26, 2017, 3:20 AM), http://bit.ly/2oJNjK8 (calling original Order "the ban"); @realDonaldTrump, TWITTER (Feb. 4, 2017, 1:44 PM), http://bit.ly/2f3F9tQ (same); @realDonaldTrump, TWITTER (Feb. 4, 2017, 12:44 PM), http://bit.ly/2eGVHYb ("a Homeland Security travel ban"); @realDonaldTrump, TWITTER (Feb. 4, 2017, 5:06 AM), http://bit.ly/2xP334e ("the ban"); @realDonaldTrump, TWITTER (Jan. 30, 2017, 5:31 AM), http://bit.ly/2okbtwc (same).

they insist that the Executive Order is not the promised Muslim ban because the Order's "text does not refer to or draw any distinction based on religion." Br. 70. That was by design: When his express calls on the campaign trail for a Muslim ban were roundly and almost universally denounced, including by his future running mate,[7] Mr. Trump responded that because "[p]eople were so upset when [he] used the word Muslim," he would begin "talking territory instead of Muslim" (*Meet the Press*, NBC NEWS (July 24, 2016), http://nbcnews.to/29TqPnp). That shift in terminology was semantic, not substantive: "So you call it territories. OK? We're gonna do territories. * * * [C]all it whatever you want. We'll call it territories." *The Republican Ticket*, *supra*.

This strategy and the preferred terminology of petitioners' counsel notwithstanding, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Lukumi*, 508 U.S. at 534. An objective observer familiar with the pledge to ban Muslims, the Executive Orders, and the President's official statements could reach no conclusion other than that the Orders are the promised Muslim ban.

i. The government, however, seeks to brush aside the evidence that the Executive Orders are campaign promises fulfilled. It contends that considering "campaign statements long before development of the Or-

---

[7] See Jessie Hellmann, *Trump to Stick with Muslim Ban*, HILL (May 4, 2016), http://bit.ly/1OekCvt (reporting strong criticism by both Republican and Democratic officials); *The Republican Ticket*, *supra* ("'Calls to ban Muslims from entering the U.S. are offensive and unconstitutional.'" (quoting then-Gov. Pence)).

der" would require impermissible "'judicial psychoanalysis'" (Br. 70 (quoting *McCreary*, 545 U.S. at 862)), and that taking the presidential oath of office "marks a profound transition from private life to the Nation's highest public office" that washes away all that came before (Br. 73). But there is nothing improper about relying on campaign statements to illuminate the nature of governmental action in fulfillment of a campaign promise. See, *e.g.*, *Epperson*, 393 U.S. at 107–108 & n.16 (relying on campaign statement to conclude that "fundamentalist sectarian conviction was and is the law's reason for existence"). That is especially true when, once in office, the decisionmaker—here a single official, the President himself—continues to invoke his campaign promises to explain the official action. See, *e.g.*, *Full Transcript and Video*, *supra* ("I keep my campaign promises * * *.").

If on assuming office the President had renounced the ban, or changed his rhetoric other than cosmetically, or consulted with knowledgeable government officials and experts (cf. p. 21, *infra*), or considered the contrary findings of his own Department of Homeland Security (see *ibid.*), there might be some possible worry about unfairly criticizing permissible governmental action based on ill-advised campaign rhetoric. Instead, the President, as President, explicitly propounded the anti-Muslim pledge; wrote it into law—twice; and then underscored the object of the Executive Orders by repeatedly describing them as the promised ban, emphasizing that "[t]hese are campaign promises" (*Full Transcript and Video*, *supra*).

j. In all events, no one is asking this Court to consider stale campaign statements while ignoring more recent, repeated, official acts. As explained above, the whole "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 members of the decisionmaking body," are all "objective factors [that] bear on the question of discriminatory object." *Lukumi*, 508 U.S. at 540 (plurality opinion). The government's official acts and statements of policy since January 20, and their antecedents, are all "readily discoverable fact[s]." *McCreary*, 545 U.S. at 862.

And these facts are compelling. The Executive Orders are *executive* orders—official acts of the President. And so, the Administration has confirmed, are the presidential tweets. See note 4, *supra*. The President and his closest advisers are also the drafters of both Executive Orders; and the President is the authority who issued them and dictated that they be enforced. After the inauguration as well as before, the President has consistently told the American public exactly what he is doing, and why. There is thus no danger of falsely attributing stray statements of third parties to the actual decisionmaker.

Judicial psychoanalysis this is not. One need not be Sigmund Freud to understand what the President is doing; one need only take him at his word.

2. The government's assertion of a national-security rationale is inadequate to justify a Muslim ban.

Because this Court "appl[ies] strict scrutiny in adjudging [the] constitutionality" of a denominational preference, petitioners must demonstrate that the Muslim ban is "justified by a compelling governmental interest" and that it is "closely fitted to further that interest." *Larson*, 456 U.S. at 246–247; accord

Lukumi, 508 U.S. at 546 (actions disfavoring one faith must satisfy "the most rigorous of scrutiny" and are impermissible unless they "advance 'interests of the highest order'" that "could [not] be achieved by narrower [restrictions]" (quoting *McDaniel* v. *Paty*, 435 U.S. 618, 628 (1978)). What is more, the governmental objective must "be sincere and not a sham." *Edwards* v. *Aguillard*, 482 U.S. 578, 587 (1987). The Muslim ban fails in all respects.

a. The challenged Executive Order purports "to protect the Nation from terrorist activities by foreign nationals admitted to the United States." Exec. Order No. 13,780 pmbl. While no one doubts that preventing terrorist attacks would be a compelling interest, the Order's bald assertion of that objective is insufficient to justify a denominational preference: "To survive strict scrutiny * * * a State must do more than assert a compelling state interest—it must also demonstrate that its law is necessary to serve the asserted interest." *Burson* v. *Freeman*, 504 U.S. 191, 199 (1992); see also, *e.g.*, *Shaw* v. *Hunt*, 517 U.S. 899, 915 (1996) (under strict scrutiny, "we have always expected that the [government's] action would substantially address, if not achieve, the avowed purpose"). Strict scrutiny thus "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–431 (2006) (explaining strict scrutiny in case arising under Religious Freedom Restoration Act).

In other words, the government must show that its asserted interest here is genuinely served by, and genuinely requires, the blanket exclusion of all the persons affected by the ban. Blunt instruments are

not good enough: "national-security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1862 (2017) (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 523 (1985)).

Were the rule otherwise, the government could always defeat strict scrutiny by invoking some vague phrase—be it 'preventing terrorism' or 'promoting national security,' advancing "public safety" (*Nat'l Treasury Emps. Union* v. *Von Raab*, 489 U.S. 656, 677 (1989)), "combating corruption" (*Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 750 (2011)), "protecting children" (*Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989)), or anything else that, under some set of conditions, might be compelling.

b. Here, the best that can be said for the Executive Order is that it is wildly over- and underinclusive as a means to prevent terrorism, because it does not even try to identify those who are actual or potential terrorists. In fact, it is so poorly fitted to any genuine national-security objective that the sincerity of the rationale is in doubt.

First, were the Executive Order and its precursor truly concerned with national security, one would expect the Administration to have called on the government's own national-security experts as drafters or consultants. It didn't. The Executive Order was instead crafted by the President and a small group of political advisers with a record of anti-Muslim animus. See Evan Perez et al., *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017), http://cnn.it/2kGdcZy; Andrew Kaczynski, *Steve Bannon in 2010: 'Islam Is Not a Religion of Peace. Islam Is a Religion of Submission,'* CNN (Jan.

31, 2017), http://cnn.it/2knpxSE. The authors neither solicited nor accepted input from the Department of Homeland Security, the Department of Defense, the State Department, or other agencies or experts. See Michael D. Shear & Ron Nixon, *How Trump's Rush to Enact an Immigration Ban Unleashed Global Chaos*, N.Y. TIMES (Jan. 29, 2017), http://nyti.ms/2jtHiPd.

Second, although Administration officials have described the Executive Order as necessary to combat terrorism, the Department of Homeland Security found the opposite: It determined that citizenship (*i.e.*, the focus of both Executive Orders on country of origin) is an "'unreliable' threat indicator" for terrorism, and that nationals of the seven predominantly Muslim countries that were targeted in the Executive Orders were "rarely" involved in terrorism in the United States.[8] Matt Zapotosky, *DHS Report Casts Doubt on Need for Trump Travel Ban*, WASH. POST (Feb. 24, 2017), http://wapo.st/2lOkpKW. And after the revised Executive Order was issued, more than 100 former government officials, from both Republican and Democratic administrations, signed an open letter explaining that the Order would "weaken U.S. national security" rather than enhance it. Nicholas Loffredo, *Trump Travel Ban Weakens National Security, Foreign Policy Experts Argue*, NEWSWEEK (Mar. 11, 2017), http://bit.ly/2mWUZM2.

Third, a measure truly tailored to ensuring national security would apply equally to all countries from which similar levels of terrorist threat might

---

[8] Nationals of six of the seven Muslim countries from the first Executive Order are still barred from the United States under the revised version (see Exec. Order No. 13,780 § 2(c)), and nationals of the seventh, Iraq, are subjected to extra scrutiny (see *id.* § 4).

arise. Again, that is not how the revised Executive Order operates. Though it points to concerns over "terrorist safe havens" identified by the State Department (see Exec. Order No. 13,780 § 1(e)), it singles out only Muslim-majority countries. The Order ignores the many other countries, including multiple non-Muslim countries, that the very same State Department report identifies as terrorist safe havens (see U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2015 ch. 5, http://bit.ly/2qoos3M). And although the asserted purpose of the ban is to ensure proper "screening and vetting of foreign nationals" (Exec. Order No. 13,780 § 2(c)), on the very day when the revised Order was signed, the Secretary of Homeland Security publicly acknowledged that there are "thirteen or fourteen other countries, not all of them Muslim countries, * * * that have very questionable vetting procedures" (Daniella Diaz, *Kelly: There Are '13 or 14' More Countries with Questionable Vetting Procedures*, CNN (Mar. 7, 2017), http://cnn.it/2mSdv94 (video)). None of those—and no countries other than ones with overwhelmingly Muslim populations—are mentioned in or covered by the Order.

In other words, the Executive Order targets only Muslim countries and their nationals, while ignoring what the government itself has identified as identically situated non-Muslim-majority countries and *their* nationals. And it does that even though, in the last forty years, no one from *any* of the banned countries has killed *anyone* in a terrorist attack on U.S. soil. See Alex Nowrasteh, *Where Do Terrorists Come From? Not the Nations Named in Trump Ban*, NEWSWEEK (Jan. 31, 2017), http://bit.ly/2kWoddx.

Fourth, although the Executive Order asserts that "hundreds of persons born abroad have been convicted

of terrorism-related crimes in the United States," it identifies just one person from *any* of the banned countries: a Somali refugee who came to the United States as a five-year-old child. Exec. Order No. 13,780 § 1(h); see Lynne Terry, *Family of Portland's Bomb Suspect, Mohamed Mohamud, Fled Chaos in Somalia for New Life in America*, OREGONIAN (Dec. 5, 2010), http://bit.ly/2rZnhEm. On the strength of that one incident, the Executive Order categorically bars virtually all the nationals of six countries whose people share the faith that the President promised to keep out of the United States.

Fifth, if the revised Executive Order were truly necessary to address "unacceptably high" risks that terrorists would enter the United States (Exec. Order No. 13,780 §§ 1(f), 2(c)), it should have been implemented as soon as practicable. In January 2017, White House Senior Policy Adviser Stephen Miller warned that "if we waited five days, 10 days, six months to begin establishing the first series of controls," the government would be leaving "the homeland unnecessarily vulnerable." Phil McCausland & Hallie Jackson, *Donald Trump Expected to Sign New Immigration Order: A Timeline*, NBC NEWS (Mar. 6, 2017), http://nbcnews.to/2n3Ao5m. Yet after the first Order was enjoined, the Administration postponed issuing the revised version again and again—including to prolong a favorable news cycle on unrelated matters. See *ibid.*; Laura Jarrett et al., *Trump Delays New Travel Ban After Well-Reviewed Speech*, CNN (Mar. 1, 2017), http://cnn.it/2mOWkRp.

Sixth, were the Muslim ban genuinely intended, as it says, "[t]o temporarily reduce investigative burdens" while the government "conduct[s] a worldwide review to identify * * * what[] additional information

will be needed * * * to adjudicate" visa applications (Exec. Order No. 13,780 §2(a), (c); see also Br. 8), the duration of the ban (set for 90 days (see Exec. Order No. 13,780 § 2(c))) would have been tied to the pendency of that review. Though the district court in No. 16-1540 temporarily enjoined the review—which should at that point already have been underway for weeks under the original Executive Order (see Exec. Order No. 13,769 § 3(a))—the Ninth Circuit's vacatur of that portion of the injunction on June 12 (see Supp. Add. 71) meant that the review was again entirely unimpeded. Yet the President acted on June 14 to ensure that the ban would be in place for a full 90 days if and when the injunctions of the ban were "lifted or stayed" (Effective Date in Executive Order 13780, 82 Fed. Reg. 27,965 (June 14, 2017)), without regard to whether the agencies might complete their review earlier or find, consistent with the Department of Homeland Security's February 2017 report, that the ban does not promote national security. The government offered no justification for this decoupling of the ban from its stated purpose.

c. The government protests that none of that should matter because "[e]ach of the countries" whose nationals it singles out for unfavorable treatment "had previously been identified as presenting heightened terrorism-related concerns in connection with the Visa Waiver Program." Br. 71. But the Executive Order targets people without regard to whether they currently reside in or have any ongoing connection with any of the listed countries—much less whether they have any connection to terrorism or terrorists. Even those who, for example, fled one of the countries as refugees decades ago and have resided peacefully elsewhere ever since are branded for exclusion.

This policy is irrational and inexplicable except with reference to anti-Muslim bias. "Just as Holmes's dog could tell the difference between being kicked and being stumbled over" (*McCreary*, 545 U.S. at 866 n.14), American Muslims can tell the difference between rank bias and genuine national-security concerns that keep them from their children, parents, or grandparents and deny people who share their faith the opportunity to learn, teach, and work in this country.

That is why "the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage." *McCreary*, 545 U.S. at 866 n.14; cf., *e.g.*, *Grumet*, 512 U.S. at 702 n.6 (single-religion school district created using "a religious criterion" is constitutionally distinct from one "whose boundaries are derived according to neutral historical and geographic criteria"); *Lukumi*, 508 U.S. at 539–540 (invalidating ordinance that "appear[ed] to apply to substantial nonreligious conduct" because it "had as [its] object the suppression of religion," even if it might otherwise have "survive[d] constitutional scrutiny"); *Edwards*, 482 U.S. at 594 (invalidating Creationism Act, "primary purpose" of which was "to endorse a particular religious doctrine," even though "teaching a variety of scientific theories about the origin of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction").

d. In all events, the Executive Orders are in no sense "the same government action" as the earlier implementation of visa requirements. There is, after all, a world of difference between banning travelers from Muslim countries outright and simply requiring that people obtain a visa before coming to the United

States. A bare visa requirement exists for many countries throughout the world, without regard to the religious makeup of their populations. See *Visa Waiver Program*, U.S. DEP'T STATE, http://bit.ly/1V9XIeB (last visited Sept. 6, 2017) (listing just 38 countries of origin for which *no* visa is required). The visa requirements thus neither embodied nor communicated religious animus but instead implemented genuine assessments about appropriate immigration policy, while not barring—or tarring—any groups.

The ban, by contrast, conclusively identifies all immigrants and travelers from six predominantly Muslim countries as dangerous, marks them as collectively responsible for acts that other people, from other countries, have committed in the name of Islam, and treats them as unworthy to visit our shores—for no reason other than their religion.

* * *

The government "asks us to pretend that we do not recognize what every [American] understands clearly—that this policy is about [religion]. The [government] further asks us to accept what is obviously untrue: that [the ban is] necessary" for national security. *Santa Fe*, 530 U.S. at 315. This Court should "refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of" banning Muslims. *Ibid.* The Executive Order is inconsistent with—and certainly, therefore, not narrowly tailored to—the government's professed national-security objective. Rather, it can be explained, if at all, solely as effecting the President's ongoing commitment to ban Muslims from the United States.

C. The government's denigration of Muslims foments the social divisiveness and violence that the Establishment Clause was meant to forestall.

The Establishment Clause's prohibition against denominational preferences is critical, because "nothing does a better job of roiling society" than when government singles out people for differential treatment based on their adherence to a favored or disfavored faith. *McCreary*, 545 U.S. at 875–876. That "sectarianism[,] which is so often the flashpoint for religious animosity" (*Lee*, 505 U.S. at 588), has been unleashed by the government's enactment of the Muslim ban.

1. Governmental policies that disfavor a minority group impermissibly "put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2602 (2015). Hence, "[j]ust as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial." *Grumet*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment).

2. This causal connection between governmental stigmatization and violence against disfavored groups is well documented. See, *e.g.*, Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by 'Unenforced' Sodomy Laws*, 35 HARV. C.R.–C.L. L. REV. 103, 124, 137–143 (2000) (explaining that anti-sodomy laws have been used to rationalize private violence and discrimination against lesbians and gay men); Charlene L. Smith, *Undo Two: An Essay Regarding Colorado's Anti-Lesbian and Gay Amendment 2*, 32 WASHBURN L.J. 367, 369–370 (1993) (reporting that

violence against lesbians and gay men tripled after Colorado passed constitutional amendment, ultimately invalidated by *Romer*, *supra*, that had precluded laws banning discrimination based on sexual orientation); José Roberto Juárez Jr., *Recovering Texas History: Tejanos, Jim Crow, Lynchings & the University of Texas School of Law*, 52 S. TEX. L. REV. 85, 92–93 (2010) (noting that "the Jim Crow system * * * encouraged violence against" racial minorities). For "[s]tate-sanctioned condemnation of a group of citizens * * * sends the clear message that this group is not entitled to the freedom from physical violence provided other citizens." Leslie, *supra*, at 126.

3. The current experience of Muslims in this country is of a piece with other sad chapters in our Nation's history in revealing how official messages of exclusion fuel animus and persecution against their targets, in both the public and private spheres. Accordingly, it is no surprise that the pernicious effects of the Muslim ban go well beyond legally mandated separation of children, parents, and grandparents; disruption of businesses and educational institutions; and relegation of refugees to further suffering. As the former Assistant Attorney General for Civil Rights has testified: "Policies singling out protected groups can normalize hate and legitimize hate-motivated violence directed at Muslims or people perceived to be Muslim." *Responses to the Increase in Religious Hate Crimes: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 5 (2017) (statement of Vanita Gupta, President, Leadership Conference on Civil and Human Rights), http://bit.ly/2xa29Bp.

4. The government's clear message that Muslims are not worthy of equal respect and dignity and do not belong in this country has this stigmatizing effect, not

just in the substance of the Executive Orders—banning nationals of Muslim-majority countries—but also in the words.

The original Order, for example, declared the objective to protect the United States from those who "bear hostile attitudes toward it and its founding principles," "do not support the Constitution," and "would place violent ideologies over American law." Exec. Order No. 13,769 § 1. This language echoes that of anti-Muslim extremists, who routinely assert that Muslims and Islam are hostile to the Constitution (*e.g.*, *Stop Importing Jihadists*, CTR. FOR SECURITY POL'Y (June 28, 2016), http://bit.ly/2vJQllS[9]) and adhere to "an ideology that does not assimilate and aims to dominate" (Katie Jones, *U.S. Hits Refugee Cap Months Early: How America's Muslim Population Is Shaping the Nation*, GELLER REPORT (Aug. 5, 2017), http://bit.ly/2wLZehW).

Similarly, both the original and revised Executive Orders direct the Department of Homeland Security to compile statistics not just on terrorism but also on "honor killings" committed "by foreign nationals." Exec. Order No. 13,780 § 11(a); Exec. Order No. 13,769 § 10(a). Aside from being wholly unrelated to terrorism or national security, the Orders' focus on 'honor killings' is another tip of the hat to anti-Muslim extremists, many of whom inaccurately associate the practice with Islam. See Nahal Toosi, *'Honor Killings'*

---

[9] See generally *Center for Security Policy*, S. POVERTY L. CTR., http://bit.ly/2atHufL (last visited Sept. 7, 2017) (designating Center for Security Policy as a hate group). *Amicus* Southern Poverty Law Center defines hate groups as those with beliefs or practices that attack or malign an entire class of people, typically based on immutable characteristics.

Highlighted Under Trump's New Travel Ban, POLITICO (Mar. 6, 2017), http://politi.co/2x74mLr.

5. As private speech, of course, that odious rhetoric is protected, as long as it stops short of direct incitement to violence. Cf. *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969). But government speech is different: The government is not permitted to communicate that one religion or race or other insular minority is by its very nature inferior and a threat to American values or the American way of life.

In part that is because official messages of disapprobation and denigration bear the unique weight of governmental authority, placing official imprimatur on private discrimination. When government puts its thumb on the scale in favor of prejudice, it promotes violence and social strife. Conversely, when government signals respect for minority groups, attacks on those groups may diminish. For instance, after President George W. Bush rejected the equation of Islam with terrorism and spoke at a mosque on September 17, 2001, about the value of tolerance, anti-Muslim hate crimes "dropped dramatically across the country." Brian H. Levin & Kevin Grisham, *Hate Crimes Rise in Major American Localities in 2016*, CTR. FOR STUDY HATE & EXTREMISM, CAL. ST. UNIV., SAN BERNARDINO 17 (June 29, 2017), http://bit.ly/2wcQZaT.

Government speech and official action have real, palpable force in telling people what conduct toward others is acceptable and what is not. So when the government communicates that minority groups are objects of scorn who do not belong, private citizens are encouraged to treat them as such.

6. That is just what has happened here. In the period since the President signed the original Executive

Order in January, attacks on Muslims have increased dramatically across the country.

The Council on American–Islamic Relations reports a *91%* increase over the same period in 2016 in the number of anti-Muslim hate crimes and a 24% increase in anti-Muslim bias incidents. *CAIR Report Shows 2017 on Track to Becoming One of Worst Years Ever for Anti-Muslim Hate Crimes*, COUNCIL ON AM.–ISLAMIC RELATIONS (July 17, 2017), http://bit.ly/2uCpFqR.[10] Muslim Advocates has identified more than 80 incidents between January and May 2017 of violence or threats of violence against Muslims and people who appear to be Muslim. *Map: Recent Incidents of Anti-Muslim Hate Crimes*, MUSLIM ADVOCATES, http://bit.ly/1Orsk4m (last visited Sept. 7, 2017); see also *Responses to the Increase in Religious Hate Crimes*, 115th Cong. 6 (Gupta statement). And fully 60% of Muslims reported experiencing discrimination based on their religion in the past year alone. DALIA MOGAHED & YOUSSEF CHOUHOUD, INST. FOR SOC. POL'Y & UNDERSTANDING, AMERICAN MUSLIM POLL 2017: MUSLIMS AT THE CROSSROADS 4 (2017), http://bit.ly/2x2klx8.

Chillingly, there were at least 85 anti-Muslim incidents at mosques during the first half of 2017. Christopher Ingraham, *American Mosques—and American Muslims—Are Being Targeted for Hate Like Never Before*, WASH. POST (Aug. 8, 2017), http://wapo.st/2x3nCty. Among them:

---

[10] CAIR defines bias incidents as cases involving "an identifiable element of religious discrimination" and hate crimes as "criminal offenses against persons or property" under state or federal law. *CAIR Report*, *supra*.

- On January 28, the day after the President issued the first Executive Order, a Texas mosque was destroyed by an arsonist who apparently believed that the worshippers there were terrorists. See *Man Indicted for Hate Crime for Texas Mosque Fire*, CBS NEWS (June 23, 2017), http://cbsn.ws/2wcTtWP; *Investigator: Suspect in Texas Mosque Fire Feared Muslims*, U.S. NEWS & WORLD REP. (Mar. 10, 2017), http://bit.ly/2vJp8jk.
- On February 11, an Islamic Center in Ohio was vandalized by a man whose car bore the words "Oppose Trump You Are Doomed!" Kevin Landers, *Hilliard Man Charged with Vandalizing Perry Township Mosque*, WBSN-10TV (Feb. 17, 2017), http://bit.ly/2gLyUeo.
- On March 19, two weeks after the President issued the revised Executive Order, a note left at an Islamic Center in Iowa warned that the "new sheriff in town—President Donald Trump"—was "going to cleanse America" and would "start with you Muslims"; the note threatened that the President was "going to do to you Muslims what Hitler did to the Jews." Jason Le Miere, *Trump Will Do to Muslims 'What Hitler Did to the Jews,' Claims Hate Crime Note Sent to Iowa Mosque*, NEWSWEEK (Mar. 20, 2017), http://bit.ly/2f7XExn.

The sharp increase in violence and threats since the Muslim ban was instituted is all the more disturbing because the level of anti-Muslim animus was already high. The FBI had catalogued 257 anti-Muslim hate crimes in 2015—a 67% increase over the prior year. See Katayoun Kishi, *Anti-Muslim Assaults Reach 9/11-Era Levels, FBI Data Show*, PEW RES.

CTR. (Nov. 21, 2016), http://pewrsr.ch/2ga9TYk. And the number of organized anti-Muslim hate groups in America had jumped from 34 in December 2015 to 101 in December 2016. See *Hate Groups Increase for Second Consecutive Year as Trump Electrifies Radical Right*, S. POVERTY L. CTR. (Feb. 15, 2017), http://bit.ly/2lPK1Vw.

7. To be sure, hate crimes against Muslims are not new; this religious and racial bias has a long and shameful pedigree. But the skyrocketing threats and violence coincide with the demonization of Muslims and the repeated pledge to ban them. *Amicus* Southern Poverty Law Center received reports of nearly 50 incidents of intimidation, harassment, or hate crimes against Muslims in just the first ten days after President Trump was elected. This anti-Muslim persecution was not only spurred by campaign rhetoric; it received official sanction through the Executive Orders, thus emboldening harassment and hate crimes against American Muslims.

8. In sum, official action can and does profoundly influence private treatment of minority groups, whether encouraging respect toward those groups or sanctioning violence, harassment, and discrimination against them. The government here chose the poorer path, with the expected results.

Cognizant of these dangers, this Court has been scrupulous in rejecting official measures that treat religious and other minorities unequally. See *Grumet*, 512 U.S. at 699–705; *Lukumi*, 508 U.S. at 534–542; *Larson*, 456 U.S. at 253–255; see also, *e.g.*, *Romer*, 517 U.S. at 634 (striking down anti-gay state constitutional amendment where "the disadvantage imposed [was] born of animosity toward the class of persons affected"); *United States* v. *Windsor*, 133 S. Ct. 2675,

2693–2695 (2013) (invalidating Defense of Marriage Act because design, purpose, and effect were impermissible targeting of same-sex couples and their families for stigma and discrimination); *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982) ("[D]espite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes."). The Court should do the same here.

CONCLUSION

Government "may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion." *Lukumi*, 508 U.S. at 547. Declaring a religion's adherents unworthy even to visit this country is "precisely the sort of official denominational preference that the Framers of the First Amendment forbade" (*Larson*, 456 U.S. at 255). This "bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest," much less a *compelling* one. *Romer*, 517 U.S. at 634 (quoting *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534 (1973)). And the resulting unleashing of violence against Muslims, or against any group, is abhorrent and indefensible. Our government should not tolerate persecution of religious minorities, much less encourage it.

The preliminary injunctions should be affirmed.

Respectfully submitted.

GILLIAN B. GILLERS
KRISTI L. GRAUNKE
NAOMI R. TSU
Southern Poverty Law Center
150 East Ponce de Leon Ave., Ste. 340
Decatur, GA 30030
(404) 521-6700

SUSAN L. SOMMER
Lambda Legal Defense and Education Fund, Inc.
120 Wall St., 19th Fl.
New York, NY 10005
(212) 809-8585

CAMILLA B. TAYLOR
Lambda Legal Defense and Education Fund, Inc.
105 W. Adams St., 26th Fl.
Chicago, IL 60603
(312) 663-4413

SHARON M. MCGOWAN
Lambda Legal Defense and Education Fund, Inc.
1875 I St. NW, 5th Fl.
Washington, DC 20006
(202) 740-0914

RICHARD B. KATSKEE
Counsel of Record
ERIC ROTHSCHILD†
ANDREW L. NELLIS‡
Americans United for Separation of Church and State
1310 L St. NW, Ste. 200
Washington, DC 20005
(202) 466-3234
katskee@au.org

ELLIOT M. MINCBERG
DIANE LAVIOLETTE
People For the American Way Foundation
1101 15th St. NW, Ste. 600
Washington, DC 20005
(202) 467-4999

JENNIFER C. PIZER
Lambda Legal Defense and Education Fund, Inc.
4221 Wilshire Blvd., Ste. 280
Los Angeles, CA 90010
(213) 382-7600

Counsel for Amici Curiae

SEPTEMBER 2017

† Admitted in Pennsylvania; supervised by Richard B. Katskee of the D.C. Bar.

‡ Admitted in New York; supervised by Richard B. Katskee of the D.C. Bar.

APPENDIX

APPENDIX OF *AMICI CURIAE*

AMICI MEMBERS OF THE CLERGY

Amici include members of the clergy who practice and promote the values of the Christian faith and worry about the government's harmful message of judgment and condemnation of our Muslim brothers and sisters. As Christian leaders, we are obligated to lead in matters of faith and to defend our freedom of religion from governmental intrusion. Among other concerns, the Executive Order risks being misunderstood as representing our faith, furthering the inaccurate and harmful narrative that America is a "Christian Nation"—a message that we strongly reject. And the Executive Order will be correctly interpreted by the world as bare discrimination against Muslims. Actions of this nature perpetuate inaccurate narratives and harmful stereotypes and undermine the arduous path to peace between the world's two largest faiths.

Although the Executive Order's discriminatory treatment of Muslims will be interpreted by many in the global community as a statement from Christians, it does not represent our will or our position as the actual representatives of our faith. As Christian leaders, we did not and do not request preferential treatment for adherents of our faith. The risk of appearance that the American government is in any way, shape, or form representing the Christian faith with this action is of grave concern to us—and should be to the courts and to the American people, regardless of their faith affiliation. Whether this trespass of our sovereign agency is intentional or not is inconsequential to our fundamental opposition. The Order is an embarrassing distortion of everything we profess, and it stands to harm our cause domestically and abroad.

We descend from a lineage of martyrs who modeled self-sacrifice, not self-protection. We take seriously the responsibility of continuing a legacy of welcoming foreigners and loving our neighbors as ourselves. We embrace this responsibility gladly and join our colleagues in asking the Court to reject this Executive Order.

ORGANIZATIONAL *AMICI*

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of church and state. Americans United represents more than 125,000 members and supporters nationwide. Since its founding in 1947, Americans United has participated as a party, as counsel, or as an *amicus curiae* in the leading church–state cases decided by this Court and by the federal courts of appeals throughout the country. Consistent with our support for the separation of church and state, Americans United has long fought to uphold the guarantees of the First Amendment and equal protection that government must not favor, disfavor, or punish based on religion or belief.

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 in-

stitutional boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

Lambda Legal Defense and Education Fund, Inc.

Lambda Legal Defense and Education Fund, Inc., is a national impact-litigation, public-policy, and advocacy organization committed to achieving full recognition of the civil rights of those who are lesbian, gay, bisexual, or transgender or living with HIV—including many who are Muslim and face increased discrimination because of the challenged Executive Order. Through its decades of work on behalf of historically persecuted people, Lambda Legal has deep knowledge of the corrosive effect of government measures that single out marginalized groups for mistreatment. Lambda Legal has also worked to vindicate protections afforded by the Establishment Clause to those treated unequally based on religious beliefs and affiliations, and has a long-standing interest in access to immigration and asylum for individuals who are LGBT or living with HIV.

Lambda Legal has participated as counsel or *amicus curiae* in this Court and lower courts in numerous cases addressing First Amendment, Equal Protection, and other civil-rights bulwarks for LGBT people, and has had a long-standing interest in immigration and asylum matters. For example, Lambda Legal has served as party counsel in *Romer* v. *Evans*, 517 U.S. 620 (1996); *Lawrence* v. *Texas*, 539 U.S. 558 (2003); *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015); and *Barber* v. *Bryant*, 860 F.3d 345 (5th Cir. 2017), *petition for reh'g en banc filed*, No. 16-60477 (5th Cir. July 6,

2017), and participated as an *amicus* in asylum cases such as *Hernandez-Montiel* v. *INS*, 225 F.3d 1084 (9th Cir. 2000), and *Velasquez-Banegas* v. *Lynch*, 846 F.3d 258 (7th Cir. 2017).

People For the American Way Foundation

People For the American Way Foundation is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principles that both the Free Exercise Clause and the Establishment Clause of the First Amendment to the Constitution work to truly protect religious liberty for all Americans, and that it violates the Establishment Clause for government to take action that, effectively or on its face, harms one particular religious group. This is especially important because of the additional harm such government opprobrium can and does cause, and with respect to particularly vulnerable populations like immigrants, as in this case.

The Riverside Church in the City of New York

The Riverside Church is an interdenominational church, influential on the nation's religious and political landscapes. We are an interdenominational, interracial, international, open, welcoming, and affirming church and congregation. The Riverside Church in the City of New York seeks to be a community of faith. Its members are united in the worship of God known in Jesus, the Christ, through the inspiration of the

Holy Spirit. The mission of the Church is to serve God through word and witness; to treat all human beings as sisters and brothers; and to foster responsible stewardship of all God's creation.

Southern Poverty Law Center

The Southern Poverty Law Center has provided *pro bono* civil-rights representation to low-income persons in the Southeast since 1971. SPLC has litigated numerous cases to enforce the civil rights of immigrants and refugees to ensure that they are treated with dignity and fairness. SPLC also monitors and exposes extremists who attack or malign groups of people based on their immutable characteristics. SPLC is dedicated to reducing prejudice and improving intergroup relations. SPLC has a strong interest in opposing discriminatory governmental action that undermines the promise of civil rights for all.