

No. 17-1351

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *et al.*,

Defendants-Appellants.

On Motion for a Stay Pending Appeal of a
Preliminary Injunction Issued by the
United States District Court for the District of Maryland
Case No. 8:17-cv-00361, Hon. Theodore D. Chuang

**BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,
BEND THE ARC, AND THE SOUTHERN POVERTY LAW CENTER
AS *AMICI CURIAE* SUPPORTING APPELLEES AND DENIAL OF A STAY**

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INTERESTS OF THE *AMICI CURIAE*¹

As detailed in the accompanying motion, *amici curiae* are nonprofit public-interest organizations committed to preserving religious freedom. Because the challenged Executive Order discriminates against Muslims based on their faith, and because harm will accrue immediately if the Executive Order takes effect, *amici* have a strong interest in the preliminary injunction remaining in place.

BACKGROUND

President Trump promised “a 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/1jKL2eW>. He insisted that “hundreds of thousands of refugees from the Middle East” would attempt to “radicaliz[e]” and “take over our children.” *Donald Trump Remarks in Manchester, New Hampshire*, C-SPAN 20:05 (June 13, 2016), <http://cs.pn/2k7bHGq>. When he “talked about the Muslims,” he explained: “we have to have a ban . . . it’s gotta be a ban.” *Presidential Candidate Donald Trump Town Hall Meeting in*

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief’s preparation or submission. A motion accompanies this brief.

Londonderry, New Hampshire, C-SPAN 28:00 (Feb. 8, 2016), <http://cs.pn/2kY4f1T>.

One week into his presidency, he fulfilled his pledge by barring entry by nationals from seven overwhelmingly Muslim countries. *See* Exec. Order 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017). When he signed that Executive Order, President Trump announced its title—“Protection of the Nation from Foreign Terrorist Entry into the United States”—and remarked: “We all know what that means.” *Trump Signs Executive Orders at Pentagon*, ABC NEWS (Jan. 27, 2017), <https://tinyurl.com/zbnvnkp>.

Multiple courts recognized the Executive Order as the promised Muslim ban and blocked its enforcement. *See Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017); *Aziz v. Trump*, No. 1:17-cv-116, 2017 WL 580855 (E.D. Va. Feb. 13, 2017). Because no evidence supported the government’s proffered national-security rationale, the Ninth Circuit declined to stay a TRO. *See Washington*, 847 F.3d at 1169.

So President Trump tried again. *See* Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). His replacement Executive Order is—in his own words—just “a watered-down version of the first one.” Alexander Burns, *2 Federal Judges Rule Against Trump’s Latest Travel Ban*, N.Y. TIMES (Mar. 15, 2017), <http://nyti.ms/2np9Kbh>. Although it addresses some failings of the original, such as exclusion of lawful permanent residents (*see* Exec.

Order 13,780 § 3(b)), it does not fix the basic defect: It is the Muslim Ban redux. See 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>.

ARGUMENT

A. THE REPLACEMENT EXECUTIVE ORDER CONTINUES TO VIOLATE THE ESTABLISHMENT CLAUSE.

1. The Establishment Clause requires that governmental action have a preeminently secular purpose (*McCreary County v. ACLU of Ky.*, 545 U.S. 844, 864 (2005)), and hence “prohibits government from . . . ‘making adherence to a religion relevant in any way to a person’s standing in the political community’” (*County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 594 (1989) (citation omitted)).

The Clause is violated if the “government’s actual purpose is to endorse or disapprove of religion.” *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987). And it is not enough for the government merely to articulate a secular purpose: “the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.” *McCreary*, 545 U.S. at 864.

“The eyes that look to purpose belong to an objective observer.” *Id.* at 862 (internal quotation marks omitted) (quoting *Santa Fe Indep. Sch. Dist.*

v. Doe, 530 U.S. 290, 308 (2000)). The question here, therefore, is “whether an objective observer . . . would perceive” the government to have placed its stamp of disapproval on Islam. *Santa Fe*, 530 U.S. at 308 (citation omitted). This hypothetical observer is “presumed to be familiar with the history of the government’s actions and competent to learn what history has to show.” *McCreary*, 545 U.S. at 866. Thus, the Court must not “turn a blind eye to the context” but must “look to the record of evidence showing the progression leading up to” the challenged action. *Id.* at 866, 868 (quoting *Santa Fe*, 530 U.S. at 315); *see also Washington*, 847 F.3d at 1167. Even officially repudiated past acts are not “dead and buried” but remain in the objective observer’s memory, affecting how the government’s action is viewed. *McCreary*, 545 U.S. at 870.

Hence, as a matter of law, the public’s understanding of the replacement Executive Order and its development must be considered in determining whether the Order amounts to an unconstitutional religious endorsement. *See id.* at 866; *Green v. Haskell Cty. Bd. of Comm’rs*, 568 F.3d 784, 801 (10th Cir. 2009). If a reasonable observer, considering the history and context, would perceive governmental endorsement, the Order cannot stand. *See McCreary*, 545 U.S. at 866.

Here, that context includes President Trump’s and his advisers’ statements and actions both before and after the inauguration. *See Hawai’i*

v. Trump, No. 17-00050 DKW-KSC, 2017 WL 1011673, at *13–14 (D. Haw. Mar. 15, 2017); *see also Aziz*, 2017 WL 580855, at *8.

2. Disapproval of Islam is apparent from the text of the Executive Order. Sections 1 and 2 exclude persons from countries that are more than 90% Muslim. *See* Exec. Order 13,780 §§ 1(f), 2(c); PEW RES. CTR., *THE GLOBAL RELIGIOUS LANDSCAPE* 45–50 (2012), <http://bit.ly/2k4Us8B>. Section 4 requires additional screening procedures for Iraqis, 99.0% of whom are Muslims. PEW RES. CTR., *supra*, at 47. And Section 6 blocks all refugees (Exec. Order 13,780 § 6(a)), disproportionately affecting Muslims, who make up a growing plurality of all refugees coming to the United States. Jens Manuel Krogstad & Jynnah Radford, *Key Facts About Refugees to the U.S.*, PEW RES. CTR. (Jan. 30, 2017), <http://pewrsr.ch/2kk7ro8>.

3. Though these features of the replacement Executive Order alone communicate official animus toward Muslims, the objective observer knows much more.

First, both Executive Orders are rooted in then-candidate Trump’s repeated promises of a “total and complete shutdown of Muslims entering the United States.” *Donald J. Trump Statement, supra*.

Second, candidate Trump repackaged his Muslim ban only after public outcry, explaining that because “[p]eople were so upset when [he] used the word Muslim,” he would now be “talking territory instead of

Muslim.” *Meet the Press*, NBC NEWS (July 24, 2016) <http://nbcnews.to/29TqPnp>; see also *The Republican Ticket: Trump and Pence*, CBS NEWS (July 17, 2016), <http://cbsn.ws/29NrLqj> (“[C]all it whatever you want. We’ll call it territories, OK?”).

Third, after the election, President-elect Trump asked Rudy Giuliani (his transition-team vice chair) how the “Muslim ban” could be implemented “legally,” resulting in the first Executive Order. 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>.

Fourth, after the Ninth Circuit upheld the TRO blocking the first Executive Order, the President’s Senior Policy Adviser, Stephen Miller, announced that its replacement would have the “same basic policy outcome.” Zapotosky, *supra*. And the replacement Executive Order states that it continues the work of the enjoined one. See Exec. Order 13,780 § 1(i).

Fifth, notwithstanding the President’s insistence that the ban is necessary for national security, the first Executive Order was crafted not by national-security experts but by political advisers who have a record of hostility toward Muslims. 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>. Although less is known about who drafted the replacement Executive Order, the Department of Homeland Security has determined that “citizenship is an ‘unreliable’ threat indicator and that people from the seven countries have rarely been implicated in U.S.-based terrorism.” Matt Zapotosky, *DHS Report Casts Doubt on Need for Trump Travel Ban*, WASH. POST (Feb. 24, 2017), <http://wapo.st/2lOkpKW>.

And sixth, President Trump has admitted that the replacement Executive Order is just a “watered-down version of the first one.” Burns, *supra*. What is more, he said: “We ought to go back to the first one . . . which is what I wanted to do in the first place.” *Id.* (video).

4. In short, the acts and statements of President Trump, his advisers and surrogates, and the members of his administration who developed the Executive Orders, as well as the broader social context in which the Executive Orders were issued, all underscore that the President is still pursuing his promised Muslim ban. The objective observer sees in the replacement Executive Order “a purposeful change of *words* . . . effected without any corresponding change in *content*.” *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 721 (M.D. Pa. 2005).

5. The President cannot erase his statements and the whole history of the Executive Orders by asserting that he now is “not motivated by animus toward any religion.” Exec. Order 13,780 § 1(b)(iv). The law requires that

the history be considered, because that is the reasonable observer's frame of reference. It does not matter that some of President Trump's statements came during the campaign. *Cf.* Mot. Stay 17. "[A] person is not made brand new simply by taking the oath of office." *Aziz*, 2017 WL 580855, at *8. As a matter of law, what candidate Trump and President-elect Trump promised illuminates what President Trump has done.

6. Finally, it is immaterial that the countries targeted in the two Executive Orders were previously subjected to heightened immigration measures. For the objective observer, "purpose matters." *McCreary*, 545 U.S. at 866 n.14. Thus, "the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage." *Id.* "Just as Holmes's dog could tell the difference between being kicked and being stumbled over, it will matter to objective observers whether [an Executive Order] follows on the heels of [statements] motivated by sectarianism, or whether it lacks a history demonstrating that purpose." *Id.*

Nor are the Executive Orders "the same government action" (*id.*) as those previously identifying the targeted countries. Unlike the heightened visa requirements in place before, the Executive Orders uniformly ban **everyone** from the targeted countries. *Cf. Exodus Refugee Immigration, Inc.*

v. Pence, 838 F.3d 902, 904–05 (7th Cir. 2016) (holding that excluding all Syrian refugees as dangerous *per se* is unlawful discrimination).

The ban communicates that all Muslims bear collective responsibility and are under collective suspicion for what others have done, supposedly in the name of Islam. Yet “to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights.” *Korematsu v. United States*, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting). Collective maltreatment on the basis of faith sends the strongest possible message of disfavor—evoking some of the most sordid episodes in our history. *See Hassan v. City of New York*, 804 F.3d 277, 309 (3d Cir. 2015) (“We have been down similar roads before. Jewish-Americans during the Red Scare, African-Americans during the Civil Rights Movement, and Japanese-Americans during World War II are examples that readily spring to mind.”).

The replacement Executive Order communicates loudly and clearly that Muslims are unwanted. *See Hawai‘i*, 2017 WL 1011673, at *14 (“Any reasonable, objective observer would conclude . . . that the stated secular purpose of the Executive Order is, at the very least, ‘secondary to a religious objective’ of temporarily suspending the entry of Muslims.” (quoting *McCreary*, 545 U.S. at 864)).

B. THE BALANCE OF HARMS AND THE PUBLIC INTEREST FAVOR PLAINTIFFS.

1. The preliminary injunction is appropriate to protect against imminent unconstitutional discrimination. If stayed, plaintiffs and many, many others will suffer irreparable injuries for which there is no adequate remedy. *See* Pls.’ Mot. Prelim. Inj. 30–36. Indeed, because the Executive Order violates First Amendment rights, these injuries would be irreparable as a matter of law. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *Washington*, 847 F.3d at 1169; *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 520–21 (4th Cir. 2002).

By contrast, “upholding constitutional rights surely serves the public interest.” *Giovani*, 303 F.3d at 521; *accord Aziz*, 2017 WL 580855, at *10 (“enjoining an action that is likely a violation of the Establishment Clause serves the public interest, particularly in the absence of evidence to support the government’s asserted national security interest”).

2. For its part, the government argues only that the President has the right to make national-security decisions (Mot. Stay 1), not that the preliminary injunction poses any actual risk to national security.

Nor could it, as the administration’s conduct dating back to the first Executive Order negates any suggestion of a national-security emergency that might justify a stay.

President Trump issued the original Executive Order on January 27, purportedly “to protect the American people from terrorist attacks by foreign nationals” (Exec. Order 13,769 pmb.)—yet without any consultations with “senior national security officials” (*Aziz*, 2017 WL 580855, at *9).

On February 3, the U.S. District Court for the Western District of Washington issued a nationwide temporary restraining order, which “merely returned the nation temporarily to the position it has occupied for many previous years” (*Washington*, 847 F.3d at 1168), yet President Trump insisted that immediate measures were needed to prevent terrorists from entering the country (*see, e.g., Darlene Superville, Trump Lashes Out at Federal Judge Over Ruling on Travel Ban*, ST. LOUIS POST-DISPATCH (Feb. 4, 2017), <http://bit.ly/2n7zuso>).

On February 9, the Ninth Circuit denied the government’s emergency stay motion on the TRO. The government waited a week, then represented that “in the near future” it would issue a replacement executive order. Gov’t’s Suppl. *En Banc* Br. 4, *Washington v. Trump*, No. 17-35105, 2017 WL 655437 (9th Cir. Feb. 16, 2017).

A month then passed before that new Executive Order went into effect (Exec. Order 13,780 § 14), in part because the President “delayed plans to sign a reworked travel ban in the wake of positive reaction” to his first

address to Congress. See Laura Jarrett et al., *Trump Delays New Travel Ban After Well-Reviewed Speech*, CNN (Mar. 1, 2017), <http://tinyurl.com/zc9kwcg>. The administration described this delay as intended to let the replacement Executive Order “have its own ‘moment’”—i.e., to avoid detracting from positive media coverage on the President’s speech. *Id.*

Additionally, although the original Executive Order required the Secretary of Homeland Security to compile “within 30 days” a report on which countries provide inadequate information for adjudicating visa decisions, to determine whether heightened measures may be warranted (Exec. Order 13,769 § 3(b)), and although **sixty** days have since elapsed, that report has still not issued. Instead, the government simply reinstituted essentially the same ban, with “mostly minor technical differences.” Zapotosky, *A New Travel Ban*, *supra*.

Now, more than two months after the original Executive Order’s release, and more than seven weeks after the Ninth Circuit’s ruling, the government is once again asserting, just as before, that “Serious, Irreparable Harm” will result if a stay is not granted. Mot. Stay 2. The Ninth Circuit was not convinced last time. See *Washington*, 847 F.3d at 1168. The administration’s delays since then only underscore the correctness of that decision.

CONCLUSION

The preliminary injunction was warranted, and the government has not demonstrated why it should be stayed. The motion should be denied.

Respectfully submitted,

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Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for *amici curiae* certifies that this brief:

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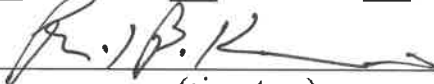
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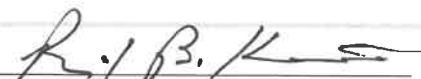
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