

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAII, *et al.*,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *et al.*,
Defendants-Appellants.

On Appeal of a Preliminary Injunction issued by the
United States District Court for the District of Hawai'i
Case No. 1:17-cv-00050, Hon. Derrick K. Watson

**BRIEF OF MEMBERS OF THE CLERGY; AMERICANS UNITED FOR
SEPARATION OF CHURCH AND STATE; BEND THE ARC: A JEWISH
PARTNERSHIP FOR JUSTICE; CENTRAL CONFERENCE OF AMERICAN
RABBIS; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.;
PEOPLE FOR THE AMERICAN WAY FOUNDATION; RIVERSIDE CHURCH
IN THE CITY OF NEW YORK; SOUTHERN POVERTY LAW CENTER; UNION
FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM
AS *AMICI CURIAE* SUPPORTING APPELLEES AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Amici are individuals and nonprofit entities. They have no parent corporations, and no publicly held corporation owns any portion of any of them.

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<i>Washington v. Trump</i> , No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), <i>stay pending appeal denied</i> , 847 F.3d 1151 (9th Cir. 2017)	9, 13, 14
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Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017).....	<i>passim</i>

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	Page(s)
Donald J. Trump (@realDonaldTrump), TWITTER	
(Feb. 4, 2017, 1:44 PM), http://bit.ly/2f3F9tQ	17
(Apr. 26, 2017, 3:20 AM), http://bit.ly/2oJNjK8	17
(Apr. 26, 2017, 3:30 AM), http://bit.ly/2gN1HDe	17
(June 5, 2017, 3:25 AM), http://bit.ly/2rWPMHa	12
(June 5, 2017, 3:29 AM), http://bit.ly/2svraEu	17
(Sept. 15, 2017, 3:54 AM), http://bit.ly/2wh0o66	16, 17
 Miscellaneous	
David Brody, <i>Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees</i> , CBN NEWS (Jan. 27, 2017), http://bit.ly/2kCqG8M	12
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	29
Kathryn Casteel & Andrea Jones-Rooy, <i>Trump’s Latest Travel Order Still Looks a Lot Like a Muslim Ban</i> , FIVETHIRTYEIGHT (Sept. 28, 2017), https://tinyurl.com/ybvz3ct	18, 19
Center for Security Policy, S. POVERTY L. CTR., http://bit.ly/2atHufL (last visited Sept. 7, 2017)	27
Jeremy Diamond, <i>Trump Rails Against Court Ruling Blocking Travel Ban</i> , CNN (Mar. 15, 2017), http://cnn.it/2rG3oGD	14, 16
Donald J. Trump Statement on Preventing Muslim Immigration, DONALD J. TRUMP FOR PRESIDENT (Dec. 7, 2015), http://bit.ly/2tODc9U	10, 16
Full Transcript and Video: Trump News Conference, N.Y. TIMES (Feb. 16, 2017), http://nyti.ms/2kXcFW4	13, 14
William Gallo & Victoria Macchi, <i>Trump Signs New Travel Ban Order</i> , VOA (Mar. 6, 2017), http://bit.ly/2rZksTy	14, 15

TABLE OF AUTHORITIES—continued

	Page(s)
Steve Guest, <i>Trump: ‘We’re Having Problems with the Muslims,’</i> DAILY CALLER (Mar. 22, 2016), http://bit.ly/2sBoYtz	10, 11
Michael Edison Hayden & Benjamin Siegel, <i>Green Card Holders Fall Under Trump’s Executive Order</i> , ABC NEWS (Jan. 28, 2017), http://abcn.ws/2kzvWdV	11, 12
Patrick Healy, ‘President Trump?’ Here’s How He Says It Would Look, N.Y. TIMES (May 4, 2016), http://nyti.ms/2uFaEmg	11
Esther Honig, <i>Hate Group Demonstrates Outside Columbus Mosque: ‘We Love Donald Trump,’</i> WOSU PUBLIC MEDIA (Sept. 15, 2017), https://tinyurl.com/y7wrxccd	30, 31
Christopher Ingraham, <i>American Mosques—and American Muslims—Are Being Targeted for Hate Like Never Before</i> , WASH. POST (Aug. 8, 2017), http://wapo.st/2x3nCty	30
<i>Investigator: Suspect in Texas Mosque Fire Feared Muslims</i> , U.S. NEWS & WORLD REP. (Mar. 10, 2017), http://bit.ly/2vJp8jk	30
<i>IRAP v. Trump</i> , CSPAN 30:29 (May 8, 2017), http://cs.pn/2j4kM4h	18
Laura Jarrett, <i>Second Federal Judge Blocks New Trump Travel Ban</i> , CNN (Oct. 18, 2017), https://tinyurl.com/ydyrxr5u	17
Katie Jones, <i>U.S. Hits Refugee Cap Months Early: How America’s Muslim Population Is Shaping the Nation</i> , GELLER REPORT (Aug. 5, 2017), http://bit.ly/2wLZehW	27
José Roberto Juárez Jr., <i>Recovering Texas History: Tejanos, Jim Crow, Lynchings & the University of Texas School of Law</i> , 52 S. TEX. L. REV. 85 (2010).....	25
Elizabeth Landers, <i>White House: Trump’s Tweets Are ‘Official Statements,’</i> CNN (June 6, 2017), http://cnn.it/2s58bOs	12

TABLE OF AUTHORITIES—continued

	Page(s)
Kevin Landers, <i>Hilliard Man Charged with Vandalizing Perry Township Mosque</i> , WBSN-10TV (Feb. 17, 2017), http://bit.ly/2gLyUeo	30
Jason Le Miere, <i>Trump Will Do to Muslims ‘What Hitler Did to the Jews,’ Claims Hate Crime Note Sent to Iowa Mosque</i> , NEWSWEEK (Mar. 20, 2017), http://bit.ly/2f7XExn	30
Christopher R. Leslie, <i>Creating Criminals: The Injuries Inflicted by ‘Unenforced’ Sodomy Laws</i> , 35 HARV. C.R.–C.L. L. REV. 103 (2000).....	25, 26
Brian H. Levin & Kevin Grisham, <i>Hate Crimes Rise in Major American Localities in 2016</i> , CTR. FOR STUDY HATE & EXTREMISM, CAL. ST. UNIV., SAN BERNARDINO 17 (June 29, 2017), http://bit.ly/2wcQZaT	28
Adam Liptak, <i>Trump Will Issue New Travel Order Instead of Fighting Case in Court</i> , N.Y. TIMES (Feb. 16, 2017), http://nyti.ms/2kP0qso	13
Nicholas Loffredo, <i>Trump Travel Ban Weakens National Security, Foreign Policy Experts Argue</i> , NEWSWEEK (Mar. 11, 2017), http://bit.ly/2mWUZM2	23
<i>Man Indicted for Hate Crime for Texas Mosque Fire</i> , CBS NEWS (June 23, 2017), http://cbsn.ws/2wcTtWP	30
<i>Map: Recent Incidents of Anti-Muslim Hate Crimes</i> , MUSLIM ADVOCATES, http://bit.ly/1Orsk4m (last visited Nov. 20, 2017).....	29
Dan Merica, <i>Trump Claims Increased Military Action After NYC Attack</i> , CNN (Nov. 3, 2017), http://www.cnn.it/2izYgNb	17
Dalia Mogahed & Youssef Chouhoud, <i>American Muslim Poll 2017: Muslims at the Crossroads</i> , INST. FOR SOC. POL’Y & UNDERSTANDING, http://bit.ly/2x2klx8	30

TABLE OF AUTHORITIES—continued

	Page(s)
Alex Nowrasteh, <i>Where Do Terrorists Come From? Not the Nations Named in Trump Ban</i> , NEWSWEEK (Jan. 31, 2017), http://bit.ly/2kWoddx	23
Matthew Nussbaum, <i>Flynn’s Son Says ‘Muslim Ban’ Is ‘Necessary,’</i> POLITICO (Jan. 29, 2017), http://politi.co/2k6e2jr	13
PEW RES. CTR., <i>THE GLOBAL RELIGIOUS LANDSCAPE 45–50</i> (Dec. 2012), http://bit.ly/2k4Us8B	11
<i>Presidential Candidate Donald Trump Town Hall Meeting in Londonderry, New Hampshire</i> , C-SPAN 28:00 (Feb. 8, 2016), http://cs.pn/2kY4f1T	11
<i>Responses to the Increase in Religious Hate Crimes: Hearing Before the S. Comm. on the Judiciary</i> , 115th Cong. 5 (2017) (statement of Vanita Gupta, President, Leadership Conference on Civil and Human Rights), http://bit.ly/2xa29Bp	26, 29
Theodore Schleifer, <i>Donald Trump: ‘I Think Islam Hates Us,’</i> CNN (Mar. 10, 2016), http://cnn.it/1RBk6Z4	11
Cogan Schneier, <i>Removal of Trump’s Muslim Comments Raises Travel Ban Questions</i> , NAT’L L.J. (May 11, 2017), http://bit.ly/2rRhzcB	10
Charlene L. Smith, <i>Undo Two: An Essay Regarding Colorado’s Anti-Lesbian and Gay Amendment 2</i> , 32 WASHBURN L.J. 367 (1993)	25, 26
Amy Davidson Sorkin, <i>Donald Trump’s First, Ugly TV Ad</i> , NEW YORKER (Jan. 4, 2016), http://bit.ly/1PH9tp5	10
Lesley Stahl, <i>The Republican Ticket: Trump and Pence</i> , CBS NEWS (July 17, 2016), http://cbsn.ws/29NrLqj	12, 15
<i>Stop Importing Jihadists</i> , CTR. FOR SECURITY POL’Y (June 28, 2016), http://bit.ly/2vJQLIS	27

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	Page(s)
Jane C. Timm, <i>Advocacy, Aid Groups Condemn Trump Order as ‘Muslim Ban,’</i> NBC NEWS (Jan. 28, 2017), http://nbcnews.to/2sV0YVc	13
Nahal Toosi, <i>‘Honor Killings’ Highlighted Under Trump’s New Travel Ban,</i> POLITICO (Mar. 6, 2017), http://politi.co/2x74mLr	28
<i>Trump Signs Executive Orders at Pentagon,</i> ABC NEWS (Jan. 27, 2017), http://abcn.ws/2kbeqPu	12
Ali Vitali & Jane C. Timm, <i>Trump: Consider Sending NYC Truck Attacker to Guantanamo Bay,</i> NBC NEWS (Nov. 2, 2017), http://nbcnews.to/2A6uac8	17
Amy B. Wang, <i>Trump Asked for a ‘Muslim Ban,’ Giuliani Says—and Ordered a Commission to Do It ‘Legally,’</i> WASH. POST (Jan. 29, 2017), http://wapo.st/2jLbEO5	10, 13
Matt Zapotosky, <i>DHS Report Casts Doubt on Need for Trump Travel Ban,</i> WASH. POST (Feb. 24, 2017), http://wapo.st/2lOkpKW	16, 23
Matt Zapotosky, <i>A New Travel Ban with ‘Mostly Minor Technical Differences’? That Probably Won’t Cut It, Analysts Say,</i> WASH. POST (Feb. 22, 2017), http://wapo.st/2mmmECm	14

INTERESTS OF THE *AMICI CURIAE*¹

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.

This case affects individuals and families living across the United States and around the world. If the challenged Proclamation 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 a diverse workforce. And all Americans will know that our government officially denigrates and excludes Muslims because of their faith.

Amici have a strong interest in ensuring that the Proclamation remains enjoined, lest we betray our constitutional commitments to religious freedom and equal rights for all without regard to faith or belief.

¹ No counsel for a party authored this brief in whole or in part, and no one other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties have consented to this filing.

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- The Riverside Church in the City of New York.
- Southern Poverty Law Center.
- Union for Reform Judaism.
- Women of Reform Judaism.

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

INTRODUCTION AND SUMMARY OF ARGUMENT

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). This “essential commitment to religious freedom” (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993)) reflects the Framers’ “awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand” (*Engel v. Vitale*, 370 U.S. 421, 432 (1962)).

The challenged Proclamation reneges on that commitment by targeting Muslims for opprobrium, denigration, and discrimination based solely on their faith. This marking of one religion for exclusion cannot be justified by the government’s asserted interest in national security, both because the Muslim ban is woefully ill-suited to achieving that interest and because the government has made no meaningful changes that sever the policy from the hostility toward Islam that spawned it. What is more, the ban has unleashed persecution and violence that endanger lives and rip communities apart: Attacks on mosques and other anti-Muslim hate crimes have nearly doubled since the ban was first imposed.

Casting one group as the object of fear, disrespect, and official maltreatment is invidious discrimination and an unconstitutional religious preference that cannot withstand scrutiny. Thus, although the district court did not reach Hawai‘i’s Establishment Clause claims because it concluded that the Proclamation likely violates the Immigration and Nationality Act, this Court should affirm on both grounds to preserve the “profound commitment to religious liberty” “that has served [this Nation] so well” (*McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 882, 884 (2005) (O’Connor, J., concurring)).

ARGUMENT

I. THE PROCLAMATION 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); accord *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 619 (9th Cir. 1996). Yet by design and in actual effect the challenged Proclamation 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 Government To Disfavor Or Denigrate One Faith.

1. “[T]he Framers of the First Amendment forbade” any “official denominational preference.” *Larson*, 456 U.S. at 255 (holding that state statute treating some denominations more favorably than others violated Establishment Clause). Hence, the Supreme 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 (1990) (plurality opinion); *Sch. Dist. v. Ball*, 473 U.S. 373, 389 (1985); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)). The Clause thus mandates the strict “principle of denominational neutrality.” *Larson*, 456 U.S. at 246; *see also Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) (“[T]he First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which . . . prefer one religion over another,” and “[n]o person can be punished for entertaining or professing religious beliefs . . .”). Indeed, so fundamental is this prohibition against denominational preferences that courts “apply strict scrutiny in adjudging [their] constitutionality.” *Larson*,

456 U.S. at 246. For nothing more plainly violates the Establishment Clause than when government favors some religions over others. *Id.* at 244.²

Accordingly, “the Establishment Clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause.” *Grumet*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment); *see also Lukumi*, 508 U.S. at 540 (under “Establishment Clause, ‘neutrality in [law’s] application requires an equal protection mode of analysis’” (brackets omitted) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring))). It also works in tandem with the Free Exercise Clause to safeguard equality without regard to religion or belief. *See, e.g., Grumet*, 512 U.S. at 715 (O’Connor, J., concurring in part and concurring in the judgment); *Larson*, 456 U.S. at 245 (Establishment Clause’s “constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause”). The Establishment, Free Exercise, and Equal Protection

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 government-sponsored endorsement of religion . . . where the endorsement is sectarian . . .”); *Wallace*, 472 U.S. at 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.”).

Clauses thus all prohibit government from denigrating minority groups and thereby coercing adherence to “state-created orthodoxy” (*Lee*, 505 U.S. at 592).

2. When either the principal purpose or the primary effect of official action is to denigrate or exclude a religion or its adherents, the government violates the Establishment Clause regardless of whether the disfavor is stated expressly or instead is achieved through artifice or subterfuge. *See, e.g., McCreary*, 545 U.S. at 864 (governmental action must have secular purpose that is “genuine, not a sham, and not merely secondary to a religious objective”); *Lukumi*, 508 U.S. at 533–35, 538 (basing free-exercise analysis on Establishment Clause jurisprudence, and striking down ordinance as religious “gerrymander” because “almost the only conduct subject to it” was associated with one denomination); *Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593–94 (1989) (“The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from ‘making adherence to a religion relevant in any way to a person’s standing in the political community.’” (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring))), *dicta on unrelated issue disapproved in Town of Greece v. Galloway*, 134 S. Ct. 1811, 1821 (2014). The government may not skirt the constitutional prohibitions by clothing disfavor toward

minority faiths in secular rationales, 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 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)). And “it is . . . the duty of the courts to ‘distinguish a sham secular purpose from a sincere one.’” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (brackets omitted) (quoting *Wallace*, 472 U.S. at 75 (O’Connor, J., concurring in the judgment)).

3. Thus, when determining whether official action complies with the Establishment Clause, courts must consider “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 decision-mak[er].” *Lukumi*, 508 U.S. at 540 (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977)); accord *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1158–59 (9th Cir. 2013). “These objective factors bear on the question of discriminatory object.” *Lukumi*, 508 U.S. at 540 (citing *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 n.24 (1979)); see also *McCreary*, 545 U.S. at 862–63 (discriminatory object shown by “readily

discoverable fact” and “openly available data support[ing] a commonsense conclusion that a religious objective permeated the government’s action”).

Targeting religious groups for special legal disabilities cannot be reconciled with the constitutional mandate of equal treatment. “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 Proclamation’s discriminatory object is plain and unambiguous.

B. The Proclamation Disfavors And Denigrates Muslims.

1. The Proclamation is the Administration’s third attempt to enact its promised Muslim ban.

Born as a political maneuver to spark and capitalize on religious and racial animus, a ban on Muslims was entrenched into law immediately after the current Administration took office (*see* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017)). That first ban was quickly enjoined. *See 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); *Aziz v. Trump*, 234 F. Supp. 3d 724 (E.D. Va. 2017). So the administration issued a second Executive Order with cosmetic alterations. *See* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). The courts concluded that it was merely a continuation of the first ban, and enjoined it, too. *See Hawai‘i*

v. Trump, 859 F.3d 741 (9th Cir. 2017); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017).

Now the Administration is trying once again 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>. But the core remains rotten.

a. A pledge to ban Muslims was central to the President’s campaign from the outset. *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, Mr. Trump consistently 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 after the election and inauguration and even after the first and second Executive Orders were enjoined. *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*

³ The message was abruptly removed on the day of the *en banc* Fourth Circuit argument in *IRAP*. *See* Schneier, *supra*.

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>.

He pledged that during his first 100 days in office he would 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).

b. This first Executive Order immediately and categorically banned 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 generally* PEW RES. CTR., THE GLOBAL RELIGIOUS LANDSCAPE 45–50 (Dec. 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, tourists, or even lawful permanent U.S. residents. *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." Lesley Stahl, *The Republican Ticket: Trump and Pence*, CBS NEWS (July 17, 2016), <http://cbsn.ws/29NrLqj>. "[T]he lawyers and the courts can call it whatever they want, but I am calling it . . . a TRAVEL BAN!" Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2017, 3:25 AM), <http://bit.ly/2rWPMHa>.⁴

But lest the point be missed, the President publicly announced the Order's title, "Protecting the Nation from Foreign Terrorist Entry into the United States," and commented, "we all know what that means." *Trump Signs Executive Orders at Pentagon*, ABC NEWS (Jan. 27, 2017), <http://abcn.ws/2kbeqPu>. He further underscored 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>.

⁴ The President's tweets are official government statements. See Elizabeth Landers, *White House: Trump's Tweets Are 'Official Statements'*, CNN (June 6, 2017), <http://cnn.it/2s58bOs>.

And Rudolph Giuliani, vice-chair of the President's transition team, confirmed that the Order implemented the President's directive to "do" a "Muslim ban" "legally." Wang, *supra*.

c. Despite some official protestations to the contrary, the proponents, critics, and observers of the Executive Order all recognized it to be 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> (quoting supporter); Jane C. Timm, *Advocacy, Aid Groups Condemn Trump Order as 'Muslim Ban,'* NBC NEWS (Jan. 28, 2017), <http://nbcnews.to/2sVOYVc> (quoting critics).

So did the federal courts, which concluded that the Order was the product not of "rational national security concerns" but of "Trump's desire for a Muslim ban" (*Aziz*, 234 F. Supp. 3d at 736), and enjoined it accordingly (*id.*; *accord Washington*, 2017 WL 462040 at *2).

d. The Administration responded by revising the Order (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 pledged to redraft in a way "very much tailored to the [sic] what I consider to be a very bad decision" by this Court, 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 confirmed this ongoing commitment. For example, White House Senior Policy Adviser Stephen Miller stated that the revised 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>.

The revised Order, issued in March 2017, “expressly exclude[d] . . . categories of aliens that have prompted judicial concerns” (Exec. Order No. 13,780 § 1(i)), seeking to sidestep this Court’s ruling that the original 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[ed] 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).

This Court and the Fourth Circuit agreed with the Administration that the revised Order was not meaningfully different, and enjoined it, too. *Hawai‘i*, 859 F.3d at 789; *IRAP*, 857 F.3d at 604–05.

e. So the government tried a third iteration, issuing the Proclamation now under review. This Proclamation continues the ban on the majority of immigrants and visitors from six overwhelmingly Muslim countries (*see* Proclamation No. 9645, 82 Fed. Reg. 45,161, § 2 (Sept. 27, 2017)), still using nationality as a proxy for religion (*see* Stahl, *supra* (quoting then-candidate Trump’s announcement of strategy to circumvent scrutiny by couching Muslim ban as nationality)).

By its own terms, the Proclamation implements the second Executive Order. *See* Proclamation § 1. Accordingly, it “cannot be divorced from the cohesive narrative linking it to the animus that inspired it.” *IRAP*, 857 F.3d at 601; *see Santa Fe*, 530 U.S. at 308 (courts must not “turn a blind eye to the context in which [the challenged] policy arose”); *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987) (Establishment Clause inquiry looks to “the historical context of the statute . . . and the specific sequence of events leading to [its] passage”).

f. To be sure, past actions do not “forever taint” new ones. *McCreary*, 545 U.S. at 874. But curative efforts “should be (1) *purposeful*, (2) *public*, and (3) at least as *persuasive* as the initial endorsement of religion.” *Felix v. City of Bloomfield*, 841 F.3d 848, 863 (10th Cir. 2016) (emphasis in original); *see also McCreary*, 545 U.S. at 871–72 (“new statements of purpose” deemed mere “litigating position” where earlier acts “were not repealed or otherwise repudiated.”).

Here, the President’s insistence on a “total and complete shutdown of Muslims” (*Donald J. Trump Statement, supra*) is not readily forgotten. And the government rushed to implement the ban—at least twice—without consulting national-security experts, casting doubt on the government’s litigating position that the ban is not the product of religious animus. *See* Matt Zapotosky, *DHS Report Casts Doubt on Need for Trump Travel Ban*, WASH. POST (Feb. 24, 2017), <http://wapo.st/2lOkpKW>.

The President has also continued to repeat his goal of enacting a Muslim ban, judicial opinions and constitutional limitations notwithstanding.⁵ He has continued to project anti-Muslim animus,

⁵ *See, e.g.,* Diamond, *supra* (quoting President Trump) (“[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.”); @realDonaldTrump, TWITTER (Sept. 15, 2017, 3:54 AM), <http://bit.ly/2wh0o66> (“The travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be

tweeting that “a method hostile to Islam—shooting Muslims with bullets dipped in pig’s blood—should be used to deter future terrorism.” See Laura Jarrett, *Second Federal Judge Blocks New Trump Travel Ban*, CNN (Oct. 18, 2017), <https://tinyurl.com/ydyrxr5u>. Commenting on national tragedies, he has spoken in more pointed terms about Muslim perpetrators of violence than about non-Muslims engaged in comparable acts. See, e.g., Dan Merica, *Trump Claims Increased Military Action After NYC Attack*, CNN (Nov. 3, 2017), <http://www.cnn.it/2izYgNb> (calling Muslim perpetrator of attack on pedestrians in New York a “degenerate animal” while using no similar epithets for white-supremacist who attacked pedestrians in Charlottesville or for Las Vegas mass murderer); Ali Vitali & Jane C. Timm, *Trump: Consider Sending NYC Truck Attacker to Guantanamo Bay*, NBC NEWS (Nov. 2, 2017), <http://nbcnews.to/2A6uac8> (calling for New York attacker to be sent to Guantanamo Bay detention facility).

And the Proclamation does not repudiate but instead makes permanent the unconstitutional policy. Hence, “[n]o reasonable observer

politically correct!”); @realDonaldTrump, TWITTER (June 5, 2017, 3:29 AM), <http://bit.ly/2svraEu> (“The Justice Dept. should have stayed with the original Travel Ban”); see also, e.g., @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).

could swallow the claim that the [government] had cast off the objective so unmistakable in the earlier [orders].” *McCreary*, 545 U.S. at 872.

g. The government has conceded that expressly banning Muslims from immigrating or traveling to the United States—the President’s campaign promise—would likely be unconstitutional even if imposed in the name of national security. *IRAP v. Trump*, CSPAN 30:29 (May 8, 2017), <http://cs.pn/2j4kM4h>. Yet the government argues that the Proclamation’s “text does not refer to or draw any distinction based on religion” and that the “operation confirms that it is religion-neutral.” (Defs.’ Mem. Opp’n Pls.’ Mot. TRO (Dkt. 378) at 35.) But “[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. Though the Proclamation studiously avoids naming the disfavored faith—Islam—it, like the Executive Orders from which it springs, affects, as a practical matter, only immigrants and travelers from Muslim-majority countries, and hence also their relatives and others in the United States with connections to them. See Proclamation § 2 (a)-(c), (e), (g), (h).⁶

⁶ Although the Proclamation also bans immigration and travel from North Korea and restricts travel from Venezuela, that does not alter its clear and overwhelming effect as an anti-Muslim measure. Including North Korea does essentially nothing: In 2016, only nine North Koreans obtained immigrant visas. See Kathryn Casteel & Andrea Jones-Rooy, *Trump’s*

The Proclamation also violates the ‘baseline’ test for secure vetting that it purports to impose, so as to ban more Muslims and avoid banning non-Muslims. Somalia, an overwhelmingly Muslim country, *passed* the test, yet that country and its nationals are subject to a complete immigration ban. Meanwhile, Venezuela, a non-Muslim country, is not subject to an immigration ban even though it *failed* the test.⁷ The Proclamation purports to justify this latter departure from its own mandate by saying that the government has “alternative sources for obtaining information” about Venezuelans. Proclamation § 2(f)(i). But the government has not even hinted at what those supposed alternative sources are; nor has it shown why alternative sources of information would be unavailable for the Muslim-majority countries that are subject to the ban.

Latest Travel Order Still Looks a Lot Like a Muslim Ban, FIVETHIRTYEIGHT (Sept. 28, 2017), <https://tinyurl.com/ybvz3ct>. By contrast, 12,998 Yemenis and 7727 Iranians obtained immigrant visas that year; similarly situated people today would be banned. *Id.* And the restrictions on Venezuela apply solely to *visits* by certain *government officials and their families*, with no ban on immigration and no effect on other Venezuelans. *See* Proclamation § 2(f).

⁷ Iraq also failed but avoided restrictions for diplomatic reasons, as had also been the case for the second Executive Order. *See* Proclamation § 1(g); Exec. Order 13,780 § 1(g). The Muslim ban does not, however, cease to be a Muslim ban just because it does not target *every* Muslim and every Muslim-majority country. *See IRAP*, 857 F.3d at 597.

Moreover, the Proclamation, like the Executive Orders before it, targets nationals of Muslim-majority countries even if they legally reside elsewhere and have no ongoing connection to any listed country, thus underscoring the extraordinary lack of fit between the ban and the asserted justification of inadequate “information-sharing” and “identity-management” in the targeted countries. *See Hawai‘i*, 859 F.3d at 773. What the ban accomplishes, in other words, is not to address other countries’ inadequate bureaucracies, but to exclude Muslims without regard to real or perceived dangers. This governmental targeting of minorities based on religion, so obvious in practice even if not forthrightly stated, cannot be squared with the mandates of the Establishment Clause.

2. The governmental review process does not cure the constitutional violation.

a. The government relies heavily on an agency review-and-recommendation process to validate the Proclamation’s ban. But neither that process nor the Proclamation’s words, nor its aim, nor its actual effect severs the Proclamation from the policies on which it is grounded. “Rather, they cast the Proclamation as the inextricable re-animation of the twice-enjoined Muslim ban, and in echoes of *McCreary*, convey the message that the third iteration of the ban—no longer temporary—will be the ‘enhanced

expression’ of the earlier ones.” *IRAP v. Trump (IRAP II)*, No. TDC-17-0361, 2017 WL 4674314, *36 (D. Md. Oct. 17, 2017).

Notably in this regard, neither the review-and-recommendation process—which the second Executive Order mandated to try to justify the ban retroactively—nor the results of that review have been revealed or explained either to the public or to the courts. Thus, as the district court recognized here, they offer little to assure the public that the government is now acting lawfully. *See* ER 35 (“While the September 15, 2017 DHS report . . . might offer some insight, the Government objected to the Court’s consideration or even viewing the classified report, making it impossible to know.”); *accord IRAP II*, 2017 WL 4674314 at *36 (“Purposes that can be discerned only if one ‘burrows into a difficult-to-access’ record do little to ‘assure the public that the government is not endorsing a religious view.’” (brackets omitted) (quoting *Felix*, 841 F.3d at 863)).

What the courts and the public *do* know is that the second Executive Order required the Secretary of Homeland Security to “submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals.” Exec. Order No. 13,780 § 2(e). The U.S. District Court for the District of Maryland found that this language “indicates that the President had decided, even before the study had been conducted, that

regardless of the results, some nationals would be subject to a travel ban.”
IRAP II, 2017 WL 4674314 at *34.

What is more, the government used the same criteria to pick which countries the Proclamation would ban as it had used to pick the countries for the second Executive Order’s ban, even after this Court held that it could not use those criteria. *Hawai’i*, 859 F.3d at 773–74. As this Court concluded, the second Executive Order “relie[d] on 8 U.S.C. §1187(a)(12) to explain why the six countries have been designated,” even though Congress enacted that section not to ban countries or individuals but to direct the State Department’s determinations about which countries may participate in the Visa Waiver Program—which allows citizens or nationals of participating countries to enter the United States for up to 90 days without a visa or any prescreening. *See id.* at 774. The government “identifie[d] no new information to justify Section 2(c)’s blanket ban as contrasted with § 1187(a)(12)’s restriction from the Visa Waiver Program.” *Id.*

The mismatch is particularly acute for immigrants. The criteria in 28 U.S.C. § 1187 pertain to nonimmigrant travelers seeking visas for short visits; they have nothing to do with immigration. Yet the Proclamation employs those criteria to ban immigration from six Muslim-majority countries—while acknowledging that immigrants already “receive more extensive vetting than nonimmigrants”—simply because immigrants, once

admitted, will be afforded “more enduring rights” than visitors. Proclamation § 1(h)(ii). The clear object here is to keep out religious ‘undesirables’—and most especially to ensure that they do not live among us.

b. Nor is there anything to suggest that the process used to mark Muslim-majority countries for the current iteration of the ban took account of any actual data or findings as to whether existing vetting practices were insufficient to detect national-security risks, or whether, if they were, something other than a total ban would address the shortcomings. Nationals from the targeted countries have been responsible for no fatal terrorist attacks in the United States. *See, e.g.,* Alex Nowrasteh, *Where Do Terrorists Come From? Not the Nations Named in Trump Ban*, NEWSWEEK (Jan. 31, 2017), <http://bit.ly/2kWoddx>. The Department of Homeland Security has found that restrictions based on nationality do not advance national security. Zapotosky, *DHS Report, supra*. And a bipartisan group of dozens of former national-security officials has concluded that the Proclamation, like the Executive Orders before it, serves no legitimate national-security interests. ER 51–62; *cf.* Nicholas Loffredo, *Trump Travel Ban Weakens National Security, Foreign Policy Experts Argue*, NEWSWEEK (Mar. 11, 2017), <http://bit.ly/2mWUZM2>. Yet none of that had any more effect on the Proclamation’s extension of the ban to permanence than it did

on the Executive Orders. Once again, the government’s failure to conform its conduct to expert determinations (or to explain why it did not) is “strong evidence that any national security justification for [the ban] was secondary to its primary religious purpose” *IRAP*, 857 F.3d at 596.

* * *

The Proclamation purports “to protect [U.S.] citizens from terrorist attacks and other public-safety threats.” Proclamation § 1(a). While no one doubts that preventing terrorist attacks would be a compelling interest, the bald assertion of that objective is insufficient to justify a denominational preference. For “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)). The government has made no showing that its review process was designed to, or did, advance national security any more than the Executive Orders did. The Proclamation, like its forebears, is an unconstitutional ban on Muslims.

II. THE GOVERNMENT’S DENIGRATION OF MUSLIMS FOMENTS THE SOCIAL DIVISIVENESS AND VIOLENCE THAT THE ESTABLISHMENT CLAUSE WAS MEANT TO FORESTALL.

The Establishment Clause’s protections are fundamental because “nothing does a better job of roiling society” than when government singles out people for differential treatment based on their adherence to a

particular faith. *McCreary*, 545 U.S. at 875–76. The “sectarianism which is so often the flashpoint for religious animosity” (*Lee*, 505 U.S. at 588) has been unleashed by the government’s Muslim ban.

1. 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).

The connection between governmental stigmatization and violence is well documented. See, e.g., 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); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by ‘Unenforced’ Sodomy Laws*, 35 HARV. C.R.–C.L. L. REV. 103, 124, 137–43 (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, 369–70 (1993) (reporting that violence against lesbians and gay men tripled after Colorado passed constitutional amendment that forbade laws banning discrimination based on sexual orientation). 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.

2. The experience of American Muslims today is comparable to other sad chapters in our Nation’s history in revealing how official messages of exclusion fuel animus and persecution against their targets. Accordingly, it is no surprise that the pernicious effects of the Muslim ban go well beyond legally mandated separation of children, parents, and grandparents and disruption of businesses and educational institutions. As the former Assistant Attorney General for Civil Rights 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>.

3. The government’s stigmatizing message that Muslims are not worthy of equal respect is manifest not just in the aims of the Proclamation and its precursors, but also in their words.

The first Executive 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 anti-Muslim extremists, who routinely assert that Muslims and Islam are hostile to the Constitution 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>).⁸

Similarly, *both* Executive Orders directed 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 focus on ‘honor killings’ is another hat-tip to anti-Muslim extremists, many of whom inaccurately associate the

⁸ See, e.g., *Stop Importing Jihadists*, CTR. FOR SECURITY POL’Y (June 28, 2016), <http://bit.ly/2vJQllS>. 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.

practice with Islam (see Nahal Toosi, *'Honor Killings' Highlighted Under Trump's New Travel Ban*, POLITICO (Mar. 6, 2017), <http://politi.co/2x74mLr>).

4. As private speech, 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.

That is in part because official messages of disapprobation and denigration place the government's imprimatur on private discrimination. When government puts its thumb on the scale in favor of prejudice, it promotes violence and social strife. Conversely, when it 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>.

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

5. That is just what is occurring today. In the period since the President signed the first Executive Order last January, attacks on Muslims have increased dramatically across the country.

The Council on American–Islamic Relations reports a 91% increase in the number of anti-Muslim hate crimes during the first half of 2017 as compared to the same period in 2016. *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> (defining hate crimes as “criminal offenses against persons or property” under state or federal law). 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. *See Map: Recent Incidents of Anti-Muslim Hate Crimes*, MUSLIM ADVOCATES, <http://bit.ly/1Orsk4m> (last visited Nov. 20, 2017); *see also Responses to the Increase in Religious Hate Crimes, supra* (Gupta statement). And fully 60% of American Muslims surveyed reported experiencing religious discrimination in the past year

alone. See Dalia Mogahed & Youssef Chouhoud, *American Muslim Poll 2017: Muslims at the Crossroads*, INST. FOR SOC. POL'Y & UNDERSTANDING, <http://bit.ly/2x2klx8>.

Chillingly, there were at least 85 anti-Muslim incidents at mosques during the first half of 2017. See 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:

- On January 28, the day after the President issued the first Executive Order, an arsonist destroyed a Texas mosque, believing 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 second 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>.
- On September 15, one week before the President issued the Proclamation, members of a hate group shouted “We love Donald Trump, you wicked devil!” outside a mosque in Ohio while holding

signs stating “Homos and Muslims go to hell.” Esther Honig, *Hate Group Demonstrates Outside Columbus Mosque: ‘We Love Donald Trump,’* WOSU PUBLIC MEDIA (Sept. 15, 2017), <https://tinyurl.com/y7wrxccd>.

Anti-Muslim hate crimes are not new. But the skyrocketing threats and violence coincide with the Administration’s demonization of Muslims and repeated pledge to ban them. Indeed, *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.

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

Cognizant of these dangers, the federal courts have 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 534–42; *Larson*, 456 U.S. at 253–55; *see also, e.g., Romer*, 517 U.S. at 634 (invalidating 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, 2693–95 (2013) (invalidating Defense of Marriage Act as 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.”); *Perry v. Brown*, 671 F.3d 1052, 1093 (9th Cir. 2012) (invalidating state ban on marriage of same-sex couples because it sent “message that gays and lesbians are of lesser worth as a class”). This Court should do so again here.

CONCLUSION

Whether applied to immigrants or to visitors, a ban based on religion is unprecedented in this country. Or it was until the President issued the first Executive Order. But there is nothing new about the collective maltreatment of people based on religion—or race, or sex, or sexual orientation, or other protected classifications. The ban here evokes some of the most shameful episodes in our Nation’s history. *Cf. 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.”). This denigration of a religious minority and its adherents cannot be squared with the mandates of the Establishment Clause. 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 incite it.

The preliminary injunction should be affirmed.

Respectfully submitted,

/s/ Richard B. Katskee

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-17168

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- This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1. The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
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Signature of Attorney or Unrepresented Litigant

s/ Richard B. Katskee

Date

Nov 22, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I certify that on November 22, 2017, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ Richard B. Katskee

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 Proclamation at issue here 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 Proclamation 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 Proclamation’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 Proclamation 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 Proclamation.

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 the Supreme Court, this Court, and courts 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: A Jewish Partnership for Justice is the nation's leading progressive Jewish voice empowering Jewish Americans to be advocates for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

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 Proclamation. Through its decades of work on behalf of historically persecuted people, Lambda Legal has deep knowledge of the corrosive effects 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 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); and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), 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 that 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.

Union for Reform Judaism, Central Conference of American Rabbis, and Women of Reform Judaism

The Union for Reform Judaism, whose 900 congregations across North America includes 1.5 million Reform Jews, the Central Conference of American Rabbis, whose membership includes more than 2,000 Reform rabbis, and Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue out of our affirmation of the supreme value of human life and the equal dignity of every human being. We also share a long-standing commitment to the principle of religious liberty that has lifted up people of all faiths while providing more protections, rights and opportunities than have been known anywhere else throughout history. We are committed to fulfilling the mandate of the Prophets of Israel who bade

us pursue justice, seek peace, and build a society of loving-kindness among all of God's creatures.