No. 17-17168

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 from the United States District Court
for the District of Hawaii, No. 1:17-cv-00050-DKW-KSC
District Judge Derrick K. Watson

BRIEF OF *AMICUS CURIAE* KHIZR KHAN IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

JOHN W. KEKER - # 49092
DAN JACKSON - # 216091
R. ADAM LAURIDSEN - # 243780
KEKER, VAN NEST & PETERS LLP
633 Battery Street
San Francisco, CA 94111-1809
Telephone: 415 391 5400
Facsimile: 415 397 7188

Attorneys for Khizr Khan

Table of Contents

Table of Authorities

Page(s)

Federal Cases

Federal Statutes

Federal Rules

Constitutional Provisions

Other Authorities

I. INTRODUCTION

On October 3, 1965, at the foot of the Statue of Liberty, President Lyndon B. Johnson commemorated the abolition of discrimination from the Immigration and Nationality Act ("INA"). Saluting those who have been "brave enough to die for liberty," President Johnson remarked that:

> Neither the enemy who killed them nor the people whose independence they have fought to save ever asked them where they or their parents came from. They were all Americans. It was for free men and for America that they gave their all, they gave their lives and selves. By eliminating that same question as a test for immigration the Congress proves ourselves worthy of those men and worthy of our own traditions as a Nation.

Remarks at the Signing of the Immigration Bill, 2 PUB. PAPERS 1037, 1039 (Oct. 3, 1965).

On June 8, 2004, at an Army base in Iraq, Captain Humayun Khan joined the hallowed company of those who have sacrificed everything for this country. Captain Khan died stopping a car full of explosives before it could reach hundreds of other American soldiers. He was one of thousands of Muslims who have served in the United States armed forces since the terrorist attacks of September 11, 2001. It is now the sacred duty of this Court to ensure that we remain worthy of those men and women, and worthy of our traditions as a Nation—including the Constitution itself, which Captain Khan gave his life to defend.

II. BACKGROUND

A. Statement of *amicus curiae* pursuant to FRAP 29(a)(4)(D)-(E)

Amicus curiae Khizr Khan is the father of Captain Humayun Khan, and has an interest in this case because the latest version of President Donald Trump's "Muslim Ban" not only desecrates Humayun Khan's service and sacrifice as a Muslim-American officer in the United States Army, but also violates Khizr Khan's own constitutional rights. Mr. Khan previously filed a declaration further explaining his interest in this matter, which he hereby incorporates by reference. *See* Dkt. Entry No. 88, *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 19, 2017). All parties have consented to the filing of this brief, which is authorized by Federal Rule of Appellate Procedure 29(a) and Ninth Circuit Rule 29-3. This brief was neither authored nor funded by anyone other than Mr. Khan and his undersigned counsel, who do not represent any of the parties to this case.

B. Out of the melting pot and into the fire

Mr. Khan is originally from Pakistan. He met his wife, Ghazala, at the University of Punjab, where she studied Persian and he studied law. After they married, they moved to the United Arab Emirates, where their son Humayun was born on September 9, 1976. In 1980, the Khans came to the United States, originally settling in Houston, Texas. Once they had saved enough money, Mr. Khan enrolled at Harvard Law School, graduating with a master of laws (LL.M.)

degree in 1986. The Khans moved to Silver Spring, Maryland, where Humayun and his two brothers grew up—all of them having become United States citizens.

Thomas Jefferson has long been one of Mr. Khan's heroes, and he liked to take the boys to the Jefferson Memorial and have them read the inscription under the dome: "I have sworn upon the altar of god eternal hostility against every form of tyranny over the mind of man." Years later, when Humayun applied to the University of Virginia, he invoked the spirit of Jefferson, writing that "liberty requires vigilance and sacrifice," and that those who are "beneficiaries of liberty must always bear this in mind, and keep it safe from attacks." Putting those ideals into practice, Humayun enrolled in the Army Reserve Officers' Training Corps (ROTC).

Humayun graduated in 2000 and was commissioned as an Army officer, eventually attaining the rank of Captain. After he was called to serve in Iraq, he reminded his father of his college application essay about defending liberty. "I meant it," Humayun said. He was stationed at Camp Warhorse near Baqubah, Iraq—about fifty miles northeast of Baghdad—leading the Force Protection Team of the 201st Support Battalion, First Infantry Division.

As Captain Khan's commanding officer later wrote, Captain Khan's unit was the most motivated and combat-oriented logistics unit he had ever seen. Dana J.H. Pittard, *I was Capt. Khan's commander in Iraq. The Khan family is our*

family, WASH. POST, Aug. 3, 2016. As a Muslim, Captain Khan was particularly able to foster warm relationships with local Iraqis. He started a program to hire locals to work on the base as a way of trying to improve relations between the soldiers and the town. And he was determined to break the cycle of violence by preventing unnecessary deaths and injuries at the gates, where several innocent Iraqi drivers had been wounded or killed because they failed to heed or did not understand the soldiers' instructions. The terrible irony is that Captain Khan's remarkable success in winning local Iraqi hearts and minds may have been what provoked the suicide bombing that took his life.

C. Captain Khan's sacrifice

On the morning of June 8, 2004, Captain Khan was supervising a checkpoint outside of Camp Warhorse. A taxi was approaching the gates. Captain Khan could have ordered his soldiers to put a .50 caliber shell through the windshield, but perhaps this driver, like others before, was just confused. Ordering his soldiers to hit the dirt, Captain Khan moved forward to stop the taxi before it could reach the gates or the mess hall beyond, where hundreds of soldiers were eating breakfast. Captain Khan was killed when the suicide bombers in the taxi detonated their explosives.

Captain Khan was posthumously awarded a Bronze Star and a Purple Heart. The Army named the 201st Battalion headquarters at Camp Warhorse the Khan

Building in his honor. The University of Virginia's ROTC center has a Khan Room dedicated to his memory. In July 2016, a regiment of ROTC cadets at Fort Knox honored Captain Khan at their graduation. The University of Virginia honored Captain Khan with a memorial plaque. But the soldier who dropped Captain Khan off at the gates that fateful morning honored him in the terms he might have appreciated most: "I read where someone called him a soldier's officer," Sergeant Crystal Selby said. "To me, he was a human's human." N.R. Kleinfield, Richard A. Oppel, Jr. & Melissa Eddy, *Moment in Convention Glare Shakes Up Khans' American Life*, N.Y. TIMES, Aug. 5, 2016.

After Captain Khan's death, Mr. and Mrs. Khan moved to Charlottesville, Virginia, to be near their two remaining sons. The Khans have also become an integral part of the University of Virginia's Army ROTC program. Since 2005, the Khans and the ROTC have given the CPT Humayun S.M. Khan Memorial Award to the fourth year cadet who best exemplifies Captain Khan's qualities of courage, dedication, leadership, and selfless service. At the commissioning ceremonies, Mr. Khan gives the new officers pocket-sized copies of the Constitution. He reminds them to think hard about their oath to "defend the Constitution of the United States against all enemies, foreign and domestic." 10 U.S.C. § 502. No oath is more solemn, he tells them: "My son died for that document."

D. The Muslim Ban

On December 7, 2015, then-candidate Donald J. Trump called for a Muslim Ban. When asked how it would be enforced, Mr. Trump said that customs agents would ask, "Are you Muslim?," and ban people who answered "yes." Maya Rhodan, *Here's How Donald Trump Says His Muslim Ban Would Work*, TIME, Dec. 8, 2015. President Trump still seeks to accomplish the same unconstitutional result, merely changing the question to, in effect, "Are you from one of these Muslim-majority countries?" But in 1965, Congress and President Johnson abolished such questions as unworthy of the sacrifices of soldiers like Captain Khan. *See* Remarks at the Signing of the Immigration Bill, 2 PUB. PAPERS 1037, 1039 (Oct. 3, 1965).[1]

Mr. Khan was asked to speak about his son's sacrifice at the Democratic National Convention on July 28, 2016. During that speech, Mr. Khan held up his copy of the Constitution—the pocket-sized kind he has been giving to newly commissioned Army officers and others for years—and asked if Mr. Trump had ever read it, offering to lend him one. Mr. Khan also urged Mr. Trump to go to

[1] Since 1965, Congress has repeatedly reaffirmed the nondiscrimination principles that President Johnson emphasized. For example, the Refugee Act of 1980 prohibits discrimination based on "race, religion, nationality, sex, or political opinion." 8 U.S.C. § 1522(a)(5). Congress intended that "the plight of the refugees themselves, as opposed to national origins or political considerations, should be paramount in determining which refugees are to be admitted to the United States." H.R. Rep. No. 96-608, at 13 (1979).

Arlington National Cemetery, where Captain Khan is buried, to look at the graves of brave patriots, of all faiths, genders and ethnicities, who died defending the United States. Mr. Trump responded by disparaging the Khans and their plea to respect the Constitution and those who have died defending it.

After candidate Trump became President Trump, he lost no time in implementing his unconstitutional Muslim Ban. President Trump asked his advisors to find a way to do so "legally," but they failed, and the initial executive order ("EO-1") was enjoined. Rather than defend EO-1, President Trump issued a second executive order ("EO-2"), which President Trump described as a watered-down version of the first one. The Supreme Court was set to hear oral arguments on EO-2 when it expired, and the Supreme Court dismissed the case as moot.

The day EO-2 expired, President Trump issued a proclamation entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats," Proc. 9645 (Sept. 24, 2017) ("EO-3"). That same day, President Trump stated: "The travel ban: The tougher, the better." 2-ER-91 ¶ 94. EO-3 flows directly from EO-2. It is yet another watered-down version of the Muslim Ban. The taint of discrimination has not been washed away.

Indeed, the underlying message of EO-3 is the same as that of the original Muslim Ban. The message is that Muslims are unwelcome outsiders. And that

message has been received loud and clear—not only by Muslims like Mr. Khan, but by those who have been denigrating and attacking Muslims with increasing frequency and vehemence since President Trump called for, and then began trying to implement, his unconstitutional Muslim Ban.

III. ARGUMENT

A. EO-3 violates the separation of powers.

As President Johnson stated when he signed the INA, neither the enemies who killed soldiers like Captain Khan "nor the people whose independence they have fought to save ever asked them where they or their parents came from," and by "eliminating that same question as a test for immigration the Congress proves ourselves worthy of those men and worthy of our own traditions as a Nation." Remarks at the Signing of the Immigration Bill, 2 PUB. PAPERS 1037, 1039 (Oct. 3, 1965). President Johnson was right to give credit to *Congress*, *id.*, because the principle "that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan v. Press*, 347 U.S. 522, 531 (1954). Even more deeply embedded is the first principle of our Constitution: "All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1. Congress is specifically and exclusively empowered to

establish immigration laws, and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. 1, § 8, cl. 4 & 18.

The President's role, in the immigration context, is the "enforcement" of *Congress's* policies. *Galvan*, 347 U.S. at 531. "That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review," as the Supreme Court made clear in *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983). "Because the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens," anyone who has "the privilege of litigating in our courts can seek to enforce separation-of-powers principles." *Boumediene v. Bush*, 553 U.S. 723, 743 (2008) (citation omitted). Congress and the President must "engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism," and the Court's "'insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so.'" *Id.* at 798 (quoting *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring)).

Yet EO-3 "does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952). Like a statute, EO-3 "sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution." *Id.* But the "Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times." *Id.* at 589.

None of the authorities cited in Defendants' brief support President Trump's assertion of unilateral authority to promulgate new immigration policies at odds with those already established by Congress. For example, Defendants cite *Fiallo v. Bell*, 430 U.S. 787 (1977), but the Court in *Fiallo* afforded "judicial deference to ***congressional*** policy choices in the immigration context." *Id.* at 793 (emphasis added). And in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the Court made clear that "[n]ormally Congress supplies the conditions of the privilege of entry into the United States," and that, even during war, any delegation of power to the executive is constrained by "congressional intent." *Id.* at 543. "Standards prescribed by Congress are to be read in the light of the conditions to

which they are to be applied. They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *Id.* (quoting *Lichter v. United States*, 334 U.S. 742, 785 (1948)).

Defendants' interpretation of 8 U.S.C. §§ 1182(f) and 1185(a) as grants of boundless legislative authority deprives those statutes of "meaningful content." *Knauff*, 338 U.S. at 543 (quoting *Lichter*, 334 U.S. at 785). The Supreme Court rejected a similarly overbroad interpretation of Section 1185 in *Kent v. Dulles*, 357 U.S. 116 (1958). Section 1185(b) makes it unlawful for a citizen to depart from or enter the United States without a valid passport "except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe." *Id.* at 122 n.4. Those "broad terms" are the same as in Section 1185(a)(1), but the Court held that they do not grant the "pervasive power" to deny passports based on "beliefs or associations." *Id.* at 127-30. Even in the context of "foreign relations," a statute cannot "grant the Executive totally unrestricted freedom of choice." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). On the contrary, a seemingly broad grant of authority "must take its content from history," authorizing only those "refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior administrative practice.'" *Id.* at 17-18 (quoting *Kent*, 357 U.S. at 128). Without that limiting construction, the statute would "constitute an invalid delegation." *Id.* at 18.

Similarly, President Truman's Commission on the INA warned that Section 1182(f), in the absence of a limiting construction, would be impermissibly "vague." Commission on Immigration and Naturalization, WHOM WE SHALL WELCOME 178 (1953). Although "**latitude in administrative action is frequently a desirable objective . . . such discretionary authority should not be nebulous and undefined but rather should contain some standards controlling the administrative action**." *Id.* (emphasis in original). From Truman's time until now, executive orders under Section 1182(f) have "typically" applied to "individuals"; have sometimes been "based on affiliation"; and otherwise have suspended entry "based on objectionable conduct." 9 *Foreign Affairs Manual* § 302.14-3(B)(1) (2016), https://fam.state.gov/FAM/09FAM/09FAM030214.html.

Thus, Defendants' interpretation of Section 1182(f) as a grant of sweeping legislative authority is inconsistent with "prior administrative practice." *Kent*, 357 U.S. at 128. In any case, past practice "does not, by itself, create power." *Texas v. United States*, 809 F.3d 134, 184 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (quoting *Medellin v. Texas*, 552 U.S. 491, 532 (2008)). "Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution 'in the Government of the United States, or in any Department or Officer thereof.'" *Youngstown*, 343 U.S. at 588-89 (quoting U.S. CONST. art. I, § 8, cl. 18).

Congress has given the President authority to address exigent circumstances, but has not given and cannot give him the legislative power to amend Congress's "specific criteria for determining terrorism-related inadmissibility." *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring in the judgment). Nor may the President disregard Congress's command that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). Sections 1182(f) and 1185(a) may be "broad grants of authority," but they "cannot reasonably be construed as assigning decisions of [such] vast economic and political significance." *Texas*, 809 F.3d at 183 (internal quotation marks omitted).

Defendants' contrary interpretation would make Sections 1182(f) and 1185(a) the immigration equivalents of the line-item veto, which the Supreme Court ruled unconstitutional in *Clinton v. City of New York*, 524 U.S. 417 (1998). The Constitution denies the President the power to unilaterally suspend, amend, repeal, or enact statutes, in whole or in part, even if Congress purports to grant the President such power. *See id.* at 438-45; *see also, e.g.*, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring) (Congress cannot delegate legislative power to the President). Such changes to the INA can be accomplished "in only one way; bicameral passage followed by presentment to

the President." *Chadha*, 462 U.S. at 954-55. This may "often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked." *Id.* at 959.

Congress already rejected the argument that we should put "self-interest first" by refusing to admit "greater numbers of persons of different cultures and with different values who may come to add to our own very real and growing social upheavals," or engage in "subversion." S. Rep. No. 89-748, at 3347-48 (1965). Such fearful prejudice is "un-American in the highest sense," and unworthy of Captain Khan's sacrifice. Remarks at the Signing of the Immigration Bill, 2 PUB. PAPERS 1037, 1038 (Oct. 3, 1965). The United States has "flourished because it was fed from so many sources, because it was nourished by so many cultures and traditions and peoples." *Id.* at 1039. President Trump cannot overturn half a century of congressional policy—much less the Constitution itself—with the mere stroke of his pen.

B. EO-3 violates the First Amendment's Religion Clauses.

EO-3 also violates the First Amendment, which prohibits any "law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The Establishment and Free Exercise Clauses are "inextricably connected." *Larson v. Valente*, 456 U.S. 228, 245 (1982). They

must be "read together" in light of their joint purpose "to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring); *accord Larson*, 456 U.S. at 246.

Determining whether the Religion Clauses have been violated "requires an equal protection mode of analysis." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (quoting *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 696 (1970)). Lawmakers "are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Larson*, 456 U.S. at 245. When they fail to do so, the Court must "apply strict scrutiny." *Id.* at 246. The challenged law must advance "interests of the highest order," and be narrowly tailored to those interests; it "will survive strict scrutiny only in rare cases." *Lukumi*, 508 U.S. at 546 (citation omitted).

The protection of the Religion Clauses, moreover, "extends beyond facial discrimination" to forbid "subtle departures from neutrality and covert suppression of particular religious beliefs. Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* at 534 (citations and internal quotation marks omitted). Accordingly, courts look to "both direct and circumstantial evidence," including

"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 members of the decisionmaking body." *Id.* at 540.

For example, in *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011), this Court held that, in determining whether the government has sent the impermissibly "stigmatic message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members," the Court adopts "the perspective of an informed and reasonable observer who is familiar with the history of the government practice at issue." *Id.* at 1109-10 (citations and internal quotation marks omitted). Although Congress had predominantly secular reasons for acquiring the memorial at issue in *Trunk*, which featured a cross, *earlier* statements about that memorial "cast a long shadow of sectarianism." *Id.* at 1122. Thus, the memorial conveyed "a message of government endorsement of religion that violates the Establishment Clause." *Id.* at 1125.

Similarly, in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), the Supreme Court held that school prayers violated the Establishment Clause—even though they were offered by students, rather than school officials—because a student "will unquestionably perceive the inevitable pregame prayer as

stamped with her school's seal of approval." *Id.* at 308. "Most striking" to the Court was the "evolution" of the school's policy from "the candidly titled 'Prayer at Football Games' regulation." *Id.* at 309. Although the school later removed the word "prayer" from the regulation, the "history indicates that the District intended to preserve the practice of prayer before football games." *Id.*

As in *Santa Fe*, the "evolution" from what candidate Trump candidly called a "Muslim Ban," to the watered-down version of EO-2, to EO-3, which President Trump still candidly calls a "ban: the tougher, the better," 2-ER-91 ¶ 94, shows that, although the form of the executive order has changed, the underlying message has not. The message is that Muslims are outsiders, regardless of the depth of their devotion to the Constitution, and despite paying the ultimate price to defend it—a message that is painfully clear to Mr. Khan. Contrary to Defendants' assertions, no psychoanalysis is necessary to perceive that message. Indeed, no "other conclusion seems possible if we take seriously the admonition that 'when we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men and women.'" *Rusak v. Holder*, 734 F.3d 894, 897 (9th Cir. 2013) (brackets omitted) (quoting *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879)).

IV. CONCLUSION

Mr. Khan respectfully urges this Court to affirm the preliminary injunction.

DATED: November 22, 2017

/s/ *Dan Jackson*

DAN JACKSON
KEKER, VAN NEST & PETERS LLP
Attorneys for Khizr Khan

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 4,100 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

DATED: November 22, 2017

/s/ *Dan Jackson*

DAN JACKSON
KEKER, VAN NEST & PETERS LLP
Attorneys for Khizr Khan

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Dan Jackson
Dan Jackson