Nos. 16-1436; 16-1540

In The Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, ET AL.,

Petitioners,

v.

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, ET AL.,

Respondents.

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF HAWAI'I, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Fourth Circuit And Ninth Circuit

BRIEF OF FREEDOM FROM RELIGION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

The Freedom From Religion Foundation[1] ("FFRF"), a national nonprofit organization based in Madison, Wisconsin, is the largest association of freethinkers, representing over 29,000 atheists, agnostics, and other freethinking American citizens. FFRF has members in every state, the District of Columbia, and Puerto Rico. FFRF's dual purposes are to educate the public on matters relating to nontheism, and to protect the constitutional principle of separation between state and church.

FFRF's interest in this case arises from its position that the Executive Order, "Protecting the Nation from Foreign Terrorist Entry into the United States" issued January 27, 2017, and then reissued on March 6, 2017, violates the Establishment Clause of the First Amendment, which FFRF works to protect and defend. The Executive Order, which targets Muslims, constitutes a religious test for citizenship and for entry into our country. It would create precedent that could be used to target not only non-Christian religious minorities, but the significant non-Christian minority today that identifies as non-religious. The ability of people of any religion and no religion to travel, to gather and to communicate freely in the United States is necessary

[1] This brief has not been authored, in whole or in part, by counsel for either party. No contribution has been made to the preparation or submission of this brief other than the *amicus curiae*, its members or its counsel. Consent to this brief has been given by all parties.

for the open dissemination of ideas, free speech, free inquiry, free association, and freedom of conscience.

SUMMARY OF ARGUMENT

Never in the history of the United States have our immigration policies and procedures been used to deny opportunity to religious groups and to favor a particular religion. Executive Order 13780 sullies that history with a ban on travel targeting six majority-Muslim countries and motivated by the religious makeup of those countries. No secular purpose justifies the Order. Its true purpose and primary effect are inherently religious. It advances Christianity, gives preference to Christians, and discriminates against a religious minority in violation of the Establishment Clause.

The only references to a relationship between state and church in our Constitution are exclusionary, namely the First Amendment's Establishment Clause and Article VI, which explicitly forbids religious tests for office or public trust. Yet, the Trump Administration seeks to codify such a test for immigrants seeking entry at our borders. This discriminatory policy betrays core American values and violates fundamental rights guaranteed by the Establishment Clause of the First Amendment to our members and to others who are free from religion.

It contravenes U.S. immigration laws and policies, establishing a base constituency's religion as politically

and legally preferable and codifying religious discrimination against vulnerable, unpopular religious minorities. The Trump Administration has engaged in a campaign of religious discrimination and favoritism that will not stop until the Court unequivocally strikes down its religious purpose as unconstitutional.

ARGUMENT

I. THE EXECUTIVE ORDER VIOLATES THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE BECAUSE THE PURPOSE AND EFFECT IS TO ADVANCE CHRISTIANITY AND TO DISCRIMINATE AGAINST A RELIGIOUS MINORITY.

Executive Order 13780, "Protecting the Nation from Foreign Terrorist Entry into the United States," ("the Executive Order" or "the Order") violates the Establishment Clause of the First Amendment, which prohibits any "law respecting an establishment of religion." U.S. Const. amend. I. In the first case incorporating the Establishment Clause, this Court wrote that "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . ." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947). Indeed, "[t]he 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). The Executive Order violates these basic principles of Establishment Clause jurisprudence.

The *Lemon* test is used to determine whether a challenged government action, like a statute or executive order, is permissible under the Establishment Clause. Under the three-part test, (1) the action must have a secular purpose, (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) the statute must not foster "an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

The Executive Order fails the first and second prongs of the test and should be struck down as unconstitutional.

A. The Order's purpose is to give preference to Christianity and to discriminate against the Muslim faith.

"The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion." *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984). "[It] requires that a government activity have a secular purpose." *Id.* Lack of a legitimate secular purpose is sufficient to render government action unconstitutional.

No secular purpose justifies the Executive Order. "When a governmental entity professes a secular purpose for an arguably religious policy, the government's

characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (quoting *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring in judgment)). The government discredits its avowed secular purpose when the law enacted does nothing to meaningfully advance that purpose. *See Stone v. Graham*, 449 U.S. 39 (1980) (rejecting an avowed educational purpose where the Court found no meaningful educational benefit to a mandate on posting the Ten Commandments in schools, and emphasizing that if it had any effect at all, that effect was religious in nature).

1. The Executive Order's avowed purpose is a "sham."

"The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. That requirement is not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 690-91. Government action violates the Establishment Clause when secular purposes played a role in the action but were overshadowed by a primary religious purpose, such as in *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 846 (2005). In McCreary, the Court credited some secular purposes advanced by the government but ultimately found its Ten Commandments display unconstitutional because of its core religious purpose. *Id*. The Court noted that

"*Lemon* requires the secular purpose to be genuine, not a sham, and not merely secondary to a religious objective." *Id.* at 846.

The Petitioners argue that the Executive Order's purpose is to bolster national security but the facts and circumstances belie this assertion. The Order's purpose undermines U.S. national security interests and the order conflicts with the Immigration and Nationality Act. Its true purpose is to give preference to Christianity and to discriminate against a religious minority.

a. The Order actively undermines U.S. national security interests, rather than advancing them.

While the Executive Order's stated purpose is to bolster national security, expert opinion and judicial scrutiny of the Order demonstrate that it affords no meaningful benefits within the ambit of national security. Both the Fourth Circuit and the Ninth Circuit asked the Executive Branch to present a finding that U.S. interests justify this dramatic, far-reaching change in immigration. At every level, the Executive Branch failed to provide one. The Department of Justice insisted that the President, by virtue of making the decision, justified the need. The Immigration and Nationality Act, however, requires a *finding* from the President, reviewable by the courts, that entry would be detrimental to U.S. interests. 8 U.S.C. § 1182(f). The Executive Order merely "*proclaim[s]* that entry . . .

would be detrimental to the interests of the United States," First Order, *supra*, at Sec. 2(c) and Sec. 6(b) (emphasis added). No branch of government rules by plenary dictate; the courts have authority to review "cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." *Marbury v. Madison*, 5 U.S. 137, 173 (1803).

The President provides no support for a finding that the entry of all nationals from six designated countries, all refugees, or refugees in excess of 50,000 would be harmful to the national interest or that the exclusion of these persons would benefit national security. The Department of Justice has failed to support any such finding in subsequent litigation, as well. Instead, it offers only the circular assertion that the President enacting the ban is itself sufficient evidence for the finding.

The President issued this Executive Order after multiple federal courts struck down the First Order. *Aziz v. Trump*, No. 117CV116LMBTCB, 2017 WL 580855 (E.D. Va. Feb. 13, 2017); *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017), and *reconsideration en banc denied*, No. 17-35105, 2017 WL 2468700 (9th Cir. Mar. 17, 2017). In the *Joint Declaration by Former National Security, Foreign Policy, and Intelligence Officials Opposing Executive Order*, a group of top senior U.S. diplomats and national security officials declared the first executive order "ultimately undermines the national security of the United

States, rather than making us safer." *See Joint Declaration*, (Feb. 6, 2017), at 2. This conclusion was based on the determination that the Order "disrupts thousands of lives, including . . . refugees and visa holders," and it could "endanger[] U.S. troops in the field and disrupt[] counterterrorism and national security partnerships," as well as "aid ISIL's propaganda effort and serve its recruitment message by feeding into the narrative that the United States is at war with Islam." *Id.* The current iteration of the order does nothing to address these fatal concerns. Each risk to national security articulated in the declaration is still present in the Order. *See generally Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017).

The Order is not tailored to address the President's supposed purpose. Less than a quarter of Muslim Americans involved in violent extremism of any kind have family ties to the six countries designated in the Order.[2] The Order excludes Saudi Arabia and Egypt, both of which are countries of origin for leaders of several militant jihadist groups but also countries in which President Trump has personal financial interests.[3] The Order also cites terrorist acts perpetrated by immigrants generally, but it provides thin data for terrorist acts specifically perpetrated by asylum seekers. In fact, very few asylum seekers admitted to the U.S.

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[2] Charles Kurzman, *Muslim-American Involvement with Violent Extremism*, 2016.

[3] Michael Keller, *Tracking Trump's Web of Conflicts*, Bloomberg Politics (May 18, 2017) *at* https://www.bloomberg.com/graphics/tracking-trumps-web-of-conflicts/.

have ever committed violent acts of terror. Only four asylum seekers, or 0.0006 percent of the 700,522 admitted from 1975 through 2015, later committed acts of terror.[4]

b. The Order directly conflicts with the Immigration and Nationality Act from which it derives its authority

The President's actions are fundamentally at odds with U.S. immigration law and policy. The Order contravenes immigration law in order to establish religion and promote religious discrimination within the U.S. Refugee Program. Current U.S. immigration law permits persons of various categories fleeing persecution to seek protection in the United States. *See* Immigration and Nationality Act of 1952 ("INA"), § 207a (normal flow of refugees); INA § 207b (regarding the emergency flow of refugees); INA § 208 (asylum seekers); (person seeking withholding or removal under INA § 241b(3) whose life or freedom would be threatened); (persons seeking protection under Convention Against Torture, 8 C.F.R. § 208.16-.18, 1208.16-.18) and parolees under INA § 212(d)(5). To qualify for any of these categories, a refugee must demonstrate a well-founded fear of persecution.

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[4] Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, Cato Institute (Sep. 13, 2016), *at* https://www.cato.org/publications/policy-analysis/terrorism-immigration-risk-analysis.

Immigration law generally defines persecution as "a threat to the life or freedom of, or infliction of suffering or harm upon, those who differ in a way regarded as offensive." *See Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985); *Stanojkova v. Holder*, 645 F.3d 943, 947-49 (7th Cir. 2011) (offering a definition of persecution distinguished from harassment). *See also Li v. Attorney General of the U.S.*, 400 F.3d 157, 164-68 (3d Cir. 2005) (discussing legislative history of persecution). Currently, courts have ruled that the severity of each incident should be considered as well as the cumulative effects of the events. *See Javhlan v. Holder*, 626 F.3d 1119, 1123 (9th Cir. 2010). *See also Chand v. I.N.S.*, 222 F.3d 1006 (9th Cir. 2000) (the cumulative harm to an applicant has suffered is considered in asylum claims); *Korablina v. I.N.S.*, 158 F.3d 1038 (9th Cir. 1998) (stating that a single isolated incident may not "rise to the level of persecution, [but] the cumulative effect of several incidents may constitute persecution).

The First Order required a person seeking admission to the U.S. on the basis of persecution to have a particular religion in order to receive priority within the U.S. Refugee Program. Section 5(b) directed federal agencies to "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." *See* Exec. Order No. 13769, Sec. 5(b). The order directed federal agencies that they "may continue to process . . . refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of

the individual is a minority religion in the individual's country of nationality." *See id.* Sec. 5(f). The current Order suspends refugee admittance completely, but Sec. 6(c) gives discretion to admit asylum-seekers on a case-by-case basis. *See* Executive Order Sec. 6(c). The Order's history suggests a high likelihood that discretion is intended to be abused to discriminate on religious grounds.

Rather than following the established precedent of considering the cumulative effects and circumstances of persecution, the Executive Order contravenes the use of U.S. immigration laws and policies to establish religion and promote religious discrimination. The Executive Order permits administrative preference to those who are religious, in particular those who are Christian and discriminates against Muslims. This sweeping change in standards will have negative impacts on how refugees, asylees, and others seeking protection from persecution will be determined eligible.

The effects of the Order are fundamentally at odds with its avowed purpose and contradictory to the interests of immigration law and policy, thus leaving the Order without any legitimate secular purpose. Having no legitimate secular purpose, the Order fails the first prong of the *Lemon* test, which is sufficient to hold it unconstitutional.

2. The stated presidential purpose is clear, unambiguous and oft repeated.

Consistent public statements by the Trump Administration coloring the Order as a "Muslim ban" suggest an underlying religious purpose. Here, the Court should credit the President's myriad statements that the Executive Order is, in fact, meant to give preference to Christianity and codify religious discrimination.

"Reasonable observers have reasonable memories, and the Court's precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.' " *McCreary Cty.*, 545 U.S. at 846 (quoting *Santa Fe*, 530 U.S. at 315). "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). *See*, *e.g.*, (*Larson*, 456 U.S. at 254-55 (holding that a facially neutral statute violated the Establishment Clause considering legislative history demonstrating an intent to regulate only minority religions); *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977) (explaining that circumstantial evidence of intent, including the historical background of the decision and statements by decision makers, may be considered in evaluating whether a governmental action was motivated by a discriminatory purpose with regards to Equal Protection).

The President of the United States, the Executive Order's sole legislator, has consistently characterized the Order as religiously motivated, starting before he took office and continuing into the present. Prior to his election, Donald Trump campaigned on the promise that he would ban Muslims from entering the United States. On December 7, 2015, candidate Trump issued a press release calling for "a total and complete shutdown of Muslims entering the United States."[5] The press release was deleted from the Trump campaign's website in May.[6] In defending his decision the next day on ABC's "Good Morning America," candidate Trump compared the Muslim ban to former President Franklin Roosevelt's decision to intern Japanese Americans during World War II, and stated, "[t]his is a president highly respected by all, [Roosevelt] did the same thing."[7]

On June 13, 2016, candidate Trump reiterated in a public address his promise to ban all Muslims entering this country, and that the ban "will be lifted when we as a nation are in a position to properly and

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[5] Mallory Shelbourne, Trump Call for Muslim Ban Deleted from Site After Reporter's Question, The Hill (May 8, 2017), *available at* http://thehill.com/homenews/administration/332404-trump-call-for-muslim-ban-deleted-from-campaign-site-after-reporters.

[6] *Id.*

[7] Good Morning America, interview with George Stephanopoulos, ABC News (Dec. 8, 2016), http://abcnews.go.com/Politics/donald-trump-stands-barring-muslims-criticism/story?id=35640361.

perfectly screen those people coming into our country."[8] Asked during a July 24, 2016 interview whether he was "backing off on his Muslim ban[],"candidate Trump admitted the alleged purpose was a sham and that the genuine purpose was religious:

> I actually don't think it's a rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim.[9]

He continued, "Our Constitution is great. . . . Now, we have a religious, you know, everybody wants to be protected. And that's great. And that's the wonderful part of our Constitution. I view it differently."[10]

In a foreign policy speech delivered on August 15, 2016, candidate Trump noted that the United States could not "adequate[ly] screen[]" immigrants because the U.S. admits "about 100,000 permanent immigrants from the Middle East every year." Trump proposed creating an ideological screening test for immigration applicants, which would "screen out any who have hostile attitudes towards our country or its principles – or who believe that Sharia law should supplant American

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[8] Donald Trump, "Speech on the Orlando Shooting" (speech, Manchester, NH, Jun. 13, 2016), Time, http://time.com/4367120/orlando-shooting-donald-trump-transcript/.

[9] Meet the Press, NBC News (Jul. 24, 2016), http://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706.

[10] *Id.*

law." During the campaign speech, he referred to his proposal as "extreme, extreme vetting."[11]

In his first television interview as President, he again referred to his plan for "extreme vetting."[12] On January 27, 2017, one week after being sworn in, President Trump signed an executive order entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States." The Executive Order directed a series of sweeping changes to the way non-citizens, including legal permanent residents, may seek and obtain entry into the United States. Section 3(c) of the Executive Order proclaimed that entry of immigrants and nonimmigrants from countries referred to in section 217(a)(12) of the Immigration and Nationality Act, 8 U.S.C. § 1187(a)(12), i.e., Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen, "would be detrimental to the interests of the United States." The Executive Order would have "suspend[ed] entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order." Sections 5(a)-(b) of the Executive Order would have suspended the U.S. Refugee Admissions Program in its entirety for 120 days and then, upon its resumption, would have directed the Secretary of State to prioritize refugees who claim religious-based persecution, "provided that the

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[11] Donald Trump, "Speech on Fighting Terrorism" (speech, Youngstown, OH, Aug. 15, 2016), http://www.politico.com/story/2016/08/donald-trump-terrorism-speech-227025.

[12] World News Tonight, interview with David Muir, ABC News (Jan. 26, 2017), http://abcnews.go.com/Politics/transcript-abc-news-anchor-david-muir-interviews-president/story?id=45047602.

religion of the individual is a minority religion in the individual's country of nationality." Section 5(c) of the Executive Order proclaimed that entry of Syrian refugees is "detrimental to the interests of the United States" and suspends their entry indefinitely. After January 27, 2017 hundreds of people, both nonimmigrants and immigrants, were refused entry into the United States. Some had their permanent resident status declared abandoned and some had their visa revoked.

In a January 27, 2017 interview with the Christian Broadcasting Network, President Trump confirmed his intent to prioritize Christians in the Middle East for admission as refugees.[13] President Trump stated during the interview:

> If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair – everybody was persecuted, in all fairness – but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them.[14]

During a signing ceremony for the Executive Order on January 27, 2017, President Trump stated that the purpose of the Executive Order was to "establish[]

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[13] The Brody File, Interview with David Brody, Christian Broadcast Network (Jan. 27, 2017), *available at* http://www1.cbn.com/cbnnews/politics/2017/january/president-trump-to-sit-down-with-news-for-exclusive-interview-friday.

[14] *Id*.

new vetting measures to keep radical Islamic terrorists out of the United States of America." He continued, "We don't want them here."

After issuing the second Order, President Trump publicly acknowledged the difference between avowing a purpose to avoid litigation and a genuine underlying purpose, saying "[p]eople, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!"[15] In fact, he described the second Order as a "watered down version of the first order."[16]

The President has never recanted past rhetoric condemning Islam and calling his attempts at changing immigration policy a "Muslim ban," and he has never disavowed such a purpose for the second Order. Clear and consistent statements by the President show the Order was motivated by a desire to give preference to a religion and to discriminate against unpopular religious minorities. This impermissible intent fails the *Lemon* test as an unconstitutional endorsement and advancement of religion.

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[15] Donald Trump (@realDonaldTrump), Twitter (June 5, 2017, 3:25 A.M.), https://twitter.com/realDonaldTrump/status/871674214356484096 ("People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!")

[16] Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak,'* Time (Mar. 16, 2017).

B. The Order's primary effect is government preference for Christians and discrimination against Muslims.

Even if the Court were to find a legitimate secular purpose, the Order fails under the second prong of the *Lemon* test. Under this prong, the government can neither advance, nor inhibit religion. This prong has also been known as the "endorsement test." Justice O'Connor noted in her concurrence to *Lynch v. Donnelly* that the question under this prong is "whether the government intended to convey a message of endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. at 670-72 (O'Connor, J., concurring). In subsequent decisions, this Court clarified that the government cannot "advance" religion, which means it cannot endorse, prefer, promote or favor religion. *See Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989) ("Our subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion . . . Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. 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." *Lynch v. Donnelly*, 465 U.S., at 687 (O'Connor, J., concurring).").

The Justice Department argues Section 2(c) of the Order is facially neutral with respect to religion and does not operate on the basis of religion. However, the

primary effect of the Order cannot be ignored. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[17] Each of the designated countries excluded in the Order – Iran, Libya, Somalia, Sudan, Syria, and Yemen – are predominantly Muslim. The President's initial attempt to "prioritize refugee claims . . . provided that the religion of the individual is a minority religion in the individual's country of nationality" created an exception for Christians. Indeed President Trump wanted to "help them" and he made good on those promises. Federal courts correctly and unanimously condemned this provision. *See*, *e.g.*, *Int'l Refugee Assistance Project*, 857 F.3d, *as amended* (May 31, 2017); *Washington v. Trump*, 847 F.3d 1151, 1157 (9th Cir.), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017), and *reconsideration en banc denied*, No. 17-35105, 2017 WL 2468700 (9th Cir. Mar. 17, 2017); *Hawai'i v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 1011673, at *3 (D. Haw. Mar. 15, 2017). The Order creates a preference for Christians, thus unconstitutionally advancing or favoring the Christian religion.

The Order also has the effect of disfavoring Islam. Nearly half of all refugees admitted to the United States in 2016 were Muslim.[18] Refugees comprise less than 10% of all immigrants to the U.S. each year, and

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[17] Anatole France, *The Red Lily*, 1894, Chapter 7.

[18] Phillip Connor, *U.S. Admits Record Number of Muslim Refugees in 2016*, Pew Research (Oct. 2016) at http://www.pewresearch.org/fact-tank/2016/10/05/u-s-admits-record-number-of-muslim-refugees-in-2016/.

only about one-in-ten of the other 90% of those immigrants is Muslim.[19] The provisions of the Order banning travel from six designated countries and suspending the refugee program both disproportionately affect Muslims in practice.

The history and effect of this Order conveys President Trump's message loud and clear: "we don't want them here." Thus, this action – excluding Muslims from entering our country – also sends a strong governmental message of disapproval of Islam.

The Executive Order's alleged purpose, to bolster national security, is not served by the Order as written or in effect. The President has emphatically stated the Order's true purpose is to exclude Muslims and favor Christians. The Order, in practice, advances that discriminatory purpose, disproportionately barring the entry of Muslims to the United States. In all, the evidence compels the conclusion that the Executive Order's purpose and primary effect are unconstitutional religious discrimination. It effectively establishes Christianity as a favored religion and Christians as favored members of society, while fervently discriminating against Muslims, thus violating the Establishment Clause.

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[19] *Id.*

II. THE PRESIDENT'S GENERAL AUTHORITY ON IMMIGRATION, ALTHOUGH EXPANSIVE, CANNOT BE USED TO CIRCUMVENT CONSTITUTIONAL MANDATES.

A President's authority, if any, to issue an executive order must be derived from either a power delegated by an Act of Congress or an enumerated executive power in the Constitution itself. Exec. Order No. 11935, 41 FR 37301 (1976); 5 U.S.C. §§ 3301, 3301(1), 3302; U.S. Const. Art. II, § 1, cl. 1, 2. *See also Mow Sun Wong v. Hampton*, 435 F. Supp. 37, 42 (N.D. Cal. Mar. 31, 1997); *accord*, *Vergara v. Hampton*, 581 F.2d 1281, 1284 (7th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979).

Even when acting under the guise of constitutionally enumerated powers, the Court "has unequivocally stated that the political branches' immigration actions are still 'subject to important constitutional limitations.'" *Zadvydas*, 533 U.S. at 695; *see also Chadha*, 462 U.S. at 941-42. Here, the Department of Justice successfully articulated sources of the President's discretionary powers in matters of immigration *generally*. Yet, it failed to address overwhelming evidence that the Executive Order exceeds constitutional limits.

The Department of Justice correctly notes "the President has expansive constitutional authority under Article II over foreign affairs, national security, and immigration[]" and then argues "[t]he exclusion of aliens is a fundamental act of sovereignty inherent in the executive power to control the foreign affairs of the

nation." *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). *See Department of Justice Emergency Motion page 4*. This amply illustrates that the President has the power *generally* to exclude aliens from entry, but the inquiry cannot end there. The courts have determined that executive discretion "is broad, but not unlimited. It may be subjected to judicial scrutiny on a charge that discretion was arbitrarily exercised or withheld." *Jean v. Nelson*, 727 F.2d 957, 975 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

Arbitrary discrimination against entire classes of people in matters of immigration is beyond the zenith of executive power. Obviously, the President could not prohibit all Catholics from entering the country. In *In re Reyes v. United States Dept. of Immigration and Naturalization*, 910 F.2d 611, 613 (9th Cir. 1990), an executive order attempted to authorize the naturalization of only those servicemen and women who served the U.S. military during a particular military campaign. The Ninth Circuit held that the order was an impermissible exercise of executive power. *Id.*

While the geographical discrimination struck down in *Reyes* is similar to the discrimination based on nationality facially present in this case, the Executive Order goes further. Its true purpose, to enact a procedural preference for Christianity and to disfavor Islam, is an unconstitutional government endorsement and preference of Christianity and condemnation of non-Christians. The Department of Justice cites the President's authority to act within the ambit of immigration

generally, but it fails to legally justify abusing that authority to promulgate sweeping, religiously discriminatory immigration policy.

III. THE PRESIDENT HAS REPEATEDLY SHOWN A DETERMINATION TO USE THE IMMIGRATION AND NATIONALITY ACT TO FAVOR CHRISTIANITY, DISFAVOR ISLAM, AND INHIBIT MUSLIM IMMIGRATION; AS SUCH, A STATUTORY FINDING WILL NOT SUFFICE TO END THIS CASE AND REDRESS THE INJURY AND THE COURT NEEDS TO REACH THE CONSTITUTIONAL QUESTION.

A. Plaintiff's injury cannot be redressed without a ruling against the President's religious intent.

It is well established that "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring in judgment). Yet, as a fundamental principle of law, for a plaintiff with Article III standing, a favorable decision will redress that plaintiff's injury. *See* 25 Fed. Proc., L. Ed. § 59:7 (the irreducible constitutional minimum of standing requires that: "it must be likely . . . that the injury will be redressed by a favorable decision.").

If the Court here were to rely on constitutional avoidance and rule on statutory grounds under the Immigration and Nationality Act alone, the injury caused by executive abuse of power would not be redressed. The President has shown unprecedented determination to give preference to Christianity, disfavor Islam, and to codify religious discrimination by promulgating sweeping changes to immigration policy. When the courts struck down the Trump Administration's first Executive Order, referred to by the President himself as a "Muslim ban," a second attempt at the ban was executed. That order, at issue here, was crafted particularly to evade judicial scrutiny while still advancing its principal religious aim. An unequivocal ruling against the President's unconstitutional purpose is necessary to end this campaign of religious establishment and discrimination against religious minorities.

B. "Constitutional avoidance" is a presumption against unconstitutionality, not a license to ignore clearly unconstitutional legislative intent.

The canon of constitutional avoidance "does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986). It is a tool that "rest[s] on the reasonable presumption that [a legislator] did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). No

such presumption can stand in the face of the overwhelming evidence of President Trump's religious intent. The Order does nothing to advance its avowed purpose, or any secular purpose. The Order disproportionately harms Muslims and other non-Christians, a disparate impact implemented by design. The President is the Order's sole legislator, and his own public statements consistently and unambiguously declare the Order to be religiously motivated. Constitutional avoidance is a *presumption* against unconstitutional intent, but no presumption can survive the weight of evidence against the Order. The Court cannot ignore the unconstitutional legislative will manifested here.

IV. THE EXECUTIVE ORDER UNCONSTITUTIONALLY CREATES A "RELIGIOUS TEST FOR OFFICE OR PUBLIC TRUST" THAT VIOLATES ARTICLE VI.

The United States of America was founded in part by refugees seeking freedom from government dictation of religion. The Framers adopted an entirely secular Constitution, whose only references to religion in government are exclusionary, such as "no religious test shall ever be required" for public office. U.S. Const. art. VI. The United States was the first nation to adopt a secular constitution, investing sovereignty in "We the People," not a divine entity.

The United States was not founded as a Christian nation, either. There is not a single reference to Christianity or Jesus in the Constitution or its twenty-seven

amendments. The 1796 Treaty of Tripoli, negotiated by George Washington, ratified by the Senate, and signed by John Adams, states that "the United States of America is not, in any sense, founded on the Christian religion." The Treaty of Peace and Friendship between the United States of America and the Bey and Subjects of Tripoli of Barbary U.S.-Tripoli, art. 11, Nov. 4, 1796, T.S. No. 358. This treaty is a reminder that not only did the Founders intend to create a secular government, but they explicitly held out the United States as a government that separated state from church.

The Executive Order creates a "religious test for citizenship." This unprecedented litmus test betrays core American principles and violates Article VI of the Constitution.

A. Article VI Clause 3 proscribes a religious test for office or public trust.

The separation between state and church derived from the First Amendment is also bolstered by Article VI Clause 3, which dictates "[n]o religious test shall ever be required as a qualification to any office or public trust under the authority of the United States."

> As Supreme Court Justice Joseph Story (1812-45) wrote in his *Commentaries on the Constitution of the United States*, "This clause is not introduced merely for the purpose of satisfying the scruples of many respectable persons, who feel an invincible repugnance to any religious test, or affirmation. It has a higher object; to cut off for ever every pretence

> of any alliance between church and state in the national government.

James E. Wood, Jr., "*No Religious Test Shall Ever Be Required": Reflections on the Bicentennial of the U.S. Constitution*, 29 J. Church & St. 199 (1987), pg. 207.

The Court in 1961 ruled that States likewise may not impose a religious test for public office under Art. VI of the Constitution. *See Torcaso v. Watkins*, 367 U.S. 488 (1961). Roy Torcaso was appointed to the office of Notary Public by the Governor of Maryland, but was refused a commission to serve because he would not declare his belief in God. In unanimously ruling the Maryland law unconstitutional, this Court stated:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

Id. at 495.

B. Article VI Clause 3 necessarily extends to rights of citizenship.

"Article VI not only removed the basis for any preferential treatment of one religion over another for holding public office, but also denied the right of any

preferential status of religion over nonreligion in matters of one's political participation in the life of the Republic." James E. Wood, Jr., "*No Religious Test Shall Ever Be Required": Reflections on the Bicentennial of the U.S. Constitution*, 29 J. Church & St. 199 (1987) at 207.

The Court in 1946 also recognized the necessity of extending Article VI to citizenship. In *Girouard v. United States*, 328 U.S. 61 (1946), the Court considered the case of a Seventh Day Adventist, who applied for naturalization, but declared he would not take up arms in defense of the United States. The Court recognized that "[p]etitioner's religious scruples would not disqualify him from becoming a member of Congress or holding other public offices" because of Article VI Clause 3. The Court continued:

> There is not the slightest suggestion that Congress set a stricter standard for aliens seeking admission to citizenship than it did for officials who make and enforce the laws of the nation and administer its affairs. It is hard to believe that one need forsake his religious scruples to become a citizen but not to sit in the high councils of the state.

Id. at 65-66.

"Religious identity is made irrelevant to one's rights of citizenship, e.g., the right to vote and to hold public office. One's religion or irreligion may not be made the basis of political privilege or discrimination." Wood, *supra*, at 207.

The Framers arguably understood Article VI Clause 3 to encompass those seeking entry into our country as well. The religious test proscription extends beyond office holders and includes the "public trust," which "[t]he authors of *The Federalist* understood [] to mean [] an embodiment of a collection on intangible qualities: 'blood and friendship,' 'a personal influence among people,' a 'wisdom to discern and . . . virtue to pursue the common good,' 'pride and consequence,' 'reputation and prosperity.'" Jennifer Anglim Kreder, *The "Public Trust,"* 18 U. Pa. J. of Con. L. 1425, 1437 (2016).

An Executive Order that creates a religious litmus test for citizenship, legal permanent residents, refugees and other visitors to our country, and that creates preferential treatment for Christians over other minority faiths and nonbelievers is "abhorrent to our tradition." *Girouard*, 328 U.S. at 69. We are a nation of immigrants who sought to shed the shackles of religious tyranny. It would be un-American to now deny refuge to those who seek freedom based on their religious beliefs.

CONCLUSION

The Executive Order violates the Establishment Clause of the First Amendment. The Order abuses Executive power and U.S. immigration laws and policies to establish Christianity as preferable to other religions and to nonreligion, disfavor Islam, and to codify

religious discrimination in order to further the myth that the U.S. is a Christian nation rather than a pluralistic society built on the hard work of immigrants and refugees of all religions and none at all. This Administration has demonstrated that it will continue to abuse executive authority to discriminate against minority religious groups until the Court unequivocally rules that actions taken with such intent are unconstitutional *qua intent*.

FFRF agrees with the Joint Declaration by Former National Security, Foreign Policy, and Intelligence Officials Opposing Executive Order declaring that, "Reinstating the Executive Order would wreak havoc on innocent lives and deeply held American values. Ours is a nation of immigrants, committed to the faith that we are all equal under the law and abhor discrimination, whether based on race, religion, sex, or national origin." Government officials seeking to protect our country should work to maintain "an immigration system free from intentional discrimination, that applies no religious tests, and that measures individuals by their merits, not stereotypes of their countries or groups. Blanket bans of certain countries or classes of people are beneath the dignity of the nation and Constitution," and "rebranding a proposal first advertised as a 'Muslim Ban' as 'Protecting the Nation from Foreign Terrorist Entry into the United States' does not disguise the Order's discriminatory intent, nor makes it necessary, effective, or faithful to America's Constitution, laws, or values." *See* Joint Declaration, *supra*,

date Feb. 6, 2017. The Order may have been repackaged, but the principal change was simply a calculated attempt to evade judicial scrutiny. The unconstitutional religious purpose remains inescapably fixed at the heart of the Order.

Respectfully submitted,

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