CASE NO. 17-1351

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself; HIAS, INC., on behalf of itself and its clients; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; JOHN DOES #1 & 3; JANE DOE #2

PLAINTIFFS-APPELLEES,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; DANIEL R. COATS, in his official capacity as Director of National Intelligence,

DEFENDANTS-APPELLANTS.

Appeal from the United States District Court for the District of Maryland, Southern Division, No. 8:17-cv-00361-TDC

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 17-1351 Caption: IRAP v. Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

Constitutional Law Scholars (listed in appendix to brief)
(name of party/amicus)

who is Amici, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Joshua Matz Date: 4/19/2017

Counsel for: Constitutional Law Scholars as Amici

CERTIFICATE OF SERVICE

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I certify that on 04/19/17 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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INTEREST OF *AMICI CURIAE*

Amici are constitutional law scholars. They submit this brief to identify a distinct legal principle requiring the conclusion that President Trump's revised executive order is unconstitutional: the long-settled prohibition on governmental acts based on animus toward a particular religious group.

A full list of *amici* is attached as an appendix to this brief.[1]

SUMMARY OF ARGUMENT

The District Court properly concluded that the Order is unconstitutional. Relying mainly on *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005), and *Lemon v. Kurtzman*, 403 U.S. 602 (1971), it found that an objective observer would understand that the Order lacked a secular purpose—and that, instead, its "primary purpose was grounded in religion," namely effectuating "the proposed Muslim Ban." *Int'l Refugee Assistance Project v. Trump*, No. 12-Civ-361, 2017 WL 1018235, at *11 (D. Md. Mar. 16, 2017) ("*IRAP*"). Under settled precedent, this conclusion was correct. But *Lemon* and *McCreary* remain controversial. *See Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994 (2011) (Thomas, J., dissenting from denial of certiorari) (discussing criticism of *Lemon* by the Chief

[1] Pursuant to Fed. R. App. P. 29(c)(5) amici state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than amici and their counsel—contributed money that was intended to fund preparing or submitting the brief. The parties have provided blanket consent for the filing of *amicus* briefs.

Justice and Justices Kennedy, Scalia, Thomas, and Alito); *see also Green v. Haskell Cty. Bd. of Comm'rs*, 574 F.3d 1235, 1243-1249 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing en banc).

Importantly, the District Court's conclusion is also independently supported by a line of Establishment Clause precedent—repeatedly confirmed in Free Exercise and Equal Protection Clause cases—that forbids the government from acting on the basis of animus toward any particular religion. *See, e.g., Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *id.* at 1831 (Alito, J., concurring); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 722, 728 (1994) (Kennedy, J., concurring in the judgment); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Larson v. Valente*, 456 U.S. 228 (1982). This longstanding and fundamental principle has been adopted by judges of many different persuasions concerning the Establishment Clause. And it is directly applicable to the unusual nature of the President's constitutional violation here.

As the District Court found, the evidence that the Order violates the Establishment Clause is overwhelming. While the District Court focused on whether the President lacked a secular purpose under *Lemon*, the very same facts even more clearly bespeak anti-Islamic animus under familiar means of discerning improper motive. *See, e.g., Town of Greece*, 134 S. Ct. 1824-26; *Locke v. Davey*, 540 U.S. 712, 725 (2004); *Lukumi*, 508 U.S. at 534-36; *see also, e.g., United States*

v. Windsor, 133 S. Ct. 2675, 2693-94 (2013); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985). That conclusion is compelling even without consideration of President Trump's admissions of animus in the pre-inauguration period. But it is forcefully confirmed by a careful review of those remarks, which, as a matter of precedent, *must* be considered in the constitutional analysis.

The extraordinary record in this case demonstrates that President Trump's sole motive in issuing the Order—and in gerrymandering it—was based on animus. After repeatedly and specifically promising voters that he would ban Muslims from entering the United States, he arrived in office and promptly issued a sweeping, unprecedented, and bizarrely-structured order without any discernible connection to an actual national security threat. That order, even as subsequently revised, functioned as the "Muslim Ban" that he had repeatedly promised to voters during (and after) the campaign. In case this point somehow remained unclear, President Trump made numerous statements to the effect that excluding Muslims was the Order's core purpose. An extensive public record thus supports the inference that President Trump was following through on his animus-laden campaign promise, rather than acting for any legitimate reason.

Even if one assumes that national security concerns played some role, that will not save the order. It is not unusual for animus to co-exist with legitimate motives. As the Supreme Court has explained, where the government acts on the

basis of mixed motives, courts do not hesitate to invalidate official acts when animus was a *primary* or *essential* motive. *See Windsor*, 133 S. Ct. at 2693; *Lukumi*, 508 U.S. at 535; *Larson*, 456 U.S. at 248. In that respect, *Korematsu v. United States*, 323 U.S. 214 (1944), is instructive. As *Korematsu* teaches, the combination of animus and actual (or perceived) national security threat is uniquely toxic: a veneer of noble motive can be invoked to justify the most horrid abuses. Even if an official starts with the best of intentions, animus ultimately corrupts and distorts any motive it touches. Here, only by ignoring months of clear and consistent statements by the President could it be thought that he did not act on the basis of animus toward Muslims in following through on his promise to ban them. Not only did he ban many Muslims from entering the nation, but he has also repeatedly made anti-Muslim claims inflicting stigma and disability on Muslims nationwide. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) ("We refuse to turn a blind eye to the context in which this policy arose . . . .").

In 1785, James Madison presciently warned against any law departing "from that generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens." Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 9 (1785). He added:

> Instead of holding forth an Asylum to the persecuted, [the Bill] is itself a signal of persecution. It degrades

> from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthropy in their due extent, may offer a more certain repose from his Troubles.

Id. The bill against which Madison famously remonstrated has been consigned to the dustbin of history. But the underlying evils against which Madison warned are still with us. This case does not present them in disguise. No, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). President Trump repeatedly and ostentatiously expressed the animus that brought it forth in his calls, and subsequent acts, to ban persons of a single faith from entering the United States. For liberty to endure, the Order must be rejected.

ARGUMENT

I. THE CONSTITUTION PROHIBITS GOVERNMENTAL ACTION BASED ON ANIMUS TOWARD DISFAVORED RELIGIONS

As Justice Kennedy has explained, "In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." *Lukumi*, 508 U.S. at 532. This prohibition against governmental action motivated by animus toward

a religious group is an axiom of our tradition. It is so fundamental that it has been expressed not only in Establishment Clause doctrine, but also in cases arising under the Free Exercise and Equal Protection Clauses. Together, these precedents teach that the anti-animus rule rests upon an abiding national commitment to equal treatment and religious freedom. Justice O'Connor thus reasoned that "the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion [] 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." *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring). When an official act has the purpose and effect of disapproving a particular religion, it cannot stand under the Constitution.

A. The Establishment Clause

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. This rule is "inextricably connected with the continuing vitality of the Free Exercise Clause." *Id.* at 245. Religious freedom "can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Id.* As Justice Goldberg explained, the Religion Clauses recognize that "[t]he fullest realization of true religious liberty requires that government neither engage in nor compel

religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 305 (1963).

The Supreme Court has thus held time and again that the Establishment Clause forbids official acts based on animus toward any particular religious group. This principle transcends many of the familiar divisions in Establishment Clause jurisprudence, and has been embraced by strict separationists, devotees of the endorsement test, those who believe that the Clause targets coercion, and jurists who see a very broad role for religion in public life. *See, e.g.*, *Locke*, 540 U.S. at 725 (Rehnquist, C.J.) (upholding a scholarship program against Establishment Clause attack because "we find neither in the history or text of [the state law], nor in the operation of the [program], anything that suggests animus toward religion"); *Kiryas Joel*, 512 U.S. at 703 (holding courts must safeguard "a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion"); *id.* at 714 (O'Connor, J., concurring) ("[T]he government generally may not treat people differently based on the God or gods they worship, or do not worship."); *Wallace v. Jaffree*, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting) ("[Madison] saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects."); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (holding the

Establishment Clause "forbids hostility toward any [religion]"); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (holding that "[t]he State may not adopt programs or practices . . . which 'aid or oppose' any religion").

The Supreme Court recently reaffirmed the rule against governmental animus toward religion in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), which upheld a town's practice of holding a prayer program at the start of monthly board meetings. A crucial issue in *Town of Greece* was whether the town had established Christianity by adopting a rotational policy that led to mostly Christian prayers. Writing for the Court, Justice Kennedy upheld the town's policy. He concluded that some sectarian prayer is consistent with the nation's historical traditions, and that the town's prayer program did not result in religious coercion. *See id.* at 1819-1825.

However, Justice Kennedy's opinion contained a critical limitation:

> If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.

Town of Greece, 134 S. Ct. at 1823. Justice Kennedy later elaborated upon this anti-denigration rule, explaining that the town could not "signal disfavor toward

nonparticipants or suggest that their stature in the community was in any way diminished." *Id.* at 1826. He reasoned that practices serving to "denigrate, proselytize, or betray an impermissible government purpose" would violate the Constitution. *Id.* at 1824; *accord Kiryas Joel*, 512 U.S. at 722 (Kennedy, J., concurring in the judgment) (stating religious accommodations, too, would violate the Establishment Clause were they to "discriminate against other religions"). These categorical prohibitions against religious discrimination and denigration are vital protections of liberty.

In a concurrence, Justice Alito echoed Justice Kennedy's warning against official acts based on animus toward a disfavored religion. He noted that the town's lack of non-Christian prayer leaders "was at worst careless, and it was not done with a discriminatory intent"—adding, "I would view this case very differently if the omission of these synagogues were intentional." *Id.* at 1831. In Justice Alito's view, then, it was only the absence of a desire to exclude a particular religious group that saved the town's official practice. Similarly, Justice Breyer made clear that he would have viewed the case differently had there been proof of discrimination. *See id.* at 1840 (Breyer, J., dissenting) (emphasizing that "[t]he plaintiffs do not argue that the town intentionally discriminated against non-Christians when choosing whom to invite"); *see also* Corey Brettschneider,

Praying for America, SSRN (Apr. 3, 2017) (arguing animus doctrine applies across the Establishment, Free Exercise and Equal Protection Clauses).

As *Town of Greece* showed, and as many other precedents confirm, the Establishment Clause's prohibition against animus is of ancient lineage and enjoys wide support among judges of all methodological persuasions. The rule is also supported by historical evidence concerning the original understanding of the First Amendment. "A large proportion of the early settlers of this country came here from Europe to escape [religious persecution]." *See Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 8 (1947). And by the time the Bill of Rights was ratified, "the American states had already experienced 150 years of a higher degree of religious diversity than had existed anywhere else in the world." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421 (1990).

The Framers thus understood that their task was to design a "government for a pluralistic nation—a country in which people of different faiths had to live together." Jon Meacham, *American Gospel: God, the Founding Fathers, and the Making of a Nation* 101 (2006). As George Washington wrote, "the government of the United States . . . gives to [religious] bigotry no sanction, to persecution no assistance." Letter from George Washington to the Jews (Aug. 18, 1790), in *The Separation of Church and State: Writings on a Fundamental Freedom by*

America's Founders 110 (Forrest Church ed., 2004). Thomas Jefferson, in turn, saw the Establishment Clause as "proof that [the people] meant to comprehend, within the mantle of [the law's] protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo and infidel of every denomination." Thomas Jefferson, *Writings* 40 (Merrill D. Peterson ed., Library of Am. 1984).

Governmental acts based on animus toward a disfavored religious group are thus at war with the Establishment Clause, as a matter of history, principle, and precedent. This anti-animus rule follows directly from the Clause's purpose of protecting religious freedom for those sects not favored by the political majority: just as the government cannot coerce (or endorse) religious belief or practice, nor may it take action based on a desire to harm or suppress any faith.

This does not mean that government is unable to recognize the importance of religion—including majority religions—in people's lives. Far from it: this rule is perfectly consistent with very broad views of religion's permissible role in public life. Rather, the Establishment Clause, which operates as a structural limit on government, forbids officials from exercising governmental power on the basis of a desire to suppress, harm, or denigrate any particular religious sect or denomination. *See* Michael Dorf, *The Establishment Clause and the Muslim Ban*, TAKE CARE (Mar. 18, 2017) ("One need not accept the principle that the Establishment Clause bars *endorsement* of religion or a particular religion to see

that a policy of disfavoring a religious minority violates the Establishment Clause."). This limit, though narrow, is essential to religious liberty in America. *See Am. Commc'ns Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 448 (1950) (Black, J., dissenting) ("Centuries of experience testify that laws aimed at one . . . religious group . . . generate hatreds and prejudices which rapidly spread beyond control.").

B. The Free Exercise Clause

The Free Exercise and Establishment Clauses speak as one against laws designed to exclude disfavored faiths. This reflects "the common purpose of the Religion Clauses," which is "'to secure religious liberty.'" *Santa Fe*, 530 U.S. at 313 (2000) (quoting *Engel v. Vitale*, 370 U.S. 421, 430 (1962)). Indeed, it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.).

This principle received its fullest elaboration in *Lukumi*, where the Supreme Court struck down a local ordinance on the ground that it was based on animosity toward Santeria religious practices. *See* 508 U.S. at 542. Writing for the Court, Justice Kennedy explained that "[t]he Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it

secures." *Id.* at 547. He added, "Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Id.*

Governmental acts based on "religious animosity" are thus forbidden by the Free Exercise Clause. *Id.* at 535. That is true regardless of whether officials "did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom." *Id.* at 524. Furthermore, in discerning animus, "[f]acial neutrality is not determinative," since the "Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination." *Id.* at 534. Rather, when government classifies on religious lines, or works a "religious gerrymander," courts guard against "impermissible attempt[s] to target [religious people] and their religious practices." *Id.*

Under *Lukumi*, evidence of improper purpose may come from the text and structure of an order, "the effect of a law in its real operation," *id.* at 535, and the degree to which the order is tailored to achieve legitimate ends. *See id.* at 534-536. Courts must also consider "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 (opinion of Kennedy, J.).

Thus, if the full circumstances of an official act disclose that it was taken on the basis of animus toward a religious group, that act must be invalidated.

C. The Equal Protection Clause

Precisely because the Establishment Clause anti-animus rule is grounded in considerations of equal treatment for all religions, Justice Kennedy has explained that the Religion Clauses must be informed by insights from equal protection doctrine. *See Lukumi*, 508 U.S. at 540 (opinion of Kennedy, J.) ("In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases. As Justice Harlan noted in the related context of the Establishment Clause, '[n]eutrality in its application requires an equal protection mode of analysis.'" (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (concurring opinion))).

There are three respects in which the Equal Protection Clause is instructive here. First, on many occasions the Supreme Court has equated race with religion as bases of discrimination inimical to our constitutional order. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 303-304 (1976). This principle has been invoked in a wide array of contexts: "Just 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." *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment); *see also Shaw v. Reno*, 509 U.S. 630, 648 (1993).

The Supreme Court has thus warned in the strongest terms against governmental action based on animus toward religion. Given the centrality of religion in many peoples' lives—to their identity, social relations, and concept of the universe—there is good reason to look with the utmost doubt upon official acts based on hostility to religion in general or any particular religion. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) ("The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.").

Second, equal protection jurisprudence offers a nuanced account of animus. In some circumstances, animus flows from a single actor's "'bare . . . desire to harm a politically unpopular group.'" *City of Cleburne*, 473 U.S. at 447 (citation omitted). But in many other cases where the Supreme Court has invalidated acts on animus grounds, there has not been any finding that particular individuals were subjectively motivated by bigotry. *See, e.g.*, *Windsor*, 133 S. Ct. at 2693; *Romer v. Evans*, 517 U.S. 620, 634 (1996). Rather, as Justice Kennedy has explained: "Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people

who appear to be different in some respects from ourselves." *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring); *accord Lukumi*, 508 U.S. at 524 (recognizing the possibility that officials "did not understand" or "failed to perceive" their animus toward Santeria).

Accordingly, courts have remained sensitive to the subtle dangers posed by "unconscious prejudices and disguised animus," as well as the social harms of "covert and illicit stereotyping." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522 (2015). "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Finally, equal protection cases shed additional light on how to recognize animus. While courts have not attempted a systematic catalogue, several objective factors are often considered highly relevant: the text of an act; the full context leading up to and following enactment; the act's real-world effects; and the degree of fit between an act's stated purpose and its actual structure. *See Windsor*, 133 S. Ct. at 2693-94; *Romer*, 517 U.S. at 634-35; *Cleburne*, 473 U.S. at 448; *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-67 (1977); *Dept. of Agriculture v. Moreno*, 413 U.S. 528, 536-38 (1973).

Given that many of the Supreme Court's free exercise and establishment cases reference equal protection doctrine, it comes as no surprise that these are the

same considerations present in Religion Clause precedents, including but not limited to those addressing official acts based on animus toward specific religious denominations. *See Kiryas Joel*, 512 U.S. at 698-705; *Lukumi*, 508 U.S. at 534-36; *Edwards v. Aguillard*, 482 U.S. 578, 594-595 (1987); *see also Town of Greece*, 134 S. Ct. 1824-26 (pointing to this sort of evidence while describing when a pattern of prayers would be unconstitutional because it functioned to "denigrate . . . or betray an impermissible government purpose"). The link between the Religion Clauses and Equal Protection Clause thus permits a more refined application of the Establishment Clause's ban on official animus toward religion.

* * * * *

There is a jurisprudential consensus on the proposition that government may not act on the basis of animus toward disfavored religious groups. Acts with this purpose and effect are forbidden under the Establishment Clause. *See* Ira C. Lupu, Peter J. Smith & Robert W. Tuttle, *The Imperatives of Structure: The Travel Ban, The Establishment Clause, and Standing to Sue*, TAKE CARE (Apr. 3, 2017) ("[T]he Establishment Clause also operates as a structural limit that forbids governmental actions that endorse or denigrate a particular faith, even when those actions do not operate coercively against individuals."). This principle is deeply embedded in cases interpreting the Establishment Clause, and is confirmed by cases arising under the Free Exercise and Equal Protection Clauses.

II. THE ORDER VIOLATES THE CONSTITUTION BECAUSE IT IS BASED ON ANIMUS AGAINST ISLAM

"For centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom." *Town of Greece*, 134 S. Ct. at 1841 (Kagan, J., dissenting). Yet the President of the United States has issued a curiously structured and widely derided order targeting six Muslim-majority nations—and has done so while maintaining a campaign website, still updated on a daily basis, stating that he supports "a total and complete shutdown of Muslims entering the United States."[2] Even acknowledging the deference due to the President in matters of immigration and national security, it is hard to imagine a clearer case of governmental action motived by animus toward a single religion.

A. Evidence of Animus—Including But Not Limited to Campaign Statements—is Overwhelming and Properly Before the Court

The District Court described in detail the formidable evidence that the Order was based on anti-Islamic prejudice, rather than any legitimate motive. *See IRAP*, 2017 WL 1018235, at *12-*15. In short, it relied primarily on four considerations: (1) "public statements made by President Trump and his advisors, before his election, before the issuance of the First Executive Order, and since the decision to issue the Second Executive Order"; (2) the Administration's highly irregular process in promulgating the Order, which excluded virtually every relevant

[2] *Available at* https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration (last accessed April 19, 2017).

national security and intelligence agency; (3) the Administration's late-in-the-day assertion that the Order does, in fact, rest upon national security concerns; and (4) the Order's failure to "explain specifically why this extraordinary, unprecedented action is the necessary response to the existing risks," coupled with the fact that the Order "bears a clear resemblance to the precise action that President Trump described as effectuating his Muslim ban." *Id.* at *11, *16.[3]

While the District Court treated this evidence as proof that the President lacked a secular purpose, the very same facts even more clearly bespeak anti-Islamic animus: President Trump's order and the oft-repeated campaign promise it fulfilled are based on a desire to exclude Muslims from the United States. Indeed, as explained above, this kind of evidence—the text of an order, its real-world effects, the full context of its enactment, statements made by decisionmakers, and the degree of fit between an order's stated purpose and actual structure—is the standard fare of courts engaged in animus analysis. *See Town of Greece*, 134 S. Ct. 1824-26; *Locke*, 540 U.S. at 725; *Lukumi*, 508 U.S. at 534-36; *see also*, *e.g.*, *Windsor*, 133 S. Ct. at 2693-94; *Romer*, 517 U.S. at 634-35; *Cleburne*, 473 U.S. at 448. And as the District Court and many others have concluded, the immigration

[3] To this list, we would add the Order's call to publicize "so-called 'honor killings'" that occur "in the United States by foreign nationals." This provision amounts to anti-Islamic dog-whistling: "'Honor killings' are believed to be rare in the U.S.," yet "far-right conservative activists often focus on honor killings as an example of the potential 'Islamization' of America posed by allowing Muslim immigrants into the U.S." Nahal Toosi, *'Honor Killings' Highlighted Under Trump's New Travel Ban*, POLITICO (Mar. 3, 2017).

and national security context of this litigation does not alter that bottom line. *See IRAP*, 2017 WL 1018235, at *15, *17; Daniel Hemel, *Faith in the Ninth Circuit*, TAKE CARE (Mar. 16, 2017) (explaining why analysis of the President's motive for issuing the Order is necessary even if *Kerry v. Din*, 135 S. Ct. 2128 (2015), and *Kleindienst v. Mandel*, 408 U.S. 753 (1972), supply the rule of decision).

The Government argues that campaign statements by President Trump and senior advisors involved in creating the Order may not be considered as part of this analysis. *See* Br. at 45-53. That contention is a red herring, and is riddled with legal and factual errors.

First, setting aside the campaign, a review of *only* post-election and post-inauguration statements by the President and his senior advisors demonstrates that the Order is based on anti-Islamic animus. Here are some of the more notable statements from this period:

> (1) More than a month after the election, President Trump was asked whether he would reevaluate his intention to ban people of the Muslim faith. He responded: "You know my plans all along, and I've been proven to be right."[4]
>
> (2) Immediately upon signing the initial Executive Order, President Trump read its oblique title "Protecting The Nation From Foreign Terrorist Entry Into The United States" and said, "We all know what that means."[5]

[4] *Trump: "You've Known My Plans" On Proposed Muslim Ban*, WASH. POST (Dec. 21, 2016).

[5] *Trump Signs Executive Orders at Pentagon*, ABC NEWS (Jan. 27, 2017).

(3) On January 28, 2017, Rudy Giuliani stated, "When [President Trump] first announced it, he said 'Muslim ban.' He called me up, he said, 'Put a commission together, show me the right way to do it legally.'"[6]

(4) On the day that President Trump's second order was enjoined, he stated that he would rather "go all the way, which is what I wanted to do in the first place."[7]

(5) President Trump remarked on March 16 that "The assimilation [of Muslims in the U.S.] has been very, very hard. It's been a very, very difficult process."[8]

(6) President Trump's campaign website continues to state that he supports "a total and complete shutdown of Muslims entering the United States."

These statements alone reveal President Trump's motives. This case does not pivot on whether the Court considers pre-election expressions of animus.

Second, as a matter of law, the Supreme Court has never suggested that statements in some fora—such as campaigns—are uniquely irrelevant to motive analysis. To the contrary, courts must consider "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." *Lukumi*, 508 U.S. at 540 (opinion of Kennedy, J.) (citing *Arlington Heights*, 429

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[6] Amy B. Wang, *Trump Asked for a "Muslim Ban' Giuliani Says,* WASH. POST (Jan. 29, 2017).

[7] Bob Van Voris & Erik Larson, *Trump on Travel Ban Ruling: "Go Back To the First One,"* BLOOMBERG (Mar. 15, 2016).

[8] Jonathan Chait, *Donald Trump's Race War*, NEW YORK MAGAZINE (Apr. 4, 2017).

U.S. at 266). That reflects simple common sense: "[T]he world is not made brand new every morning." *McCreary*, 545 U.S. at 866.

Here, given that President Trump issued this policy almost immediately upon taking office, the "series of events leading to the . . . official policy," and the "contemporaneous statements made by members of the decisionmaking body," necessarily include statements made by President Trump *while he was crafting the policy*—a process that unquestionably began *during* the campaign and pre-inauguration period. *Cf. Romer*, 517 U.S. at 623 (emphasizing "the contentious campaign that preceded" the adoption of a state constitutional amendment). Indeed, the connection in time, subject matter, scope, and substance between the President's campaign statements and the Order he issued is extraordinarily tight. And unlike in *Lukumi*, where the Court determined a multi-member body's purpose, here the only question is why a single man (Donald J. Trump) took a single official act (issuing the Order).

Third, excluding President Trump's pre-inauguration statements would render unintelligible many of the post-inauguration statements that everyone agrees *can* be considered. Put differently, the President opened the door to consideration of his prior remarks by explicitly referencing them in post-inauguration comments (and by keeping them on his regularly-updated campaign website).

Fourth, First Amendment values would not be chilled by consideration of the President's campaign statements. *Contra Washington v. Trump*, No. 17-35105 (9th Cir. Mar. 17, 2017), Slip. Op. at 9-14 (Kozinski, J., dissenting from denial of reconsideration en banc). Are we supposed to believe that a candidate could run an explicitly racist campaign, win an election, enact facially neutral measures that distinctively injure the racial minority he had attacked for months, and then prevail against an equal protection challenge? What if a candidate announced a day before being sworn in that she planned to implement three specific policies for the sole purpose of harming Latinos—would that evidence be excluded in a subsequent lawsuit? Certainly not. The First Amendment protects speech, but that does not mean it allows politicians to evade all accountability if their words reveal that an illegal purpose motivated their actions.

That is true *throughout* a politician's career. The Government's bizarre insistence that Donald J. Trump was a mere private citizen on January 19, 2017—one whose promises about how to run the federal government meant nothing at all—"taxes the credulity of the credulous." *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013) (Scalia, J., dissenting).

Finally, the Government's analysis is unworkable. If an incumbent is running for office, would the Government selectively exclude statements made while campaigning but consider statements made in all other contexts as part of a

purpose analysis? How would courts decide when an incumbent is campaigning? In truth, this rule is an awkward and absurd limitation on assessing purpose—one at odds with precedent, and arbitrary in application.

The proper conclusion here is that the many sources typically considered in constitutional analysis demonstrate that the Order is based on anti-Islamic animus.

B. The Order Is Unlawful Even if Animus Was Not Its Sole Motive

Given the exceptional record in this case—and, in particular, the utter lack of any serious national security justification for a travel ban structured like this one—there is compelling reason to believe that the Order was motivated solely by anti-Islamic animus. At the very least, there is sound reason to believe that the Order was motivated solely by a decision to follow through on avowedly and explicitly anti-Islamic campaign promises. From that perspective, the Order—whose scope and structure do not match even its own professed purposes—is analogous to the constitutional amendment invalidated in *Romer*: "Its sheer breadth is so discontinuous with the reasons offered for it that the [Order] seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." 517 U.S. at 632.

But animus can co-exist with other motives. Thus, in *Lukumi*, the Court recognized that the subject did implicate "multiple concerns unrelated to religious animosity, for example, the suffering or mistreatment visited upon the sacrificed

animals and health hazards from improper disposal." 508 U.S. at 535. But those concerns were so "remote" from the ordinance under review that they could not save it. *Id.* So too in *Windsor*, where the Court acknowledged other legislative purposes but concluded that the Defense of Marriage Act's "principal effect" and "principal purpose" were to "impose inequality, not for other reasons like governmental efficiency." 133 S. Ct. 2693. And again in *Larson*, where Minnesota had a valid interest in "protecting its citizens from abusive practices in the solicitation of funds for charity," but where that interest could not explain the State's *de facto* denominational line-drawing. *See* 456 U.S. at 248.

In short, where the government acts on the basis of mixed motives—as it often does—courts do not hesitate to invalidate governmental action when animus was a *primary* or *essential* motive. *Cf. McCreary*, 535 U.S. at 865. And here, for reasons well stated by the District Court, that conclusion is inevitable: both with respect to the existence of a travel ban in general, and with respect to the bizarre way that the Order is structured and gerrymandered.

Ultimately, perhaps the most instructive precedent is *Korematsu v. United States*, 323 U.S. 214 (1944). There, too, an executive order built on animus was presented to courts as justified by national security concerns, which courts were forcefully urged to take at face value. There, too, the President acted on the basis of various motives, some of them legitimate and others (the decisive ones)

emphatically not so. And there, too, internal executive branch evidence undercut much of the Government's factual argument to the Judiciary—though whereas we now know about such reports due to leaks, in 1944 this evidence remained buried. *See* Nora Ellingsen, *Leaked DHS Report Contradicts White House Claims on Travel Ban*, LAWFARE (Feb. 27, 2017); Peter Irons, *Justice At War: The Story of the Japanese-Interment Cases* (1993); Leah Litman and Ian Samuel, *No Peeking?: Korematsu and Judicial Credulity*, TAKE CARE (Mar. 22, 2017).

In *Korematsu*, the Supreme Court went along with a presidential demand for boundless deference, over a courageous dissent that called out the Court for upholding bigotry. *See* 323 U.S. at 233 (Murphy, J., dissenting) ("Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."). The mere facade of a national security justification, even if actually in the mix of presidential motives, should not have saved an order that rested ultimately on prejudice and stereotype. As that case teaches, when otherwise valid motives are mixed with forbidden animus, inevitably the legitimate justification is itself corrupted and distorted. *See also Powers v. Ohio*, 499 U.S. 400, 416 (1991) (warning that "race prejudice stems from various causes and may manifest itself in different forms"). For good reason, *Korematsu* is now taught as one of the most painful lessons in our history. *See Hassan v. City of N.Y.*, 804 F.3d 277, 307 (3d Cir. 2015) ("Given that unconditional deference to [the] government['s] . . .

invocation of 'emergency' . . . has a lamentable place in our history, the past should not preface yet again bending our constitutional principles merely because an interest in national security is invoked." (citing *Korematsu*, 323 U.S. at 223)).

This appeal tests the lesson of *Korematsu* in our own time. One of America's foundational principles is to welcome people of all faiths and to reject religious intolerance. Issuing an order to keep Muslims out is inconsistent with that principle as expressed through the First and Fourteenth Amendments. Nor can the President's order be saved by a pretextual, after-the-fact appeal to national security. Respectfully, this Court should not abide an order widely—and correctly—understood to flow from anti-Islamic animus.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that this Court should agree with the District Court's conclusion that Appellees have demonstrated a likelihood of success on the merits of their Establishment Clause claims.

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Respectfully Submitted,
/s/ Joshua Matz

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CERTIFICATE OF COMPLIANCE

Counsel for *amici curiae* certifies that this brief contains 6,432 words, based on the "Word Count" feature of Microsoft Word 2016. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this word count does not include the words contained in the Corporate Disclosure Statement, Table of Contents, Table of Authorities, and Certificates of Counsel. Counsel also certifies that this document has been prepared in a proportionally spaced typeface using 14-point Times New Roman in Microsoft Word 2016.

Dated: April 19, 2017

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CERTIFICATE OF SERVICE

Counsel for *amici curiae* certifies that on April 19, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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