

No. 17-1351

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Plaintiffs-Appellees,
v.

DONALD J. TRUMP, President of the United States, *et al.*,
Defendants-Appellants.

On Appeal from Entry of Preliminary Injunction
United States District Court for the District of Maryland
Case No. 17-cv-361-TDC, Hon. Theodore D. Chuang

**CONSENT MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*, THE
AMERICAN CENTER FOR LAW AND JUSTICE, SUPPORTING DEFENDANTS-
APPELLANTS' POSITION ON APPEAL AND URGING THAT THE PRELIMINARY
INJUNCTION BE VACATED**

JAY ALAN SEKULOW*

Counsel of Record

STUART J. ROTH*

COLBY M. MAY*

ANDREW J. EKONOMOU**

JORDAN SEKULOW**

CRAIG L. PARSHALL*

MATTHEW R. CLARK**

BENJAMIN P. SISNEY*

AMERICAN CENTER FOR LAW

AND JUSTICE

201 Maryland Avenue, NE

Washington, DC 20002

Tel.: 202-546-8890

Email: sekulow@aclj.org

EDWARD L. WHITE III*

ERIK M. ZIMMERMAN**

AMERICAN CENTER FOR LAW
AND JUSTICE

3001 Plymouth Road, Suite 203

Ann Arbor, Michigan 48105

Tel.: 734-680-8007

Email: ewhite@aclj.org

FRANCIS J. MANION*

GEOFFREY R. SURTEES**

AMERICAN CENTER FOR LAW
AND JUSTICE

6375 New Hope Road

New Hope, Kentucky 40052

Tel.: 502-549-7020

Email: fmanion@aclj.org

* Admitted to Fourth Circuit Bar

** Not admitted in this jurisdiction

Counsel for amicus curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(A) and Circuit Rule 26.1, the *amicus curiae*, the American Center for Law and Justice (“ACLJ”), makes the following disclosures:

1. The ACLJ is a non-profit organization that has no parent corporation.
2. No publicly held corporation or other publicly held entity owns any portion of the ACLJ.
3. The ACLJ is unaware of any publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation.
4. This case does not arise out of a bankruptcy proceeding.

CONSENT MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Movant, the American Center for Law and Justice (“ACLJ”), respectfully seeks leave of Court to file its *Amicus Curiae* Brief in support of Defendants-Appellants’ position on appeal and urging that the preliminary injunction be vacated. A copy of the proposed *amicus* brief has been submitted with this consent motion.¹

¹ Pursuant to Fed. R. App. P. 29(a)(4)(E), the ACLJ affirms that no counsel for a party authored its proposed *amicus* brief in whole or in part and that no person other than the ACLJ, its members, or counsel made any monetary contributions intended to fund the preparation or submission of its proposed *amicus* brief.

I. THE PARTIES CONSENT TO THE GRANTING OF THIS MOTION

Pursuant to Circuit Rule 27(a), Movant certifies that it informed counsel for Plaintiffs-Appellees (Attorneys Omar Jadwat, Lee Gelernt, and Cecillia Wang) and counsel for Defendants-Appellants (Attorneys Sharon Swingle, H. Thomas Byron, and Lowell Sturgill) via electronic mail on March 22, 2017, of the intended filing of this motion. Counsel for Plaintiffs-Appellees (Attorney Omar Jadwat) and counsel for Defendants-Appellants (Attorney Sharon Swingle) consented to the granting of this motion.²

II. INTEREST OF THE MOVANT

The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. Counsel for the ACLJ have presented oral argument, represented parties, and submitted *amicus* briefs before the Supreme Court of the United States, this Court, and other courts around the country in cases concerning the First Amendment and immigration law. *See, e.g., FEC v. Wisc. Right to Life*, 551 U.S. 449 (2007); *McConnell v. FEC*, 540 U.S. 93 (2003); *United States v. Texas*, 136 S. Ct. 2271 (2016); and *Washington v. Trump*, 2017 U.S. App. LEXIS

² Although a motion for leave to file should not be needed when the parties have consented to the filing of an *amicus curiae* brief, Fed. R. App. P. 29(a)(2), the practice in this appeal by *amici* to date has been to file motions for leave even when consent has been granted.

2369 (9th Cir. 2017). The ACLJ has actively defended, through advocacy and litigation, immigration policies that protect American citizens. The submitted *amicus* brief is supported by members of the ACLJ's Committee to Defend Our National Security from Terror, which represents more than 205,000 Americans who have stood in support of the President's Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States.

The ACLJ believes it can offer this Court information or perspective that will assist it in deciding the pending issues. The proposed *amicus curiae* is in support of Defendants-Appellants' position on appeal and urges this Court to vacate the preliminary injunction. The ACLJ respectfully submits that its participation as *amicus curiae* will aid this Court in resolving this case, and it requests that this Court grant its motion for leave to appear as *amicus curiae* and to accept for filing its attached *amicus curiae* brief.

III. MOVANT'S BRIEF IS TIMELY AND USEFUL TO THE DISPOSITION OF THE ISSUES BEFORE THE COURT.

The ACLJ has submitted this consent motion and proposed *amicus curiae* brief by March 31, 2017, which is the deadline for the filing of *amicus curiae* briefs in support of Defendants-Appellants. CTA Dkt. # 25 at 1. The proposed *amicus* brief complies with the governing Federal Rules of Appellate Procedure and Fourth Circuit Rules. The issues presented before this Court are complex matters of constitutional and national security law. The ACLJ's team of

constitutional lawyers is uniquely situated to provide insight into the matters before this Court. The ACLJ's proposed *amicus curiae* brief will provide this Court with unique or helpful information in the following summarized ways:

1. The *amicus* brief explains that this case is not a standard Establishment Clause case wherein the Court examines the primary purpose and effect of the government's actions. Rather, this case involves the special context of a presidential executive order ("EO"), enacted pursuant to the President's constitutional and statutory authority, concerning the admission of aliens into the United States from six unstable and terrorism-infested countries of particular concern. When the Supreme Court has considered constitutional challenges to immigration-related actions of this sort, it has declined to subject those actions to the same level of scrutiny applied to non-immigration-related actions. As the Supreme Court has held, "when the Executive exercises [the power to exclude an alien] on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against" opposing interests. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). The EO, which pauses the entry of immigrants from these countries of concern for the legitimate purpose of allowing time for needed improvements to the immigration and refugee screening process, is valid under the governing standards.

2. Even if the EO were subject to traditional Establishment Clause analysis, however, it still passes constitutional muster. The EO satisfies the “purpose prong” of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), by furthering the secular purpose of protecting national security. Moreover, any attempt to sidestep the EO’s obvious secular purpose by focusing on miscellaneous comments made by then-candidate Trump, or by his advisors, is flawed for at least three reasons.

- The Supreme Court has emphasized, in the context of legislative enactments, that “what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law.” *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) (plurality opinion). The EO, on its face, serves the secular purpose of protecting national security.

- Miscellaneous comments by a candidate for public office, or his or her proxies, *while on the campaign trail and as a private citizen(s)* do not constitute “contemporaneous legislative history” or “official acts.” See *McCreary Cnty. v. ACLU*, 545 U.S. 844, 862, 895 (2005). Indeed, “one would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment.” *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002).

- The mere suggestion of a possible religious or anti-religious motive, mined from past comments of a political candidate or his supporters is not enough

to doom government action. The Supreme Court has explained that “all that *Lemon* requires” is that government action have “a secular purpose,” not that its purpose be “*exclusively* secular,” and a policy is invalid under this test only if it “was motivated *wholly* by religious considerations.”³ The EO clearly serves a secular purpose and satisfies *Lemon*’s purpose test. The secular purpose of the EO—protecting our national security—is genuine.

³ *Lynch v. Donnelly*, 465 U.S. 668, 680-81 & n.6 (1984) (emphasis added); *see also Van Orden v. Perry*, 545 U.S. 677, 703 (2005) (Breyer, J.) (upholding government action that “serv[ed] a mixed but primarily nonreligious purpose”); *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) (“[A] court may invalidate a statute only if it is motivated wholly by an impermissible purpose . . .”).

IV. CONCLUSION

The ACLJ respectfully requests that this Court grant this consent motion, allow it to participate as *amicus curiae*, and accept for filing the *amicus curiae* brief submitted herewith.

Dated: March 31, 2017.

JAY ALAN SEKULOW*
Counsel of Record
STUART J. ROTH*
COLBY M. MAY*
ANDREW J. EKONOMOU**
JORDAN SEKULOW**
CRAIG L. PARSHALL*
MATTHEW R. CLARK**
BENJAMIN P. SISNEY*
AMERICAN CENTER FOR LAW
AND JUSTICE
201 Maryland Avenue, NE
Washington, DC 20002
Tel.: 202-546-8890
Fax: 202-546-9309
Email: sekulow@aclj.org

* Admitted to Fourth Circuit Bar
** Not admitted in this jurisdiction

Respectfully submitted,

/s/ Edward L. White III
EDWARD L. WHITE III*
ERIK M. ZIMMERMAN**
AMERICAN CENTER FOR LAW
AND JUSTICE
3001 Plymouth Road, Suite 203
Ann Arbor, Michigan 48105
Tel.: 734-680-8007
Fax: 734-680-8006
Email: ewhite@aclj.org

FRANCIS J. MANION*
GEOFFREY R. SURTEES**
AMERICAN CENTER FOR LAW
AND JUSTICE
6375 New Hope Road
New Hope, Kentucky 40052
Tel.: 502-549-7020
Fax: 502-549-5252
Email: fmanion@aclj.org

Counsel for amicus curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I hereby certify that the foregoing motion complies with the type-volume limitations in Fed. R. App. P. 27(d)(2)(A). According to the word count feature of Microsoft Word, the motion contains 1,196 words, excluding the exempted parts under Rule 32. The motion has been prepared in a proportionally spaced typeface using Times New Roman in 14 point size.

Dated: March 31, 2017

Respectfully submitted,

/s/ Edward L. White III

EDWARD L. WHITE III*

AMERICAN CENTER FOR LAW

AND JUSTICE

3001 Plymouth Road, Suite 203

Ann Arbor, Michigan 48105

Telephone: (734) 680-8007

Facsimile: (734) 680-8006

Email: ewhite@aclj.org

* Admitted to Fourth Circuit Bar

Counsel for amicus curiae

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2017, I caused true and correct copies of the foregoing consent motion and attached, proposed *amicus curiae* brief to be electronically filed with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit using CM/ECF, which will send notification of such filings to counsel of record.

Respectfully submitted,

/s/ Edward L. White III

EDWARD L. WHITE III*

AMERICAN CENTER FOR LAW

AND JUSTICE

3001 Plymouth Road, Suite 203

Ann Arbor, Michigan 48105

Telephone: (734) 680-8007

Facsimile: (734) 680-8006

Email: ewhite@aclj.org

* Admitted to Fourth Circuit Bar

Counsel for amicus curiae