

Nos. 17-2231(L), 17-2232, 17-2233, 17-2240 (Consolidated)

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

No. 17-2231(L)
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. 8:17-cv-361-TDC, Hon. Theodore D. Chuang
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**CONSENT MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*,
THE AMERICAN CENTER FOR LAW AND JUSTICE, SUPPORTING
DEFENDANTS-APPELLANTS ON THE MERITS AND URGING REVERSAL**

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NO. 17-2232
IRANIAN ALLIANCES ACROSS BORDERS, *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. 8:17-cv-2921-TDC, Hon. Theodore D. Chuang

NO. 17-2233
EBLAL ZAKZOK, *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. 1:17-cv-2969-TDC, Hon. Theodore D. Chuang

NO. 17-2240
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Plaintiffs-Appellants,

v.

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

On Appeal from Entry of Preliminary Injunction
United States District Court for the District of Maryland
Case No. 8:17-cv-361-TDC, Hon. Theodore D. Chuang

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 the position on the merits of the Defendants-Appellants, President Donald J. Trump, *et al.*, and urging reversal of the lower court’s decision. A copy of the proposed *amicus curiae* brief has been submitted with this consent motion.

I. THE PARTIES CONSENT TO THE FILING OF THE *AMICUS CURIAE* BRIEF

Pursuant to Circuit Rule 27(a), the undersigned informed counsel for Plaintiffs-Appellees/Plaintiffs-Appellants, International Refugee Assistance Project, *et al.* (Nos. 17-2231, 17-2240), counsel for Plaintiffs-

Appellees, Iranian Alliances Across Borders, *et al.* (No. 17-2232), counsel for Plaintiffs-Appellees, Eblal Zakzok, *et al.* (No. 17-2233), and counsel for Defendants-Appellants/Defendants-Appellees, President Donald J. Trump, *et al.* (Nos. 17-2231, 17-2232, 17-2233, 17-2240), via electronic mail on October 27, 2017, of the intended filing of an *amicus curiae* brief by the ACLJ in support of Defendants-Appellants' position on the merits and urging reversal of the lower court's decision and sought their position on the filing of the brief.

Attorney Omar Jadwat, counsel for Plaintiffs-Appellees/Plaintiffs-Appellants, International Refugee Assistance Project, *et al.*, Attorney Sirine Shebaya, counsel for Plaintiffs-Appellees, Iranian Alliances Across Borders, *et al.*, Attorney Gadeir Abbas, counsel for Plaintiffs-Appellees, Eblal Zakzok, *et al.*, and Attorney Sharon Swingle, counsel for Defendants-Appellants/Defendants-Appellees, President Donald J. Trump, *et al.*, informed the undersigned that their clients consent to the filing of the ACLJ's *amicus curiae* brief.

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 curiae* briefs before the Supreme Court

of the United States, this Court, and other courts around the country in cases involving the Establishment Clause and immigration law. *See, e.g., United States v. Texas*, 136 S. Ct. 2271 (2016); *Pleasant Grove City v. Sumnum*, 555 U.S. 460 (2009); *FEC v. Wis. Right to Life*, 551 U.S. 449 (2007); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017).

The ACLJ has actively defended, through advocacy and litigation, immigration-related policies that protect American citizens. The ACLJ’s proposed *amicus curiae* brief is supported by members of the ACLJ’s Committee to Defend Our National Security from Terror, which represents more than 276,000 Americans who have stood in support of the President’s efforts to protect this nation from the entry of foreign terrorists.

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 reverse the decision below. The ACLJ respectfully submits that its participation as *amicus curiae* on the merits will aid this Court in resolving this case, and it requests that this Court grant this consent 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 timely submitted this consent motion and proposed *amicus curiae* brief on November 1, 2017, which is within the deadline set by this Court for the filing of *amicus curiae* briefs in support of Defendants-Appellants on the merits. CTA Order, Dkt. # 52. 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 attached, 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. Rather, this case involves the special context of a Presidential Proclamation, enacted pursuant to the President’s constitutional and statutory authority, concerning the admission of aliens into the United States. 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 Proclamation is valid under the governing standards.

2. Even if the Proclamation were subject to traditional Establishment Clause analysis, however, it still passes constitutional muster. It 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 Proclamation’s obvious secular purpose by focusing on miscellaneous comments made by then-candidate Trump, or by his advisors, is flawed for several reasons, including:

- 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 Proclamation, 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,” which are what matter for Establishment Clause analysis. *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 the government acts with a *predominant* purpose of advancing religion. *Lynch v. Donnelly*, 465 U.S. 668, 680-81 & n.6 (1984) (emphasis added); *McCreary Cty.*, 545 U.S. at 860; *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. . . .”). The Proclamation clearly serves a secular purpose—protecting our national security—and satisfies *Lemon*’s purpose test; and,

- Under the district court’s incorrect analysis, any hypothetical future immigration-related actions taken by the current President or officials within his Administration will be irredeemably tainted by the alleged subjective, predominantly anti-Muslim intent of the President and his surrogates, which runs

contrary to the Supreme Court’s admonition that the government’s “past actions” do not “forever taint any effort . . . to deal with the subject matter.” *McCreary Cty.*, 545 U.S. at 874; *see also ACLU v. Schundler*, 168 F.3d 92, 105 (3d Cir. 1999); *Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556, 564 (8th Cir. 2009). The district court’s starting point was a presumption that the Proclamation is unconstitutional unless the government could bear the burden of proving that it is “a ‘purposeful’ curative action that establishes that the taint of EO-2 no longer underlies the travel ban.” *Int’l Refugee Assistance Project v. Trump*, 2017 U.S. Dist. LEXIS 171879, at *125–26 (D. Md. 2017). This approach is backwards. As the Supreme Court noted in a case challenging part of the Immigration and Nationality Act, “[w]e begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained.” *INS v. Chadha*, 462 U.S. 919, 944 (1983); *see also Evans v. Stephens*, 387 F.3d 1220, 1222 (11th Cir. 2004).

IV. CONCLUSION

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

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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 1,442 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: November 1, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2017, I caused true and correct copies of the foregoing 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,

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