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IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF HAWAII

STATE OF HAWAII, *et al.*,

*Plaintiffs,*

v.

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

*Defendants.*

Civil Action

No. 1:17-cv-00050-DKW-KJM

**BRIEF OF AMICI CURIAE AMERICANS UNITED FOR  
 SEPARATION OF CHURCH AND STATE AND THE  
 SOUTHERN POVERTY LAW CENTER IN SUPPORT OF PLAINTIFFS'  
 MOTION FOR A TEMPORARY RESTRAINING ORDER**

## **CORPORATE DISCLOSURE STATEMENT**

*Amici* are nonprofit corporations. They have no parent corporations, and no publicly held corporation owns any portion of either of them.

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## INTERESTS OF THE *AMICI CURIAE*<sup>1</sup>

As detailed in the accompanying motion, *amici curiae* are nonprofit public-interest organizations committed to preserving religious freedom. Because the challenged Executive Order discriminates against Muslims based solely on their faith, and because constitutional injuries will accrue immediately if the Executive Order takes effect, *amici* have a strong interest in ensuring that a temporary restraining order is granted.

### BACKGROUND

President Trump has spent more than a year promising to ban Muslims from entering the United States. During that time, he has repeatedly disparaged and attacked an entire religion and all its adherents because he says that it is “hard to separate . . . who is who” between Muslims and terrorists. Transcripts, *Anderson Cooper 360 Degrees*, CNN (Mar. 9, 2016), <http://cnn.it/2jJmaEC>. He has insisted that, without a Muslim ban, “hundreds of thousands of refugees from the Middle East” will attempt to “take over” and radicalize “our children.”

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no party or person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief’s preparation or submission. A motion accompanies this brief.

*Donald Trump Remarks in Manchester, New Hampshire*, C-SPAN 20:05 (June 13, 2016), <http://cs.pn/2k7bHGq>. He has warned that Syrian refugees would “be a better, bigger, more horrible version than the legendary Trojan Horse.” *Id.* And when he has “talked about the Muslims,” he has explained: “we have to have a ban . . . it’s gotta be a ban.” *Presidential Candidate Donald Trump Town Hall Meeting in Londonderry, New Hampshire*, C-SPAN 28:00 (Feb. 8, 2016), <http://cs.pn/2kY4f1T>.

One week into his presidency, President Trump made good on these campaign promises by barring entry to the United States from seven predominantly Muslim countries and implementing a system to ban even more Muslims, from other countries, in the months to come. *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017). When called to task over this unconstitutional discrimination on the basis of religion, the government insisted that the Executive Order avoided illegality because it was written to target certain countries rather than expressly naming Muslims. *See, e.g.,* Anna Giaritelli, *Conway Explains Why ‘Muslim, Islam’ Not in Trump Refugee Order*, WASH. EXAMINER (Jan. 27, 2017), <http://washex.am/2nmZv2Z>. But President Trump had already explained

the point of this linguistic subterfuge: When challenged over the illegality of banning an entire religion and its adherents, then-candidate Trump responded: “So you call it territories. OK? We’re gonna do territories.” *The Republican Ticket: Trump and Pence*, CBS NEWS (July 17, 2016), <http://cbsn.ws/29NrLqj>.

As the Ninth Circuit and the U.S. District Courts for the Western District of Washington and the Eastern District of Virginia have already recognized, the artifice does not change the basic fact that the first Executive Order was the promised Muslim ban, and hence it is unconstitutional. *See Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017); *Washington v. Trump*, No. 2:17-cv-00141-JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017); *Aziz v. Trump*, No. 1:17-cv-116, 2017 WL 580855 (E.D. Va., Feb. 13, 2017).

Blocked in court, President Trump promised to continue to litigate the existing ban and to issue a new Executive Order that would supplement the first one, explaining that his next attempt would be a continuation and extension of the previous effort. *See* Ronn Blitzer, *President Trump Signs New Travel Ban Executive Order*, LAW NEWZ (Mar. 6, 2017), <http://bit.ly/2nesEhE>. The result was Executive Order No.

13,780, 82 Fed. Reg. 13,209, § 13 (Mar. 6, 2017). This replacement Executive Order continues the ban on entry to the United States of persons from six of the same seven predominantly Muslim countries, while creating special enhanced procedures for addressing persons from the seventh. *Id.* §§ 1(f), 2(c), 4.

To be sure, the replacement Executive Order purports to address some concrete failings of the original version that the courts have identified, such as the exclusion of lawful permanent residents. *Id.* § 3(b). But it does not get to the basic defect: The efforts are all designed and intended to effect President Trump’s promised ban on Muslims. Indeed, President Trump’s Senior Policy Adviser, Stephen Miller, declared that the replacement Executive Order will produce the “same basic policy outcome” as the first. Sec. Am. Compl. ¶ 74.

## ARGUMENT

“The First Amendment mandates governmental neutrality between religion and religion,” forbidding official discrimination. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *accord, e.g., McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005); *Larson v. Valente*, 456 U.S. 228, 246 (1982). In mandating neutrality, the Religion Clauses “seek to assure

the fullest possible scope of religious liberty and tolerance for all [and] . . . seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.” *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) (internal quotation marks and citation omitted).

Ignoring this clear constitutional command, the government has singled out one religious group—Muslims—for official disfavor and maltreatment. By instituting a punishing ban on Muslim immigrants, the government runs roughshod over core First Amendment protections.

Because the Executive Order violates fundamental First Amendment rights, the injuries that it inflicts are irreparable as a matter of law. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). And because the harms are imminent and extraordinary, a temporary restraining order should issue.

**A. Plaintiffs Are Likely To Succeed On The Merits Because The Replacement Executive Order Continues To Violate The Establishment Clause.**

At least three tests apply in determining whether governmental action violates the Establishment Clause. First, when the government confers a denominational preference—when it acts to favor or disfavor

one faith or denomination over others—its conduct is subject to strict scrutiny and presumptively does not stand. *Larson*, 456 U.S. at 246. Second, the action is reviewed to determine whether the government is endorsing—placing its stamp of approval on—religion or certain religious beliefs. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000). Third, the action is evaluated under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to determine, among other considerations, whether the government acted with a religious purpose and whether the effect of the government’s action is to favor or disfavor religion or a particular faith. It is customary to apply all the tests pertinent to the particular facts. *See, e.g., Modrovich v. Allegheny County*, 385 F.3d 397, 400–01 (3d Cir. 2004); *see also Hernandez v. Comm’r*, 490 U.S. 680, 695 (1989) (courts should apply *Larson* when relevant before proceeding to *Lemon*). Failure to satisfy any of these tests invalidates the challenged action. The Executive Order fails them all.

**1. The Executive Order fails the *Larson* Test.**

“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson*, 456 U.S. at 244; *accord McCreary*, 545 U.S. at 875 (“the

government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals”). Thus, when the government designates one denomination for different treatment—favorable or unfavorable—its action is subject to strict scrutiny under *Larson*. See, e.g., *Awad v. Ziriax*, 670 F.3d 1111, 1129–30 (10th Cir. 2012) (applying strict scrutiny to and invalidating state law disfavoring Islam).

a. The replacement Executive Order continues to single out six countries that are almost entirely Muslim and subjects those who were born in or come from those countries—i.e., Muslims—to harsh legal disabilities. Exec. Order 13,780 §§ 1(f), 2(c). The disfavored status is not limited to people abroad; many within the United States will be harmed. For example, citizens of any of the six targeted countries who are lawfully residing in this country on a single-entry visa will be unable to leave the country for fear of being denied reentry. And U.S. citizens with relatives in the targeted countries will be separated from their loved ones. See Sec. Am. Compl. ¶¶ 24–27.

Such straightforward religious favoritism is “suspect” and calls for “strict scrutiny in adjudging its constitutionality.” *Larson*, 456 U.S. at 246.

b. For purposes of the strict-scrutiny analysis, the government has asserted an interest in “protect[ing] its citizens from terrorist attacks, including those committed by foreign nationals.” Exec. Order 13,780 § 1(a). Preventing terrorism is a compelling interest. But the Executive Order must be “closely fitted to further the interest.” *Larson*, 456 U.S. at 248. It isn’t.

A policy of suddenly, flatly, and universally excluding Muslims without regard to whether they have any connection whatever to terrorism is not the least restrictive means to fight terrorism. People from the countries listed in the Executive Order have, collectively, killed *zero* people in terrorist attacks in the United States since 1975. Alex Nowrasteh, *Where Do Terrorists Come From? Not the Nations Named in Trump Ban*, NEWSWEEK (Jan. 31, 2017), <http://bit.ly/2kWoddX>. Not a single one of the top five countries of origin for foreign-born perpetrators of terrorism in the United States is listed in or covered by the Executive Order. *See id.* Homegrown terrorism—by non-Muslims—is a far greater

threat and causes significantly more deaths, yet the Executive Order leaves that problem entirely unaddressed. *See, e.g.,* Ellen Nakashima, *Domestic Extremists Have Killed More Americans than Jihadists Since 9/11. How the Government Is Responding*, WASH. POST (Oct. 15, 2015), <http://wapo.st/1Qh8Kft>. And the Executive Order does not cover any of the non-Muslim countries that the U.S. Department of State has identified as “Terrorist Safe Havens.” *Cf.* U.S. DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM 2015, <https://tinyurl.com/jap2fpf>. Hence, the policy’s fit with the government’s asserted interest is not merely loose; it is nonexistent. *See Aziz*, 2017 WL 580855, at \*3.

## **2. The Executive Order fails the Endorsement Test.**

The Establishment Clause forbids government to “discriminate among persons on the basis of their religious beliefs and practices” and hence “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.’” *County of Allegheny v. ACLU*, 492 U.S. 573, 590, 594 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring)). “[T]he government may not favor one religion over another” by endorsing

the one or condemning the other. *McCreary*, 545 U.S. at 875. Yet the Executive Order does exactly that.

a. The Establishment Clause is violated by “both perceived and actual endorsement of religion.” *Santa Fe*, 530 U.S. at 305. Hence the question under the Endorsement Test is “ ‘whether an objective observer . . . would perceive’ the government to have placed its stamp of approval or disapproval on religion or on a particular faith. *Id.* at 308 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring in the judgment)). This hypothetical “ ‘objective observer’ is presumed to know far more than most actual members of a given community.” *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1031 n.16 (10th Cir. 2008). Most notably, the objective observer is “presumed to be familiar with the history of the government’s actions and competent to learn what history has to show.” *McCreary*, 545 U.S. at 866. What is more, even officially repudiated past acts are not “dead and buried” but remain in the reasonable observer’s memory, affecting how the final governmental action is viewed. *Id.* at 870.

Hence, as a matter of law, the public’s view and understanding of the challenged policy here and the entire history of publicly available

information about its genesis and evolution must be considered in determining whether the replacement Executive Order is an unconstitutional religious endorsement. *See McCreary*, 545 U.S. at 866; *Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 801 (10th Cir. 2009); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 734 (M.D. Pa. 2005). If a reasonable observer considering the full history and context of the policy would perceive governmental endorsement, even if the government did not intend it, the policy cannot stand. *See McCreary*, 545 U.S. at 866.

b. Disapproval of Islam and approval of other faiths is apparent from the bare text of the Executive Order. Sections 1 and 2 single out for exclusion persons from six overwhelmingly Muslim nations: Iran (99.5% Muslim), Libya (96.6% Muslim), Somalia (99.8% Muslim), Sudan (90.7% Muslim), Syria (92.8% Muslim), and Yemen (99.1% Muslim). *See Exec. Order 13,780* §§ 1(f), 2(c); PEW RES. CTR., *THE GLOBAL RELIGIOUS LANDSCAPE* 45–50 (2012), <http://bit.ly/2k4Us8B>. Section 4 requires additional screening procedures for persons from Iraq (99.0% Muslim). PEW RES. CTR., *supra*, at 47. And Section 6 blocks entry of all refugees temporarily (*Exec. Order 13,780* § 6(a))—disproportionately affecting

Muslims because Muslims made up a plurality of all refugees resettled in the United States last year, the number of Muslim refugees having increased almost every year over the past decade. Jens Manuel Krogstad & Jynnah Radford, *Key Facts About Refugees to the U.S.*, PEW RES. CTR. (Jan. 30, 2017), <http://pewrsr.ch/2kk7ro8>. The intention to disfavor Muslims, and only Muslims, is pellucid.

c. Though these features of the Executive Order alone suffice to communicate official preference for non-Muslims, as a matter of law the objective observer knows much more.

First, both Executive Orders on immigration are rooted in then-candidate Trump's public and repeated promises of a "total and complete shutdown of Muslims entering the United States." *Donald J. Trump Statement on Preventing Muslim Immigration*, DONALD J. TRUMP FOR PRESIDENT (Dec. 7, 2015), <http://bit.ly/1jKL2eW>.

Second, candidate Trump renamed and repackaged his Muslim ban only after public outcry over its illegality, candidly explaining that because "[p]eople were so upset when [he] used the word Muslim," he would no longer "use the word Muslim" but would now be "talking territory instead of Muslim." *Meet the Press*, NBC NEWS (July 24, 2016)

<http://nbcnews.to/29TqPnp>; see also *The Republican Ticket: Trump and Pence, supra* (“[C]all it whatever you want. We’ll call it territories, OK?”).

Third, President Trump publicly described this change as not “a pull-back” but “an *expansion*” of his Muslim ban. *Meet the Press, supra* (emphasis added).

Fourth, after the election, President-elect Trump asked Rudy Giuliani (then a vice-chair of the President-elect’s transition team) how the “Muslim ban” could be implemented “legally.” Amy B. Wang, *Trump Asked for a ‘Muslim Ban,’ Giuliani Says—and Ordered a Commission to Do It ‘Legally,’* WASH. POST (Jan. 29, 2017), <http://wapo.st/2jLbEO5>.

Fifth, the President originally announced that he would issue what would become the replacement Executive Order as a supplement to its enjoined precursor, while still fighting also to resurrect the earlier effort. See Blitzer, *supra*.

Sixth, the replacement Executive Order on its face announces its purpose to continue the work of the enjoined one. Exec. Order 13,780 § 1(i).

Seventh, as noted above, the President's Senior Policy Adviser specifically announced that the replacement Executive Order would have the "same basic policy outcome" as the earlier one. Sec. Am. Compl. ¶ 74.

Eighth, the objective observer will also be aware that, notwithstanding the President's insistence that his Muslim ban is necessary to ensure national security, the first Executive Order was crafted not by national-security experts but by political advisers, who themselves have a public record of hostility toward Muslims. Evan Perez et al., *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017), <http://cnn.it/2kGdcZy>; Andrew Kaczynski, *Steve Bannon in 2010: 'Islam Is Not a Religion of Peace. Islam Is a Religion of Submission,'* CNN (Jan. 31, 2017), <http://cnn.it/2knpxSE>. Although less is yet known about who may have drafted the replacement Executive Order, the Department of Homeland Security has determined that "citizenship is an 'unreliable' threat indicator and that people from the seven [now six] countries have rarely been implicated in U.S.-based terrorism" (Matt Zapotosky, *DHS Report Casts Doubt on Need for Trump Travel Ban*, WASH. POST (Feb. 24, 2017), <http://wapo.st/2lOkpKW>), leaving not even a fig leaf of justification for the measure.

d. If all of that were not enough, the timing of the issuance of the replacement Executive Order further belies the government's attempts to describe it as anything other than a continuation of the previous unconstitutional efforts to ban Muslims.

The Western District of Washington issued a nationwide temporary restraining order on February 3. President Trump immediately began repeating his declarations from the campaign trail that immediate measures were urgently needed to prevent imminent threats of terrorist acts. *See, e.g.,* Darlene Superville, *Trump Lashes Out at Federal Judge Over Ruling on Travel Ban*, ST. LOUIS POST-DISPATCH (Feb. 4, 2017), <http://bit.ly/2n7zuso>. After several promised dates for a new or supplemental executive order came and went, an administration official stated that the President would issue the supplemental executive order on March 1—the day after the President's first address to a joint session of Congress. Phil McCausland & Hallie Jackson, *Donald Trump Expected to Sign New Immigration Order: A Timeline*, NBC NEWS (Mar. 6, 2017), <https://tinyurl.com/hk4zn7m>.

But then after delivering that speech late on the evening of February 28, the President “delayed plans to sign a reworked travel ban

in the wake of positive reaction to his first address to Congress.” See Laura Jarrett et al., *Trump Delays New Travel Ban After Well-Reviewed Speech*, CNN (Mar. 1, 2017), <http://tinyurl.com/zc9kwcg>. The administration described the resulting delay (of nearly a week, as it turned out) as intended to let the replacement Executive Order “have its own ‘moment’”—in other words, not disrupt the news cycle and detract from the favorable press coverage that the President’s speech was receiving. *Id.*

If there really were a grave and imminent threat of terrorist attacks that warranted an immediate and decisive ban on immigration, as the President and his advisers have been insisting, it is hard to understand how prolonging the favorable press coverage for a speech could so readily trump the security of the nation. Hence, the reasonable, objective observer cannot help but question the genuineness of the stated dire need for the action here. The inevitable conclusion is that the President was driven instead by the desire to make good on campaign promises to ban Muslims—without regard to whether the purported threat of terrorism is genuine.

e. In these and numerous other respects, the acts and public statements by President Trump, his advisers and surrogates, and the members of his administration who developed the Executive Orders, as well as the broader “social context” in which the Executive Orders were issued (*Kitzmiller*, 400 F. Supp. 2d at 734), all underscore to the reasonable observer that the government is continuing to pursue the President’s promised Muslim ban. An objective observer would notice “a purposeful change of *words* . . . effected without any corresponding change in *content*.” *Id.* at 721 (emphasis in original); *cf.* Sec. Am. Compl. ¶ 74 (quoting Stephen Miller). Thus, the objective observer cannot help but perceive a strong message of governmental condemnation of Islam and an accompanying message of official preference for other faiths. Straightforwardly, the objective observer would thus conclude that the Executive Order treats Muslims as “outsiders, not full members of the political community,” and persons of other faiths as “insiders, favored members of the political community.” *Santa Fe*, 530 U.S. at 309–10 (quoting *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring)).

f. It is of no moment that the six countries targeted in the replacement Executive Order (and the seven targeted in the first

attempt) have previously been subjected to heightened immigration measures. For the objective observer, “purpose matters.” *McCreary*, 545 U.S. at 866 n.14. Thus, “the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage.” *Id.* “Just as Holmes’s dog could tell the difference between being kicked and being stumbled over, it will matter to objective observers whether [an Executive Order] follows on the heels of [statements] motivated by sectarianism, or whether it lacks a history demonstrating that purpose.” *Id.*

g. Simply put, the government cannot wash away the President’s statements and the other publicly available information about the history of the Executive Order by insisting that this most recent iteration “was not motivated by animus toward any religion.” Exec. Order 13,780 § 1(b)(iv). The Endorsement Test *requires* that past information be considered, as an objective test of how the objective observer in the public would view the challenged action. And as Judge Brinkema of the U.S. District Court for the Eastern District of Virginia observed in preliminarily enjoining the first version of the Executive Order, “a person is not made brand new simply by taking the oath of office.” *Aziz*, 2017 WL

580855, at \*8. As a matter of law, what candidate Trump and President-elect Trump promised illuminates what President Trump has now done.

Moreover, the Executive Orders are not “the same government action” (*McCreary*, 545 U.S. at 866 n.14) as those that previously identified the countries as areas of concern. The Executive Order uniformly bans all immigrants and visitors from the targeted countries. *Cf. Exodus Refugee Immigration, Inc. v. Pence*, 838 F.3d 902, 904–05 (7th Cir. 2016) (holding that excluding all Syrian refugees as dangerous *per se* is unlawful discrimination). It sends the strong message that all Muslims bear collective responsibility and are under collective suspicion for what some people—from entirely different countries—have done, supposedly in the name of Islam. “[T]o infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights.” *Korematsu v. United States*, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting). Collective maltreatment on the basis of faith sends the strongest possible message that a religion is disfavored—evoking some of the most sordid episodes in American history. *See Hassan v. City of New York*, 804 F.3d

277, 309 (3d Cir. 2015) (“We have been down similar roads before. Jewish-Americans during the Red Scare, African-Americans during the Civil Rights Movement, and Japanese-Americans during World War II are examples that readily spring to mind.”).

Simply put, the Executive Order communicates loudly and clearly that Muslims are a disfavored caste. That is not a message that the government can or should convey. “When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual’s decision about whether and how to worship.” *McCreary*, 545 U.S. at 883 (O’Connor, J., concurring). The violation of the Establishment Clause here is forthright and flagrant.

### **3. The Executive Order fails the *Lemon* Test.**

For similar reasons, the Executive Order also fails the *Lemon* Test, under which governmental action must have a preeminently secular purpose (*McCreary*, 545 U.S. at 864) and must have a “principal or primary effect . . . that neither advances nor inhibits religion” (*Lemon*, 403 U.S. at 612)). Failure to satisfy either requirement constitutes an Establishment Clause violation. *See id.* at 612–13.

a. The secular-purpose requirement is violated if the “government’s actual purpose is to endorse or disapprove of religion.” *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (quoting *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring)). It is not enough for the government merely to articulate a secular purpose: “the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.” *McCreary*, 545 U.S. at 864. As with the Endorsement Test, “[t]he eyes that look to purpose belong to an objective observer.” *Id.* at 862 (internal quotation marks omitted) (quoting *Santa Fe*, 530 U.S. at 308). And because “reasonable observers have reasonable memories,” the Court must not “turn a blind eye to the context” but must “look to the record of evidence showing the progression leading up to” the challenged action. *Id.* at 866, 868 (quoting *Santa Fe*, 530 U.S. at 315). In this case, the context includes President Trump’s and his advisers’ statements and actions both before and after his inauguration. *See Aziz*, 2017 WL 580855, at \*8.

President Trump’s clear, unambiguous statements of purpose as a candidate, as President-elect, and now as President (only a few of which are detailed above), and the rest of the substantial and very public history

leading up to the first and the replacement Executive Orders, all bespeak the purpose to disfavor Islam—a religious minority in the United States. The President and his campaign surrogates and policy advisers promised a “total and complete shutdown of Muslims entering the United States” and an immigration program that would favor Christians. *See Donald J. Trump Statement, supra*; David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees*, CBN NEWS (Jan. 27, 2017), <http://bit.ly/2kCqG8M>. Their first Executive Order delivered on that promise. *See Aziz*, 2017 WL 580855, at \*9. So does its replacement.

The incantation of ‘national security’ simply does not explain the actions actually taken, including, most recently, the administration’s decision to delay the replacement Executive Order to enjoy a honeymoon of favorable press coverage following the President’s address to Congress. Hence, the government’s proffered justification for the Executive Order must be deemed either a “sham” or “merely secondary” to an impermissible purpose (*McCreary*, 545 U.S. at 864) to disfavor, vilify, and shun Muslims.

b. The Executive Order also fails *Lemon's* principal-effect requirement by inhibiting Islam and advancing other faiths for the reasons explained above. *See* Section A.2, *supra*. *See generally Lemon*, 403 U.S. at 612.

The effect requirement is violated when “it would be objectively reasonable for the government action to be construed as sending primarily a message of either endorsement or disapproval of religion.” *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1398 (9th Cir. 1994). The fact that the replacement Executive Order now allows a person from a banned country to apply for a waiver does not purge the government’s action of its improper effects. *See* Exec. Order 13,780 § 3(c). The Executive Order still directs U.S. customs and immigration officials to subject persons from overwhelmingly Muslim countries to special, more onerous procedures in seeking permission to enter the United States. Having to seek a special waiver from the otherwise strict rule of exclusion, far from being a boon to these individuals, is just another special burden on Muslims that others do not face.

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Rather than undertake a careful examination of existing federal immigration policy to determine what may be needed to ensure national security, President Trump did what he has been promising for over a year: He banned Muslims. Because the Executive Order is grounded in religious animus, strict scrutiny cannot be satisfied, and the government's constitutionally and morally indefensible policy cannot stand.

**B. The Balance Of Harms And The Public Interest Favor A TRO.**

A TRO is appropriate to protect against imminent and unconstitutional official discrimination against Muslims. *Amici* agree that if the Executive Order goes into effect, Plaintiffs will suffer irreparable injuries for which there would be no adequate remedy. Mem. Supp. Pls.' Mot. TRO 45–49.

What is more, “enforcement of an unconstitutional law is always contrary to the public interest.” *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013); accord *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). And because the Executive Order violates First Amendment rights, the injuries that it inflicts are irreparable as a matter of law.

*Washington II*, 847 F.3d at 1169; *Elrod*, 427 U.S. at 373; *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 304 (D.C. Cir. 2006) (“We . . . hold that a party alleging a violation of the Establishment Clause per se satisfies the irreparable injury requirement of the preliminary injunction calculus.”).

On the other side of the scales, in the Ninth Circuit proceedings challenging the original Executive Order the government asserted unfettered discretion to exclude an entire “class of aliens” whenever it makes the “predictive judgment[]” that the class threatens national security, and it argued that judicial review of those decisions offends the public interest (Emergency Motion at 21–22, *Washington II*, 847 F.3d 1151 (No. 17-35105)). The replacement Executive Order is, moreover, explicitly intended to avoid or circumvent judicial scrutiny. *See* Exec. Order 13,780 § 1(i). But the government has no legitimate interest, much less a compelling one, in enforcing unconstitutional policies. *See Melendres*, 695 F.3d at 1002. It has no legitimate interest in discriminating on the basis of religion. It has made no showing that the challenged measures here are genuinely geared to combatting terrorism. *Cf. Aziz*, 2017 WL 580855, at \*10. The Department of Homeland Security

has, in fact, reached the opposite conclusion. *See Zapotosky, supra.* And judicial review is an essential constitutional safeguard against governmental overreach; to say that it is counter to the public interest runs directly contrary to the basic principles on which our system of government is premised.

The harms to the plaintiffs from the Executive Order are imminent and extreme; the purported harms to the government are not legally cognizable. All factors favor the entry of a TRO.

## **CONCLUSION**

A Muslim ban by any other name is still a ban on Muslims. The replacement Executive Order is just that; no amount of rebranding can change its fundamental purpose and effect. People are prevented from entering the land of the free for no reason other than their deity and preferred holy book. The challenged Executive Order is an insult to the fundamental principles of religious freedom enshrined in our Constitution. It cannot stand—even for a day. A temporary restraining order should be granted.

Respectfully submitted,

/s/ Steven D. Strauss

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Date: March 10, 2017

## **CERTIFICATE OF SERVICE**

I certify that on March 10, 2017, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

*/s/ Steven D. Strauss*