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(See Next Page For Additional Counsel)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

STATE OF HAWAII and ISMAIL ELSHIKH, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	CASE NO. 1:17-cv-50-DKW-KJM AMERICAN CENTER FOR LAW & JUSTICE'S MEMORANDUM OF LAW SUPPORTING ITS MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

AMERICAN CENTER FOR LAW & JUSTICE'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF SUPPORTING DEFENDANTS

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The American Center for Law & Justice ("ACLJ") respectfully submits this memorandum of law supporting its motion for leave to file the attached proposed *amicus curiae* brief (Exhibit B) in support of Defendants' opposition to Plaintiffs' motion for a temporary restraining order.[1]

I. DISTRICT COURTS HAVE AUTHORITY TO ACCEPT *AMICUS CURIAE* BRIEFS.

District courts have broad discretion regarding the appointment of an *amicus curiae*. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). *Amicus* briefs are "frequently welcome" in district courts, especially when "the amicus has 'unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.'" *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (quoting *Cobell v. Norton*, 246 F.Supp.2d 59, 62 (D.D.C. 2003)). This assistance to the court is helpful "in case[s] of general public interest," and "supplements the efforts of counsel, and draws the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Labor & Indus. State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982). The case before this Court implicates issues of general public interest. The proper resolution of this case is a matter of utmost concern to the ACLJ because of its impact on the integrity of the Constitutional process and the safety of American citizens, many of

[1] No party to the case drafted any portion of the ACLJ's *amicus curiae* brief, and no one other than *amicus curiae*, its members, or its counsel paid for the preparation or submission of the brief.

whom are ACLJ members. In the past, this Court has granted non-profit organizations, similar to the ACLJ, leave to participate as *amici*. *See Fisher v. Kealoha*, 976 F. Supp. 2d 1200, 1203 (D. Hawaii 2013).

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 United States Supreme Court and numerous state and federal courts around the country in cases concerning the First Amendment and immigration law, including *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), *McConnell v. FEC*, 540 U.S. 93 (2003), and *United States v. Texas*, 136 S. Ct. 2271 (2016). The ACLJ has been active in advocacy and litigation concerning the need for protecting the Constitution, the separation of powers, and the immigration laws in place that protect American citizens from harm. The ACLJ believes it can offer this Court information or perspective that will assist it in deciding the pending issues. The ACLJ respectfully submits that its participation as *amicus curiae* will aid the Court in resolving this case.

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

The ACLJ has submitted its motion and proposed *amicus* brief within the timeframe for the filing of Defendants' opposition to Plaintiffs' motion for a

temporary restraining order. Dkt. # 60. Thus, the ACLJ asks this Court to accept its motion and brief as timely filed.

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 now before this Court. In the following respects, the attached, proposed *amicus curiae* brief will provide this Court with unique or helpful information:

1. The 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.[2] When the Supreme Court has considered constitutional challenges to

[2] *See, e.g.*, 8 U.S.C. § 1187(a)(12) (terrorist areas of concern include Syria and other countries that the Secretary of Homeland Security designates); U.S. Dep't of State, *Country Reports on Terrorism 2015*, June 2016, https://www.state.gov/documents/organization/258249.pdf, at pp. 11-12 (discussing terrorism in Somalia), pp. 165-66 (describing Syria, Libya, and Yemen as primary theaters of terrorist activities), pp. 299-302 (designating Iran, Sudan, and Syria as state sponsors of terrorism); Dep't of Homeland Security, *United States Begins Implementation of Changes to the Visa Waiver Program* (Jan. 21, 2016), https://preview.dhs.gov/news/2016/01/21/united-states-begins-implementation-changes-visa-waiver-program, and *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016),

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 standard of review.

2. Even if the EO were subjected to traditional Establishment Clause analysis, which it should not, 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, Plaintiffs' attempt to sidestep the EO's obvious secular purpose by focusing on miscellaneous

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https://preview.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program (explaining that most nationals of Visa Waiver Program countries who are also nationals of Iran, Sudan, or Syria, or who visited those countries or Libya, Somalia, or Yemen on or after March 1, 2011, are ineligible to be admitted to the U.S. under the Program); *Testimony of DHS Deputy Assistant Secretary for Counterterrorism Policy Tom Warrick*, H. Comm. on Foreign Affairs, Dec. 2, 2014, https://www.dhs.gov/news/2014/12/02/written-testimony-dhs-deputy-assistant-secretary-counterterrorism-policy-house (discussing DHS's efforts to protect the U.S. from terrorists operating out of Syria including those who may seek to attack the U.S.).

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 (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 and is not a "sham" as Plaintiffs wrongfully contend.

IV. CONCLUSION

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

Dated: March 13, 2017.

Respectfully submitted,

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[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.").

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