

Thomas Benedict
 tbenedict@goodsill.com
 (Bar No. 005018)
 GOODSILL,
 ANDERSON,
 QUINN & STIFEL
 First Hawaiian Center
 999 Bishop Street, Suite
 1600
 Honolulu, HI 96813
 Telephone:
 +1 (808) 547-5600

Robert D. Fram*
 rfram@cov.com
 COVINGTON
 & BURLING LLP
 1 Front St.
 San Francisco, CA 94111
 Telephone:
 +1 (415) 591-6000

Karun Tilak*
 ktilak@cov.com
 Michael Baker*
 mbaker@cov.com
 COVINGTON &
 BURLING LLP
 One City Center
 850 Tenth Street, NW
 Washington, D.C. 20001-
 4965
 Telephone:
 + 1 (202) 662-6000

Attorneys for Amici Curiae Interfaith Coalition
 **Appearing Pro Hac Vice*

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI‘I

STATE OF HAWAI‘I, et al.,

Plaintiffs,

v.

DONALD TRUMP, et al.,

Defendants.

)
) Case No. 1:17-cv-00050-DKW-KSC
)
) BRIEF OF AMICI CURIAE
) INTERFAITH COALITION IN
) SUPPORT OF
) PLAINTIFFS’ MOTION FOR A
) TEMPORARY RESTRAINING
) ORDER [Doc. No. 65];
) CERTIFICATE OF SERVICE
)
)
)
)
)
)
)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 7.1, corporate amici curiae state that they do not have parent corporations and that no publicly held corporation owns 10 percent or more of any stake or stock in amici curiae.

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE.....	1
INTRODUCTION	4
ARGUMENT	6
I. The Establishment Clause Forbids National Security Laws That Selectively Burden One Religion.....	6
A. The Establishment Clause Bars Even Facially Neutral Laws From Burdening One Religion and Not Another.....	6
B. The Establishment Clause Applies with Full Force in the Immigration and National Security Context	7
II. The Executive Order Selectively Burdens Muslim-Majority Countries While Exempting Comparable Christian-Majority Countries	9
A. Executive Order’s Selection Criteria and its Reliance on the Report	9
1. Requirements of Section 1(d)	9
2. Section 1(e) and the Report.....	12
B. Per the Report, Venezuela and the Philippines Satisfy the Criteria of Section 1(d)	13
1. The Application of the Section 1(d) Factors to the Report’s Allegations Regarding Venezuela.....	14
2. The Application of the Section 1(d) Factors to the Report’s Allegations Regarding the Philippines.....	15
C. Per the Report, Venezuela and the Philippines Present a Greater Section 1(d) Risk than Does Sudan	18
1. Basis for Sudan’s Inclusion	19

2.	A Comparison of the Report’s Account of the Three Nations Confirms that the Executive Order Violates the Establishment Clause	20
III.	In Light of This Selective Burden Imposed Only on Muslim-Majority Nations, the Court Should Look to the Statements of the Drafters to Determine Its Purpose.....	22
	CONCLUSION.....	24

TABLE OF AUTHORITIES

Cases

<i>Aziz v. Trump</i> , No. 1:17-cv-116, 2017 WL 580855 (E.D. Va. Feb. 13, 2017)....	9, 23
<i>Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet</i> , 512 U.S. 687 (1994).....	6, 23
<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008)	8
<i>Church of the Lukumi Babalu Aye, Inc. v. Hialeah</i> , 508 U.S. 520 (1993)	6
<i>City of Los Angeles v. Alameda Books, Inc.</i> , 535 U.S. 425 (2002)	12
<i>Everson v. Bd. of Educ.</i> , 330 U.S. 1 (1947)	6
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004)	8
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	7
<i>Larson v. Valente</i> , 456 U.S. 228 (1982)	6, 7, 23
<i>McCreary Cty. v. ACLU</i> , 545 U.S. 844 (2005).....	23
<i>Santa Fe Indep. Sch. Dist. v. Doe</i> , 530 U.S. 290 (2000)	23
<i>United States v. Robel</i> , 389 U.S. 258 (1967)	8
<i>Washington v. Trump</i> , 847 F.3d 1151 (9th Cir. 2017).....	8, 23
<i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001)	7

Statutes

8 U.S.C. § 1182(a)(7)(B)(i)(II)	10
8 U.S.C. § 1187(a)	10

Other Authorities

Protecting the Nation from Foreign Terrorist Entry Into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).....8

Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017)..... *passim*

U.S. Dep’t of State, Bureau of Counterterrorism and Countering Violent Extremism, Country Reports on Terrorism 2015 (June 2016)..... *passim*

INTEREST OF AMICI CURIAE

Amici are a coalition of individuals and organizations of diverse religions. Although they profess different faiths, they are united in the belief that religious tolerance is critical to the safety and wellbeing of our local and national community. The Executive Order, which by its plain language, structure, and intent, clearly discriminates on the basis of religion, is anathema to this core tenet that all members of our coalition share.

Amici¹ are:

- Congregation B'nai Jeshurun, a nonaffiliated Jewish synagogue in New York City.
- The Right Reverend Andrew Dietsche, the Episcopal Bishop of New York. The Episcopal Diocese of New York is made up of over 200 congregations encompassing Manhattan, the Bronx, and Staten Island in New York City, and the counties of Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster and Westchester in the state of New York.
- The Right Reverend Allen K. Shin, Bishop Suffragan of the Episcopal Diocese of New York.
- The Right Reverend Mary D. Glasspool, Bishop Assistant of the Episcopal Diocese of New York.
- Imam Abdul Malik Mujahid, a Muslim Imam actively involved in interfaith work. Imam Mujahid has served as Chairman of the Parliament of the World's Religions and on the Council of Foreign Relations'

¹ Unless stated otherwise, amici are acting on their own behalf, and not on behalf of any organizations with which they are associated. No party's counsel authored this brief in whole or in part, and no person other than the undersigned counsel contributed financially to its preparation or submission.

Independent Task Force on Civil Liberties and National Security. He is the founder of Sound Vision, an Islamic charity.

- The Sikh Coalition, which was founded on September 11, 2001 to, *inter alia*, ensure religious liberty for all people.
- The Right Reverend Lawrence C. Provenzano, the Episcopal Bishop of Long Island. The Episcopal Diocese of Long Island has ecclesiastical jurisdiction over Brooklyn, Queens, Nassau, and Suffolk Counties in the state of New York.
- The Muslim Public Affairs Council, a public service agency working for the civil rights of American Muslims, for the integration of Islam into American pluralism, and for a positive, constructive relationship between American Muslims and their representatives.
- The Right Reverend Marc Handley Andrus, the Episcopal Bishop of California. The Episcopal Diocese of California has ecclesiastical jurisdiction over San Francisco, Alameda, Contra Costa, Marin, and San Mateo Counties, along with the northernmost portion of Santa Clara County, in California.
- Rabbi Joy Levitt, the Executive Director of JCC Manhattan.
- Reverend Curtis W. Hart, Editor-in-Chief of the *Journal of Religion and Health* and Lecturer in the Departments of Medicine and Psychiatry, Division of Medical Ethics, at Weill Cornell Medical College.
- Congregation Beit Simchat Torah, a non-affiliated Jewish synagogue in New York City that serves Jews of all sexual orientations and gender identities.
- Rabbi Sharon Kleinbaum, the Senior Rabbi of the Congregation Beit Simchat Torah in New York City.
- Reverend Timothy B. Tutt, Senior Minister at the Westmoreland Congregational United Church of Christ in Bethesda, Maryland.

- Rabbi Joel Mosbacher, the Senior Rabbi of Temple Shaaray Tefila in New York City.
- Rabbi Frederick Reeves, the Rabbi of the KAM Isaiah Israel Congregation in Chicago.
- Rabbi Peretz Wolf-Prusan, the Chief Program Officer and a Senior Educator at Lehrhaus Judaicam, a non-denominational center for adult Jewish studies in San Francisco.
- Rabbi Noa Kushner, the leader of The Kitchen, a Jewish community building a spiritually alive generation and a new resonant approach to religious life in San Francisco.
- Union Theological Seminary, the oldest independent seminary in the United States. The seminary's education is rooted in Christian traditions but instructed by other faiths.
- Rabbi John Rosove, the Senior Rabbi of the Temple Israel of Hollywood in Los Angeles.
- United Methodist Women, the largest denominational faith organization for women with approximately 800,000 members whose mission is fostering spiritual growth, developing leaders and advocating for justice.
- Rabbi James Ponet, the emeritus Howard M. Holtzmann Jewish Chaplain at Yale University.
- The Hyde Park & Kenwood Interfaith Council, which, since its founding in 1911, has strived for the increased efficiency of the spiritual forces of our community along cooperative lines. The Council's members agree to respect the integrity of their different faiths and the right to practice their beliefs. The Council is dedicated to projects for the betterment of life in the community and to the struggle for human equality.
- Rabbi Michael Strassfeld, Rabbi Emeritus of the Society for the Advancement of Judaism, a Manhattan synagogue.

INTRODUCTION

Two documents establish the Establishment Clause violation in this case. The first is the March 6, 2017 Executive Order itself.² The second is a Report of the State Department—the Country Reports on Terrorism 2015 (“the Report”).³ The Executive Order expressly states that the Report largely informs the selection of the Muslim-majority nations for inclusion under the travel ban.

Taken together, these two documents compel one conclusion: that six Muslim-majority nations were selectively targeted for the travel ban. This is demonstrated by the fact that at least two Christian-majority nations, Venezuela and the Philippines, were not included in the ban. This omission is striking. Per the Report, these two countries allegedly satisfy the criteria that the Executive Order purports to apply when determining whether a country should be subject to the ban. Indeed, a close reading of the Report reveals that Venezuela and the Philippines allegedly satisfy these criteria by a greater margin than at least one of the selected Muslim-majority nations: Sudan.

² *Protecting the Nation From Foreign Terrorist Entry Into the United States*, Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

³ U.S. Dep’t of State, Bureau of Counterterrorism and Countering Violent Extremism, *Country Reports on Terrorism 2015* (June 2016). Relevant portions of the Report are attached as Exhibit A. Due to the length of the Report—407 pages—the entire Report was not included in this filing. If the court desires, counsel can file the entire Report, and it is also available at <https://www.state.gov/documents/organization/258249.pdf>.

To be clear, Amici do not vouch for the statements in the Report. Amici do not contend that the Philippines and/or Venezuela should be included in the travel ban. Nor do they purport to second guess the Administration's assessment of the security risk posed by Sudan. Amici merely contend that if the criteria set forth in the Executive Order are applied fairly, and the factual basis of the Executive Order's determination are primarily (if not entirely) those set forth in the Report, then there is no principled basis for the Executive Order's "Muslim only" list.

This analysis, by itself, establishes a violation of the Establishment Clause. At the very least, this selective burdening of one nation over another opens the door to consideration of the intent of the drafter of the travel ban. In such circumstances, the Court must carefully scrutinize the statements of President Trump to determine whether the purpose of the travel ban violates the Establishment Clause.

ARGUMENT

I. The Establishment Clause Forbids National Security Laws That Selectively Burden One Religion.

A. The Establishment Clause Bars Even Facially Neutral Laws From Burdening One Religion and Not Another.

Under the Establishment Clause, the government cannot selectively impose a burden on one religion and not others. *See Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (“Neither [a state nor the Federal Government] can pass laws which . . . prefer one religion over another.”); *cf. Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 535-36 (1993) (“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 . . .”).

The government also cannot hide behind facial neutrality and claim that a law which burdens one religion over another is constitutional simply because it does not mention religion. The court’s analysis “does not end with the text of the statute at issue.” *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 699 (1994). Rather, a facially-neutral law that imposes arbitrary distinctions not explained by that law’s alleged purpose, but is instead designed to burden or

benefit one religion over another, runs afoul of the First Amendment. *See Larson*, 456 U.S. at 255.

To root out the true nature of a facially neutral law, courts look to both the structure and history of the law. In *Larson*, for example, the Court noted that the structure of the challenged regulation appeared to create an arbitrary distinction between religions. *Id.* at 252. In particular, the law exempted certain religions that received fifty percent of their contributions from members or affiliated organizations from a requirement to register with and provide the state with annual financial reports. *Id.* at 231–32. In light of this fact, the Court looked to the legislative history, and found that the drafters had sought to specifically avoid imposing a burden on the Catholic Church. *Id.* at 254. After considering the structure and history of the “fifty percent rule,” the Court concluded that the rule served no legitimate purpose and violated the Establishment Clause. *Id.* at 255.

B. The Establishment Clause Applies with Full Force in the Immigration and National Security Context

The fact that the Executive Order regulates immigration and purports to rest on national security grounds does not alter the Establishment Clause analysis. Although the political branches have considerable authority over immigration, that power “is subject to important constitutional limitations.” *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *see also INS v. Chadha*, 462 U.S. 919, 941 (1983) (affirming courts’ authority to review whether the federal government “has chosen a

constitutionally permissible means of implementing” its power to regulate immigration). The Supreme Court has often reviewed the constitutionality of, and struck down, legal measures taken to promote national security. *See, e.g., Boumediene v. Bush*, 553 U.S. 723 (2008) (striking down law that stripped federal courts of jurisdiction to review habeas petitions of enemy combatants detained at Guantanamo Bay); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (holding that enemy combatants held at Guantanamo Bay had the right to challenge the factual basis of their detention); *United States v. Robel*, 389 U.S. 258 (1967) (striking down law making it unlawful for members of Communist organizations to be employed at defense facilities).

The courts have applied this principle in the context of the circumstances of this case. After the Trump Administration issued the first version of this Executive Order,⁴ which similarly burdened individuals from seven Muslim-majority countries (Iran, Iraq, Syria, Libya, Yemen, Sudan, and Somalia), lawsuits were filed across the country challenging its constitutionality. In addressing these suits, courts reaffirmed that it is “beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action,” *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017), and that the Executive Order “must

⁴ *Protecting the Nation from Foreign Terrorist Entry Into the United States*, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

still comply with . . . the constraints of the Constitution, including the Bill of Rights,” *Aziz v. Trump*, No. 1:17-cv-116, 2017 WL 580855, at *6 (E.D. Va. Feb. 13, 2017).

The same analysis applies to the revised Executive Order, which continues to burden individuals from six of the seven Muslim-majority countries singled out in the original Order. Regardless of the immigration and national security justifications proffered by the Administration, the Court must still adjudicate the constitutionality of the Order. In doing so, the Court is not bound by the justifications offered by the government, and should conduct a regular Establishment Clause analysis. As set forth below, this analysis reveals that the Executive Order unconstitutionally burdens Muslims.

II. The Executive Order Selectively Burdens Muslim-Majority Countries While Exempting Comparable Christian-Majority Countries

A. Executive Order’s Selection Criteria and its Reliance on the Report

1. Requirements of Section 1(d)

Section 1(d) of the Executive Order states that the six Muslim-majority countries were chosen for the travel ban “because the conditions in these countries present heightened threats.” Exec. Order No. 13,780, 82 Fed. Reg. at 13210. This constitutes an evolution in the Administration’s articulation of its approach to the travel ban.

Section 1(b)(i) of the Executive Order notes that the six countries were among the seven identified in the January 27, 2017 Executive Order 13769, which relied upon the countries designated under section 217(a)(12) of the INA, 8 U.S.C. § 1187(a)(12). Exec. Order No. 13,780, 82 Fed. Reg. at 13209. That statutory provision concerned restrictions on eligibility for the Visa Waiver Program. Pursuant to section 217(a)(12), persons who are citizens of one of these six countries (or Iraq), or who have visited these countries in the last five years, are ineligible to participate in the Visa Waiver Program. Instead, if they wish to enter the United States as nonimmigrant visitors, they must apply for a visa. *See* 8 U.S.C. § 1182(a)(7)(B)(i)(II); *id.* § 1187(a). This enactment did not entail a blanket travel ban.

Section 1(d) of the revised Executive Order seeks to cure this defect in the original Executive Order by offering a further justification of the travel ban. The new Executive Order seeks to justify the travel ban by asserting that that the six Muslim-majority selected countries “warrant additional scrutiny” when viewed in light of the following four factors:

- [1] Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones.
- [2] Any of these circumstances diminishes the foreign government’s willingness or ability to share or validate important information about individuals seeking to travel to the United States.

[3] Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States.

[4] Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents.

Exec. Order No. 13,780, 82 Fed. Reg. at 13210. As set forth in the next section, the first three of these factors are discussed in the State Department—the Country Reports on Terrorism 2015 (the “Report”), referenced in Section 1(e).

Factor One. Critical criteria for determining why a country was selected for the travel ban is that a nation be either (1) “a state sponsor of terrorism”; (2) “significantly compromised by terrorist organizations”; or have (3) “active conflict zones.” Exec. Order No. 13,780, 82 Fed. Reg. at 13210. It is worth noting that the second category encompasses “terrorist safe havens,”⁵ which are defined in the Report as including “ungoverned, under-governed, or ill-governed physical areas where terrorists are able to organize, plan, raise funds, communicate, recruit,

⁵ The Executive Order’s description of why Somalia should be included in the scope of the Executive Order is illustrative. There is no allegation that it is a state sponsor of terrorism or is an active conflict zone. Instead, it begins by saying that “[p]ortions of Somalia have been terrorist safe havens.” Exec. Order No. 13,780, 82 Fed. Reg. at 13211.

train, transit, and operate in relative security because of inadequate governance capacity, political will, or both.” Report at 307.

Factors Two and Three. The second and third factors on which the Executive Order purports to base its decision to select the six Muslim majority nations are: (a) an inability or unwillingness to share information about individuals seeking to travel to the United States, and (b) the significant presence of terrorist organizations and the risk that terrorist activity will be exported to the United States.

2. Section 1(e) and the Report

Section 1(e) explains the reasons why the six selected Muslim-majority nations qualified for a travel ban by applying the criteria of Section 1(d). Section 1(e) states that the information recited in the Executive Order was taken “in part” from the Report. Exec. Order No. 13,780, 82 Fed. Reg. at 13210. No other document is cited. Indeed, much of Section 1(e)’s descriptions of the selected Muslim-majority nations are identical to those in the Report.

On these facts, the Report is an appropriate and indeed critical reference with which to construe the meaning and operation of the Order itself. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (both the majority and dissent closely scrutinized whether a study, mentioned in a city ordinance as

justification for the ordinance, actually supported the purported reason for the regulation).

B. Per the Report, Venezuela and the Philippines Satisfy the Criteria of Section 1(d)

Careful analysis of the Report demonstrates that the Administration has not consistently applied the criteria set forth in Section 1(d). Specifically, a review of the representations set forth in the Report demonstrates that at least two Christian-majority nations—Venezuela and the Philippines—allegedly satisfy the three operative factors set forth in Section 1(d), but were not burdened with the travel ban.

As noted above, Amici take no position on whether or not these two nations should be subject to a travel ban or whether the criteria stated in the Executive Order regarding the selected countries are the right criteria (or not). Nor do Amici vouch for the representations made in the Report. Rather, the analysis of Venezuela and the Philippines set forth below simply demonstrates that the Administration has taken an internally-inconsistent approach to selecting nations for the travel ban. It is an approach that selectively favors Christian-majority countries over Muslim-majority countries. It renders the Executive Order fatally defective under the Establishment Clause.

1. The Application of the Section 1(d) Factors to the Report's Allegations Regarding Venezuela

Factor One: Terrorist Safe Haven. The Report bases its determination that Venezuela is a safe haven for terrorism on purportedly “credible reports that Venezuela maintained a permissive environment that allowed for support of activities that benefited known terrorist groups.” Report at 314-15; *see also id.* at 297. Such groups are said to include the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army, and Basque Fatherland and Liberty, “as well as Hizballah supporters and sympathizers.” Report at 297.

According to the Report, the United States is said to have repeatedly sought the assistance of Venezuela in combating terrorism. For the tenth year in a row, however, Venezuela has been deemed “not cooperati[ve],” Report at 297, and has been ineligible to purchase or license any “defense articles or defense service” from anywhere within the United States under the Arms Export Control Act, 22 U.S.C. § 2781(a).

Factor Two: Unable and Unwilling to Share or Validate Important Information About Individuals Seeking to Travel to the United States. The Report states that in Venezuela, “[b]order security at ports of entry is vulnerable and susceptible of corruption,” and specifically calls attention to the “lack of government transparency.” Report at 297. According to the Report, the “government routinely did not perform biographical or biometric screenings at

ports of entry or exit,” and there was “no automated system to collect advanced Passenger Name Records on commercial flights or to cross-check flight manifests with passenger disembarkation data.” Report at 297. Moreover, as noted above, the Report states that Venezuela has (for the last ten years) been “not cooperat[ive]” with U.S. anti-terrorism efforts. Report at 297.

Factor Three: Significant Presence of Terrorist Organizations and Risk of Terrorists Travelling to the United States. The Report states that Venezuela provides a fertile environment for terrorist organizations such as FARC, the National Liberation Army, and Basque Fatherland and Liberty, “as well as Hizballah supporters and sympathizers.” Report at 297, 314-15. Reporting such conditions about a country so close to the United States suggests that the State Department believes that there is a serious concern that “conditions will be exploited to enable terrorist operatives or sympathizers to travel [from Venezuela] to the United States.” Cf. Exec. Order No. 13,780, 82 Fed. Reg. at 13210.

2. The Application of the Section 1(d) Factors to the Report’s Allegations Regarding the Philippines

Factor One: Terrorist Safe Haven. According to the Report, the Filipino government receives substantial assistance from several American agencies, and it closely cooperates with both the United States government and international organizations to combat terrorism. Report at 80–84. Nonetheless, the country’s composition of over 7,100 islands “makes it difficult for the central government to

maintain a presence in all areas.” Report at 309. Thus, according to the Report, several militant groups, including Abu Sayyaf Group (ASG), Jemaah Islamiya, Bangsamoro Islamic Freedom Fighters (BIFF), the Ansarul Khilafah Philippines (AKP), and the New People’s Army, are able to operate out of “base locations” in the Southern Philippines. Report at 78–79, 309.

The Report also focuses on the Sulu/Sulawesi Seas Littoral, an island/maritime region that straddles Indonesia, Malaysia, and the Philippines, and is said to be the home to many of the identified terrorist groups. Report at 308. Per the Report, “the expanse remain[s] difficult to control,” and any surveillance is “partial at best,” as historic smuggling and piracy “provide[] an effective cover for terrorist activities, including the movement of personnel, equipment, and funds.” Report at 308. The Report refers to this region as “an area of concern for WMD proliferation and transit” due in part to “[w]eak strategic trade controls, legal and regulatory frameworks, [and] inadequate maritime law enforcement and security capabilities.” Report at 308.

Factor Two: Unable to Share or Validate Important Information About Individuals Seeking to Travel to the United State. The Report states that the government of the Philippines has made progress in improving its border security, and collaborates closely with the United States and regional groups in doing so. Report at 80–84. Nonetheless, despite this willingness to collaborate with the

United States, per the Report, the government is unable to monitor “the movement of personnel, equipment, and funds.” Report at 308.

According to the Report, this inability to verify this information is due in part to difficulties in international cooperation and poor surveillance capabilities in the Sulu/Sulawesi Seas Littoral. Report at 308. It is also due to the country’s geographic composition, which “makes it difficult for the central government to maintain a presence in all areas.” Report at 309. At the time the Report was published, “violent opposition” and a “continued heavy military and police presence” allegedly remained in the southern islands. Report at 78. Moreover, the Report also notes that law enforcement and counterterrorism agencies lack necessary equipment, have a “mixed record of accountability, are “under-resourced and understaffed,” and suffer from “widespread official corruption.” Report at 80, 82.

Factor Three: Significant Presence of Terrorist Organizations and Risk of Terrorists Travelling to the United States. The Report states that “ISIL was attempting to recruit Filipinos,” and that some of the Filipino-based groups including ASG, AKP, and BIFF, “have publicly pledged allegiance to ISIL.” Report at 79. According to the Report, in 2015, these groups “displayed ISIL-affiliated images and conducted some of ISIL’s most reprehensible practices—including the beheading of hostages.” Report at 79. The Report also states that in

2015, terrorist groups in the Southern Philippines engaged in kidnappings of both locals and foreigners, roadside bombings, and the seizing private vessels and Coast Guard ships. Report at 79-80.

The Report goes further to state that these groups export terrorist activity. According to the Report, these Filipino-based groups were responsible for high-profile terrorist attacks, including several outside of the Philippines. These include:

- The 2002 Bali bombings which killed more than 200, including 7 U.S. citizens;
- The October 2002 bombing near a military base that killed an American soldier;
- The August 2003 bombing of the J.W. Marriott Hotel in Jakarta;
- The September 2004 bombing outside the Australian Embassy in Jakarta;
- The October 2005 suicide bombing in Bali that killed 26; and,
- The July 2014 firing upon civilians celebrating the end of Ramadan with assault rifles that left 21 individuals dead.

Report at 352, 380.

C. Per the Report, Venezuela and the Philippines Present a Greater Section 1(d) Risk than Does Sudan

Thus, if the allegations of the Report are to be credited, both Venezuela and the Philippine satisfy the three operative factors of Section 1(d) of the Executive Order. They were nonetheless exempted from the travel ban. This exclusion occurred even though the Report—the only source cited as support for the

inclusion of the six Muslim-majority countries—sets forth allegations that suggest that Venezuela and the Philippines are greater threats to the national security of the United States than is Sudan.

By including Sudan and excluding Venezuela and the Philippines (two Christian-majority nations), the Administration’s policy is internally and fatally inconsistent.⁶ This inconsistency demonstrates that a country’s predominant religion is the real basis for its inclusion in the travel ban.

1. Basis for Sudan’s Inclusion

Section 1(e)(iv) of the Executive Order, relying on information from the Report, is the paragraph used to justify Sudan’s inclusion in the travel ban:

Sudan has been designated as a state sponsor of terrorism since 1993 because of its support for international terrorist groups, including Hizballah and Hamas. Historically, Sudan provided safe havens for al-Qa’ida and other terrorist groups to meet and train. Although Sudan’s support to al-Qa’ida has ceased and it provides some cooperation with the United States’ counterterrorism efforts, elements of core al-Qa’ida and ISIS-linked terrorist groups remain active in the country.

Exec. Order No. 13,780, 82 Fed. Reg. at 13211. The Report provides only slightly more detail than this paragraph, and significantly less detail than the information provided for Venezuela and the Philippines. *See* Report at 301.

⁶ As noted above, Amici take no position on the Administration’s assessment of the national security risk posed by Sudan.

2. A Comparison of the Report's Account of the Three Nations Confirms that the Executive Order Violates the Establishment Clause

a) Factor 1: State Sponsors of Terrorism/Safe Havens

Per the Report, all three countries satisfy the first criteria, if one accepts the statements of the Executive Order and the Report. A close reading of those materials, however, reveals a significant distinction. Sudan is designated as a state sponsor of terrorism, but such designation is based on historical facts. It was designated as a state sponsor of terrorism in 1993, when it “served as a meeting place, safe haven, and training hub for international terrorist groups.” Report at 301. Per the Executive Order and the Report, Sudan has changed its posture significantly since that time. Report at 301 (“Sudan’s support to al-Qa’ida has ceased and it provides some cooperation with the United States’ counterterrorism efforts.”); *id.* (noting that “the use of Sudan by Palestinian designated terrorist groups appears to have declined”); Exec. Order No. 13,780, 82 Fed. Reg. at 13211 (“Sudan’s support to al-Qa’ida has ceased.”).

By contrast, both Venezuela’s and the Southern Philippines’ status as terrorist safe havens are, per the Report, based on *current* facts. The Report noted that Venezuela “maintained a permissive environment that allowed for support of activities benefiting known terrorist groups” in 2015. Report at 297. Similarly, the Report detailed how the Philippines has been unsuccessfully attempting to

eradicate terrorist safe havens in the southern Islands in 2015. Report at 80–84, 308–09.

Put simply, if Sudan satisfies the first Section 1(d) factor, then—in the view of the Report—Venezuela and the Philippines do as well.

b) Factor 2: Ability and Will to Share and Validate Information

While Venezuela has been unwilling to cooperate with the United States in combatting terrorism, and the Filipino government has been unable to validate important information, “[t]he United States and Sudan worked cooperatively in countering the threat posed by al-Qa’ida and ISIL in 2015, which included their use of transit and facilitation routes within the country.” Report at 301.

Sudan is also reported to be a member of the Partnership for Regional East Africa Counterterrorism (PRACT), a United States-funded program “designed to build counterterrorism capacity and cooperation of military, law enforcement, and civilian actors across East Africa to combat terrorism.” Report at 13. This stands in stark contrast to Venezuela’s reported lack of cooperation for ten consecutive years, Report at 297, and the Filipino government’s apparent inability to establish domain over the southern islands, Report at 308–09.

Again, if Sudan satisfies the second Section 1(d) factor, then (in the view of the Report) the Philippines and Venezuela clearly do so as well.

c) Factor 3: Risk That Terrorists Will Travel to the United States

While terrorist organizations continue to operate in Sudan, their presence is alleged by the Report to be greater in the Philippines. The Report provides a one-sentence description of terrorism in Sudan: “elements of al-Qa’ida and ISIL-linked terrorist groups remained active in Sudan in 2015.”⁷ Report at 301. The only other recent reference to terrorist activity is an attempted Hamas arms shipment in 2014. Report at 301.

Once again, when compared to the Report’s description of kidnappings, roadside bombings, and the seizing of private and Coast Guard Ships in the Philippines, *see* Report at 79–80, or its description of Venezuela’s “permissive environment” for “known terrorist groups,” Report at 297, the point is quite simple: if Sudan satisfies Factor Three according to the information in the Report, the two Christian-majority nations clearly do so as well.

III. In Light of This Selective Burden Imposed Only on Muslim-Majority Nations, the Court Should Look to the Statements of the Drafters to Determine Its Purpose.

When read in light of the Report on which it relies, it is apparent that the Executive Order selectively disfavors Muslim-majority countries as compared to similarly-situated non-Muslim countries. The Executive Order’s “express design”

⁷ As with Sudan, the Report did not list any instances of specific terrorist activity that took place in Venezuela. *See* Report at 297–98, 314–15.

is “to burden or favor selected religious denominations.” *Larson*, 456 U.S. at 255. Accordingly, the Executive Order is in clear violation of the Establishment Clause.

The Administration denies that this is the purpose of the Executive Order. While “the government’s characterization is . . . entitled to some deference . . . it is nonetheless the duty of the court to distinguish a sham secular purpose from a sincere one.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000); *see also McCreary Cty. v. ACLU*, 545 U.S. 844, 864 (2005). Courts determine the purpose of a law by considering its history, including statements made by its drafters. *Larson*, 456 U.S. at 254; *Grumet*, 512 U.S. at 699–70. Once the discriminatory impact of the Order has been established, the Court may look behind the Executive Order to determine whether it has a discriminatory purpose that runs afoul of the Establishment clause.

Here, the intention of at least one of the Defendants to burden a particular religion was articulated publicly. Defendant President Trump’s comments related to this Executive Order have made it clear that his intention is to discriminate against Muslims. *See, e.g., Aziz*, 2017 WL 580855, at *9 (looking to statements made during and after the election by President Trump, and the “dearth of evidence indicating a national security purpose,” and concluding that the original Executive Order was likely intended to be a “Muslim ban”); *see also Washington*, 847 F.3d at 1167–68 (finding that the States’ Establishment Clause claim raised “serious

allegations” and “significant constitutional questions” because of “evidence of numerous statements by the President about his intent to implement a ‘Muslim ban’ as well as evidence [suggesting] that the Executive Order was intended to be that ban”).

CONCLUSION

For the foregoing reasons, the Executive Order should be invalidated as violating the Establishment Clause. In the alternative, the Court should consider the extrinsic statements of the President regarding the purpose of the Order to evaluate its constitutionality.

Dated: Honolulu, Hawai'i, March 14, 2017.

/s/ Thomas Benedict

THOMAS BENEDICT

ROBERT D. FRAM (pro hac vice)

KARUN TILAK (pro hac vice)

MICHAEL BAKER (pro hac vice)

*Attorneys for Amici Curiae Interfaith
Coalition*

CONGREGATION B'NAI JESHURUN;
REVEREND CURTIS W. HART; RABBI
SHARON KLEINBAUM; RABBI JOEL
MOSBACHER; REVEREND TIMOTHY
TUTT; RABBI JOY LEVITT; THE SIKH
COALITION; THE RIGHT REVEREND
ANDREW DIETSCH, EPISCOPAL
BISHOP OF NEW YORK; THE RIGHT
REVEREND ALLEN K. SHIN, BISHOP
SUFFRAGAN OF THE EPISCOPAL; THE
RIGHT REVEREND MARY D.
GLASSPOOL, BISHOP ASSISTANT OF
THE EPISCOPAL DIOCESE OF NEW
YORK; IMAM ABDUL MALIK MUJAHID;
THE RIGHT REVEREND LAWRENCE C.
PROVENZANO, EPISCOPAL BISHOP OF
LONG ISLAND; THE MUSLIM PUBLIC
AFFAIRS COUNCIL; THE RIGHT
REVEREND MARC HANDLEY ANDRUS,
EPISCOPAL BISHOP OF CALIFORNIA;
CONGREGATION BEIT SIMCHAT
TORAH ; RABBI FREDERICK REEVES;
RABBI PERETZ WOLF-PRUSAN; RABBI
NOA KUSHNER; UNION THEOLOGICAL
SEMINARY; RABBI JOHN ROSOVE;
UNITED METHODIST WOMEN; RABBI
JAMES PONET; HYDE PARK &
KENWOOD INTERFAITH COUNCIL and
RABBI MICHAEL STRASSFELD

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI‘I

STATE OF HAWAI‘I, et al.,)	Case No. 1:17-cv-00050 -DKW-KSC
)	
Plaintiffs,)	CERTIFICATE OF SERVICE
)	
v.)	
)	
DONALD TRUMP, et al.,)	
)	
Defendants.)	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to all attorneys of record.

Dated: Honolulu, Hawai'i, March 14, 2017.

/s/ Thomas Benedict

THOMAS BENEDICT

ROBERT D. FRAM (pro hac vice)

KARUN TILAK (pro hac vice)

MICHAEL BAKER (pro hac vice)

*Attorneys for Amici Curiae Interfaith
Coalition*

CONGREGATION B'NAI JESHURUN;
REVEREND CURTIS W. HART; RABBI
SHARON KLEINBAUM; RABBI JOEL
MOSBACHER; REVEREND TIMOTHY
TUTT; RABBI JOY LEVITT; THE SIKH
COALITION; THE RIGHT REVEREND
ANDREW DIETSCH, EPISCOPAL
BISHOP OF NEW YORK; THE RIGHT
REVEREND ALLEN K. SHIN, BISHOP
SUFFRAGAN OF THE EPISCOPAL; THE
RIGHT REVEREND MARY D.
GLASSPOOL, BISHOP ASSISTANT OF
THE EPISCOPAL DIOCESE OF NEW
YORK; IMAM ABDUL MALIK MUJAHID;
THE RIGHT REVEREND LAWRENCE C.
PROVENZANO, EPISCOPAL BISHOP OF
LONG ISLAND; THE MUSLIM PUBLIC
AFFAIRS COUNCIL; THE RIGHT
REVEREND MARC HANDLEY ANDRUS,
EPISCOPAL BISHOP OF CALIFORNIA;
CONGREGATION BEIT SIMCHAT
TORAH ; RABBI FREDERICK REEVES;
RABBI PERETZ WOLF-PRUSAN; RABBI
NOA KUSHNER; UNION THEOLOGICAL
SEMINARY; RABBI JOHN ROSEVE;
UNITED METHODIST WOMEN; RABBI
JAMES PONET; HYDE PARK &
KENWOOD INTERFAITH COUNCIL and
RABBI MICHAEL STRASSFELD