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HONORABLE JAMES L. ROBERT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON and
STATE OF MINNESOTA,

Plaintiffs,

v.

DONALD TRUMP, in his official capacity as
President of the United States; U.S.
DEPARTMENT OF HOMELAND
SECURITY; JOHN F. KELLY, in his official
capacity as Secretary of the Department of
Homeland Security; TOM SHANNON, in his
official capacity as Acting Secretary of State;
and the UNITED STATES OF AMERICA,

Defendants.

NO. 2:17-cv-00141 JLR

BRIEF OF *AMICUS CURIAE* AMERICANS
UNITED FOR SEPARATION OF CHURCH
AND STATE IN SUPPORT OF STATE OF
WASHINGTON'S AMENDED MOTION FOR
TEMPORARY RESTRAINING ORDER

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1 **INTRODUCTION**

2 President Donald Trump has spent over a year promising to ban Muslims from entering the
 3 country. *See, e.g.*, First Am. Compl. ¶¶ 42–61. During that time, he has repeatedly disparaged and
 4 attacked an entire religion because he regards it as “hard to separate . . . who is who” between
 5 Muslims and terrorists. Transcripts, *Anderson Cooper 360 Degrees*, CNN (Mar. 9, 2016),
 6 <http://cnn.it/2jJmaEC>. He insisted, for example, that “hundreds of thousands of refugees from the
 7 Middle East” would attempt to “take over” and radicalize “our children.” *Donald Trump Remarks*
 8 *in Manchester, New Hampshire*, C-SPAN 20:05 (June 13, 2016), <http://cs.pn/2k7bHGq>. He argued
 9 that Syrian refugees would “be a better, bigger, more horrible version than the legendary Trojan
 10 Horse.” *Id.* And when he “talked about the Muslims,” he explained his position clearly: “we have
 11 to have a ban . . . it’s gotta be a ban.” *Presidential Candidate Donald Trump Town Hall Meeting in*
Londonderry, New Hampshire, C-SPAN 28:16 (Feb. 8, 2016), <http://cs.pn/2kY4f1T>.

12 Now, in the face of the clear constitutional and statutory prohibitions against official
 13 discrimination on the basis of religion, President Trump insists that Executive Order 13,769 is a
 14 security measure aimed merely at specific countries and *not* at a specific religion. But he
 15 telegraphed this very strategy as a candidate: When asked about the constitutionality of banning an
 16 entire religion, then-candidate Trump responded “[s]o you call it territories. OK? We’re gonna do
 17 territories.” 60 Minutes, *The Republican Ticket: Trump and Pence*, CBS NEWS (July 17, 2016),
 18 <http://cbsn.ws/29NrLqj>. But a Muslim ban by any other name is still a Muslim ban. And as such, it
 19 violates the fundamental constitutional guarantees of religious freedom. The gross deprivations, for
 20 even a day, would be unfair, unjust, un-American, and just plain cruel.

21 **ARGUMENT**

22 “[T]he First Amendment mandates governmental neutrality” with respect to religion.
 23 *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *accord, e.g., McCreary County, Ky. v. ACLU of*
 24 *Ky.*, 545 U.S. 844, 860 (2005); *Larson v. Valente*, 456 U.S. 228, 246 (1982). This principle,
 25 contained in the First Amendment’s Religion Clauses and reflected also in the Religious Freedom

1 Restoration Act, 42 U.S.C. § 2000bb-1, secures the right to religious freedom by straightforwardly
2 forbidding official discrimination on the basis of religion. Ignoring the clear constitutional
3 command, however, the government has singled out a religious group—Muslims—for official
4 disfavor and maltreatment. By instituting a wide-ranging, punishing ban on immigrants, the
5 government has run roughshod over core First Amendment protections.

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

9 **I. The Executive Order violates the Establishment Clause.**

10 Three tests apply in determining whether governmental action like the challenged Executive
11 Order violates the Establishment Clause. First, when the government confers a denominational
12 preference (i.e., when it acts to favor or disfavor one faith or denomination over others), the official
13 action is subject to strict scrutiny and presumptively does not stand. *Larson*, 456 U.S. at 246. Second,
14 the action is reviewed to determine whether the government is endorsing religion or certain religious
15 beliefs. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000). And third, the
16 challenged conduct is evaluated under the disjunctive three-part test of *Lemon v. Kurtzman*, 403 U.S.
17 602 (1971), to determine (i) whether the government acted with a religious purpose, (ii) whether the
18 effect of the government's action is to favor or disfavor religion or a particular faith, and (iii) whether
19 the government has entangled itself with religion. It is customary to apply all the tests pertinent to
20 the particular facts. *See, e.g., Modrovich v. Allegheny County*, 385 F.3d 397, 400–01 (3d Cir. 2004);
21 *see also Hernandez v. Comm'r*, 490 U.S. 680, 695 (1989) (courts should apply *Larson* when relevant
22 before proceeding to *Lemon*). Failure to satisfy any one test—or any one part of the three-part *Lemon*
23 test—invalidates the challenged action. The Executive Order fails all three.

24 Hence, the Executive Order should be enjoined. And to prevent imminent and extraordinary
25 harm in the meantime, a temporary restraining order should issue immediately.

1 **A. The Executive Order fails the Establishment Clause’s *Larson* Test.**

2 “The clearest command of the Establishment Clause is that one religious denomination
3 cannot be officially preferred over another.” *Larson*, 456 U.S. at 244. Thus, when the government
4 designates one denomination for different treatment, whether favorable or unfavorable, its action is
5 subject to strict scrutiny and cannot stand. *Id.* at 246; *see, e.g., Awad v. Ziriax*, 670 F.3d 1111,
6 1128 (10th Cir. 2012) (applying strict scrutiny to and invalidating state action that targeted Islam
7 for disfavor). Simply put, “the government may not favor one religion over another, or religion
8 over irreligion, religious choice being the prerogative of individuals.” *McCreary*, 545 U.S. at 875.

9 The challenged Executive Order singles out Muslim-majority countries and subjects those
10 who were born in or come from those countries (principally Muslims) to harsh legal disabilities
11 and punishments, including exclusion, detention, and expulsion, based on their faith. Exec. Order
12 No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017). At the same time, it affords exemptions and more
13 favorable treatment to “religious minorit[ies]” in those countries—in other words, non-Muslims.
14 *See id.* § 5(b), (e). Legal U.S. residents from the identified countries are thereby targeted and put at
15 severe risk of detention and deportation because of their officially disfavored Muslim faith, while
16 non-Muslims are free from threats of similar harm.

17 The Executive Order thereby acts in the most personal, palpable terms to disfavor Muslims
18 in Washington and throughout the country. Many Muslims on legal visas for work or education
19 are, at best, trapped in the United States: If they leave, they will not be allowed to return. So they
20 cannot engage in the ordinary activities enjoyed by non-Muslims that may be essential to
21 educational or professional success or to maintenance of family relationships. And even under the
22 government’s litigation-inspired change to its actions (*see* First Am. Compl. Ex. 14)—which
23 apparently now exempts permanent residents from the prescribed discriminatory treatment, these
24 individuals, as well as U.S. citizens, will still be deprived of family reunifications through
25 immigration and visits from geographically distant relatives that similarly situated Americans from

1 non-Muslim countries enjoy as a matter of course. The Executive Order thus severely injures
2 Muslims by depriving them of fundamental rights and freedoms, negatively interfering with their
3 professional and personal lives, and quarantining them from the outside world.

4 Therefore, this Court should “treat the [Executive Order] as suspect and . . . apply strict
5 scrutiny in adjudging its constitutionality”: the discriminatory treatment of Muslims “must be
6 invalidated unless it is justified by a compelling governmental interest and unless it is closely fitted
7 to further that interest.” *Larson*, 456 U.S. at 246–47 (citation omitted).

8 Here, the government’s *asserted* interest is “stop[ping] attacks by foreign nationals . . .
9 admitted to the United States.” Exec. Order No. 13,769 § 1. Preventing attacks is a compelling
10 interest; but merely incanting the mantra of “terrorism” or “national security” is not enough. The
11 Executive Order must be “closely fitted to further the interest.” *Larson*, 456 U.S. at 248. It isn’t.

12 National security is not furthered by a policy of suddenly, flatly, and universally excluding
13 Muslims *whose entry the government had already approved*. Much less is it closely fitted to that
14 end. People from the seven identified countries—Iran, Iraq, Libya, Somalia, Syria, Sudan, and
15 Yemen—have, collectively, killed *zero* people in terrorist attacks in the United States since 1975.
16 Alex Nowrasteh, *Where Do Terrorists Come From? Not the Nations Named in Trump Ban*,
17 NEWSWEEK (Jan. 31, 2017), <http://bit.ly/2kWoddx>.¹ The Executive Order does not address the
18 greater terrorist threat posed by domestic extremists who are not Muslims. *See, e.g.*, Ellen
19 Nakashima, *Domestic Extremists Have Killed More Americans than Jihadists Since 9/11. How the*
20 *Government Is Responding*, WASH. POST (Oct. 15, 2015), <http://wapo.st/1Qh8Kft> (noting that since
21 2001, “white supremacists and people motivated by racial and religious hatred and anti-government
22 views” have killed more Americans than have “international terrorists”). And even accepting the
23 Trump administration’s fixation on terrorist attacks by Muslims, sixty-nine percent of the individuals
24 who have perpetrated such attacks were either natural-born or naturalized U.S. citizens. *Who Are the*

25 ¹ The top five countries of origin for foreign-born perpetrators of terrorism in the United States have been Croatia, Cuba, Egypt, Pakistan, and Saudi Arabia—not one of which is covered by the Executive Order. *See id.*

1 *Terrorists?*, NEW AMERICA, <http://bit.ly/2keSmUO> (last visited Feb. 2, 2017). As a defense against
2 terrorism, the Executive Order wildly misses the mark. The fit with the defendants’ asserted interest
3 is not merely loose; it is nonexistent. Strict scrutiny cannot be satisfied, and the Executive Order
4 cannot stand. Hence, it should not be enforced, to the great harm of so many, while the government
5 litigates to try to defend its constitutionally and morally indefensible policy.

6 **B. The Executive Order fails the Endorsement Test.**

7 Not only is government forbidden to “discriminate among persons on the basis of their
8 religious beliefs and practices,” but the Establishment Clause “prohibits government from
9 appearing to take a position on questions of religious belief or from ‘making adherence to a
10 religion relevant in any way to a person’s standing in the political community.’” *County of*
11 *Allegheny v. ACLU*, 492 U.S. 573, 590, 594 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687
12 (1984) (O’Connor, J., concurring)). “[T]he government may not favor one religion over another”
13 by endorsing the one or condemning the other. *McCreary*, 545 U.S. at 875. Yet the Executive
14 Order does exactly that.

15 The question under the Endorsement Test is “whether an objective observer . . . would
16 perceive” the government to have placed its stamp of approval or disapproval on religion or on a
17 particular faith. *Santa Fe*, 530 U.S. at 308 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985)
18 (O’Connor, J., concurring)). The hypothetical objective observer is “presumed to be familiar with
19 the history of the government’s actions and competent to learn what history has to show”
20 (*McCreary*, 545 U.S. at 866), which means that the entire history of publicly available information
21 about the genesis and evolution of the challenged policy here speaks directly to whether the
22 Executive Order is an unconstitutional religious endorsement. What is more, even officially
23 repudiated past acts are not “dead and buried” but remain in the reasonable observer’s memory,
24 affecting how the final—or in this case evolving—governmental action is viewed. *Id.* at 870. And
25 the Establishment Clause is violated by “both perceived and actual endorsement of religion”

1 (*Santa Fe*, 530 U.S. at 305), meaning that if a reasonable observer, considering the full history and
2 context of the challenged policy, would perceive governmental endorsement, even if the
3 government did not intend it, the policy cannot stand.

4 Disapproval of Islam and approval of other faiths is apparent even from the bare text of the
5 Executive Order. It singles out for exclusion persons from seven *overwhelmingly* Muslim nations:
6 Iran (99.5% Muslim), Iraq (99.0% Muslim), Libya (96.6% Muslim), Somalia (99.8% Muslim),
7 Sudan (90.7% Muslim), Syria (92.8% Muslim), and Yemen (99.1% Muslim). Exec. Order No.
8 13,769 § 3(c); PEW RES. CTR., *THE GLOBAL RELIGIOUS LANDSCAPE* 45–50 (2012),
9 <http://bit.ly/2k4Us8B>.

10 The Executive Order also blocks entry of *all* refugees temporarily and of Syrian refugees
11 indefinitely (Exec. Order No. 13,769 § 5(a), (c)), again disproportionately affecting Muslims. As
12 noted, Syria is overwhelmingly Muslim; and Muslims made up a plurality of *all* refugees resettled
13 in the United States last year, the number of Muslim refugees to the U.S. having increased almost
14 every year over the past decade. Jens Manuel Krogstad & Jynnah Radford, *Key Facts About*
15 *Refugees to the U.S.*, PEW RES. CTR. (Jan. 30, 2017), <http://pewrsr.ch/2kk7ro8>. The disfavor of
16 Islam is, once again, compounded by the Executive Order’s favoritism toward refugees who
17 belong to minority religions (*see* Exec. Order No. 13,769 § 5(b), (e)), as most refugees worldwide
18 today come from Muslim-majority countries (*Figures at a Glance*, UNHCR, <http://bit.ly/2cmTBiF>
19 (last visited Feb. 2, 2017)). The intention to target Muslims and only Muslims is pellucid.

20 Though these features of the Executive Order alone suffice to communicate official
21 preference for non-Muslims, the objective observer as a matter of law also knows much more.
22 First, the precursor to the Executive Order was then-candidate Trump’s public and repeated
23 promise of a “total and complete shutdown of Muslims entering the United States.” First Am.
24 Compl. Ex. 1. Second, candidate Trump renamed and repackaged his Muslim ban only after civil-
25 rights organizations and others decried its illegality, saying “I’m talking territory instead of

1 Muslim.” First Am. Compl. Ex. 4, at 6. Moreover, he publicly described this change not as “a pull-
2 back” but as “an *expansion*” of the ban. First Am. Compl. Ex. 4, at 1 (emphasis added). Third,
3 after the election, President-elect Trump asked Rudy Giuliani (then under consideration for the
4 post of Secretary of State) how the “Muslim ban” could be implemented “legally.” First Am.
5 Compl. Ex 17. Fourth, in an interview with the Christian Broadcasting Network on January 27,
6 2017, the very day he issued the Executive Order, President Trump declared that his administration
7 would be acting to give priority (i.e., favoritism) to Christian refugees going forward. First Am.
8 Compl. Ex. 8. And fifth, the government has exempted from the ban any person from one of those
9 countries who also holds an Israeli passport (i.e., anyone likely to be Jewish). *See Message from*
10 *U.S. Embassy Tel Aviv Consular Section*, U.S. EMBASSY IN ISRAEL, <http://bit.ly/210KWB8> (last
11 visited Feb. 2, 2017). The objective observer is aware of these public statements by President
12 Trump and others who developed and imposed the Muslim ban and the resulting Executive Order,
13 and is also aware of the broader “social context” in which the Executive Order and the policy that
14 it embodies arose. *See, e.g., Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 734 (M.D.
15 Pa. 2005). And the magnitude of the government’s disfavor toward Islam is made vivid to the
16 objective observer by the government’s initial attempt, through the Executive Order, to ban even
17 lawful permanent residents—residents whom the government had *already vetted*—before its
18 rushed disavowal of that position in the face of compelling legal challenges (First Am. Compl.
19 Exs. 13, 14), and by the government’s mass revocation of “*all* valid nonimmigrant and immigrant
20 visas,” with few exceptions, from the seven countries (First Am. Compl. Ex. 10 (emphasis added)).

21 Taking all of that into account, an objective observer could hardly help but perceive
22 governmental condemnation of Islam, as well as governmental endorsement of Christianity—most
23 notably through President Trump’s express declaration that his administration would favor
24 Christians over other refugees. The objective observer would thus receive the message that
25 Muslims are “outsiders, not full members of the political community” and that Christians are

1 “insiders, favored members of the political community.” *Santa Fe*, 530 U.S. at 309–10 (quoting
 2 *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring)). Simply put, the Executive Order
 3 communicates that Muslims of all different legal statuses are a disfavored caste. That is not a
 4 message that the government can or should convey: “When the government associates one set of
 5 religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the
 6 individual’s decision about whether and how to worship.” *McCreary*, 545 U.S. at 883 (O’Connor,
 7 J., concurring). The violation of the Establishment Clause here is forthright and flagrant.

8 **C. The Executive Order fails all three requirements of the *Lemon* Test.**

9 The Executive Order also violates the *Lemon* Test, under which governmental action must
 10 (1) have a preeminently secular purpose (*McCreary*, 545 U.S. at 864), (2) have a “principal or
 11 primary effect . . . that neither advances nor inhibits religion” (*Lemon*, 403 U.S. at 612), and
 12 (3) “must not foster ‘an excessive government entanglement with religion’” (*id.* at 613 (quoting
 13 *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970))). Failure to satisfy any part constitutes an
 14 Establishment Clause violation. *See id.* at 612–13. The Executive Order fails all three.

15 1. The secular-purpose requirement is violated if the “government’s actual purpose is to
 16 endorse or disapprove of religion.” *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (quoting
 17 *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring)). It is not enough merely to articulate a secular
 18 purpose; “the secular purpose required has to be genuine, not a sham, and not merely secondary to
 19 a religious objective.” *McCreary*, 545 U.S. at 864. As with the Endorsement Test, “[t]he eyes that
 20 look to purpose belong to an ‘objective observer.’” *Id.* at 862 (internal quotation marks omitted)
 21 (quoting *Santa Fe*, 530 U.S. at 308). And because “reasonable observers have reasonable
 22 memories,” the court must not “turn a blind eye to the context” but must “look to the record of
 23 evidence showing the progression leading up to” the challenged action. *Id.* at 866, 868.

24 As explained above, President Trump’s clear, unambiguous statements of intent both
 25 before and after the election and inauguration, and the rest of the history leading up to the

1 Executive Order, all bespeak the purpose to disfavor Islam and favor Christianity. The President
2 and his campaign surrogates and policy advisers promised a “complete and total shutdown of
3 Muslims entering the United States” and favoritism toward Christian refugees. First Am. Compl.
4 Exs. 1, 8. They have now acted to deliver on those promises. *See* Exec. Order No. 13,769 §§ 3, 5;
5 *see also* First Am. Compl. Ex. 17. The invocation of terrorist threats simply does not explain the
6 action actually taken. So it must be deemed either a “sham” or merely “secondary” to an
7 impermissible religious purpose (*McCreary*, 545 U.S. at 864).

8 2. The Executive Order also fails *Lemon*’s principal-effect requirement by inhibiting Islam
9 and advancing Christianity. *See Lemon*, 403 U.S. at 612. Again, that is partly for the reasons
10 already stated: the effect requirement is violated whenever “it would be objectively reasonable for
11 the government action to be construed as sending primarily a message of either endorsement or
12 disapproval of religion.” *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1398 (9th Cir. 1994).

13 The Executive Order also has the impermissible effect of inhibiting Islam by demonstrably
14 targeting Muslims, singling them out for unfavorable treatment. Muslim refugees desperate to
15 escape the charnel house of Syria and reunite with family members in the State are now forced to
16 renounce or disguise their faith to qualify for the Executive Order’s exception affording preferred
17 status to “religious minorit[ies].” Exec. Order No. 13,769 § 5(e). When remaining in Syria may be
18 tantamount to a death sentence, this scenario is hardly implausible. *Cf., e.g., The Marranos*,
19 JEWISHHISTORY.ORG, <http://www.jewishhistory.org/the-marranos/> (last visited Feb. 2, 2017)
20 (describing “[t]he forced conversion of a quarter-million Jews in Spain” during the Inquisition). It
21 is difficult to imagine a policy that would more greatly inhibit the practice of one’s faith than to
22 make religious conversion a life-or-death matter.

23 3. Finally, the Establishment Clause forbids “excessive government entanglement with
24 religion.” *Lemon*, 403 U.S. at 613 (quoting *Walz*, 397 U.S. at 674). It thus prohibits government
25 from imposing or implementing religious tests or making determinations based on religious

1 doctrine. See, e.g., *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l*
2 *Presbyterian Church*, 393 U.S. 440, 450 (1969).

3 Among other suspect features, the Executive Order gives priority to certain refugee claims
4 “provided that the religion of the individual is a minority religion in the individual’s country of
5 nationality.” Exec. Order No. 13,769 § 5(b). Yet it does not define the term *minority religion*,
6 forcing individual government agents—although it is yet unclear *which* agents—to make that
7 determination themselves.

8 The Syrian example demonstrates how fraught judgments about religious-minority status
9 would be. Because Syria is overwhelmingly Muslim, those who profess a faith other than Islam are
10 undoubtedly religious minorities there. But that is just the beginning. Syria’s Muslim population is
11 predominantly Sunni. There is also a substantial minority Shiite population that includes
12 significant numbers of Alawites and Ismailis. *The World Factbook: Syria*, CENT. INTELLIGENCE
13 AGENCY, <http://bit.ly/JZ2o63> (last updated Jan. 12, 2017). Although Alawites are a numerical
14 minority, they hold disproportionate governmental power and count Syrian President Bashar al-
15 Assad (himself a leading cause of refugees) among their number. *Guide: Syria’s Diverse*
16 *Minorities*, BBC NEWS (Dec. 9, 2011), <http://bbc.in/2l0Zgd0>. Given the demographics and politics,
17 whether a Sunni, a non-Alawite Shiite, or an Alawite would be considered a religious minority
18 when fleeing Sunni-majority but Alawite-controlled Syria is unclear. What *is* clear is that the
19 Executive Order would require U.S. officials to make religious determinations, apparently on an *ad*
20 *hoc*, case-by-case basis, about which branch of Islam each potential refugee is most closely
21 associated with and whether that branch constitutes a religious minority—or else to make the
22 theological determination that the distinct branches of Islam are insufficiently different and
23 therefore that *no* Muslim refugee will be accepted as a religious minority.

24 If it is unconstitutional for government to decide, for example, how much of a school’s
25 expenditure is attributable to “religious activity” versus “secular education” (*Lemon*, 403 U.S. at

1 620) or whether student activity constitutes “religious speech” (*Widmar v. Vincent*, 454 U.S. 263,
2 272 n.11 (1981)), it is all the more improper for government to decide whose religion is what and
3 how that relates to other denominations or sects.

4 **II. The Executive Order violates the Religious Freedom Restoration Act.**

5 The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2015), provides that
6 governmental action cannot substantially burden religious exercise unless it is the least restrictive
7 means of furthering a compelling interest—that is, unless the action survives strict scrutiny. *See*
8 *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015). Here, the Executive Order cannot meet that
9 “exceptionally demanding” test (*see id.* at 864).

10 In the first instance, Muslim residents of Washington (or other States) who hold visas and
11 are legally present in the United States cannot make a pilgrimage to Mecca—one of the five pillars
12 of Islam and a mandatory religious obligation to be fulfilled at least once in a practicing Muslim’s
13 lifetime (Diaa Hadid, *What Muslims Do on Hajj, and Why*, N.Y. TIMES (Sept. 8, 2016),
14 <http://nyti.ms/2kYGovS>). For if they leave the United States and then try to come back, they will
15 be detained and deported. Because coercion “to act contrary to [one’s] religious beliefs by the
16 threat of civil or criminal sanctions” is a substantial burden on religious exercise (*Navajo Nation v.*
17 *U.S. Forest Serv.*, 535 F.3d 1058, 1069-70 (9th Cir. 2008)), no one could seriously dispute that
18 detention and subsequent deportation meet RFRA’s threshold.

19 The Executive Order must therefore be “the least restrictive means of furthering [a]
20 compelling governmental interest” (§ 2000bb-1(b)), which, as explained (*see supra* Section I.A), it
21 is not. A blanket ban on all immigration and visitation from seven overwhelmingly Muslim nations
22 with little to no history of sending terrorists to the United States, and the revocation of visas and
23 the inevitable detention and deportation of people lawfully in the United States and accused of no
24 crime, much less terrorism, are not only far more restrictive than necessary to fight terrorism, but
25 they may not further the government’s asserted interest at all. *See* David Morgan, *Former Intel*

1 *Official: Trump Immigration Ban Makes Americans Less Safe*, CBS NEWS (Jan. 30, 2017),
2 <http://cbsn.ws/2jKLkpK>. The Executive Order is thus unlawful under RFRA.

3 What is more, RFRA was enacted “to provide greater protection for religious exercise than
4 is available under the First Amendment.” *Holt*, 135 S. Ct. at 859-60. Thus, whatever else RFRA
5 may cover, it certainly encompasses violations of the Free Exercise Clause’s core mandate that the
6 government must not single out a particular group for punishment based on religious exercise.

7 Indeed, because “[t]he Free Exercise Clause protects against governmental hostility which
8 is masked, as well as overt,” the singling out of a religious group for punishment is suspect even if
9 done artfully and by subterfuge without making direct, explicit reference to the group or its faith.
10 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). Such a
11 “religious gerrymander” presumptively violates the Free Exercise Clause—and thus also RFRA
12 (*cf. Fernandez v. Mukasey*, 520 F.3d 965, 966 n.1 (9th Cir. 2008))—unless the government can
13 demonstrate that it is the least restrictive means to serve a compelling governmental interest.
14 *Lukumi*, 508 U.S. at 534, 546. As already explained, it cannot.

15 * * *

16 The Executive Order is exactly what President Trump promised all along—a “Muslim
17 ban.” No amount of rebranding will change that. People from seven countries are refused entry to
18 the United States for no reason other than their deity and preferred holy book. Beyond failing
19 every applicable legal standard, the Executive Order is an insult to the fundamental principles of
20 our Constitution. It cannot stand. It should not stand even for a day. The temporary restraining
21 order should issue.

22 DATED this 2ND day of February, 2017.

AMERICANS UNITED FOR SEPARATION OF CHURCH
AND STATE

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2017, the foregoing document was electronically filed with the United States District Court CM/ECF system, which will send notification of such filing to all attorneys of record.

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