No. 17-965

IN THE
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners*,
v.
STATE OF HAWAII, ET AL., *Respondents*.

On Writ of Certiorari to the United States Courts of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation") (www.morallaw.org) is a national public-interest organization based in Montgomery, Alabama, dedicated to the strict interpretation of the Constitution as written and intended by its Framers and the right to acknowledge God in the public arena.

The Foundation believes America was founded as a constitutional republic based upon legal and moral principles set forth in the Bible. Those principles are reflected in the Establishment Clause, at issue in this case. In conformity with its mission to further a Biblical understanding of law, the Foundation desires for the Court to have an understanding of Biblical principles about immigration. In furtherance of its mission of strictly interpreting the Constitution, the Foundation also wishes to explain why the nationwide injunctions issued in these cases fail to conform with the limits of judicial power defined in Article III of the Constitution.

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[1] All parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part. No person other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

- The Establishment Clause applies less stringently in foreign affairs, and the travel ban has a secular national-security purpose.

- The travel ban is compatible with the teaching of the Bible on immigration.

- The universal injunctions issued in these cases violate Article III of the Constitution.

ARGUMENT

I. The travel ban does not violate the Establishment Clause.

Although the Ninth Circuit did not base its opinion on the Establishment Clause of the First Amendment, this Court has asked the parties to brief the Establishment Clause issue which the State of Hawaii raised in its Response as it had below. Because the defense of religious liberty is a central purpose of the Foundation for Moral Law, we will seek to assist the Court in analyzing this question.

A. The Establishment Clause has a narrower application to foreign affairs than to domestic matters.

The United States correctly asserts that constitutional challenges to immigration matters are governed by *Kleindienst v. Mandel*, 408 U.S. 753 (1972), which subjected such challenges to a low-

scrutiny rational basis test. American history supports this conclusion.

Thomas Jefferson, an ardent advocate of separation of church and state, said in his Second Inaugural Address:

> In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the General Government. I have therefore undertaken on no occasion to prescribe the religious exercise suited to them, but have left them, as the Constitution found them, under the direction and discipline of the church or state authorities acknowledged by the several religious societies.[2]

Justice Joseph Story stated that "the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State Constitutions."[3]

From these and other statements of the Framers, Professor Robert L. Cord concluded:

> [R]egarding religion, the First Amendment was intended to accomplish three purposes. First, it was intended to prevent the establishment of a national church or

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[2] Thomas Jefferson, *Second Inaugural Address* (1805), http://avalon.law.yale.edu/19th_century/jefinau2.asp.

[3] Joseph Story, *Commentaries on the Constitution* § 1879 (1833).

> religion, or the giving of any religious sect or denomination a preferred status. Second, it was designed to safeguard the right of freedom of conscience in religious beliefs against invasion solely by the national Government. Third, it was so constructed in order to allow the States, unimpeded, to deal with religious establishments and aid to religious institutions as they saw fit.[4]

This third purpose of the religion clauses of the First Amendment—preventing federal interference with the States in their dealing with religion—clearly does not apply to the Federal Government in questions of foreign affairs such as immigration. Consequently, early Presidents such as Jefferson interacted with religion in foreign affairs in ways that they would not have done in domestic matters.

For example:

- The Preamble to the Northwest Ordinance of 1787 states: "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Because the Northwest Ordinance applied to territories that were not yet states, it was not seen as conflicting with the later-adopted First Amendment.

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[4] Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 15 (Baker Book House 1988) (1982).

- Another Act of Congress in 1787 reserved special lands "for the sole use of Christian Indians" and reserved lands for the Moravian Brethren "for civilizing the Indians and promoting Christianity."[5] This act was renewed in 1796 as "An Act regulating the grants of land appropriated for Military services and for the Society of the United Brethren for propagating the Gospel among the Heathen."[6]

- In 1803 Congress ratified a treaty proposed by the Jefferson Administration with the Kaskaskia Indians that provided, among other things, for a federal stipend of $100 annually for seven years for the support of a Catholic priest to minister to the Kaskaskia Indians. Similar treaties were made with the Wyandotte Indians in 1806 and with the Cherokees in 1807.[7]

These examples indicate that Jefferson and his contemporaries understood the Establishment Clause to restrict them to a lesser degree in foreign affairs than in domestic matters.

B. Proclamation 9645 clearly passes the "*Lemon* test."

Although the Foundation questions whether the tripartite test of *Lemon v. Kurtzman,* 403 U.S. 602

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[5] *Id.* at 41.
[6] *Id.*
[7] *Id.* at 38-39.

(1971), is an appropriate framework for analysis of this case[8], the Proclamation, as explained below, clearly satisfies all three prongs of that test.

1. Secular Purpose

Hawaii has focused primarily on unofficial campaign statements by the President as to what he wants in an immigration policy as evidence that Proclamation 9645 lacks a secular purpose. But the law makes a clear distinction between motive and purpose. A motive is what impels a person to take action. A purpose is what the person intends to achieve by the action. *Black's Law Dictionary* (4th ed. 1968) defines motive as the "[c]ause or reason that moves the will and induces action," and adds:

> In the popular mind intent and "motive" are sometimes confused, but in law they are clearly distinguished. "Motive" is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. "Motive" is that which incites or stimulates a person to do an act. *People v. Weiss*, 252 App. Div. 463, 300 N.Y.S. 249, 255.

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[8] A more appropriate framework approach is the "historical precedent" test of *Marsh v. Chambers,* 463 U.S. 783 (1983), in which this Court held that uninterrupted practices which predate the First Amendment, such as legislative chaplains, are sanctioned and approved by the First Amendment. The "endorsement test" of *Lynch v. Donnelly*, 465 U.S. 668 (1984), does not apply because there is not the slightest suggestion of endorsement of any religion.

Black's, at 1164. The President's "motive" in wanting immigration reform is only marginally relevant to the "purpose" of the immigration policy that is ultimately enacted.

"Purpose" is "[t]hat which one sets before him to accomplish; an end, intention, or aim, object, plan, project." *Id.* at 1400 (citations omitted).

This distinction is clear in the case law. An Indiana case held that "motive" is that which prompts the choice or moves the will thereby inciting or inducing action, while "purpose" is that which one sets before himself as the result to be kept in view or the object to be attained. *Kessler v. City of Indianapolis,* 157 N.E. 547, 549 (Ind. 1927). The Missouri Supreme Court held that in determining whether condemned land has been taken for a "public purpose" as required by statute, the words "purpose" and "motive" are distinguishable, and motive is that which prompts the choice or moves the will, thereby inciting or inducing action. *City of Kirkwood v. Venable,* 173 S.W.2d 8, 12 (Mo. 1943). *See similarly State ex rel. City of Creve Coeur v. Weinstein,* 329 S.W.2d 399, 405 (Mo. App. 1959) (holding that "motive" is that which prompts the choice or moves the will thereby inciting or inducing action, while "purpose is that which one sets before himself as the end, aim, effect, or result to be kept in view); *Hudson v. American Oil Co.,* 152 F. Supp. 757, 770 (E.D. Va. 1957) (same).

The United States Supreme Court has spoken to this point. In *Henderson v. Mayor of New York,* 92 U.S. 259 (1876), the Court held that the purpose of

legislation is to be determined by its "natural and reasonable effect." *Id.* at 268. Justice Harlan later elaborated this holding, stating: "In a legal sense the object or purpose of legislation is to be determined by its natural and reasonable effect, *whatever may have been the motives upon which legislators acted*." *New York v. Roberts,* 171 U.S. 658, 681 (1898) (Harlan, J., dissenting) (emphasis added).

To illustrate the difference between motive and purpose, let us go back five decades to the consideration of the Civil Rights Act of 1964 in Congress. Four congressmen decide to support the bill:

- Congressman A, a fervent Christian, supports the bill because he believes racial discrimination is contrary to the Bible and the will of God.

- Congressman B, a humanitarian, supports the bill because he believes racial discrimination is inhumane and unkind.

- Congressman C, a member of a minority race, supports the bill because he does not like being the victim of racial discrimination.

- Congressman D, a pragmatic politician, supports the bill even though he doesn't care at all about civil rights, because he knows the bill is popular in his district and voting yes will help him get reelected.

Each of these congressmen has a different *motive*:

For A, the motive is religious; for B, humanitarian; for C, personal; for D, pragmatic.

But all four have the same identical *purpose*: the passage of the Civil Rights Act of 1964 and the elimination of racial discrimination. *See Edwards v. Aguillard*, 482 U.S. 578, 636-39 (1987) (Scalia J. dissenting) (explaining the impossibility of accurately discerning the motives that underlie passage of legislation in a multi-member body),

With good reason, Chief Justice Burger used the term "purpose" rather than "motive" in crafting the *Lemon* test. When we understand the true definition of "purpose," it is clear that Proclamation 9645 has a secular purpose.

But note that the first prong of the *Lemon* test asks whether there is *a* secular purpose. It does not require that the secular purpose be the *only* purpose nor does it even require that the secular purpose be the *main* purpose. It requires only that there be a secular purpose that is legitimate and not a sham. *Lynch v. Donnelly*, 465 U.S. 668, 680 & n.6 (1984).

Nowhere can the State of Hawaii bring itself to deny that there is a genuine concern about terrorism in the United States and worldwide, that the eight nations under the Travel Ban have been the origin of many terrorists, that abundant evidence exists that these eight nations have fomented and supported terrorism, or that these eight nations have been unable to "vet" those who would emigrate to determine which of them might have criminal backgrounds or tendencies toward terrorism. Nor

does Hawaii deny that combating terrorism is a legitimate secular purpose. Each of these individually, and all of them combined, certainly constitute a secular purpose for the Travel Ban.

The purpose of the travel ban—protecting America from terrorism—is as clear a secular purpose as anyone could possibly imagine. Candidate Trump's *motives* in advocating a travel ban—whether to gain votes or any other purpose—are irrelevant.

Most of the nations under the travel ban have fomented and supported terrorism either by government action or by tolerance of terrorist groups within their borders. All have been unable to "vet" those who would emigrate to determine which might have criminal backgrounds or tendencies toward terrorism. These secular national-security purposes are valid and indisputable.

2. The principle or primary effect of the Proclamation neither advances nor inhibits religion.

The principal or primary effect of the Proclamation, like its secular purpose, is to combat terrorism and thereby protect the safety of the American people and the people of the world.

Even if Muslim terrorists are motivated by their understanding of Islam to commit terrorist acts,[9]

[9] Passages in the Koran which some have interpreted to call for *jihad* include 2:190-93, 216, 217, 246; 4:74-78, 91, 104; 9:5, 29, 36, 41, 84, 123; and 47:4-6. *See Quran in English* (Talal Itani, trans.), http://www.clearquran.com. For evidence of the

preventing terrorism does not have the principal or primary effect of inhibiting the religion of Islam. A policeman is not prohibited from arresting a mass murderer solely because the mass murderer was motivated by religious fanaticism.

The six nations directly affected by the 90-day EO-2 travel ban—Iran, Libya, Somalia, Sudan, Syria, and Yemen—had a combined population of about 166 million people.[10] Thus, only 10.4% of the global Muslim population of 1.6 billion[11] was affected by that ban. Moreover, those six countries ranged from Sudan which is 71.4% Muslim to Iran which is 99.7% Muslim.[12] Christians, Jews, and persons of other religions who lived in those countries were also affected by the ban.

Furthermore, other nations with significant Muslim populations (some with higher percentages than those nations included in the ban) were not included in the ban because they did not export terrorism or were able to "vet" their potential emigrants. Those included Afghanistan (99.8% Muslim), Algeria (98.2%), Azerbaijan (98.4%), Bahrain (81.2%), Bangladesh (90.4%), Comoros (98.3%), Djibouti (97%), Egypt (94.7%), Gambia

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violent side of Islam, *see* David Benjamin and Steven Simon, *The Age of Sacred Terror: Radical Islam's War Against America* (2005); Efraim Karsh, *Islamic Imperialism: A History* (2006).

[10] These population figures are for 2010. Pew Research Center, *Table: Muslim Population by Country* (Jan. 27, 2011), https://goo.gl/a76kVk. Other sources give varying figures.,

[11] Pew Research Center, *Muslim-Majority Countries* (Jan. 27, 2011), https://goo.gl/cRwzpt.

[12] *Muslim Population by Country*, *supra* n.10.

(95.3%), Guinea (84.2%), Indonesia (88.1%, and the largest Muslim population of any nation in the world), Iraq (98.9%), Jordan (98.8%), Kosovo (91.7%), Kuwait (86.4%), Kyrgyzstan (88.8%), Maldives (98.4%), Mali (92.4%), Mauritania (99.2%), Mayotte (98.8%), Morocco (99.9%), Niger (98.3%), Oman (87.7%), Pakistan (96.4%), Palestinian Territories (97.5%), Qatar (77.5%), Saudi Arabia (97.1%), Senegal (95.9%), Tajikistan (99%), Tunisia (99.8%), Turkey (98.6%), Turkmenistan (93.3%), United Arab Emirates (76%), Uzbekistan (96.5%), and Western Sahara (99.6).[13]

But the Proclamation differs from EO-2. It removes Sudan from the list and adds Chad, North Korea, and Venezuela.[14] This modification reduces the degree to which the ban affects Muslims. Unlike Sudan which is about 97% Muslim, Chad is only about 53.1% (some say 58%) Muslim, about 34.3% Christian, 7.3% animist, and others. North Korea is officially atheist. Although some Christians and Buddhists practice their faith underground, very few Muslims are found there. Venezuela is officially about 88% Christian (some estimates say higher), with Muslims constituting about 0.4% of the population.

What do these eight nations have in common? Certainly not the religion of Islam. Instead they all are centers in which terrorism is fomented, and they

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[13] *Id.*

[14] Although not restricting entry, the Proclamation does recommend "additional scrutiny" for nationals from Iraq. Pet. App. 127a (§ 1(g)).

do not adequately "vet" potential emigrants to the United States for terrorist propensities.

The Proclamation:

- applies to eight nations that are known to export terrorism and cannot or will not "vet" prospective emigrants,
- includes two nations that have very few Muslims,
- applies to non-Muslims living in those eight countries,
- applies at most to only 14% of the world's Muslims, and
- does not apply to at least 36 majority-Muslim nations.

These facts demonstrate that the Proclamation neither advances nor inhibits religion and is not motivated by religious "animus."

3. The Proclamation does not foster "excessive entanglement" of government with religion.

The Proclamation does not inquire into or analyze religious beliefs. It considers only whether a potential immigrant comes from a country that either harbors a substantial number of terrorists or fails to properly "vet" for terrorist propensities. Those who come from the eight nations identified in the order are denied

entry regardless of their religious beliefs. This policy hardly constitutes entanglement of any kind, much less excessive entanglement.

II. The teaching of the Bible is compatible with limiting the immigration of foreign nationals who may be seeking entry into a country to harm its people.

A number of religious organizations, including some with an emphasis on refugee resettlement, filed an amicus brief in the last travel-ban case suggesting that Biblical principles required them to support the respondents. *See* Case Nos. 16A1190 & 16A1191, *Brief for Interfaith Group of Religious and Interreligious Organizations as Amici Curiae Supporting Respondents' Oppositions to the Stay Applications* (June 12, 2017). Similarly, other religious organizations suggested two years ago in *United States v. Texas*, 136 S. Ct. 2271 (2016) that their Christian principles required them to support President Obama's executive order granting amnesty to millions of illegal immigrants. Case No. 15-674, *Amicus Curiae Brief of Faith-Based Organizations In Support of the United States and Reversal*, at 10 (quoting *Leviticus* 19:33-34).

As a Christian organization, the Foundation would like to provide a fuller perspective on what the Bible says about immigrants.

At the inception of America as a nation, the *Declaration of Independence* (1776) invoked "the laws of nature and of nature's God" as justification for

separation from Britain. *Id.*, para. 1.[15] Blackstone explained that the "law of nature" is "the will of [man's] Maker[.]" 1 William Blackstone, *Commentaries on the Laws of England* *39. Although God made the law of nature accessible through human reason, He also delivered that law through "an immediate and direct revelation." *Id.* at *42.

> The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. ...
>
> Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these.

Id. The Declaration's invocation of divine law makes Biblical analysis peculiarly relevant to American law.

A. God ordained governments to protect people from evildoers.

As John Locke recognized, mankind has the authority to establish earthly governments "according to that pact[] which God made with Noah after the deluge." John Locke, *Second Treatise of Government* § 200 (1689) (quoting King James I), *reprinted in Classics of Political and Moral*

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[15] The United States Code recognizes the Declaration of Independence as part of this nation's "organic laws." *Black's Law Dictionary* defines "organic law" as "[t]he body of laws (as in a constitution) that define and establish a government." *Black's Law Dictionary* 1274 (10th ed. 2014).

Philosophy 496 (Steven M. Cahn ed., 2002) *See also* John Eidsmoe, *Christianity and the Constitution* 61 n.20 (2008) (citing other parts of Locke's writings that reflect this proposition).

Government is a mechanism to create and enforce laws. Thus, a prime function of government is to punish lawbreakers. The first indication in Scripture of authorization for government by earthly rulers appears among the commands that God gave to Noah after the flood: "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man." *Genesis* 9:6.[16] Agreeing with Locke, theologian Wayne Grudem argues that this passage is the "first indication of God's establishment of civil government in human society," reasoning that this mandate gave man the authority to execute the greatest punishment for the greatest crime as well as lesser punishments for lesser crimes. Wayne Grudem, *Politics According to the Bible* 77 (2010).

Thus, the first command in the Bible of a governmental nature provided for the punishment of those who hurt innocent people. The New Testament likewise affirms that civil government exists to protect the innocent and punish those who do evil. *See Romans* 13:3-4 (stating that the ruler "is the minister of God, a revenger to execute wrath upon him that doeth evil"); *I Peter* 2:13-14 (noting that rulers "are sent by him for the punishment of evildoers, and for the praise of them that do well").

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[16] All Scripture quoted herein is from the King James Version unless otherwise noted.

Those two passages were cited more than any other Bible passages during America's founding era. Donald Lutz, *The Origins of American Constitutionalism* 140 (1988). Indeed, the Bible was the most cited source during America's founding period. *Id.* at 141. *Accord* Eidsmoe, *supra*, at 52; David Barton, *Original Intent: the Courts, the Constitution, and Religion* 232 (2008). Thus, the view that the primary purpose of government is to protect the innocent and punish the evildoer is not only fundamentally Biblical but also fundamentally American.

B. Although the Bible forbids oppression of foreigners, it does not require a country to have open borders.

The Bible teaches that God "hath made of one blood all nations of men for to dwell on all the face of the earth, and hath determined the times before appointed, *and the bounds of their habitation*." *Acts* 17:26 (emphasis added). The Bible teaches not only that nations are authorized to establish borders, but also that those borders have been established by God. Returning to *Genesis*, we see that the same God who ordered humanity to fill the earth (impliedly giving mankind the right to travel) also scattered mankind over the face of the earth so that they formed separate nations. *See Genesis* 9:1 (ordering mankind to "be fruitful and multiply" and "fill the earth"); 10:32 (noting that "the nations [were] divided in the earth after the flood"). Because God established both nation-states and their boundaries, it is reasonable to infer that a nation's government may exclude aliens for good cause if it is in the best interests of the

nation. *See* Grudem, *supra*, at 472 (arguing, at the end of a Biblical analysis of immigration, that it is appropriate "to *exclude* those with a criminal record, those who have communicable diseases, or those who otherwise give indication that their overall contribution would likely be negative rather than positive in terms of advancing the well-being of the nation.") .

It is certainly true that God commanded the Israelites to be kind to the strangers among them. *See, e.g.*, *Exodus* 22:21 ("Thou shalt neither vex a stranger, nor oppress him: for ye were strangers in the land of Egypt."); *Leviticus* 19:33-34 ("And if a stranger sojourn with thee in your land, ye shall not vex him. But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt: I am the LORD your God."). However, the Bible uses different Hebrew words when talking about different groups of aliens. The word used in *Exodus* 22:21 and *Leviticus* 19:33-34 for "stranger" is "*ger*," which refers to "'a person who entered Israel and followed legal procedures to obtain recognized standing as a resident alien.'" Grudem, *supra*, at 470-71 (quoting James Hoffmeier, *The Immigration Crisis: Immigrants, Aliens, and the Bible* 52 (2009)). *See also* 1 Rousas John Rushdoony, *The Institutes of Biblical Law* 530 (1973) (describing the "strangers" in these verses as "permanent residents of the community"). Other Hebrew words were used to designate foreigners who were not necessarily entitled to the same privileges. *See* Grudem, *supra*, at 471. Thus, as long as all foreigners are "dealt with in a humane manner," it is both "legally and morally

acceptable" to exclude non-resident aliens for good cause. *Id.*

The Old Testament has multiple examples of immigration restrictions. Perhaps the best example is found in *Deuteronomy* 23:3-4, which reads:

> An Ammonite or Moabite shall not enter into the congregation of the LORD; even to their tenth generation shall they not enter into the congregation of the LORD for ever:
>
> Because they met you not with bread and with water in the way, when ye came forth out of Egypt; and because they hired against thee Balaam the son of Beor of Pethor of Mesopotamia, to curse thee.

The Ammonites and Moabites were hostile towards Israel from the moment that Israel tried to enter the Promised Land; therefore God refused to allow them to even *enter* His assembly. *See Exodus* 17:14-16 (declaring a permanent state of war with the Amalekites because they attacked the Israelites on their way from Egypt to the Promised Land). Even foreigners from nations that God favored still had to wait before they could join the congregation. *Deuteronomy* 23:7-8 (providing that Egyptians and Edomites could join the congregation "in their third generation"). In addition, when the Israelites returned from the exile in Babylon, they forbade both Samaritans and Israelites who had intermarried with surrounding the peoples (in violation of God's command) from helping rebuild the Temple. See *Ezra* 4:1-3. *See also Ezra* 9-10. Thus, the Bible not only

permitted but required excluding foreigners for national security or religious reasons under certain circumstances.

C. The President's Proclamation is compatible with Biblical teaching.

After conducting an extensive review of immigration screening procedures, the President of the United States found that eight countries "remain deficient at this time with respect to their identity-management and information-sharing capabilities, protocols, and practices." Proclamation 9645, 82 Fed. Reg. 45,161 (Sep. 24, 2017). He also noted a "significant terrorist presence" within some of those countries. *Id.* Based on this information, the President imposed new restrictions and limitations on people coming into the United States from those eight countries. *Id.* at 45,161-62. Congress granted the President this authority under 8 U.S.C. §§ 1182(f) and 1185(a).

As demonstrated above, the first duty of government is to punish the wicked and protect the innocent. *Genesis* 9:5-6; *Romans* 13:1-7; *I Peter* 2:14-15. The main responsibility of any civil government is to protect its own people. By entering the aforementioned proclamation, the President *complied* with the obligations of Scripture; he did not violate them, as liberal religious groups would have this Court believe. In addition, this case is very much like *Deuteronomy* 23:3-4, where God imposed a severe immigration restriction against nationals from Moab and Ammon because of their people's hostility towards Israel. Of course, not every person from

Moab or Ammon was hostile towards Israel, just as every person from these eight countries is not hostile towards the United States. *See Ruth* 1:16 (Ruth the Moabite pledging to make Israel's God her God); *II Samuel* 10:2 (noting that Ammonite King Nahash "shewed kindness" to Israelite King David). But the friendliness of some Ammonites and Moabites towards Israel did not negate God's command, which was based on those nations' overall hostility towards Israel. In the same way, the Bible does not prohibit the President from implementing travel restrictions as to the eight designated nations.[17]

Both the general Biblical principles about the role of government and the specific history of excluding nationals from hostile countries demonstrate that there is nothing unbiblical about the President's proclamation.

III. The universal injunction issued in this case violates Article III of the Constitution.

A. This case is not a class action.

The plaintiffs in this case consist of the State of Hawaii, three individuals, and the Muslim Association of Hawaii. *See* Pet. App. 78a-87a. No plaintiff class has been requested or certified. Nonetheless, the Ninth Circuit did not limit itself to redressing the grievances of the parties before it but instead affirmed the issuance of an injunction for the

[17] The proclamation also allows for waivers on a case-by-case basis. 82 Fed. Reg. at 45,168-69.

benefit of anyone in the United States who might be affected by Proclamation 9645.

The Ninth Circuit provided a scant explanation of its decision to grant relief for the benefit of unknown persons not before the court. Although it conceded that "[i]njunctive relief must be 'tailored to remedy the specific harms[s]' shown by the plaintiffs," it nonetheless held that "[b]ecause this case implicates immigration policy, a nationwide injunction was necessary to give Plaintiffs a full expression of their rights." Pet. App. 62a (citation omitted). Had the Ninth Circuit limited its relief to the plaintiffs in the case, as the contours of judicial power require in the absence of a class action, this case would probably not be before the Court. But the sweeping scope of the relief imposed necessitated immediate review.

B. A court has no power to issue a decree for the benefit of a nonparty.

Laws by their nature apply to everyone but the judgments of courts apply only to the parties in the action.[18] "Courts do not write legislation for members of the public at large; they frame decrees and judgments binding on the parties before them." *Additive Controls & Measurement Sys. v. Flowdata, Inc.*, 96 F.3d 1390, 1394 (Fed. Cir. 1996). Thus, in the absence of a plaintiff who is suffering an actual or imminent injury traceable to the actions of a defendant and that is redressable by a judicial

[18] Judgments also bind those "in privity" with a defendant. *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). *See* Rule 65(d)(2), Fed. R. Civ. P.

decree, a court has no authority to act. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A judgment binds the defendant for the benefit of the plaintiff but extends no further.

The necessity for standing separates judicial from executive or legislative power. "[T]he law of Art. III standing is built on a single basic idea — the idea of separation of powers," *Allen v. Wright*, 468 U.S. 737, 752 (1984), and is "a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. 560. Nonparties by definition have no standing to participate in a case.

Persons not parties to a case can argue the persuasiveness of the ruling for adoption as a precedent in cases to which they are a party but cannot themselves enforce that judgment by contempt proceedings against the defendant in the original case. If a party who is found to lack standing is not entitled to have its legal rights adjudicated by a court, neither may a nonparty who never sought standing at all enjoy the benefit of a judgment to which it was not a party.

C. The lower courts' practice of issuing universal injunctions violates the limits on judicial power stated in Article III.

"The judicial Power of the United States shall be vested in one supreme Court and in such inferior

Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. What is the nature of that "judicial power"? "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority[.]" *Id.* § 2, cl. 1. The Constitution lists additional "cases" to which the judicial power extends and also certain "controversies." *Id.* Hence arises the familiar phrase "cases and controversies" as a constitutional limitation on the exercise of federal judicial power.

> Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity "to adjudge the legal rights of litigants in actual controversies."

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982) (quoting *Liverpool S. S. Co. v. Commissioners of Emigration*, 113 U. S. 33, 39 (1885)). A court may constitutionally decide only "the legal rights of litigants." It has no authority to determine the legal rights of nonlitigants. A nationwide injunction that purports to control the actions of a defendant not merely against the plaintiff but against anyone in the world is flatly unconstitutional.

Federal courts have no general mandate to repeal laws or nullify executive actions that they find repugnant to the Constitution. The only power they possess is to enforce judgments upon the parties before the Court and no one else.

> [T]he philosophy that the business of the federal courts is correcting constitutional errors, and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor ... has no place in our constitutional scheme.

Valley Forge, 454 U.S. at 489. *See also Frothingham v. Mellon*, 262 U.S. 447, 488 (1923) ("We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional."). As envisioned by the Founders, "[t]he Judiciary would be, 'from the nature of its functions, ... the [department] least dangerous to the political rights of the constitution' ... *because the binding effect of its acts was limited to particular cases and controversies*." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 223 (1995) (emphasis added) (quoting *The Federalist No. 78* (Alexander Hamilton), at 522).

The practice of issuing injunctions of limitless scope is becoming the norm as trial judges seek to outdo one another in the dramatic exercise of equitable power. As one scholar states:

> There is no reason, and no basis in principles of equity and judgments, for one

> district court in a non-class action to freeze enforcement as to every other person everywhere in the country. But we have reached a point where universality is automatic and unthinking. Every district judge believes that every injunction barring enforcement of a provision of federal law must be universal.

Howard Wasserman, *Another Unwarranted Universal/Nationwide Injunction*, Prawfsblawg.com (May 23, 2017), https://goo.gl/YaJ3pQ.

D. The meager reasoning offered by the Ninth Circuit in justification of its universal injunction is unpersuasive.

Because a judgment of a court against a defendant does not operate for the benefit of a nonparty, the blithe assumption of the Ninth Circuit that its judgment bound the petitioners against the world as opposed to the parties in the case is completely unconstitutional. The policy arguments proffered to justify the universal application of the judgment merely underscore the unconstitutionality of its scope.

The Ninth Circuit, claimed that the requirement for "uniformity" in immigration law necessitated a universal injunction. Pet. App. 62a. That policy rationale, however, does not negate the Article III requirement that a judgment only binds the parties to a case. Furthermore, lack of uniformity in the application of laws is resolved through appellate processes, not through district court ukases. See Sup.

Ct. R. 10 (listing a conflict between courts as a reason for granting a petition for a writ of certiorari).

A related incongruity in the issuance of universal injunctions for the benefit of nonparties is that the practice "conflicts with the principle that a federal court of appeals's decision is only binding within its circuit." *Virginia Soc. for Human Life v. F.E.C.*, 263 F.3d 379, 393 (4th Cir. 2001). One circuit is not at liberty to impose its view of the law on all the other circuits. *Id.* at 394. Thus, free coinage of universal injunctions "subverts our judicial hierarchy as a nationwide injunction issued by a single district judge has greater effect than a court of appeals' decision on the same issue in a noninjunction posture." Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, Harvard Law Review Blog (Jan. 25, 2018), https://goo.gl/AZHgCX.[19]

In the previous iteration of this case, the Ninth Circuit quoted the Fourth Circuit for the proposition that not extending the injunction to nonparties would allow the statutory or constitutional violations, as the case may be, to endure in all applications. *State of Hawaii v. Trump*, 859 F.3d 741, 787 (9th Cir. 2017). True enough. But the remedy is not for the district court to exercise power not bestowed by the Constitution. Other affected persons may file suit for

[19] Disagreement between circuits provides the Supreme Court with a salutary vetting of the law. "We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

their own benefit and argue that the reasoning in a similar case in another district court should be adopted in their own case. They may not, however, receive the judicial gift of a judgment without an adjudication.[20] Such actions are illegal, protestations of lower courts to the contrary notwithstanding. Indeed, the Ninth Circuit was so bold as to cite one of its precedents for the proposition that universal injunctions, even in the absence of a class action, are permissible. Pet. App. 62a. *See Bresgal v. Brock*, 843 F. 2d 1163, 1169 (9th Cir. 1987) (stating that "[t]here is no general requirement that an injunction affect only the parties in the suit").

E. Collateral damage: the nullification of Rule 23, Fed. R. Civ. P.

The loose use of the universal injunction remedy in the absence of a class action has become so prevalent as to have found its way into the leading treatise on federal practice as early as 1972. *See Sandford v. R.L. Coleman Realty Co., Inc.*, 573 F.2d 173, 178 (4th Cir. 1978) (identifying the "settled rule" that "[w]hether plaintiff proceeds as an individual or on a class suit basis, the requested [injunctive] relief generally will benefit not only the claimant but all other persons subject to the practice or the rule under attack") (quoting 7 Wright & Miller, *Federal Practice and Procedure*, § 1771, at 663-664 (1972)). Nonetheless, the fact remains: "A judgment or decree among parties to a lawsuit resolves issues as among

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[20] District court opinions are not binding precedent in any other court and, indeed, not even in the district court itself. *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011).

them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 762 (1989).

The practice of issuing injunctions for the benefit of nonparties without drawing those persons into the case through the class-action mechanism of Rule 23, Fed. R. Civ. P., may be the most widespread systematic violation of the Constitution by the lower federal courts today. That practice makes Rule 23, adopted in 1966, a mere cosmetic formality that courts may use or not use as they desire, but which does not affect the scope of their powers.[21] In a typical statement the *Sandford* court said: "Since the plaintiffs could receive the same injunctive relief in their individual action as they sought by the filing of their proposed class action, class certification was unnecessary ...." 573 F.2d at 178 (footnote omitted). *But cf. Gregory v. Litton Systems, Inc.*, 472 F. 2d 631, 633 n.4 (9th Cir. 1972) ("[W]e can not hold ... that Rule 23 is a meaningless formality which this court should disregard."). The widespread failure to heed Rule 23 in ideologically charged cases such as the one before the Court is a further reason to rein in the undisciplined use of equitable power by the lower courts. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 464 (2017) (stating that "Rule 23(b)(2) makes a class-wide injunctive remedy available if certain

[21] Rule 24, Fed. R. Civ. P., also becomes superfluous. Why bother to intervene to obtain the benefit of an injunction when it automatically runs for the benefit of all persons affected by the challenged law?

conditions are met; by implication, this remedy is available only if those conditions are met").[22]

F. The practice of deliberately selecting venues perceived as amenable to the issuance of universal injunctions undermines the reputation of the federal judiciary for fair and neutral adjudication.

The practice of issuing universal rather than party-specific injunctions has proliferated in recent years as a way of nullifying presidential actions. Alert lawyers identify jurisdictions, conservative or liberal as the case may be, that are attuned to their cause and file for a national injunction that, if successful, preempts every other court except the supervising appellate court from ruling differently. To complete the coup, district judges are selected in circuits that are likely to provide favorable review. Thus, under President George W. Bush environmentalists filed for national injunctions in the Ninth Circuit. Under President Obama, opponents of his more grandiose executive actions sought nationwide relief in Texas courts in the Fifth Circuit. Now that a Republican president is again in the White House, liberals have sought to stymie his executive actions by filing for universal injunctions in

[22] Even in the context of class actions, the Supreme Court has urged courts to exercise caution in granting national injunctions. *See Califano v. Yamasaki*, 442 U.S. 682, 701-03 (1979). *See generally* Michael T. Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. Rev. 615 (2017).

the Ninth Circuit (Washington and Hawaii) and in the newly liberal Fourth Circuit.[23]

The embarrassing spectacle of agenda-driven lawyers successfully filing for national decrees before handpicked judges in carefully selected venues may eventually bring the federal judiciary into disrepute. *See* Costa, *Old Solution* (stating that "the forum shopping [that the availability of nationwide injunctions] incentivizes on issues of substantial public importance feeds the growing perception that the courts are politicized"). This Court has an obligation to end what petitioners correctly describe as a "troubling" and "disturbing" trend and a "misguided practice." This Court has a supervisory obligation to rein in the anarchic practices in the lower courts and to instruct them to respect the constitutional limits on judicial power.

G. This case offers the Court the opportunity for a long overdue course correction in the use of equitable power by the lower courts.

The Supreme Court has had two recent opportunities to rein in the improper practice of issuing injunctions for the benefit of nonparties. *See Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (resolving case on grounds of standing and therefore not reaching "the question whether, if respondents prevailed, a nationwide injunction would be

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[23] For a survey of the relevant cases, *see* Bray, *Multiple Chancellors*, at 8-10; Getzel Berger, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. Rev. 1068, 1069-70 (2017).

appropriate"); *United States v. Texas*, 136 S. Ct. 2271 (2016) (affirming Fifth Circuit decision upholding a nationwide injunction "by an equally divided Court" with no written opinions). This case presents another opportunity to curtail the misuse of equitable judicial power by the lower federal courts and to call a halt to the unconstitutional practices described above. Should respondents prevail in any degree on the merits, this Court will have to address the propriety of the remedies ordered below. In that event, an opportunity will arise to remind the lower courts that an injunction constrains the defendant's conduct against the plaintiff and no one else.[24]

CONCLUSION

The judgments below should be reversed.

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[24] Ample and recent scholarship now exists plumbing this issue in depth and surfacing multiple problems with the current practices in the lower courts. In addition to Berger and Bray, *supra*, *see* Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 Harv. J.L. & Pub. Pol'y 487 (2016); Howard M. Wasserman, *Universal, Not Nationwide, and Never Appropriate: On the Scope of Injunctions in Constitutional Litigation*, 22 Lewis & Clark L. Rev. (forthcoming 2018), *available at* https://goo.gl/x71uoN.

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