No. 17-965

In the Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

HAWAII, *et al.*,
Respondents.

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

BRIEF OF LIBERTY, LIFE, AND LAW FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Liberty, Life and Law Foundation ("LLLF"), as *amicus curiae*, respectfully urges this Court to reverse the decision of the Ninth Circuit.

LLLF is a North Carolina nonprofit corporation established to defend religious liberty, sanctity of human life, liberty of conscience, family values, and other similar principles. LLLF is gravely concerned about the growing hostility to religious expression in America and the related threats to liberty and conscience. LLLF's counsel, Deborah J. Dewart, is the author of a book, *Death of a Christian Nation*, and many *amicus curiae* briefs in this Court and the federal circuits.

Amicus writes solely to address the Establishment Clause issue, urging this Court to render a decision for the Government that preserves the nation's high regard for religious liberty and in no way sanctions or sets precedent for the government to act with hostility toward religion.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Constitution requires benevolent government neutrality toward religion and forbids both hostility (*Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)) and "callous indifference" (*Zorach v. Clauson,* 343 U.S. 306,

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

314 (1952)). This Court can and should rule in favor of the Government without disturbing this time–honored principle or intruding on the religious liberty Americans treasure.

The Government's position is compelling. The exceptional circumstances of this case are far removed from typical Establishment Clause challenges. The context is foreign affairs and the Government documents an extraordinarily compelling interest—national security. *See* Proclamation No. 9645, Enhancing Vetting Capabilities and Process for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (the "Proclamation"). The Proclamation is focused outward toward nonresident aliens, not American citizens seeking to live and worship according to their religious convictions. The text is religiously neutral, and the Government's hostility is directed toward terrorist acts that threaten the lives of Americans, not the peaceful exercise of religion.

ARGUMENT

I. THIS COURT SHOULD RENDER A DECISION THAT WILL NOT DIMINISH THE BROAD RELIGIOUS LIBERTY AMERICANS TREASURE.

Religious freedom and liberty of conscience have been highly valued and broadly protected by courts and legislatures throughout American history. Indeed, "nothing short of the self-preservation of the state should warrant its violation." *United States v. Seeger*, 380 U.S. 163, 170 (1965), quoting Harlan Fiske Stone

(later Chief Justice), *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919). Here, self-preservation *is* at stake. Moreover, the Proclamation does not require anyone to engage in, facilitate, or finance an act contrary to conscience or religious conviction—unlike litigants in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). Nor does it require anyone to refrain from a religious exercise—in contrast to the plaintiffs in *Emp't Div., Ore. Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990).

Religious liberty stretches far and wide, and only in rare cases is the government's interest sufficiently compelling to override it. As this Court once observed, in cases where religious liberty claimants lose, their conduct "invariably pose[s] some substantial threat to *public safety*, peace or order." *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (emphasis added). The First Amendment clearly does not protect murder or other violent acts perpetrated under the banner of religion. Here, national security is an extraordinarily compelling interest and the burden falls almost exclusively on persons who are neither citizens nor residents of the United States. Moreover, that burden restricts travel—not religious exercise.

II. THE CONTEXT OF THE PROCLAMATION—FOREIGN AFFAIRS—IS A CRITICAL DISTINGUISHING FEATURE.

This Court "has never applied the Establishment Clause to matters of national security, foreign affairs, and immigration." *Int'l Refugee Assistance Project v. Trump*, 2018 U.S. App. LEXIS 3513, *321 (4th Cir. Feb. 15, 2018) (Niemeyer, J., dissenting) ("*IRAP II*"). It

should decline to transport domestic Establishment Clause jurisprudence into this context, for two compelling reasons. First, it is imperative that the nation be able to defend itself. Without an adequate defense, "constitutional protections of any sort have little meaning." *Wayte v. United States*, 470 U.S. 598, 612 (1985). Second, foreign nationals who have not been lawfully admitted to the U.S. are not American citizens with constitutional rights.

A. National security is an extraordinarily compelling interest that would satisfy even the most stringent judicial review.

In Establishment Clause cases, the Court cannot "turn a blind eye to the context in which [the action] arose." *Santa Fe Independent School Dist. v. Doe,* 530 U.S. 290, 315 (2000). Here, this Court cannot "turn a blind eye" to the terrorist acts of recent years and resulting concerns about national security. "[N]o governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). Even under stringent Establishment Clause standards, "th[is] Court is . . . deferential to a State's articulation of a secular purpose," unless that purpose is insincere or a sham. *Edwards v. Aguillard,* 482 U.S. 578, 586 (1987). National security can hardly be deemed an insincere or sham government purpose. As the Government explains, the Proclamation's "tailored restrictions" were crafted after "a worldwide review of security risks by multiple agency heads whose motives have never been questioned." Op. Br. 58.

The Ninth Circuit case did not delve into the Establishment Clause claims in this case. *See Hawaii*

v. Trump, 878 F.3d 662, 702 (9th Cir. 2017). The Fourth Circuit has twice examined similar claims but evaded this Court's decision in *Kleindienst v. Mandel*, 408 U.S. 753 (1972). *Mandel* held that courts may not look behind a "facially legitimate and bona fide reason" when the Executive exercises discretionary power to exclude an alien, nor may they balance that justification against the First Amendment interests of others. *Id*. at 770. In its now-vacated first ruling, the Fourth Circuit admitted that the Government's interest in national security is "on its face, a valid reason" for the Proclamation (*Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 591 (4th Cir. 2017), *vacated and remanded*, 138 S. Ct. 353 (2017) ("*IRAP I*")) but reasoned that rational basis is inapplicable to Establish Clause challenges, "because that would mean dispensing with the purpose inquiry that is so central to Establishment Clause review." *Id.* at 589 n. 14. Then—based primarily on the President's campaign statements—the court concluded that the Government's facially valid reason was given in bad faith. *Id.* at 591–592. In its more recent ruling, the Fourth Circuit implies—contrary to the "worldwide, multi-agency review process" described in the Proclamation (*see* Op. Br. 60)—that the Government had no bona fide rationale: "Unlike *Din* and *Mandel*, in which the Government had a 'bona fide factual basis' for its actions . . . here the Government's proffered rationale for the Proclamation lies at odds with the statements of the President himself." *IRAP II*, 2018 U.S. App. LEXIS 3513, *48. The court bypasses the Government's evidentiary review and concludes that national security is merely a "pretext for an anti-Muslim religious purpose." *Id*.

Courts owe the government significant deference where national security is at stake. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010). Where the President acts according to "an express or implied authorization from Congress"—as he has done in this case (8 U.S.C. 1182(f))—such action is entitled to "the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion . . . rest[s] heavily upon any who might attack it." *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981). In *Mandel*, even though national security was *not* involved, this Court held that deference is due when the Executive exercises conditional authority granted by Congress to exclude an alien, based on "a facially legitimate and bona fide reason." *Mandel*, 408 U.S. at 770. That same deference "has particular force in the area of national security . . . ." *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring).

Governmental purpose is a key element in Establishment Clause analysis. The "secular purpose" requirement of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) is "a common, albeit seldom dispositive, element." *McCreary County v. ACLU*, 545 U.S. 844, 859 (2005). The Fourth Circuit relied heavily on this factor. But this is not a typical Establishment Clause case. Under *Mandel*, the Proclamation's facially legitimate purpose is sufficient, and in light of the urgent national security concerns it should not be subjected to a more stringent analysis. But even if it were, it would easily pass constitutional muster. "Th[is] Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was *motivated wholly* by religious

considerations." *Lynch v. Donnelly*, 465 U.S. at 680. Moreover, this Court has never held "that political divisiveness alone can serve to invalidate otherwise permissible conduct." *Id*. at 684. Just as this Court "decline[d] to so hold" in *Lynch* (*id*.), it should decline this latest invitation.

In cases where *Lemon*'s purpose prong is controlling, this Court has found the government action "inexplicable *but for* a religious purpose, and it looked to extrinsic evidence only to confirm its suspicion, prompted by the face of the action, that it had religious origins." *IRAP I*, 857 F.3d at 652 (Niemeyer, J., dissenting. Sometimes the government's religious purpose is transparent: *School Dist. of Abington v. Schempp*, 374 U.S. 203, 223, 224 (1963) (required Bible study in public schools); *Stone v. Graham,* 449 U.S. 39, 41 (1980) *(per curiam)* (Kentucky statute requiring that Ten Commandments be posted in public school rooms had "no secular legislative purpose"); *Edwards v. Aguillard*, 482 U.S. at 585 (law requiring teaching of creation science had "no clear secular purpose"); *Santa Fe*, 530 U.S. 290 (school policy allowing student-led invocations before football games revealed preference for prayer). In rare cases, this Court has uncovered an impermissible religious purpose in the absence of a facial reference to religion. The moment of silence statute in *Wallace v. Jaffree* was admittedly an effort to return voluntary prayer to public schools and had "*no* secular purpose." *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). In, *Church of the Lukumi Babalu*, this Court invalidated a facially neutral law restricting animal sacrifices because it was designed to suppress "the central element of the Santeria worship service."

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534-535 (1993).[2]

The Fourth Circuit relied heavily on *McCreary*, but in that case the government offered a new secular purpose "as a litigating position" to justify a *facially religious* requirement to display the Ten Commandments in county courthouses. *McCreary*, 545 U.S. at 871. Here the Government provides the most compelling of interests—national security—to support a Proclamation that is *religiously neutral* on its face. This case bears little (if any) resemblance to cases tainted by religious objectives, either facially or discernible from the circumstances behind the legislation. In the Proclamation, the President explains that key officials determined that "a small number of countries—out of nearly 200 evaluated—remain deficient" concerning "their identity-management and information sharing capabilities, protocols, and practices," and some "also have a significant terrorist presence within their territory." Procl. §A It is terrorism—not religion—that motivated the Proclamation.

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[2] *Lukumi Babalu* was not an Establishment Clause, but rather a case involving free exercise rights under the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.,* Pub. L. 103-141, 107 Stat. 1488. However, it illustrates the potential for an improper government purpose to hide behind a facially neutral statute.

B. The Proclamation is directed outward toward nonresident, unadmitted aliens—not inward toward U.S. citizens with constitutional rights.

As this Court observed in *Mandel*, "an unadmitted and nonresident alien[] ha[s] no constitutional right of entry to this country as a nonimmigrant or otherwise." *Mandel*, 408 U.S. at 762. Citing the Government's brief, this Court explained that "the power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers – a power to be exercised exclusively by the political branches of government." *Id*. at 765 (internal quotation marks omitted). In this domain, "Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews v. Diaz,* 426 U.S. 67, 80 (1976). In *Fiallo*, this Court upheld a federal statute that granted preferential immigration status based on the relationship between a child and the child's natural *mother*—but not the child's natural *father*. This transparent inequality would normally be constitutionally suspect, but this Court reasoned that the statute was intended "to afford rights not to aliens but to United States citizens and legal permanent residents." *Fiallo v. Bell*, 430 U.S. 787, 793 (1977).

Here, the Proclamation does not "directly affect[] a citizen's legal rights, or impose[] a direct restraint on his liberty," but rather is action "directed against a third party [that] affects the citizen only indirectly or incidentally." *Din*, 135 S. Ct. at 2138, quoting *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773,

788 (1980). In *Din*, the alien husband of a citizen was inadmissible because of his terrorist activities—the same type of concern that motivated the Proclamation in this case.

III. THE GOVERNMENT'S EFFORT TO PROTECT THE NATION FROM TERRORIST ATTACKS IS NOT THE HOSTILITY TO RELIGION THE ESTABLISHMENT CLAUSE PROHIBITS.

The Government must be free to protect both the safety and the religious liberty of the American people. It would be frightening to think the nation must sacrifice either of these. This case is an opportunity for this Court to ensure that the Executive is not placed in such a Catch-22.

A. The Government's "hostility" is not directed toward religion but rather toward violent acts of terrorism.

The Government's "hostility" does not target religion, but violent acts of terrorism that threaten the lives of citizens and residents of the nation. The Proclamation was not drafted to "ban Muslims" but to "ban terrorism" through adequate vetting procedures. This case is not comparable to domestic Establishment Clause cases, even those that hinge on government hostility to religion. *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012) illustrates the difference. In *Awad*, the Muslim plaintiff challenged a proposed state constitutional amendment that "*expressly* condemn[ed] his religion" (*id*. at 1123) by prohibiting the use of Sharia law in state courts. The amendment failed strict scrutiny because the State of Oklahoma could not

"identify an actual concrete problem." *Id*. at 1129. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) ("the State must specifically identify an actual problem in need of solving"). In *Awad*, the state admittedly "did not know of even a single instance where an Oklahoma court had applied Sharia law" (*Awad*, 670 F.3d at 1130)—let alone created any actual problems by doing so.

Awad stands in stark contrast to this case. Nowhere does the Proclamation "expressly condemn" the Islamic faith or any other religion. Nowhere does it mention Muslims. In two places the Proclamation uses the word "Islamic." First, it notes "Iraq's commitment to combating the Islamic State of Iraq and Syria (ISIS)." Procl. § 1(c)(iii)(g). Second, it observes that "several terrorist groups are active within Chad or in the surrounding region, including elements of Boko Haram, ISIS-West Africa, and al-Qa'ida in the Islamic Maghreb." Procl. § 2(a)(i). In context, these references relate to specific groups that actively promote terrorism—not religion and not all Muslims.

B. The text of the Proclamation is religiously neutral—a decision against the Government would allow challenges far beyond the normal considerations of legislative history.

The Proclamation is facially neutral. In fact, "plaintiffs conceded during oral argument" in the Fourth Circuit that the Proclamation would have been acceptable "if another candidate had won the presidential election in November 2016 and thereafter entered this same Executive Order." *IRAP I*, 857 F.3d at 649 (Niemeyer, J., dissenting). It would set

dangerous precedent, "completely strange to judicial analysis," to infuse new meaning into an unambiguous text based on statements made during a heated campaign or other informal context. *IRAP II*, 2018 U.S. App. LEXIS 3513, *317 (Niemeyer, J., dissenting). There is no clear limiting principle as to how far back a court might look in order to construe—or even reconstruct—a text. The use of such unbounded analysis "to yield a specific constitutional violation" would wreak havoc with the legal system, allowing "the policies of an elected official" to "be forever held hostage by the unguarded declarations of a candidate." *Washington v. Trump*, 858 F.3d 1168, 1174 (9th Cir. 2017) (Kozinski, J., dissenting from the denial of reconsideration en banc). Such judicial revision would not only violate basic separation of powers principles, but drastically chill the political speech of candidates and deprive voters of information.

CONCLUSION

This Court should reverse the Ninth Circuit decision and defer to the Executive's facially valid purpose, as amply supported by the undisputed facts of an exhaustive investigation involving multiple agencies. At the same time, the ruling should reaffirm the Court's support for religious liberty and foreclose any potential use as precedent for government hostility toward religion.

Respectfully submitted,

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