No. 17-965

In the Supreme Court of the United States

DONALD J. TRUMP, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE THE BECKET FUND FOR RELIGIOUS LIBERTY'S MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AS *AMICUS CURIAE* AND FOR DIVIDED ARGUMENT

ERIC C. RASSBACH
Counsel of Record
MARK L. RIENZI
DIANA M. VERM
JOSEPH C. DAVIS
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave., NW, Suite 700
Washington, DC 20036
erassbach@becketlaw.org
(202) 955-0095

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, *Amicus* The Becket Fund for Religious Liberty states that it is not a publicly-held corporation, does not issue stock, and does not have a parent corporation.

ERIC C. RASSBACH
Counsel of Record

Amicus The Becket Fund for Religious Liberty respectfully seeks leave to participate in oral argument under Rule 28.7, as *amicus curiae* in support of neither party, for ten minutes (or for such time as the Court deems proper) in addition to the time allocated to the parties. *Amicus* seeks no reduction in the parties' argument time. Granting this motion would provide assistance not otherwise available to the Court by offering adversarial argument regarding significant constitutional issues on which the parties have demonstrated no disagreement. Both Petitioners and Respondents oppose this motion.

1. As described in detail in *amicus*'s brief, this case presents significant questions concerning the application of the Religion Clauses to the claims of religion-based targeting presented in challenges to Proclamation No. 9645. The problem is that with respect to the Religion Clauses, litigation over the Proclamation has thus far focused on the wrong Clause and the wrong test. If the Court adopts the parties' misplaced focus on the Establishment Clause and the discredited *Lemon* test, this litigation will be ill begun and far from done. Not only that, but a wide array of other Religion Clauses cases will be negatively affected.

By contrast, if the Court focuses on the free exercise claims in the case in addition to the statutory claims, it would be in a position to provide needed guidance to the lower courts with respect to most of the major claims in this case and in the parallel *International Refugee Assistance Project, et al.* v. *Trump, et al.*, No. 17-1194 (*IRAP*). Indeed, without addressing free exercise, there can be no "opportunity for this Court to resolve all of the central issues concerning the challenges to the Proclamation in

the current Term." *IRAP*, Mem. for the Respondents at 3 (filed Feb. 28, 2018).

2. *The wrong Clause.* The main problem with how the parties have presented the freedom of religion issues to the Court is that they have focused on the wrong Religion Clause. Both historically and in recent Religion Clauses jurisprudence, religious targeting has been a question for decision under the Free Exercise Clause, not the Establishment Clause. In *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, the Court decided whether targeting a particular religious group violated the Free Exercise Clause, expressly declining to analyze the case under the Establishment Clause. 508 U.S. 520, 532 (1993) (because case involved an "attempt to disfavor [a] religion" it should be decided under Free Exercise Clause, not Establishment Clause). Since Respondents' and IRAP's theory is that the Proclamation is unconstitutional because it "singl[es] out" members of one particular religion—Muslims—"for disfavored treatment," these cases thus ought to be decided under *Lukumi*, not *Lemon*.[1] Indeed, the parties have recognized this fact in a backhanded way by frequently citing *Lukumi* as support for their *Establishment* Clause arguments. See, *e.g.*, Pet. Br. 65; Resp. Br. 65, 67, 68, 71, 72, 73, 74 (citing *Lukumi* eight times as an Establishment Clause case).[2] Frequent citation to *Lukumi* is the tell that there are unavoidable free exercise issues in this litigation.[3]

---

[1] Second Am. Compl. ¶ 377, *Int'l Refugee Assistance Project* v. *Trump*, No. 8:17-cv-361, ECF No. 203 (D. Md. Oct. 5, 2017); see also Third Am. Compl. ¶¶ 142-46, *Hawaii* v. *Trump*, No. 1:17-cv-00050, ECF No. 381 (D. Haw. Oct. 15, 2017).

[2] Respondents also fail to note that some of their citations are to *Lukumi*'s two-Justice plurality section. Resp. Br. 68.

[3] That the Religion Clauses are different does not mean that they are in conflict. Professor McConnell concludes that because the two Religion Clauses "form a single grammatical unit and

Similarly, the Court's history-based approach to the Religion Clauses set forth in *Town of Greece* v. *Galloway* also points away from the Establishment Clause and towards the Free Exercise Clause. 134 S. Ct. 1811 (2014). *Town of Greece* requires courts to look to history in the first instance to decide Establishment Clause claims. But historically, standalone laws targeting a particular religious minority were not seen as constituting an establishment. Instead, targeting—like the famous case of William Penn's hat—was a matter of free exercise. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1472 & n.320 (1990).

Ignoring free exercise would come with significant costs. On a practical level, ignoring free exercise now means a likely return to this Court later, because lawsuits challenging the Proclamation or subsequent iterations of the travel ban will include free exercise claims. Providing guidance to the lower courts now could reduce the likelihood of a return trip. And on a doctrinal level, ignoring free exercise means that there is no ready way for courts to balance the important societal interests at stake. That is because the Establishment Clause, as a structural limitation on government

---

reflect a common history" they ought to be "interpreted complementarily." Michael W. McConnell, *Accommodation of Religion: An Update and A Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 695 (1992). And Professors Berg and Laycock argue that the Clauses are complementary rather than conflicting: "The Religion Clauses should be read as complementary aspects of a single principle. To interpret them as conflicting is, as one of us has previously argued, 'a mistake at the most fundamental level.' It 'imputes incoherence to the Founders,' and it ignores the historical record[.]" Thomas C. Berg & Douglas Laycock, *The Mistakes in* Locke v. Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 Tulsa L. Rev. 227, 245–46 (2004) (quoting Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 Minn. L. Rev. 1047, 1088 (1996)). The fundamental complementarity of the Religion Clauses is all the more reason why the parties' lack of interest in the free exercise issues should not stop the Court from addressing them.

power, generally includes no strict scrutiny affirmative defense. See Becket Br. at 29-32 & n.8. Expanding Establishment Clause analysis to more categories of church-state conflict will thus only increase the intractability of such conflicts.

3. *The wrong test.* The second problem with the case's current posture is the parties' focus on the wrong constitutional test. Both Hawaii and the United States have presented this case as centered on the mostly dead *Lemon* test. But *Lemon* was superseded in large part by this Court's decision in *Town of Greece*, which made clear that "historical practices and understandings" are a necessary guide to deciding Establishment Clause claims. *Town of Greece*, 134 S. Ct. at 1819. Respondents' claim hinges on *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005), which applied the purpose prong of the very *Lemon* test that was later superseded in *Town of Greece*, and the United States addresses Respondents' arguments on *McCreary*'s terms. But given the history-driven approaches adopted by all nine Justices in *Town of Greece*, the parties cannot justify relying on *Lemon*'s ahistorical or even anti-historical approach instead.

4. *Amicus* can provide a unique perspective on these issues because the parties do not disagree over which Religion Clause to focus on or the relevance of the *Lemon* framework to this litigation. And there is ample precedent for the practice of appointing *amicus* counsel to argue in support of a significant position that the parties do not contest. See, *e.g.*, *United States* v. *Windsor*, 570 U.S. 744, 755 (2013). The Court has also granted leave for *amici* to present oral argument where they address issues that the parties have passed over. See, *e.g.*, *Pac. Bell Tel. Co.* v.

linkLine Commc'ns, Inc., 555 U.S. 438, 447 (2009); Stephen M. Shapiro *et al.*, Supreme Court Practice § 14.7, at 782 & n.33 (10th ed. 2013). Indeed, earlier this Term the Court heard argument from Professor Aditya Bamzai as *amicus curiae* in *Dalmazzi* v. *United States*, No. 16-961 (argued Jan. 16, 2018) (addressing jurisdictional issue on which the parties had no disagreement).

5. Considering the free exercise issues now will save the Court, the parties, and the general public significant resources. Litigation over the various iterations of the travel ban has already resulted in multiple decisions by this Court. And "[a]ddressing the full range of claims against the Proclamation would provide much-needed clarity to the government, respondents, and the public." Pet. Reply 10. But the best way to address that "full range of claims" is to hear argument on how the Religion Clauses *as a whole* address the problem of religious targeting. Leaving those issues unaddressed will mean continued and damaging confusion in the lower courts, and likely yet another travel ban case at this Court next Term, this time concerning free exercise.

* * *

Amicus knows that leave for an *amicus* to argue is and ought to be rarely granted. Accordingly, *amicus* has never made a practice of requesting leave. But in *amicus*'s view, the uniquely high stakes for the Religion Clauses created by this litigation, combined with the parties' silence on the Free Exercise Clause, present extraordinary circumstances justifying *amicus* argument. *Amicus* therefore requests that the Court grant leave to present ten minutes of oral argument.

Respectfully submitted.

ERIC C. RASSBACH
Counsel of Record
MARK L. RIENZI
DIANA M. VERM
JOSEPH C. DAVIS
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1200 New Hampshire Ave. NW, Suite 700
Washington, D.C. 20036
erassbach@becketlaw.org
(202) 955-0095

Counsel for Amicus Curiae

MARCH 2018