No. 17-965

IN THE

Supreme Court of the United States

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

Petitioners,

—v.—

HAWAIʻI, *et al.*,

Respondents.

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

BRIEF OF PLAINTIFFS IN *INTERNATIONAL REFUGEE ASSISTANCE PROJECT V. TRUMP* *AS AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Karen C. Tumlin
Nicholas Espíritu
Melissa S. Keaney
Esther Sung
Marielena Hincapié
NATIONAL IMMIGRATION LAW CENTER
3450 Wilshire Blvd., #108-62
Los Angeles, CA 90010

Omar C. Jadwat
Counsel of Record
Lee Gelernt
Hina Shamsi
Hugh Handeyside
Sarah L. Mehta
David Hausman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
212-549-2500
ojadwat@aclu.org

Attorneys for Amici Curiae

(*Counsel continued on inside cover*)

Justin B. Cox
National Immigration
Law Center
P.O. Box 170208
Atlanta, GA 30317

David Rocah
Deborah A. Jeon
Sonia Kumar
Nicholas Taichi Steiner
American Civil Liberties
Union Foundation
of Maryland
3600 Clipper Mill Road,
Suite 350
Baltimore, MD 21211

Linda Evarts
Kathryn Claire Meyer
Deepa Alagesan
Mariko Hirose
International Refugee
Assistance Project
40 Rector Street, 9th Floor
New York, New York 10006

Cecillia D. Wang
Cody H. Wofsy
Spencer E. Amdur
American Civil Liberties
Union Foundation
39 Drumm Street
San Francisco, CA 94111

David Cole
Daniel Mach
Heather L. Weaver
American Civil Liberties
Union Foundation
915 15th Street NW
Washington, DC 20005

Attorneys for Amici Curiae

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INTEREST OF *AMICI*

Amici International Refugee Assistance Project ("IRAP"), HIAS, Inc., Middle East Studies Association, Arab-American Association of New York, Yemeni-American Merchants Association, Jane Doe #2, John Doe #4, John Doe #5, Muhammed Meteab, Mohamad Mashta, Grannaz Amirjamshidi, Shapour Shirani, and Afsaneh Khazaeli are plaintiffs in *IRAP v. Trump*, No. 17-cv-361 (D. Md. filed Feb. 7, 2017).[1] The individual *amici* are U.S. citizens and permanent residents who sought to enjoin Presidential Proclamation 9645 (the "Proclamation") because it would indefinitely separate them from family members, including spouses and parents, and, in many cases, put their most basic life plans in jeopardy. The organizational *amici* have clients and members who have been injured in similar ways, as well as their own fundamental objections to the Proclamation. For example, HIAS, the world's oldest refugee resettlement agency, is a faith-based organization that was founded in 1881 to assist Jews fleeing pogroms in Russia and Eastern Europe, and has long relied on the United States as a nation that offers refuge to those targeted based on their religion.

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[1] This *amicus* brief uses pseudonyms for several of the individual plaintiffs to reduce the risk of harassment or reprisals. The District Court allowed the plaintiffs to proceed under pseudonyms, and this Court has permitted litigants to use pseudonyms in similar circumstances. *See, e.g.*, *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 294 n.1 (2000). No counsel for any party authored the brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to its preparation or submission. Petitioners have filed a blanket letter of consent. Consent from Respondents has been lodged with the Clerk's office.

Amici have a tremendous stake in the outcome of this case. *IRAP* has proceeded in parallel with this case since President Trump issued Executive Order 13,780 ("EO-2"), the Proclamation's predecessor. After the Fourth Circuit and Ninth Circuit affirmed preliminary injunctions against EO-2, this Court granted *certiorari* and consolidated the cases for argument, 137 S. Ct. 2080 (2017), before vacating both decisions as moot when EO-2 expired and was replaced by the Proclamation. 138 S. Ct. 353 (2017), 138 S. Ct. 377 (2017). Both cases again led to appellate court decisions affirming preliminary injunctions of the Proclamation, but because the Fourth Circuit ruled later than the Ninth Circuit, only *Hawai'i* is presently before this Court on merits review; a petition (No. 17-1194) and cross-petition (No. 17-1270) for *certiorari* arising from *IRAP* are pending. But both cases involve the same core merits questions.

Amici have an especially acute interest in the constitutional question presented. In the challenges to both EO-2 and the Proclamation that *amici* litigated, the Fourth Circuit affirmed the *IRAP* preliminary injunctions on Establishment Clause grounds, while the Ninth Circuit affirmed the *Hawai'i* preliminary injunctions on statutory grounds only. *Amici* offer their brief to defend the Fourth Circuit's constitutional holding, and therefore restrict their argument to the constitutional question—whether, as the en banc Fourth Circuit found in *IRAP*, the Proclamation violates the Establishment Clause.

SUMMARY OF ARGUMENT

The Proclamation violates a fundamental constitutional rule by targeting a particular religion for disfavor. This case is different from the more typical Establishment Clause case involving a claim of improper promotion of religion, which raises line-drawing issues that are not present here. Though members of the Court have long disagreed about the extent to which the state can *support* religion without contravening the Establishment Clause, not a single Justice has ever suggested that the prohibition on official conduct *disfavoring* particular religions is anything but absolute.

The President has done exactly what the Constitution prohibits. During his campaign, he consistently promised to ban Muslims, and to do so by using "territory" as a proxy for religion. As President, he immediately and unilaterally issued that ban—which resembled no previous presidential action. Since then he has repeatedly doubled down on his pledge to maintain a ban, rejected any suggestion that he was retreating from his original promise, and continued to issue anti-Muslim statements directly linked to the ban. To any objective observer, the Proclamation—the third version of the ban in less than a year—is a direct product and manifestation of that impermissible purpose.

The government, however, urges the Court to restrict its review to the carefully vetted text of the Proclamation, ignoring facts and evidence that are readily available to any member of the public, including the President's own voluntary statements. None of the government's reasons for ignoring the

extraordinary evidence of impermissible religious purpose here withstands scrutiny. The government puts great store in the (asserted) fact that subordinate officials issued a report recommending some restrictions on entry. But that report has never been disclosed. It was, in fact, only created after the President had already issued similar bans twice, and after he made clear that he planned to issue a third version that hewed to his original purpose. And it was prepared under the guidance of a White House-selected official who had himself previously recommended a Muslim ban, pursuant to EO-2's direction that the agencies "shall" submit a list of countries to be subject to an indefinite ban.

The government's doctrinal reasons for ignoring the evidence fare no better. *Kleindienst v. Mandel*, 408 U.S. 753 (1972), does not require the Court to close its eyes to affirmative evidence that the government's explanation for the Proclamation is not bona fide, and the plaintiffs in this case, like the *IRAP* plaintiffs, plainly have the right to challenge the government's disparagement of their religion through the Proclamation, which inflicts a concrete and particularized injury.

Should the Court find in favor of the plaintiffs, *amici* urge the Court to allow the lower courts to decide in the first instance the scope of appropriate relief. The limitation of relief to exclusion of foreign nationals with a bona fide relationship to a U.S. person or entity was adopted by this Court for emergency stay purposes in the EO-2 litigation on the basis of a pure consideration of equities as presented on the record at that stage. The parties agree that that issue is not presented here and have not briefed it. The Court should make clear that the

question remains open for resolution in the first instance on remand.

The Establishment Clause cannot countenance official government action that targets a particular religion for disfavor. This Court has never allowed such conduct; it should not start now. Once before in its history, the Court blessed a glaring constitutional violation based on deference to claims of national security and an undisclosed government report. *See Korematsu v. United States*, 323 U.S. 214 (1944). It should not repeat that error here.

ARGUMENT

I. The Establishment Clause Unequivocally Prohibits Official Action Disfavoring a Specific Religion.

Because this case addresses the targeting of a particular religion for disfavored treatment, it presents an especially egregious Establishment Clause violation. Members of the Court have expressed different opinions about how far government can go in providing *support* to religion without contravening the Establishment Clause. But that "more typical" question—whether governmental conduct, such as displaying the Ten Commandments, violates the Establishment Clause by improperly promoting one particular faith or religion generally—is not presented in this case. *IRAP v. Trump*, 883 F.3d 233, 352 (4th Cir. 2018) (en banc) ("*IRAP II*") (Harris, J., concurring). Instead, "this Establishment Clause violation contravenes a different and still more deeply rooted principle: that the government may not act on the basis of *animus* toward a disfavored religious minority." *Id.* Whether an official religious display unconstitutionally *promotes*

religion depends on the context in which it is erected; but no Justice has suggested that an official display *denigrating* Christianity (or any other faith) could be permissible in any circumstance.

When it comes to the government singling out a particular religion for *disfavor*, the Establishment Clause's prohibition is "absolute." *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968). Unlike the "ancillary message" that promotion of one sect sends to nonadherents, *Santa Fe,* 530 U.S. at 309-310, denigration is a direct attack on religious minorities' "equal dignity in the eyes of the law," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015). This "nonpersecution principle of the First Amendment" is, as this Court has explained, "fundamental." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993) (explaining that "few violations" of this clear principle "are recorded in our opinions"); *accord IRAP II*, 883 F.3d at 353 (Harris, J., concurring) ("The principle that government decision-making should not be informed by religious animus is so well and deeply understood in this country that there are few violations recorded in the case law.").

Indeed, members of this Court have been unanimous on this score. In *Town of Greece, N.Y. v. Galloway*, for example, Justice Kennedy, writing for five Justices, permitted the town's practice of opening board meetings with invocations offered by private citizens, but emphasized the critical fact that the prayers did *not* "denigrate nonbelievers." 134 S. Ct. 1811, 1823 (2014). Justice Kennedy noted that that caveat was likewise crucial to the earlier approval of Nebraska's legislative prayer in *Marsh v. Chambers*, which "instructed that the 'content of the

prayer is not of concern to judges,'" *so long as* "'there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, *or to disparage any other*, faith or belief.'" *Town of Greece*, 134 S. Ct. at 1821-1822 (quoting *Marsh v. Chambers*, 463 U.S. 783, 794-795 (1983)) (emphasis added); *see also id.* at 1831 (Alito, J., concurring) ("I would view this case very differently if the omission" of synagogues from a list of potential chaplains "were intentional."). The dissenters in *Town of Greece* agreed, pointing out that "no one" on the Court had ever disagreed with the unconstitutionality of government disparagement of a particular faith. *Id.* at 1843-1844, 1848 (Kagan, J., dissenting) (citing *Lee v. Weisman,* 505 U.S. 577, 641 (1992) (Scalia, J., dissenting)); *see also Wallace v. Jaffree*, 472 U.S 38, 56 (1985) (a "purpose . . . to . . . disapprove of religion" violates the Establishment Clause); *id.* at 85 (Burger, C.J., dissenting) ("[H]ostility toward any religion . . . is . . . forbidden by the Constitution . . ."); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (Establishment Clause "forbids hostility toward any" religion); *id.* at 688 & n.1 (O'Connor, J., concurring) (Establishment Clause bars "disapproval of" a "disfavored" religion); *id.* at 698 (Brennan, J., dissenting) (similar).

The prohibition on denigration or disfavor of specific religions dates back to the founding of the Nation. From the earliest days, the Framers were attuned to the dangers of denigration and exclusion of religious "outsiders." Writing to the Hebrew Congregation in Newport in 1790, George Washington rejected all efforts to single out religious minorities for disfavor and affirmed, "[H]appily, the Government of the United States . . . gives to bigotry

no sanction, to persecution no assistance." Letter from George Washington to the Hebrew Congregation in Newport, Rhode Island (Aug. 18, 1790), in 6 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 285 (Mark A. Mastromarino ed., 1996).[2] And as James Madison, the principal architect of the First Amendment, explained, and this Court later echoed, "the first step . . . in the career of intolerance" is to place "a Beacon on our Coast, warning" the "persecuted and oppressed of every Nation and Religion" that they must "seek some other haven." *Engel v. Vitale*, 370 U.S. 421, 432 n.16 (1962) (quoting James Madison, Memorial and Remonstrance against Religious Assessments, II Writings of Madison, at 188) (internal quotation marks omitted). Such persecution was all too familiar in the colonies, where Huguenots, Quakers, Baptists, Anglicans, Catholics, and Jews had all experienced official condemnation of their religion. *See* Derek H. Davis, *Introduction, in The Oxford Handbook of Church and State in the United States* 5 (Derek H. Davis ed., 2010).

Thus, "[w]hen the government acts with the ostensible and predominant purpose" of disfavoring a particular religion, "it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005); *see also*, *e.g.*, *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred

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[2] http://founders.archives.gov/documents/Washington/05-06-02-0135.

over another."). Even "covert suppression of particular religious beliefs" is unconstitutional. *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (plurality opinion). Likewise, the First Amendment forbids policies crafted as a religious "gerrymander" against adherents of a particular religion. *Lukumi*, 508 U.S. at 533-535, 538; *accord Gillette v. United States*, 401 U.S. 437, 452 (1971); *cf. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 729 (1994) (Kennedy, J., concurring in the judgment).

The President has plainly contravened this core prohibition. As the en banc Fourth Circuit explained, "an objective observer could conclude that the President's repeated statements convey the primary purpose of the Proclamation—to exclude Muslims from the United States. In fact, it is hard to imagine how an objective observer could come to any other conclusion." *IRAP II*, 883 F.3d at 268; *see also IRAP v. Trump*, 857 F.3d 554, 594-595 (4th Cir. 2017) (en banc) ("*IRAP I*") (finding "compelling" evidence of purpose to disfavor Muslims). Nothing in the Establishment Clause or the opinions of this Court suggests that such a course of conduct could be constitutional.

II. The Evidence that the Proclamation Violates the Establishment Clause Is Overwhelming.

The evidence of religious hostility in this case is direct, flagrant, and extraordinary. *Cf. Lukumi*, 508 U.S. at 540-542 (plurality opinion) (surveying evidence of "significant hostility" and "animosity to Santeria adherents"). As a candidate, Donald Trump promised to ban Muslims, and explained that he would do so by using "territories" as a proxy. One of

his first official actions as President was to do just that, barring entry to foreign nationals from seven Muslim-majority nations, and explaining on a national Christian broadcast network that the order was designed to prefer Christian over Muslim immigrants. When that order was invalidated, he substituted another order that, by the administration's own admission, served the same purpose as the first. And when that, too, was struck down, he repeatedly "express[ed] his desire to return to 'the original Travel Ban'" over the following months, and then issued the Proclamation, which makes the temporary bans indefinite, and continues to target almost exclusively Muslim-majority nations. *IRAP II*, 883 F.3d at 264.

The President has demeaned Muslims and their faith both before and after issuing the Proclamation, including, most recently, by personally disseminating false videos disparaging Islam and claiming, through his official spokespersons, that those videos reflect a "threat [that] is real" and that he "addressed these issues with . . . [the] [P]roclamation." *IRAP II* Fourth Circuit Joint Appendix ("CA4 J.A.") 1503, 1511; *see also IRAP II*, 883 F.3d at 267. The evidence of anti-Muslim animus is so overwhelming that even the dissenters in the Fourth Circuit did not dispute that an objective observer would conclude that the President acted with that purpose in issuing the Proclamation.

1. For anyone observing the President's own words and actions since taking office, the anti-Muslim aim and message of his bans is clear. In the challenges to EO-2, the government argued that *pre*-inauguration evidence of anti-Muslim purpose should be ignored, and that the President's "[t]aking [the]

oath [of office] marks a profound transition from private life to the Nation's highest public office." *See* Br. of Petitioner, *IRAP v. Trump*, Nos. 16-1436 and 16-1540, at 73 (Aug. 2017). But the government conceded that after he took the oath, the President could "say or do things that would bear on the Order." *IRAP I* Oral Arg. at 1:56.[3]

The Fourth Circuit's constitutional analysis relies on precisely such post-inauguration evidence. *IRAP II,* 883 F.3d at 266. Indeed, throughout his term, President Trump has repeatedly singled out Muslims for condemnation and disfavor in official statements, and his office has specifically linked several of those statements to the Proclamation and its predecessor bans. *See id*. at 267 (surveying statements reflecting "general anti-Muslim bias" rather than national security concerns); *see generally* Br. of Amicus Curiae MacArthur Justice Center (setting out extensive history of anti-Muslim statements).

For instance, during his first three months in office, President Trump's own website called for "preventing Muslim immigration." CA4 J.A. 135. This was not an archived page that could not be taken down; indeed, other parts of his website were added, removed, and modified during this time. Yet even after it became an issue in the litigation, the President continued to display his message expressly calling for a Muslim ban until well after he had issued two multi-country bans against nationals of Muslim-majority countries. *See IRAP I*, 857 F.3d at 575 n.5.

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[3] https://www.c-span.org/video/?427706-1/fourth-circuit-hears-oral-argument-travel-ban.

Both initial versions of the ban, moreover, referred to "honor killings," a "well-worn tactic for stigmatizing and demeaning Islam," even though honor killings have nothing to do with international terrorism. *Id.* at 596 n.17; *compare* Gov't Br. 66 (claiming that the bans' purpose was to address "national-security objectives"); *cf. Lukumi*, 508 U.S. at 534-535 (concluding that the terms "sacrifice" and "ritual" in statute singled out Santeria). And in case the ban's purpose was not already clear, President Trump went on a national Christian television station the day he issued the initial ban to announce that he intended it to favor Christian refugees over Muslims. *IRAP II,* 883 F.3d at 250-251.

These statements continued throughout the review process that preceded the Proclamation. While the review was underway, President Trump "endorsed an apocryphal story involving General Pershing and a purported massacre of Muslims with bullets dipped in a pig's blood." *Id.* at 267. And in November 2017, several weeks after issuing the Proclamation, the President posted anti-Muslim videos on his public Twitter account. The government agrees that these posts are "official statements by the [P]resident of the United States." *Id.* One statement contained a video falsely entitled "Muslim migrant beats up Dutch boy on crutches!" *Id.*[4] Another was entitled "Muslim Destroys a Statue of Virgin Mary!" *Id.*[5] The President had taken these videos from the Twitter account of "an extremist [British] political party whose mission is to oppose

[4] The person in the video was not a migrant, and his religion is not publicly known. CA4 J.A. 1513-1514.

[5] A third video depicted mob violence in Egypt during the revolution. *IRAP II*, 883 F.3d at 267.

'all alien and destructive politic or religious doctrines, including . . . Islam.'" *Id.*

When the President's distribution of these blatantly anti-Muslim videos was met with criticism, White House spokespeople responded not by repudiating the videos, or distancing the President from them in any way, but instead by asserting that "[t]he threat is real."[6] When asked whether "President [Trump] think[s] that Muslims are a threat to the United States," the White House responded that "the President has addressed these issues with the travel order that he issued earlier this year, and the companion proclamation."[7]

In short, throughout the first year of his presidency, President Trump used the bully pulpit to condemn Islam and its adherents, and the White House explicitly connected the President's anti-Muslim statements to the Proclamation. The government does not even attempt to defend any of these statements. Gov't Br. 66-71 (purporting to respond to *IRAP II*'s analysis, but failing to address the statements that the Fourth Circuit found probative of purpose).

Further linking the Proclamation to hostility to Islam, the White House appointed a person to lead EO-2's review process who has a long history of advocating a Muslim ban and expressing hostility to Islam and Muslims. Even before President Trump

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[6] CA4 J.A. 1513 (Peter Baker & Eileen Sullivan, *Trump Shares Inflammatory Anti-Muslim Videos, and Britain's Leader Condemns Them*, N.Y. Times, Nov. 29, 2017).

[7] CA4 J.A. 1503; *see also* Kathryn Watson, *White House Defends Trump's Muslim Tweet by Mentioning the Travel Ban*, CBS News, Nov. 29, 2017, https://www.cbsnews.com/news/white-house-defends-trumps-muslim-tweet-by-mentioning-travel-ban/.

began calling for a Muslim ban, Frank Wuco publicly declared that it was a "great idea" to "stop the visa application process into this country from Muslim nations in a blanket type of policy."[8] He also publicly stated that Muslim populations "living under 'other-than-Muslim' rule" will "necessarily" turn to violence, that Islam prescribes "violence and warfare against unbelievers," and that Muslims "by-and-large . . . resist assimilation."[9] The White House appointed him Chief of the DHS Executive Order Task Force, which is responsible for implementing the "specified and implied tasks derived from" EO-2, including the report and recommendation that the Proclamation cites.[10]

2. It is also clear to all with "reasonable memories," *McCreary*, 545 U.S. at 866, that the President's post-inauguration statements are a continuation of his approach to Islam and Muslim

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[8] Eric Hananoki, *New DHS Senior Advisor Pushed "Mosque Surveillance Program," Claimed that Muslims "By-and-Large" Want to Subjugate Non-Muslims*, Media Matters (Mar. 14, 2017), https://www.mediamatters.org/research/2017/03/14/new-dhs-senior-adviser-pushed-mosque-surveillance-program-claimed-muslims-and-large-want-subjugate/215634.

[9] *Id.*

[10] Noah Lanard, *A Fake Jihadist Has Landed a Top Job at Homeland Security*, Mother Jones (Nov. 1, 2017), http://www.motherjones.com/politics/2017/11/a-fake-jihadist-has-landed-a-top-job-at-homeland-security/. Soon after the Proclamation was issued, the DHS Press Secretary confirmed that Mr. Wuco's role at the agency included implementation of President Trump's agenda on "raising the global bar for vetting and screening." Josh Delk, *Homeland Security Defends White House Advisor After Obama Comments Resurface*, The Hill, Dec. 14, 2017, http://thehill.com/blogs/blog-briefing-room/365037-dhs-defends-white-house-adviser-after-obama-comments-resurface; *cf.* Proclamation, tit. (citing "Vetting" and "Processes for Detecting Attempted Entry").

immigration, which has remained consistent from the campaign trail to the Oval Office.

President Trump first promised a ban on Muslims entering the United States in a formal campaign statement. His calls to bar Muslim immigration were explicit, consistent, repeated throughout the campaign, and memorialized on his campaign website. He called for a "shutdown of Muslims entering the United States," asserted that "Islam hates us," and expressed his belief that "we're having problems with Muslims coming into the country." *IRAP I*, 857 F.3d at 575-576. Nothing changed after the election. When President-elect Trump was asked whether he still planned to ban Muslims, he responded: "You know my plans. All along, I've been proven to be right. 100% correct." *Id.* at 576.

President Trump did not just vaguely promise to ban Muslims from entering the United States. He proposed a very specific policy to accomplish that goal: a country-based travel ban. *Cf. Lukumi*, 508 U.S. at 535 (describing a policy as a "religious gerrymander" because, despite not mentioning religion on its face, the policy was crafted to burden adherents of a particular religion). In May 2016, he announced that he was forming an "immigration commission," headed by Rudolph Giuliani, to "look at the 'Muslim ban,' or 'temporary ban' as we call it."[11] The day after the initial ban was issued, Mr. Giuliani confirmed that Mr. Trump had asked his commission to determine how to "legally" implement a "Muslim

[11]https://www.youtube.com/watch?v=abXAx_wCSoE&feature=youtu.be&t=3m9s; *see also id.* at 5:27 (agreeing that "it's a ban on Muslims, with exceptions").

ban." *IRAP II*, 883 F.3d at 251. Mr. Giuliani explained that the commission had recommended using territory as a proxy for religion. *See id.* at 266-267 (Mr. Giuliani, "an advisor to President Trump, explained that EO-1's *purpose* was to discriminate against Muslims.").

Mr. Trump followed the commission's advice to the letter. In the months after its formation, he announced that, once elected, he would achieve his goal of banning Muslims by barring the entry of people from predominantly Muslim countries. He explained that he was now "talking territories instead of Muslim" because "[p]eople were so upset when I used the word Muslim." *IRAP I*, 857 F.3d at 576; *see also id.* ("Oh, you can't use the word Muslim."). When asked whether the country-based approach was "changing [his] position" from the long-promised Muslim ban, he responded, "No. Call it whatever you want. We'll call it territories, OK?" CA4 J.A. 818. He repeatedly denied that a country-based ban was a "rollback" of his proposed Muslim ban. *IRAP I*, 857 F.3d at 576.

President Trump issued his promised ban almost immediately after taking office. Exec. Order No. 13,769 (Jan. 27, 2017) ("EO-1"). The ban took the "exact form" the President had promised as a candidate: a ban on Muslims using nationality as a proxy. *IRAP I*, 857 F.3d at 594.

Thus, the President's own statements and actions directly linked the ban to his denigration of Islam. *Cf. Lukumi*, 508 U.S. at 540 (plurality opinion) ("That the ordinances were enacted because of . . . their suppression of Santeria religious practice is revealed by the events preceding their

enactment.") (citation and internal quotation marks omitted); *Larson*, 456 U.S. at 254-255 (looking to "the history of" the provision at issue in discerning "the explicit intention" of disfavoring a religion).

3. Since issuing the first order, President Trump has relentlessly pursued essentially that same ban, revising it each time it has been enjoined in order to ensure that some version stays in place. The continuity of structure and effect in these versions of the ban, as well as the President's repeated statements in favor of as strict a ban as possible, are additional powerful evidence that the Proclamation, like its predecessors, is an effort to exclude Muslims and disparage Islam.

Similar efforts to tweak policies during the course of Establishment Clause litigation have met with skepticism from this Court. In *Santa Fe*, for example, the Court struck down "the latest" version of a school prayer policy that had evolved "in developing litigation." 530 U.S. at 315; *see id.* at 294-299. The Court held that an Establishment Clause challenge "not only can, but must" be "considered in light of the history in which the policy in question evolved." *Id.* at 311, 315. *McCreary* addressed the third courthouse display issued "within a year," with the modifications made "over the course of a single lawsuit." 545 U.S. at 855, 873 n.22. The Court rejected the argument that it should limit its consideration to the "latest news about the last in a series of governmental actions." *Id.* at 866. Rather, the Court concluded that the government's repeated efforts to enact essentially the same policy were strong evidence that the most recent version advanced the same impermissible goal as its immediate predecessors. *See id.* at 873 & n.22

(explaining that a reasonable observer "would probably suspect that the Counties were simply reaching for any way" to pursue their original goal).

The history of the President's bans compels the same conclusion. EO-1 banned hundreds of millions of people from seven countries whose combined population is more than 97% Muslim. After several courts enjoined EO-1, President Trump decided to revise it, not to eliminate its anti-Muslim purpose or its targeting of predominantly Muslim nations, but only in the hope of insulating it from litigation. He offered no retraction or refutation of his many statements of its illegal purpose. Instead, he described EO-1's successor as a "watered down" and "politically correct" version that he adopted only at the urging of "the lawyers." *IRAP II*, 883 F.3d at 267; CA4 J.A. 780. EO-2, he vowed, would "get[] just about everything" in EO-1, because "I keep my campaign promises." *IRAP I*, 857 F.3d at 577, 600. Accordingly, he directed the relevant agencies to "compile additional factual support" as a post hoc justification for his already-chosen ban.[12]

The revised ban continued to operate based on territory and targeted six of the same seven overwhelmingly Muslim countries. Like EO-1, it directed that, after studying vetting procedures, the Secretary of Homeland Security "shall submit to the President a list of countries" for a permanent ban. EO-2 § 2(e).

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[12] Gov't Reply at 2-3, *IRAP*, No. 17-1351, Doc. No. 102 (4th Cir. filed Apr. 5, 2017). The agencies found remarkably little new factual support, relying only on general country conditions—some of them decades old—and a single terrorist plot by a national of a banned country: a Somali refugee who entered the United States as a three-year-old. *See* EO-2 § 1(e), (h).

While EO-2 was in place, President Trump repeatedly announced that he planned to maintain the ban, and that his goal was to impose a "much tougher" version of the same policy he had issued immediately after taking office. *IRAP II*, 883 F.3d at 267. As he told reporters, "the travel ban: the tougher, the better."[13]

President Trump issued the Proclamation the day EO-2 expired. Like EO-1 and EO-2, the Proclamation once again takes the "exact form" of the promised Muslim ban. *See IRAP I*, 857 F.3d at 594. It bans most nationals of six overwhelmingly Muslim countries, five of which were also banned by EO-1 and EO-2. Together, their population is over 150 million and approximately 95% Muslim.

The Proclamation also bans North Korean nationals, who already receive almost no visas, and a limited number of Venezuelan government officials. The ban's impact thus falls almost entirely on Muslims. For example, if it had been in effect in 2016, the Proclamation would have denied immigrant visas to 12,998 Yemenis, 7,727 Iranians, 9 North Koreans, and 0 Venezuelans. CA4 J.A. 868. "The net result" is a policy that appears to have been

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[13]http://www.ajc.com/news/breaking-news/trump-administration-announces-new-travel-ban-the-tougher-the-better/S6JruYyDOgwtP2LTiVUrGL/ (internal quotation marks omitted). The government argues that the President's repeated calls for a continued ban did not *themselves* state an anti-Muslim bias. Gov't Br. 71. But there is plenty of other evidence of anti-Muslim purpose. The relevance of these statements is that, by directly and explicitly linking EO-1 and EO-2 to the Proclamation, they make untenable the government's position that the agency review and recommendation somehow divorced the Proclamation from the anti-Muslim aims of the two initial bans. *See* Gov't Br. 68-71.

"gerrymandered with care," *Lukumi*, 508 U.S. at 536, 542, to afford a colorable defense in court while continuing, like the prior bans, to ban almost exclusively Muslims, *cf. Larson*, 456 U.S. at 255 (policy crafted "with a view towards religious gerrymandering") (internal quotation marks omitted).

This is exactly the result President Trump has long promised, achieved through the exact means he said he would use. The President has relentlessly pursued that goal, starting with EO-1 and carrying it through to the Proclamation. His insistence on banning millions of Muslims makes clear to all Americans that the Proclamation's purpose is to denigrate Islam and exclude Muslims.

III. The Ban's Religious Aim and Message Are Not Diminished by the Involvement of Subordinate Officials in a Secret Review Process with a Foreordained Result.

The government's main Establishment Clause defense is that the Proclamation arose anew after several government agencies undertook a review process and provided a recommendation to the President, as mandated by EO-2. Gov't Br. 63, 65, 69 (invoking review). But the report and review process do not save the ban.

1. The review process was undertaken with full knowledge of what the President wanted. Long before the process was complete, the President made clear that he had decided to continue and extend the bans he had already twice imposed, and both EO-1 and EO-2 explicitly *required* the agencies to submit a list of countries to ban. *See* EO-1 (§ 2(e))

(agencies "*shall* submit to the President a list of countries" for permanent ban) (emphasis added); EO-2 (§ 2(e)) (same). The result of the review process was thus foreordained.

The government contends that President Trump's cabinet did not have to do his bidding. Gov't Br. 71. But the President sits atop the executive branch, and has the authority to remove all the relevant officials. They are subject to the "illimitable power of removal by the Chief Executive," to whom each is but a "subordinate and aid." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 493 (2010) (internal quotation marks omitted). In light of how clearly, publicly, and persistently President Trump made his wishes clear and vowed not to change course, those officials were bound to obey—or risk removal from office and replacement by others who would.[14]

As the Fourth Circuit recognized, *see IRAP II*, 883 F.3d at 268 n.16, the review process and its ultimate recommendation to continue the ban flow

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[14] In addition to his public statements promising to continue and strengthen his ban, President Trump reportedly put explicit pressure on his cabinet secretaries to intensify efforts to exclude foreigners while EO-2's review was underway. *See* Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times, Dec. 23, 2017, https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html (noting that "the White House did not deny the overall description of the meeting"). And during a contemporaneous agency review process regarding refugee admissions, the President's advisor told agency officials that "the results of this study shouldn't embarrass the President." CA4 J.A. 1565-1570 (Jonathan Blitzer, *How Stephen Miller Single-Handedly Got the U.S. to Accept Fewer Refugees*, The New Yorker (Oct. 13, 2017)).

directly from President Trump himself. *Cf. Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in the judgment) (explaining that the Framers "vest[ed] Executive authority in one person rather than several" in order to "facilitat[e] accountability"). Moreover, the President was free to discard some recommendations, adopt others only in part, and specify other features of the ban entirely on his own. *See* 4th Cir. J.A. 952-953 (Government counsel confirming that, even if his advisors disagreed, "[a]t the end of the day, the President is the one who made the decision and the President has adopted the rules he wants by issuing the [P]roclamation"). Indeed, because the recommendations remain secret, we cannot even know whether or to what extent President Trump in fact adopted them.

2. Despite its heavy reliance on the report, "the Government chose not to make the review publicly available." *IRAP II*, 883 F.3d at 268. It has kept DHS's recommendation secret and refused to release the report on vetting procedures, even in redacted form and even upon request by the Fourth Circuit. Letter, *IRAP*, No. 17-2231, Doc. No. 126 (4th Cir. filed Nov. 24, 2017) (arguing that the disclosure of the report, even *in camera*, would be improper). All it has told the public and the courts is a list of factors the agencies considered, and the agencies' ultimate recommendation—to ban almost exactly the same countries that the President had already chosen to ban in EO-1 and EO-2. *See* Proclamation §§ 1(c)(i)-(iii), 2(a)-(h).

Nor does the Proclamation explain how the agencies managed to arrive at virtually the same unprecedented policy President Trump issued on his

eighth day in office "without consulting the relevant national security agencies." *IRAP I,* 857 F.3d at 596; *see also id.* at 632 (Thacker, J., concurring) (the White House "actively shielded" the Acting Attorney General from learning EO-1's contents until after it was issued); *IRAP II*, 883 F.3d at 250 ("The President's national security officials were taken by surprise by EO-1.").

The Proclamation lists nearly a dozen factors, but does not explain the methodology by which some countries were included in the ban and other countries were excluded. The criteria set forth are so numerous and open-ended that they could be used to ban dozens, if not hundreds, of countries. For instance, more than 80 countries fail to issue electronic passports, more than 100 countries regularly fail to report lost or stolen passports, and 13 countries are designated as terrorist safe havens (only four of which are banned by the Proclamation).[15] *Cf. Lukumi*, 508 U.S. at 543-546 (concluding policy targeted particular religion in light of its underinclusiveness to achieve asserted goals). As a result, the Proclamation has a "greater disproportionate impact on majority-Muslim countries than would otherwise flow from the objective factors considered in the review." *IRAP II*, 883 F.3d at 269 n.17 (internal quotation marks omitted). The review process's malleable criteria and secrecy do nothing to assure the public that the Proclamation is anything but predetermined by the President's vocal and repeated promises to maintain a ban.

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[15] *See* CA4 J.A. 1293-1300 (David Bier, *Travel Ban Is Based on Executive Whim, Not Objective Criteria*, Cato Institute, Oct. 9, 2017).

3. The Proclamation also fails to mention, much less analyze, a number of obvious issues that any policy genuinely motivated by security concerns would address. This casts yet further doubt on the review process as a purportedly independent source for the Proclamation.

Despite being premised on a lack of information about certain visa applicants, the Proclamation fails even to acknowledge that existing law *already* requires consular officers to deny visas any time they lack sufficient information about an applicant. *See* 8 U.S.C. § 1361; 22 C.F.R. § 40.6. The Proclamation does not explain why that rule—which has guided our visa system for a century—is now insufficient to address any information deficits.[16] Instead, it cites broad country-based criteria that Congress prescribed for countries to participate in the Visa Waiver Program. *Compare* Proclamation § 1(h)(i)-(iii) *with* 8 U.S.C. § 1187. But the whole point of the Visa Waiver Program is that individuals from countries that meet these criteria may be allowed to *bypass* the individualized visa process. Where countries fall short, their nationals are merely subject to individualized vetting—*not* banned outright. *See* Hawai'i Br. 45-50.

The Proclamation likewise fails to address DHS's own directly relevant, and publicly available, findings that nationality is an unlikely indicator of terrorist activity, and that country bans—never

[16] *See* Immigration Act of 1924, Pub. L. No. 68-139, §§ 7, 23; Report of the Comm. on Imm. & Naturalization, at 9, H.R. Rep. 68-176, 68 Cong., 1st Sess. (Feb. 9, 1924) (noting that an applicant would have to produce "all available public records concerning him kept by the government to which he owes allegiance").

before used as part of the normal visa vetting system—are unlikely to improve security. *See IRAP I*, 857 F.3d at 575; J.A. 244-274. The government's own studies, produced under the same President and only months before the Proclamation was issued, contradict the asserted rationales of the Proclamation. That contradiction makes it even more improbable that the same agency then recommended issuance of the Proclamation for reasons unconnected to the President's promise to reimpose his ban.

The point is not, as the government argues (at 67), that the Court should assess the "adequacy" of the government's stated national security decisions. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999). It is that the Establishment Clause *requires* the Court to assess whether government conduct disfavors and denigrates a religion. Even the government concedes that it would be unconstitutional for the President to announce in the Proclamation that he was excluding Muslims in the name of national security. The thin and implausible veneer of religious neutrality purportedly offered by an undisclosed secret report cannot launder or erase the overwhelming evidence of impermissible anti-Muslim purpose in the public record.

4. Finally, the Proclamation distinctly echoes President Trump's other efforts to enlist cabinet agencies for the avowed purpose of helping his ban survive litigation. After EO-1 was enjoined, President Trump admitted publicly that he was revising it solely as a strategic litigation decision. *IRAP II*, 883 F.3d at 267; CA4 J.A. 780. Consequently, he directed the relevant agencies to

"compile additional factual support" to help justify the ban policy he had already chosen. *Supra* note 12. In a transparent attempt to bolster EO-2's litigation prospects, two cabinet officials (both removable at will) submitted at the last minute a boilerplate letter, which EO-2 did not even mention, recommending that President Trump adopt the same ban he had already adopted without their input. *IRAP I,* 857 F.3d at 577. The review and recommendation ordered by EO-2 and referenced in the Proclamation is more elaborate, but fundamentally similar. Neither recommendation can detach the Proclamation from its history and from the President's clear statements evincing his anti-Muslim animus and purpose.

IV. There is No Obstacle to Consideration of the Establishment Clause Claims.

Contrary to the government's contention, neither standing doctrine nor *Kleindienst v. Mandel* suggests that the Court cannot consider the Establishment Clause violations in this case.

A. The Plaintiffs Have Standing.

1. When the government disparages a religious faith, victims of that disparagement with a particularized nexus to the challenged action suffer injuries sufficiently real and concrete to establish Article III standing. Indeed, this Court has repeatedly reached the merits in Establishment Clause cases involving the claim that promotion of a particular religion *implicitly* treated nonadherents as outsiders. Such cases have included challenges to a crèche in a courthouse, *County of Allegheny v. ACLU Greater Pittsburgh Chapter,* 492 U.S. 573, 580 (1989), a Ten Commandments monument on the

grounds of the state capital building, *see Van Orden v. Perry*, 545 U.S. 677, 681 (2005), Bible readings and recitations of the Lord's Prayer in public schools, *School District of Abington Township v. Schempp*, 374 U.S. 203, 205, 224 n.9 (1963), and prayers at high school football games, *Santa Fe*, 530 U.S. at 309-310. Governmental *condemnation* of a religion presents not only a starker violation of the constitutional guarantees of religious liberty, but also a more targeted message of exclusion. *See supra* Part I.

The unrebutted record evidence demonstrates that the Proclamation—by condemning the religion of the *Hawai'i* and *IRAP* plaintiffs, and separating these plaintiffs from their families—has undermined their dignity as full members of the community. That concrete injury grounds the plaintiffs' Article III standing to challenge the Proclamation as a violation of the Establishment Clause.

The government's principal response is to suggest that the plaintiffs' theory of standing lacks any limit because their injury consists of no more than "the psychological consequence presumably produced by observation of conduct with which one disagrees." Gov't Br. 29 (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 485-486 (1982)).

That mischaracterizes the plaintiffs' injuries and argument. In *Valley Forge*, 454 U.S. 464, the plaintiffs sought to challenge a property transfer in Pennsylvania, hundreds of miles from their homes, which they had merely read about in a press release. *Id.* at 486-487. Here, the plaintiffs are not bystanders, but "*victims* of th[e] alleged religious

intolerance." *IRAP II*, 883 F.3d at 260 (internal quotation marks omitted) (emphasis added). The Proclamation excludes and marginalizes them, sending the message that they are less than full members of the national community. *See id.* at 259-260 (citing examples from among the plaintiffs in *IRAP* and consolidated litigation). And they have been personally affected by the Proclamation in a way that members of the general public—even Muslim members of the general public—have not. The Proclamation has injected itself into the plaintiffs' lives: It directly jeopardized the visa petitions they filed in order to reunite with family members and threatened to delay or prevent those reunions. *See* Hawai'i Br. 28-30.

Unlike the plaintiffs in *In Re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), who acknowledged that their theory of standing would allow even a judge on the panel to sue, *id.* at 764, the plaintiffs here have been personally harmed in a particularized way by "the discrete expression of government animus against Islam," *IRAP II*, 883 F.3d at 261-262; *see also Awad v. Ziriax*, 670 F.3d 1111, 1122-1123 (10th Cir. 2012) (recognizing standing to challenge condemnation by a state constitutional amendment singling out Sharia law for disfavor); *Catholic League for Religious & Civil Rights v. City & County of San Francisco*, 624 F.3d 1043, 1052 n.33 (9th Cir. 2010) (en banc) (holding that Catholics in San Francisco had standing to challenge a municipal resolution critical of Catholic doctrine based on their "daily experience of contact with a government that officially condemns [their] religion").

2. The plaintiffs are and always have been asserting a "violation of their *own* Establishment Clause rights," Gov't Br. 26, and seeking redress for their own injuries. The government is wrong to suggest that because the Proclamation denies visas to the plaintiffs' relatives, it cannot injure the plaintiffs themselves, or violate the plaintiffs' own rights. This Court has repeatedly decided the claims of individuals in the United States who allege that the government is injuring *them* and violating *their* rights through its use of the immigration power, even when the government does so by refusing to allow foreign nationals abroad to travel to the United States. *See Mandel*, 408 U.S. at 764-765; *Kerry v. Din*, 135 S. Ct. 2128, 2040-2042 (2015); *cf.* Oral Arg., *Washington v. Trump*, No. 17-35105, 2017 WLNR 4070578 (9th Cir. Feb. 7, 2017) (government counsel conceding that "a U.S. citizen with a connection to someone seeking entry" would have standing to challenge EO-1).

This Court has also recognized that injuries resulting from government regulation targeting others are cognizable under the Establishment Clause. In *Two Guys From Harrison-Allentown v. McGinley*, 366 U.S. 582 (1961), the plaintiff company had standing to challenge a Sunday closing law, even though only the company's employees—not the company itself—had been regulated, prosecuted, and fined for violating the law. *Id.* at 585-586.[17]

[17] In the prior briefing before this Court, the government asserted that standing in *Two Guys* was predicated on the regulation of "the business directly" in addition to its employees. *See* Gov't Reply Br., *Trump v. IRAP*, Nos. 16-1436 and 16-1540, at 11 n.3 (Oct. 2017). Not so. The *employees* were prosecuted and threatened with prosecution, and the business

Contrary to the government's suggestion, the companion case, *McGowan v. Maryland*, 366 U.S. 420 (1961), does not say that only direct regulation can cause an Establishment Clause injury. Instead, it explains that the plaintiffs in that case could not allege that their Free Exercise Clause rights were violated where they never even explained what their religious beliefs were. *Id.* at 429. And it goes on to find that the plaintiffs *did* have standing to raise their Establishment Clause claims, as they had suffered a "direct economic injury" under the challenged law. *Id.* at 430. *McGowan* and *Two Guys* underscore that the question is whether the challenged action *injures* the plaintiff, not whether it directly regulates him or her.[18] The Proclamation plainly injures these plaintiffs.

B. The Proclamation is Invalid Under the Establishment Clause Even If the Court Applies Mandel.

1. Seeking to avoid the overwhelming evidence of religious animus in this case, the government argues that because the President acted in the immigration context, the Court should close its eyes to the real goal of the Proclamation. Relying on

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sought an injunction restraining the district attorney "from arresting or threatening to arrest *any of appellant's employees* for violation of the Sunday law or for conspiracy to violate the same." Br. for Appellees at *7, *Two Guys From Harrison Allentown Inc. v. McGinley*, *available at* 1960 WL 98827 (U.S. 1960) (emphasis added); *see id.* at *10; Br. for Appellant at *8, *Two Guys*, *available at* 1960 WL 98608 (U.S. 1960).

[18] *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 16-17 (2004), is far afield from this case. In *Newdow*, the Court held as a prudential matter that a father could not sue on behalf of his daughter where it appeared that California's domestic relations law did not give him the right to do so.

Kleindienst v. Mandel, it contends that the Court's review must be restricted to the Proclamation's text even in the face of clear evidence of bad faith. *Mandel* establishes no such principle.

Rather, *Mandel* explains that where the government provides a "facially legitimate and bona fide reason" for excluding a noncitizen, courts will not "look behind" the given explanation when considering the claims that result. 408 U.S. at 770. In contrast, as Justices Kennedy and Alito explained in their controlling concurrence in *Kerry v. Din,* when a challenger makes "an affirmative showing of bad faith," 135 S. Ct. at 2141, it *is* appropriate to "look behind" the face of the Proclamation, *id.* (internal quotation marks omitted).

As the Fourth Circuit explained, the *Mandel* standard "clearly affords the political branches substantial deference," but also allows plaintiffs, in "very rare instances," to demonstrate "that a government action runs so contrary to the basic premises of our Constitution as to warrant more probing review." *IRAP II*, 883 F.3d at 264. The Fourth Circuit correctly concluded that this case presents one of those rare instances, since, in this "extraordinary case," the plaintiffs offer "undisputed evidence of [anti-Muslim] bias: the words of the President." *Id.* The fact that similar evidence of bad faith is "highly unusual and unlikely to recur," *id.* at 352 (Harris, J., concurring), underscores the correctness of this conclusion.

3. The government maintains that *Mandel*'s standard is equivalent to "'rational-basis' review" and forbids any inquiry into purpose. Gov't Br. 61 (quoting *Sessions v. Morales-Santana*, 137 S.

Ct. 1678, 1693 (2017)). But the Court did not describe *Mandel*'s standard that way in *Mandel* itself or in *Morales-Santana*. The *Morales-Santana* Court explained that *Fiallo v. Bell*, 430 U.S. 787 (1977)—not *Mandel*—applied "rational-basis" review. *Morales-Santana*, 137 S. Ct. at 1693. *Fiallo*, however, involved a challenge to congressional line-drawing on the face of the statute itself, and involved no allegation or evidence of bad faith. 430 U.S. at 791. The plaintiff was not seeking to "look behind" the statute's text to evidence of purpose, and thus the Court had no occasion to address how such evidence would be treated. *See id.* at 798-799. What is more, the government's reading of *Mandel* contravenes the natural meaning of "bona fide": A "bona fide" reason is given "sincerely," "honestly," and "with good faith." Bona Fide, *Black's Law Dictionary* 223 (4th rev. ed. 1968).

On the government's view, even if a government official admitted under oath that he had denied a visa out of racial or religious animus, or in order to collect a bribe, the admission could not be considered so long as the four corners of the written visa decision did not mention race, religion, or a bribe. In short, the government asks the Court to ignore what is apparent to everyone else. No court has ever adopted that position, and for good reason.[19]

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[19] Moreover, the Establishment Clause is a structural limit on government power. *See Engel*, 370 U.S. at 430 (Establishment Clause "is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not"); *McCreary*, 545 U.S. at 876 (warning of "the civic divisiveness that follows when the government weighs in on one side of religious debate"); *McGowan*, 366 U.S. at 430. Thus, the Court need not

V. The Court Should Reserve Any Questions Relating to the Injunction's Bona Fide Relationship Limitation.

Amici urge this Court to reserve any questions relating to the bona fide relationship limitation on the *Hawai'i* injunction. *See Hawai'i v. Trump*, 878 F.3d 662 (9th Cir. 2017) (per curiam) (citing *IRAP*, 137 S. Ct. at 2088). The parties agree that the issue is not before this Court and therefore, they have not briefed it. *See* Resp. Mem., *IRAP v. Trump*, No. 17-1194, at 2 (Feb. 2018) (grant of *certiorari* in *IRAP v. Trump* would "add" bona fide relationship limitation to issues under review); Br. in Opp., *Trump v. Hawai'i*, No. 17-965, at 7 (Jan. 2018) (Ninth Circuit's decision below was "correct" on this issue); *cf.* Pet., *IRAP v. Trump*, No. 17-1194, at 15-17 (Jan. 2018) (specifically raising bona fide relationship issue).

Thus, the Court should not further address the bona fide relationship limitation at this stage, and should instead allow the lower courts to decide in the first instance any questions relating to the limitation in light of the Court's decision in this case. There are compelling reasons why a limitation adopted in the

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undertake the "facially legitimate and bona fide" *Mandel* inquiry in this case, just as it did not undertake that inquiry in *INS v. Chadha*, 462 U.S. 919 (1983) (applying ordinary constitutional analysis without a *Mandel* inquiry in a case involving a structural constitutional claim because "what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing" its immigration power). *See also Bond v. United States*, 564 U.S. 211, 223 (2011) ("If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object.").

context of an emergency stay motion, based solely on a weighing of equities and without any consideration of likelihood of success, should not determine the scope of relief available after the Court has assessed the likelihood of success for a preliminary injunction. *See* Pet., *IRAP*, at 16-17. Moreover, extending the bona fide relationship limitation in this case would reverberate well beyond the unique factual context in which it arose, *see IRAP*, 137 S. Ct. at 2087; *see also, e.g.*, *Doe v. Trump*, No. 17-1707, 2017 WL 6551491, at *25 (W.D. Wash. Dec. 23, 2017) (applying bona fide relationship limitation in different case involving different claims), without first allowing for adequate consideration of this important question.

CONCLUSION

The Court should affirm the preliminary injunction, and clarify that the lower courts can address in the first instance any issues relating to the bona fide relationship limitation.

Respectfully submitted,

Omar C. Jadwat
Counsel of Record
Lee Gelernt
Hina Shamsi
Hugh Handeyside
Sarah L. Mehta
David Hausman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
ojadwat@aclu.org

Karen C. Tumlin
Nicholas Espíritu
Melissa S. Keaney
Esther Sung
Marielena Hincapié
NATIONAL IMMIGRATION LAW CENTER
3450 Wilshire Blvd., #108-62
Los Angeles, CA 90010

Justin B. Cox
NATIONAL IMMIGRATION LAW CENTER
P.O. Box 170208
Atlanta, GA 30317

David Rocah
Deborah A. Jeon
Sonia Kumar
Nicholas Taichi Steiner
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND
3600 Clipper Mill Road,
Suite 350
Baltimore, MD 21211

Linda Evarts
Kathryn Claire Meyer
Deepa Alagesan
Mariko Hirose
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
40 Rector Street, 9th Fl.
New York, NY 10006

Cecillia D. Wang
Cody H. Wofsy
Spencer E. Amdur
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111

Attorneys for Amici Curiae