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 COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* CERTAIN IMMIGRANT RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amici are the following organizations:

1. The American Immigration Council is a national non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants.

2. Kids in Need of Defense ("KIND") is a national non-profit organization that works to ensure that no child faces immigration court alone. KIND provides direct representation, as well as working in partnership with law firms, corporate legal departments, law schools, and bar associations that provide *pro bono* representation, to unaccompanied children in their removal proceedings. KIND advocates for changes in law, policy, and practices to improve the protection of unaccompanied children in the United States.

3. Americans for Immigrant Justice ("AI Justice"), formerly Florida Immigrant Advocacy Center, is a non-profit law firm dedicated to promoting and protecting the

1. Pursuant to Rule 37.3(a), *amici* certify that all parties have consented to the filing of this brief. Petitioners have filed a blanket consent with the Clerk, and Respondents have provided written consent. Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than the *amici*, their members, or their counsel made such a monetary contribution.

basic rights of immigrants. Since its founding in 1996, AI Justice has served over 100,000 immigrants from all over the world. AI Justice's clients are unaccompanied immigrant children; survivors of domestic violence, sexual assault, and human trafficking; immigrants facing removal proceedings; as well as immigrants seeking assistance with work permits, legal permanent residence, asylum, and citizenship. Part of AI Justice's mission is to ensure that immigrants are treated justly, and to help bring about a society in which the contributions of immigrants are valued. In Florida and on a national level, AI Justice champions the rights of immigrants, serves as a watchdog on immigration detention policies, and speaks for immigrant groups who have compelling claims to justice.

4. Central American Legal Assistance has been representing Central American and other asylum seekers since 1985 and has a current caseload of over 2,000.

5. The Door's Legal Services Center ("LSC") has provided legal representation and advice to at-risk youth, ages 12-24, for 25 years on matters including public assistance, housing, foster care, education, family law, and immigration. In particular, the LSC focuses on representing undocumented children and youth who have fled violence around the world to seek safety and opportunity in the United States. The LSC seeks to ensure that its clients remain safely in the United States, obtain lawful status, and make a successful transition to adulthood.

6. The U.C. Davis School of Law Immigration Law Clinic ("the Clinic") is an academic institution dedicated to defending the rights of detained noncitizens in the

United States. The Clinic provides direct representation to detained immigrants who are placed in removal proceedings. In addition, the Clinic screens unrepresented individuals in order to facilitate placement with *pro bono* attorneys and presents legal orientation programs for detained individuals in removal proceedings who are unable to obtain direct representation.

7. Sanctuary for Families ("Sanctuary") is New York State's largest dedicated service provider and advocate for survivors of domestic violence, human trafficking, and related forms of gender violence. Each year Sanctuary provides legal, clinical, shelter, and economic empowerment services to approximately 15,000 survivors. Sanctuary's Immigration Intervention Project, part of its legal arm, The Center for Battered Women's Legal Services, specializes in providing legal assistance and direct representation to over 3,000 indigent survivors per year in humanitarian immigration matters such as asylum, Violence Against Women Act Self-Petitions, and petitions for U and T nonimmigrant status. In addition, Sanctuary provides training on domestic violence and trafficking to community advocates, *pro bono* attorneys, law students, service providers, and the judiciary, and plays a leading role in advocating for legislative and public policy changes that further the rights and protections afforded survivors and their children.

8. The Michigan Immigrant Rights Center ("MIRC") is a statewide non-profit legal resource center for Michigan's immigrant communities, including Michigan's large and diverse Arab American community. MIRC takes calls daily from immigrant and refugee community members seeking clarity about the law and assistance with travel and family reunification.

9. Washtenaw Interfaith Coalition for Immigrant Rights ("WICIR") was called into action over ten years ago to address the urgent needs of people victimized by punitive immigration enforcement tactics—people who make up a vital part of the fabric of our communities. WICIR believes in the right of all people to live in a safe and just society without fear of family separation or removal from this country, which may be the only country they have known. WICIR provides advocacy, resources (financial and material), and legal referrals to unauthorized people; education to both the affected population and to the ally community; and support for the children and youth affected by the loss through removal of a parent or significant family member.

10. Safe Passage Project ("Safe Passage") is a small, highly-focused, non-profit immigration legal services organization. Safe Passage provides free lawyers to refugee children living in the New York area who face deportation back to life-threatening situations, despite their strong legal claim to stay in the United States. Safe Passage was founded in 2006 at New York Law School and in 2013 fully incorporated as an independent non-profit.

11. The Asian Law Alliance ("ALA"), founded in 1977, is a non-profit public interest legal organization with the mission of providing equal access to the justice system to the Asian and Pacific Islander communities in Santa Clara County, California.

12. Community Legal Services in East Palo Alto ("CLSEPA") provides legal assistance to low-income individuals and families in East Palo Alto, California and the surrounding community. CLSEPA's practice areas

include immigration, housing, and economic advancement. CLSEPA's mission is to provide transformative legal services, policy advocacy, and impact litigation that enable diverse communities in East Palo Alto and beyond to achieve a secure and thriving future. CLSEPA provides legal assistance and advice to over 6,000 community members per year, and has assisted hundreds of people seeking asylum.

13. The Public Law Center ("PLC") provides free legal services to low-income residents of Orange County. Annually, over 8,000 of the most vulnerable residents of the county, including immigrants, minorities, veterans, seniors, and children, receive services from PLC. PLC's work includes legal counseling, individual representation, community education, and strategic policy advocacy and impact litigation to challenge societal injustices, in the areas of domestic violence, human trafficking, immigration, guardianship, housing, health, bankruptcy, asylum, family law, consumer fraud, and discrimination. PLC's Immigration Unit's mission is to empower immigrants through direct legal services and community-centered lawyering. This unit works on a variety of issues, including relief under the Violence Against Women Act ("VAWA"), U-Visas, T-Visas, Special Immigrant Juvenile Status ("SIJS"), asylum, Deferred Action for Childhood Arrivals ("DACA"), naturalization assistance, and removal defense. In performing its work, PLC partners with a network of over 1,400 volunteer private attorneys, law students, and others in providing the highest quality services to our clients seeking the greatest possible impact for the community at large.

14. The City Bar Justice Center is the non-profit, legal services arm of the New York City Bar Association. Its mission is to leverage the resources of the New York City legal community to increase access to justice. Each year, the City Bar Justice Center assists more than 20,000 low-income and vulnerable New Yorkers to access critically needed legal services and matches over 1,200 cases with *pro bono* attorneys. Through direct representation and *pro bono* legal programs, the City Bar Justice Center's Immigrant Justice Project annually helps hundreds of immigrants who are at their most vulnerable: asylum seekers fleeing persecution, survivors of violent crimes and trafficking, and others seeking humanitarian protection. Operating within the New York City metropolitan area, which has long served as a gateway to America, the City Bar Justice Center is committed to helping immigrants and their families find safety and live in dignity in the United States.

15. The New York Immigration Coalition ("NYIC") represents over 200 organizational members and partners working on behalf of immigrants throughout New York State. The NYIC has taken a lead in coordinating legal services for immigrants, including running the legal efforts at JFK Airport following the issuance of all three travel bans and, more recently, organizing and running a collaborative of nearly 70 groups to provide legal rapid response to ICE enforcement, the end of the DACA program, and much more.

16. The Northwest Immigrant Rights Project ("NWIRP") is a Washington State non-profit organization that promotes justice by defending and advancing the rights of immigrants through direct legal services,

systemic advocacy, and community education. NWIRP strives for justice and equity for all persons, regardless of where they were born.

17. Lawyers For Children ("LFC") is a not-for-profit legal corporation dedicated to protecting the legal rights of individual children in New York City and compelling system-wide child welfare reform. Since 1984, LFC has provided free legal and social work services to children in more than 30,000 court proceedings involving foster care, abuse, neglect, termination of parental rights, adoption, guardianship, custody, and visitation. This year, LFC's attorney–social worker teams will represent children and youth in close to 3,000 court cases in New York City Family Courts. LFC represents numerous clients, including U.S.-born children and immigrant children, who have family members that reside outside of the United States in countries worldwide. LFC has an Immigration Rights Project with two attorneys and a masters-level social worker who have a particular expertise in issues affecting immigrant youth. LFC provides advocacy for immigrant clients who are seeking Special Immigrant Juvenile Status and have been found by the Family Court to have been abused, abandoned, and/or neglected. LFC's insight into the issues raised in the instant case is borne of more than thirty years' experience serving as court-appointed attorneys for children.

18. Legal Services NYC ("LSNYC") fights poverty and seeks justice for low-income New Yorkers. For more than 40 years, LSNYC has helped clients meet basic needs for housing, access to high-quality education, health care, family stability, and income and economic security, including aiding immigrants and survivors of crime and

violence attain lawful immigration status. LSNYC is the largest civil legal services provider in the country. Its neighborhood-based offices and outreach sites across all of New York City's five boroughs help more than 100,000 New Yorkers annually.

19. Immigrant Justice Corps ("IJC") is the country's first immigration legal fellowship program. IJC seeks to expand access to counsel by increasing the quantity of immigration lawyers and the quality of the immigration bar. IJC currently has over 75 Justice and Community Fellows placed with more than 30 legal service providers in the greater New York area. IJC has two Fellows placed at the Arab American Association of New York. IJC's Fellows regularly represent clients from countries subject to the Proclamation, including clients from Yemen and Syria.

20. New York Legal Assistance Group ("NYLAG") is a not-for-profit law office that provides free civil legal services to poor and near poor New Yorkers in the areas of immigration, government benefits, family law, disability rights, housing law, special education, and consumer debt, among others. NYLAG is one of the largest immigrant services providers in New York City. Its Immigrant Protection Unit provides low-income immigrants with comprehensive legal services, including assistance with adjustment of status, family-based immigrant petitions, humanitarian parole, immigrant community education, and many others. NYLAG represents immigrants and refugees regardless of their beliefs or nationality, including immigrants and refugees from, or with family in, the countries subject to the Proclamation. NYLAG's clients have experienced acute hardship because of the

Proclamation, including harm to their and their families' well-being.

21. The Community Activism Law Alliance ("CALA") is a non-profit organization that provides free legal assistance to low-income, underserved populations in Illinois. CALA partners with community activist organizations to create community-located, community-operated, and community-directed law programs. CALA serves over 4,000 people each year, the majority of whom are immigrants and refugees. Additionally, CALA supports the work of many community partner organizations that assist and advocate on behalf of immigrants and refugees. CALA has experience with and knowledge of the actual and potential harm the Proclamation has had and would further have upon immigrants and their communities across the country.

SUMMARY OF ARGUMENT

As President George Washington wrote to a religious minority immigrant community, "the Government of the United States . . . gives to bigotry no sanction, to persecution no assistance."[2] From as early as the arrival of the Pilgrims, the Quakers, the Baptists, and the Anabaptists, this country has been a haven for immigrants, regardless of their faith and country of birth. Freedom of religion and freedom from the establishment of religion are, of course, enshrined in our First Amendment.

The President's Proclamation, issued on September 24, 2017 and entitled "Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats" (the "Proclamation"), hews away at these foundations of our nation, baselessly labeling citizens of six Muslim-majority countries—Chad, Iran, Libya, Syria, Yemen, and Somalia (the "targeted countries")—as potential terrorist threats and banning potentially tens of thousands of people from traveling here as immigrants or non-immigrants.[3] That the targeted

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2. *From George Washington to the Hebrew Congregation in Newport, Rhode Island, 18 August 1790*, Nat'l Archives, https://founders.archives.gov/documents/Washington/05-06-02-0135.

3. Experts estimate that the Proclamation could affect more than 65,000 visas per year. *See, e.g.*, Matt Zapotosky et al., *Latest travel ban will probably affect tens of thousands, and it could short-circuit the court battle*, Wash. Post (Sept. 25, 2017), https://www.washingtonpost.com/world/national-security/latest-travel-ban-will-probably-affect-tens-of-thousands-and-it-could-short-circuit-the-court-battle/2017/09/25/d0e2aee0-a209-11e7-ade1-76d061d56efa_story.html?utm_term=.c92bc6885d5b;

countries are predominantly Muslim nations,[4] and that the President repeatedly promised to ban the entry of Muslims, suggests that the Proclamation was motivated by an unconstitutional disfavoring of Islam. This is not who we are as a country, and this is not allowed by our Constitution.

Kathryn Casteel & Andrea Jones-Rooy, *Trump's Latest Travel Order Still Looks a Lot Like a Muslim Ban*, FiveThirtyEight (Sept. 28, 2017), https://fivethirtyeight.com/features/trumps-latest-travel-order-still-looks-a-lot-like-a-muslim-ban/ (finding that "if [the Proclamation] had been in place in 2016, [it] would have stopped more than 65,000 visas from being issued in seven of the eight countries named," and "[a]bout 90 percent of those visas were issued to visitors from Iran, Syria and Yemen").

4. Six of the eight countries targeted by the Proclamation are Muslim-majority nations; several (including Iran, Somalia, and Yemen) are 99% Muslim. *See Table: Muslim Population by Country*, Pew Research Ctr. (Jan. 27, 2011), http://www.pewforum.org/2011/01/27/table-muslim-population-by-country/; CIA, The World Factbook (2017), *available at* https://www.cia.gov/library/publications/the-world-factbook/index.html. Restrictions relating to the two non-Muslim-majority countries targeted by the Proclamation—Venezuela and North Korea—are not at issue in this action, but in any event the Proclamation's effect on entry into the United States of nationals of those two countries is likely negligible: The Proclamation's restrictions on the entry of Venezuelan nationals are limited to barring entry of particular Venezuelan government officials and their immediate family members; and the total number of U.S. immigrant and non-immigrant visas issued to North Korean citizens averaged only around 83 visas each year from fiscal years 2009 through 2017. *See* U.S. Dep't of State, Report of the Visa Office 2017, tbls. XIV, XVIII, *available at* https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/annual-reports/report-of-the-visa-office-2017.html.

I. The Government is wrong when it argues that this Court is powerless to decide whether the Proclamation violates the Constitution or the INA because such claims are "not justiciable."[5] The President's powers are derived from and circumscribed by the Constitution and delegated congressional authority. And, because we live in a nation "of laws, and not of men," *Marbury v. Madison*, 5 U.S. 137, 163 (1803), it is the responsibility of federal courts to determine when that authority has been exceeded. Judicial review of executive action is part of the "fundamental structure of our constitutional democracy," *Washington v. Trump*, 847 F.3d 1151, 1161 (9th Cir. 2017) (per curiam), *recons. en banc denied*, 853 F.3d 933 (9th Cir. 2017), *and recons. en banc denied*, 858 F.3d 1168 (9th Cir. 2017), and now, more than ever, it is important to reaffirm this vital check and balance. The court below had the authority—and, in fact, the duty—to review the Proclamation for compliance with the Constitution and federal law, and in finding that Respondents had a strong likelihood of success on the merits of their claims, did not abuse its discretion in ordering preliminary injunctive relief.

II. The Proclamation violates the Establishment Clause because it was issued with the purpose of disfavoring Islam. This Court should so hold regardless of which standard of review applies. Contrary to the Government's argument, it does not require "judicial psychoanalysis" to determine that a presidential candidate who repeatedly vows to implement a "Muslim ban" if elected, who within one week of inauguration orders that nationals of seven countries that are at least 90 percent Muslim be temporarily banned from entry to the

5. Br. for Petitioners at 17-30.

United States,[6] and who continues to make disparaging statements regarding Muslims throughout his presidency is motivated by an improper religious purpose. That most such statements were made by the President "outside the process of issuing the Proclamation,"[7] is no reason for this Court to ignore them. Those statements form part of the record on which this Court must determine whether an improper religious purpose motivated the Proclamation. Words matter. When they are the words of a sitting President, they matter profoundly.

Further, this Court should be particularly vigilant in reviewing potential Establishment Clause violations that affect immigrants. As a country that welcomes refugees and asylees escaping persecution, it would be the height of hypocrisy to permit a travel ban that bears the hallmarks of the discrimination from which many such immigrants seek to escape.

III. In entering an injunction preliminarily enjoining implementation and enforcement of the Proclamation, the lower court correctly took into account the broader public harm that the Proclamation would otherwise cause. As organizations committed to serving and advocating on

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6. The seven countries targeted in the first travel ban Executive Order—Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen—are all at least 90 percent Muslim. *See Table: Muslim Population by Country*, Pew Research Ctr. (Jan. 27, 2011), http://www.pewforum.org/2011/01/27/table-muslim-population-by-country/; *About Sudan*, United Nations Development Programme, http://www.sd.undp.org/content/sudan/en/home/countryinfo.html (last visited March 30, 2018).

7. Br. for Petitioners at 71.

behalf of the nation's immigrant communities, *amici* are acutely aware of these harms. Due to the Proclamation, U.S. residents with family members in the targeted countries are deprived of visits from those family members, as well as the ability to sponsor family members for immigrant visas. Our nation's colleges and universities are unable to admit students or recruit faculty from the targeted countries, hindering their ability to foster and maintain a rich, diverse, and inclusive educational environment. And employers in the public and private sectors are unable to hire workers from the targeted countries, to the detriment of public institutions and businesses alike.

Aside from these concrete and tangible harms, the Proclamation works another less tangible but no less insidious harm: the marginalization of religious communities based on promulgation by executive action of the false notion that nationals of the targeted countries are "the 'bad'"[8] and must be excluded on a blanket basis in the purported interests of national security. This is no mere "message"[9]—it is an egregious falsehood with the veneer of presidential approval. These harms are real and cannot be undone, as the lower court recognized in granting preliminary injunctive relief.

Amici accordingly urge this Court to affirm.

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8. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 30, 2017, 5:31 AM), https://twitter.com/realDonaldTrump/status/826060143825666051.

9. Br. for Petitioners at 28.

ARGUMENT

I. THE COURTS SERVE A CRITICAL ROLE IN REVIEWING EXECUTIVE ACTIONS ON IMMIGRATION

More than two centuries of precedent instructs that we have a government "of laws, and not of men." *Marbury*, 5 U.S. at 163. The President's powers are derived from and circumscribed by the Constitution and federal law. The President may not "switch the Constitution on or off at will." *Boumediene v. Bush*, 553 U.S. 723, 765 (2008). To constrain unlawful excesses of the executive branch, our democratic system obligates the judiciary to review and check executive actions alleged to be unconstitutional or to exceed delegated congressional authority. *See Marbury*, 5 U.S. at 177 ("It is emphatically the province *and duty* of the judicial department to say what the law is." (emphasis added)). Contrary to the Government's argument, that judicial duty does not dissipate simply because the challenged actions relate to immigration or national security, or even where the legislative branch has delegated significant discretion to the Executive.[10] As the Ninth Circuit held in rejecting the

10. The Government's argument that this Court is powerless to decide whether the Proclamation violates the Constitution (Br. for Petitioners at 17-30) echoes assertions by the President's senior policy advisor that the President's exercise of powers concerning immigration and national security "will not be questioned." *See* Aaron Blake, *Stephen Miller's authoritarian declaration: Trump's national security actions 'will not be questioned,'* Wash. Post (Feb. 13, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/13/stephen-millers-audacious-controversial-declaration-trumps-national-security-actions-will-not-be-

Government's argument that the first Executive Order was "unreviewable," "[t]here is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy." *Washington v. Trump*, 847 F.3d at 1161.

Decisions of this Court emphasize that, notwithstanding the deference afforded to the political branches with respect to certain aspects of immigration law, the political branches remain "subject to important constitutional limitations" in the immigration context. *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *see also INS v. Chadha*, 462 U.S. 919, 940-41 (1983) (courts can review "whether Congress has chosen a constitutionally permissible means of implementing" its power over the regulation of noncitizens); *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("In the enforcement of [immigration] policies, the Executive Branch of the Government must respect the procedural safeguards of due process."). Indeed, the judiciary stands as a critical bulwark against invidious immigration exclusions by the political branches. *See, e.g.*, *Lesbian/Gay Freedom Day Comm., Inc. v. INS*, 541 F. Supp. 569 (N.D. Cal. 1982), *aff'd sub nom. Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983) (invalidating an Immigration and Naturalization Service policy of excluding noncitizen homosexuals from entry into the United States); *Landon v. Plasencia*, 459 U.S. 21, 32-35 (1982) (holding that a permanent resident returning from a brief trip abroad is entitled to due process in her exclusion hearing, and "[i]n evaluating the procedures in any case, the courts must consider the

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questioned/ (reporting televised public statements by President Trump's senior policy advisor, Stephen Miller, regarding the first travel ban Executive Order).

interest at stake for the individual," including whether the person "may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual").

Nor does the alleged presence of national security considerations immunize government actions from review. *See Aptheker v. Sec'y of State*, 378 U.S. 500, 514 (1964) (upholding constitutional rights despite national security concerns); *see also Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (denying that the president has "totally unrestricted freedom of choice" where a statute deals with foreign relations). Rather, complete deference to executive actions in the national security context would be an impermissible abdication of judicial authority. *Cf. Ex parte Quirin*, 317 U.S. 1, 19 (1942) ("[I]n time of war as well as in time of peace, [courts are] to preserve unimpaired the constitutional safeguards of civil liberty . . . ."); *Ex parte Milligan*, 71 U.S. 2, 120-21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace . . . under all circumstances."). As this Court has noted, "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264 (1967).

Moreover, even where, as here, Congress has delegated a measure of discretion to the President, that discretion is not unchecked. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) (the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake"). Here, the President relies on 8 U.S.C. § 1182(f) as the legal basis for the Proclamation.

But that statute's grant of discretion to the President cannot plausibly be read to strip the courts of jurisdiction to review the President's actions. The Court has required "'clear and convincing' evidence of congressional intent . . . before a statute will be construed to restrict access to judicial review." *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974). There is no evidence here of congressional intent to strip the courts of jurisdiction. To the contrary, the Immigration and Nationality Act's subsequent prohibition of immigration determinations based on nationality and other criteria squarely precludes any conclusion that the legislature intended to shield such discriminatory actions from review. 8 U.S.C. § 1152(a)(1)(A).

Finally, the Government's reliance on a so-called "nonreviewability rule"[11] synonymous with the "doctrine of consular nonreviewability"[12]—a doctrine that this Court has not embraced and that "has a tarnished pedigree, having been first recognized by the Supreme Court in cases that authorized the expulsion of hapless Chinese laborers," *Samirah v. Holder*, 627 F.3d 652, 662 (7th Cir. 2010)—is wholly misplaced. This Court's decisions in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Kerry v. Din*, 135 S. Ct. 2128 (2015), make clear that judicial review is available where, as here, a U.S. citizen asserts that the exclusion of a noncitizen abroad infringes on the citizen's own constitutional rights. *See Mandel*, 408 U.S. 753 (considering the claim of U.S. citizens that a noncitizen's exclusion violated their First Amendment rights); *Din*, 135 S. Ct. at 2132 (plurality opinion) (reviewing visa denial where U.S. citizen asserted that the exclusion of

11. *E.g.*, Br. for Petitioners at 20-23, 26.

12. Br. for Petitioners at 19.

her noncitizen husband violated her due process rights). Even lower courts that have endorsed the doctrine of consular nonreviewability have held that *Mandel* dictates an "exception" to the doctrine where "the denial of a visa implicates the constitutional rights of American citizens." *Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016) (citations omitted).[13]

The Government does not dispute this. *See* Br. for Petitioners at 27 (conceding that judicial review was available in *Mandel* and *Din* because the plaintiffs "contended that the denial of a visa to an alien abroad violated the citizen's own constitutional rights"). In fact, as the Government's own authority reflects, judicial review is proper in cases that, like this one, involve "claims by United States citizens . . . and statutory claims that are accompanied by constitutional ones." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1163 (D.C. Cir. 1999) (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1051 n.6 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987)).

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13. In addition to the Establishment Clause rights implicated here, U.S. citizens and lawful permanent residents with family members in the six targeted countries also have cognizable family reunification claims. *See Moore v. City of E. Cleveland*, 431 U.S. 494 (1977). "[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* at 503; *see also id.* at 504 (noting that the constitutional protection of the family "is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family"); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Din*, 135 S. Ct. at 2139 (Kennedy, J., concurring) (assuming *arguendo* that U.S. citizen had protected liberty interest in living with her noncitizen spouse in the United States).

Further, even absent the constitutional challenges present here, this case falls outside the narrow scope of the doctrine of consular nonreviewability. The doctrine accords deference to consular officers' decisions to grant or deny visas to *individual* applicants. *Saavedra*, 197 F.3d at 1159 (the doctrine of consular nonreviewability concerns the availability of judicial review of "the determination of the political branch of the Government to exclude a *given* alien" (emphasis added)); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543-44 (1950) (finding that the exclusion of a noncitizen war bride was a valid exercise of executive authority where the Attorney General possessed "confidential information" specific to the excluded individual). No "nonreviewability rule" provides immunity from constitutional or statutory review of the President's sweeping attempt here to ban indefinitely tens of thousands of nationals from the six targeted countries, without factual justification for the exclusion of any given person.

The Government does not (because it cannot) cite any authority to the contrary. The Government seeks to rely on *Mandel* for the proposition that, where the Executive gives "a facially legitimate and bona fide reason" for the exclusion of a noncitizen, "courts will [not] look behind the exercise of that discretion."[14] But the executive action at issue in *Mandel* was based on facts particular to an individual. *Mandel*, 408 U.S. at 770.[15] No "nonreviewability

14. Br. for Petitioners at 58-59.

15. *See also Washington v. Trump*, 847 F.3d at 1162 ("[T]he *Mandel* standard applies to lawsuits challenging an executive branch official's decision to issue or deny an *individual* visa based on the application of a congressionally enumerated

rule" mandates the kind of extreme deference that would block this Court's review of the Proclamation.

In short, the court below had the authority—and, in fact, the duty—to review the Proclamation for compliance with the Constitution and federal law, and it did not abuse its discretion in ordering preliminary injunctive relief.

II. THE PROCLAMATION VIOLATES THE ESTABLISHMENT CLAUSE

The Proclamation violates the Establishment Clause regardless of whether the *Mandel* test or the *Lemon* test applies. *Mandel* instructs courts to look beyond the facial explanation given for a government action where there has been a showing that the explanation is in bad faith. *Mandel*, 408 U.S. 753; *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring) (a government action is not considered "bona fide" under *Mandel* if plaintiffs sufficiently make an "affirmative showing of bad faith"). *Lemon* provides a framework for determining whether a government action violates the Establishment Clause. *Lemon v. Kurtzman,* 403 U.S. 602 (1971) (requiring the government to show that an action challenged under the Establishment Clause: (1) has a secular purpose; (2) has a primary effect that does not advance or inhibit religion; and (3) does not foster government entanglement with religion).

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standard to the *particular facts* presented by that visa application." (emphasis added)); *Cardenas*, 826 F.3d at 1172 (holding that, after *Din*, the *Mandel* "facially legitimate and bona fide reason test" requires that the consular official "cite an admissibility statute that 'specifies *discrete factual predicates* the consular officer must find to exist before denying a visa,' or there must be *a fact in the record* that 'provides at least a facial connection to' the statutory ground of inadmissibility" (emphasis added)).

Here, the President's numerous public statements consistently and unmistakably demonstrate the discriminatory motives for the Proclamation, highlighting not only the bad faith nature of the proffered justification, but also the lack of a secular purpose. Based on this record, the Court of Appeals for the Fourth Circuit, in ruling on the Proclamation, held that Respondents had "not just plausibly allege[d]" a bad faith reason for the Proclamation under *Mandel*, but had offered "undisputed evidence of [anti-Muslim] bias: the words of the President." *Int'l Refugee Assistance Project ("IRAP") v. Trump*, 883 F.3d 233, 264 (4th Cir. 2018) (en banc). The Fourth Circuit reasoned that "the Government's proffered rationale for the Proclamation lies at odds with the statements of the President himself," and noted, "In no prior cases have plaintiffs alleged—let alone offered undisputed evidence—that *any* government official made public statements contradicting the asserted 'bona fide' reason for the governmental action." *Id.* at 265. Likewise, the Fourth Circuit found that the Proclamation, "read in the context of President Trump's official statements," exhibited a "primarily religious anti-Muslim objective," thereby violating the Establishment Clause under the *Lemon* test. *Id.* at 269.

Determining that the Proclamation has a discriminatory religious motive does not require "judicial psychoanalysis" or complicated inferences, contrary to what Petitioners argue.[16] Courts routinely review statements and actions as evidence of intent in all areas of the law. Indeed, the"[e]xamination of purpose" is "the daily fare of every appellate court in the country." *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 861-

16. Br. for Petitioners at 67.

62 (2005). In this case, the President has frequently made statements that bear upon his intent in issuing the Proclamation and the Executive Orders that preceded it. The President and his advisors made repeated calls for a "total and complete shutdown of Muslims entering the United States"[17] and for the implementation of a "Muslim ban."[18] Later, on February 16, 2017, following the Ninth Circuit's decision to enjoin implementation of the first Executive Order, President Trump said, "We can tailor the [second Executive Order] to that decision and get just about everything, in some ways more."[19] The following month, at a March 15, 2017 rally in Tennessee, the President asserted that the second Executive Order "is a watered down version of the first one. . . . I think we ought to go back to the first one and go all the way, which is what I wanted to do in the first place."[20] Then,

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17. *See* Jessica Estepa, *'Preventing Muslim immigration' statement disappears from Trump's campaign site*, USA TODAY (May 8, 2017), https://www.usatoday.com/story/news/politics/onpolitics/2017/05/08/preventing-muslim-immigration-statement-disappears-donald-trump-campaign-site/101436780/ (providing the full text of President Trump's December 7, 2015 Statement on Preventing Muslim Immigration).

18. Amy B. Wang, *Trump asked for a 'Muslim ban,' Giuliani says — and ordered a commission to do it 'legally,'* WASH. POST (Jan. 29, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/.

19. Stephanie Castillo, *Justice Department Says President Trump Will Pursue a New Travel Ban*, FORTUNE (Feb. 16, 2017), http://fortune.com/2017/02/16/trump-new-travel-ban/.

20. Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak,'* TIME MAG. (March 16, 2017), http://time.com/4703622/president-trump-speech-transcript-travel-ban-ruling/.

nine days prior to issuing the Proclamation, President Trump tweeted, "The travel ban . . . should be far larger, tougher and more specific-but stupidly, that would not be politically correct!"[21]

Throughout his presidency, Mr. Trump has also continued to make disparaging statements about Muslims, including (just one month before the issuance of the Proclamation) promoting a false story about the mass execution of Muslims using bullets dipped in pigs' blood.[22] On November 29, 2017, President Trump retweeted three anti-Muslim videos from an extremist account—"Muslim Destroys a Statute of Virgin Mary!," "Islamist mob pushes teenage boy off roof and beats him to death!," and "Muslim migrant beats up Dutch boy on crutches!"—prompting deputy press secretary Raj Shah to explain that President Trump "has been talking about these security issues for years now, from the campaign trail to the White House," and has "addressed these issues with the travel order that he issued earlier this year and the companion proclamation."[23]

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21. Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 15, 2017, 3:54 AM), https://twitter.com/realdonaldtrump/status/908645126146265090.

22. Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 17, 2017, 11:45 AM), https://twitter.com/realDonaldTrump/status/898254409511129088.

23. *Press Gaggle by Principal Deputy Press Secretary Raj Shah en route St. Louis, MO*, U.S. WHITE HOUSE (Nov. 29, 2017), https://www.whitehouse.gov/briefings-statements/press-gaggle-principal-deputy-press-secretary-raj-shah-112917/.

After these repeated pronouncements by the President and his aides, the President's signing of a Proclamation with a vastly disproportionate detrimental effect on Muslim immigrants creates a "connection" between stated motive and action that allows for a straightforward analysis of purpose. *See IRAP*, 883 F.3d at 268.

To say that such a finding requires "judicial psychoanalysis" where the President repeatedly promised a "Muslim ban," and then acted to substantially keep that promise, is to leave no role at all for the judiciary to review executive actions in any of the myriad areas of law that demand an analysis of intent. If explicit statements do not demonstrate purpose, then this Court's carefully developed Establishment Clause jurisprudence will be rendered toothless.

Contrary to the Government's argument,[24] it is in no way unusual or improper for the Court to consider probative statements of intent made by the President and his staff outside of the formal review process. Petitioners argue that judicial review of such statements constitutes an impermissible "probing" of the President's intent.[25] Yet the White House itself considers President Trump's tweets, the source of many statements bearing on the purpose of the Proclamation, to be "official statements by the President of the United States."[26] Further, courts

24. Br. for Petitioners at 66-71.

25. Br. for Petitioners at 67.

26. Elizabeth Landers, *White House: Trump's tweets are 'official statements,'* CNN.com (June 6, 2017), https://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html.

have consistently accepted public and private statements as evidence of the purpose of a government action, both in and outside of the Establishment Clause context. *See, e.g.*, *Church of the Lukumi Babalu Aye., Inc. v. City of Hialeah*, 508 U.S. 520, 540-42 (1993) (relying on "contemporaneous statements" of city officials in concluding that city ordinances "had as their object the suppression of religion"); *Glassroth v. Moore*, 335 F.3d 1282, 1284-87 (11th Cir. 2003) (analyzing the statements and prior campaign promises of an elected state judge in holding that his decision to erect a Ten Commandments monument in the state judicial building violated the Establishment Clause); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1222 (2d Cir. 1987) (citing the campaign platform and subsequent actions of the Mayor of Yonkers as evidence of discriminatory intent in an Equal Protection housing case); *Gonzalez v. Douglas*, 269 F. Supp. 3d 948, 965 (D. Ariz. 2017) (finding racial animus where a state senator, who later became Superintendent of Public Instruction, had posted discriminatory comments on a blog, reasoning that "[t]he blog comments are more revealing of . . . state-of-mind than his public statements because [the blog] provided . . . a seeming safe-harbor to speak plainly").

The Government's argument would require the Court to cover its eyes and ears to salient evidence of intent. The Court is not being asked to engage in a speculative analysis of motive, but merely to take into consideration statements by the President when determining the purpose of his actions. No support can be found in case law or common sense for this Court to pretend that statements by the person holding the highest office in the nation were never made and do not matter. They were made and they do matter.

This Court should be especially vigilant in reviewing potential Establishment Clause violations that impact immigrant populations. The very founders of this country were immigrants seeking relief from persecution abroad, and this Court has recognized that the United States is "a country whose life blood came from an immigrant stream." *Ex parte Kumezo Kawato*, 317 U.S. 69, 73 (1942). The United States is a world leader in accepting refugees and asylum-seekers,[27] and U.S. immigration laws reflect a pronounced focus on protecting victims of persecution. *See, e.g.*, 8 U.S.C. § 1158(b)(1)(B)(i) (providing asylum eligibility for applicants who have been persecuted on the basis of "race, religion, nationality, membership in a particular social group, or political opinion"). A Proclamation that codifies the same type of discrimination so many of these immigrants are fleeing undermines the immigration policies and constitutional values of the United States.

III. THE PROCLAMATION HAS ALREADY CAUSED IRREPARABLE HARM AND WILL CONTINUE TO DO SO

In their work with immigrants, *amici* seek to strengthen diversity and promote justice and equality. Connected by our common humanity, *amici* believe that protection of the interests of individuals and organizations affected by the Proclamation reinforces the broader interests of American society. The individual

27. *See Refugee Admissions*, U.S. Dep't of State, https://www.state.gov/j/prm/ra/ (last visited March 30, 2018) ("While UNHCR reports that less than 1 percent of all refugees are eventually resettled in third countries, the United States welcomes almost two-thirds of these refugees, more than all other resettlement countries combined.").

and organizational harms faced by those affected by the Proclamation are irreparable, weighing in favor of affirming the preliminary injunction below.

The harms caused by the deprivation of a constitutional right, no matter how brief the duration, are by their very nature irreparable. Unlike pecuniary harms, constitutional harms generally cannot be fully compensated *post hoc*. That is particularly true for harms to First Amendment rights. As this Court has recognized, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).[28] Here, the Proclamation threatens the constitutionally protected rights to be free of a government-established religion, to equal protection of the law, to international travel, and to family integrity.

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28. While *Elrod* dealt with freedom of speech, five circuits have recognized that *Elrod* applies to violations of the Establishment Clause. *See IRAP*, 883 F.3d at 270; *Chaplaincy of Full Gospel Churches v. Eng.*, 454 F.3d 290, 302 (D.C. Cir. 2006); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996); *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2d Cir. 1986); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 274 (7th Cir. 1986). Moreover, the Third, Sixth, and Ninth Circuits have recognized that *Elrod's* reasoning applies to other constitutional rights. *See Latta v. Otter*, 771 F.3d 496, 500 (9th Cir. 2014) (per curiam) (deprivation of right to marry constitutes an irreparable harm); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (violations of Fourth Amendment inflict irreparable harm); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 178 (3d Cir. 2002) (limitation of Free Exercise Clause inflicts irreparable harm); *Ramirez v. Webb*, 787 F.2d 592 (6th Cir. 1986) (per curiam opinion) ("Unreasonable searches and seizures, particularly when premised on race and alienage, are demeaning to such a degree as to be practically uncompensatable.").

From their work, *amici* know that U.S. citizens and lawful permanent residents ("LPRs") with family members in the six targeted Muslim-majority countries will suffer concrete harms to their familial interests. Under the Proclamation's discriminatory nationality-based test, U.S. citizens and LPRs will be unable to receive visits from loved ones who live in the banned countries or to sponsor family members from those countries for lawful permanent residence in the United States, absent a waiver of the Proclamation's application to a particular individual. As implemented, the Proclamation separates spouses and fiancés across continents, deprives family members of time with ill or elderly relatives, and forces overseas visa applicants to miss births, weddings, funerals, and other important family events.

Immigrants and visitors from the targeted countries contribute to local and national life in numerous ways that are and will continue to be stymied by the Proclamation. For instance, public and private colleges and universities recruit students, permanent faculty, and visiting faculty from the targeted countries. The Proclamation prevents visa applicants from the targeted countries from studying or teaching at U.S. universities, irrevocably damaging their personal and professional lives and harming our educational institutions throughout the country. By way of further example, millions of doctors' appointments are provided each year by physicians from the affected countries.[29] Preventing doctors from these countries

29. The Immigrant Doctors Project, https://immigrantdoctors.org (last visited March 30, 2018) (analyzing statistics from Doximity, an online networking site for doctors that assembled data from a variety of sources, including the American Board of Medical Specialties, specialty societies, state licensing boards, and collaborating hospitals and medical schools).

from coming to the United States—or discouraging those already here from staying by preventing their family members from visiting or joining them here—will adversely impact medical institutions and curtail medical care throughout the United States.

Singling out and banning nationals from the six targeted countries, as the Proclamation does, causes further harm by stigmatizing not only immigrants and refugees, but also Muslim citizens of the United States. While the Government seeks to belittle this harm and claims it to be not cognizable,[30] courts have recognized the inherent harm to a faith community "[w]here, as here, the charge is one of official preference of one religion over another," acknowledging that "such governmental endorsement 'sends a message to nonadherents [of the favored denomination] that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *See Chaplaincy of Full Gospel Churches*, 454 F.3d at 302 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

The relentless anti-Muslim drumbeat during the President's campaign, coupled with the Proclamation itself and its predecessor Executive Orders, has made immigrants and Muslim citizens justifiably fearful. Against the backdrop of the recent rise in crimes targeting Muslims in the United States,[31] the Proclamation

30. Br. for Petitioners at 27-29.

31. *See, e.g.*, Katayoun Kishi, *Assaults against Muslims in U.S. surpass 2001 level*, Pew Research Ctr. (Nov. 15, 2017),

amplifies the sense of persecution that citizens and recent immigrants of Muslim faith are forced to suffer.

These and other harms that would be caused by the continued enforcement of the Proclamation are not fleeting. The record in this case, and in the numerous other actions across the country that have challenged the Proclamation, shows that many people have already been affected in myriad ways following implementation of the Proclamation, and the upheaval they have experienced cannot be undone. *Amici* accordingly urge this Court to recognize these harms when considering affirmance of the court below.

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www.pewresearch.org/fact-tank/2017/11/15/assaults-against-muslims-in-u-s-surpass-2001-level; Richard Cohen, *Hate Crimes Rise for Second Straight Year; Anti-Muslim Violence Soars Amid President Trump's Xenophobic Rhetoric*, S. Poverty L. Ctr. (Nov. 13, 2017), https://www.splcenter.org/news/2017/11/13/hate-crimes-rise-second-straight-year-anti-muslim-violence-soars-amid-president-trumps; *see also* Albert Samaha and Talal Ansari, *Four Mosques Have Burned in Seven Weeks – Leaving Many Muslims and Advocates Stunned*, BuzzFeed News (Feb. 28, 2017), https://www.buzzfeed.com/albertsamaha/four-mosques-burn-as-2017-begins; David Neiwert, *Is Kansas' 'Climate of Racial Intolerance' Fueled by Anti-Muslim Political Rhetoric?*, S. Poverty L. Ctr. (Mar. 2, 2017), https://www.splcenter.org/hatewatch/2017/03/02/kansas'-'climate-racial-intolerance'-fueled-anti-muslim-political-rhetoric.

CONCLUSION

For the foregoing reasons, *amici* respectfully support Respondents' request that the Court affirm in full the judgment of the court of appeals.

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Dated: March 30, 2018