No. 17-965

In the Supreme Court of the United States

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

v.

HAWAII, *et al.*,
Respondents.

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

Brief of National Security Experts Andrew C. McCarthy, Center for Security Policy, Frank Gaffney, Robert J. Shillman, Admiral James "Ace" Lyons, Lieutenant General William G. Boykin, and Ambassador Henry F. Cooper as *Amici Curiae* in Support of Petitioners

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QUESTIONS PRESENTED

The President has broad constitutional and statutory authority to prohibit or restrict the entry of aliens outside the United States when he deems it in the nation's interest. Pursuant to this authority, the President issued Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017), entitled, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats" ("Proclamation"). The Proclamation suspends entry, subject to exceptions and case-by-case waivers, of certain categories of aliens abroad from eight countries (Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia) that do not share adequate information with the United States or that present other risk factors. The district court preliminarily enjoined enforcement of the Proclamation's entry suspensions worldwide, except as to nationals of two countries (North Korea and Venezuela). The court of appeals affirmed, except as to persons without a credible claim of a *bona fide* relationship with a person or entity in the United States. The courts concluded that the Proclamation likely violates the Immigration and Nationality Act (INA).

The questions presented are:

1. Whether respondents' challenge to the President's suspension of entry of aliens abroad is justiciable.

2. Whether the Proclamation is a lawful exercise of the President's authority to suspend entry of aliens abroad.

3. Whether the global injunction is impermissibly overbroad.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, *Amici Curiae* National Security Experts Andrew C. McCarthy, Center for Security Policy, Frank Gaffney, Dr. Robert J. Shillman, Admiral James "Ace" Lyons, Jr., U.S. Navy Retired, Lieutenant General William G. Boykin, U.S. Army Retired, and Ambassador Henry F. Cooper (collectively referred to as "*Amici*") respectfully submit this brief in support of Petitioners.[1]

Andrew C. McCarthy is the author of two *New York Times* bestsellers, *Willful Blindness: A Memoir of the Jihad* (Encounter Books 2008), and *The Grand Jihad: How Islam and the Left Sabotage America* (Encounter Books 2010). He is one of the nation's most prominent voices on legal and national security issues.

For 18 years, Mr. McCarthy was an Assistant United States Attorney in the Southern District of New York. From 1993 through 1995, he led the prosecution against the "Blind Sheikh," Omar Abdel Rahman, and his jihadist cell for waging a terrorist war against the United States—a war that included the 1993 World Trade Center bombing and a plot to bomb New York City landmarks. During the last five years of his

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[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. *Amici* further state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

tenure, he was the chief assistant U.S. attorney in charge of the Southern District's satellite office in White Plains. During that time, he was also heavily involved in the investigation of the 1998 bombings of the U.S. embassies in Kenya and Tanzania. Following the 9/11 attacks, he supervised the Justice Department's Command Post near Ground Zero in New York City. In 2004, he served at the Pentagon as a Special Assistant to the Deputy Secretary of Defense. As a direct result of his experience and expertise, Mr. McCarthy has testified before Congress on various national security issues.

The Center for Security Policy (CSP) is a Washington, D.C.-based, nonprofit policy research organization dealing with issues relating to defense and foreign policy. CSP provides analysis of such national security matters for policy-makers, legislators, the media, and the general public. The founder and president of CSP, Frank J. Gaffney, Jr., acted under President Ronald Reagan as the Assistant Secretary of Defense for International Security Policy, the senior position in the Defense Department with responsibility for policies involving nuclear forces, arms control, and U.S.-European defense relations.

Since the terrorist attack on 9/11, Mr. Gaffney has directed CSP in focusing much of its resources on the underlying enemy threat doctrine known to Islamic terrorists as sharia (*i.e.*, authoritative Islam's political, military, and legal doctrine and governing system arising therefrom).

The Center for Security Policy's specific interest in this case is on behalf of policy and national security professionals who call upon CSP to assist in crafting

legislative and regulatory tools to counter the threat from Islamic terrorists who would exploit ill-enforced immigration codes and inadequately secured borders.

Dr. Robert Shillman is the Founder, Chairman and Chief Culture Officer of Cognex Corporation, the world's leading supplier of machine vision systems. Prior to founding this global company, Dr. Shillman held faculty positions in the departments of Electrical Engineering and Computer Science at the Massachusetts Institute of Technology and at Tufts University. He holds a B.S.E.E. from Northeastern University, and an M.S.E.E. and a Ph.D. from the Massachusetts Institute of Technology where his doctoral studies were in the field of machine vision and artificial intelligence. As a U.S. business leader and innovator, Dr. Shillman has changed the way industry operates globally, putting him and his company in the midst of global affairs with global operations. As a result of this first-hand experience, Dr. Shillman has developed a keen interest and expertise in the threat that Islamic terrorism poses to domestic and international business interests. To that end, Dr. Shillman serves as a board member for numerous philanthropic organizations that address this national and international threat, including The Israel Institute of Technology, The Friends of the Israel Defense Forces, and The David Horowitz Freedom Center, among others.

Admiral James "Ace" Lyons, Jr., U.S. Navy Retired, is President/CEO of LION Associates LLC, a premier global consultancy providing technical expertise in the areas of international marketing and trade, enterprise risk, including anti-terrorism site and port security,

foreign policy and security affairs along with defense and commercial procurement. Admiral Lyons has served on the Advisory Board to the Director of the Defense Intelligence Agency and is a consultant to Lawrence Livermore National Laboratory on issues of counter-terrorism.

During his thirty-six years as an officer in the U.S. Navy, Admiral Lyons served as Commander in Chief of the U.S. Pacific Fleet, the largest single military command in the world. He also served as Senior U.S. Military Representative to the United Nations. As the Deputy Chief of Naval Operations from 1983 to 1985, Admiral Lyons was principal advisor on all Joint Chiefs of Staff matters and was the father of the Navy Red Cell, an anti-terrorism group comprised of Navy Seals he established in response to the Marine Barracks bombing in Beirut. Admiral Lyons was also Commander of the U.S. Second Fleet and Commander of the NATO Striking Fleet, which were the principle fleets for implementing the Maritime Strategy.

Admiral Lyons has been recognized for his distinguished service by the United States and several foreign governments. He is a graduate of the U.S. Naval Academy and has received post graduate degrees from the U.S. Naval War College and the U.S. National Defense University.

Lieutenant General William G. Boykin, U.S. Army Retired, served as the United States Deputy Undersecretary of Defense for Intelligence under President George W. Bush from 2002 to 2007. During his 36 years in the military, General Boykin served 13 years in the Delta Force and was involved in numerous high-profile missions, including the 1980 Iran hostage

rescue attempt and the 1992 hunt for Pablo Escobar in Columbia. General Boykin also served at the Central Intelligence Agency as Deputy Director of Special Activities, and from 1998 to 2000, he was the Commanding General, U.S. Army Special Forces Command at Fort Bragg, North Carolina. General Boykin's personal decorations include, among others, the Defense Distinguished Service Medal, the Bronze Star Medal, and the Purple Heart.

Ambassador Henry F. Cooper was President Ronald Reagan's Chief Negotiator at the Geneva Defense and Space Talks with the Soviet Union and Strategic Defense Initiative (SDI) Director during the George H.W. Bush administration. Previously, he served as the Assistant Director of the Arms Control and Disarmament Agency, Deputy Assistant USAF Secretary and Science Advisor to the Air Force Weapons Laboratory.

SUMMARY OF ARGUMENT

Amici do not intend to repeat the same legal arguments presented by the parties regarding the President's constitutional and statutory authority to issue the challenged Proclamation. That authority is sweeping and well established. Rather, the purpose of this brief is to provide a policy justification that not only supports the President's actions here but also justifies and supports the legitimate policy goal of protecting our nation from aliens who have the potential and propensity to do harm to our national security interests—a policy that would include extreme vetting for Islamic terrorists. And, as argued below, the proper scope and breadth of this national security policy is ultimately for Congress and the President to decide; it is not the province of the judiciary to say otherwise.

To that end, *Amici* strongly support Petitioners' view that review (and reversal) by this Court is necessary because

> this case presents exceptionally important questions concerning the President's authority to exclude aliens abroad based on his national-security and foreign-policy judgments. . . . In addition to setting aside a Presidential Proclamation, the lower courts' interpretations of the INA would constrain the ability of this and future Presidents to exclude aliens abroad and to engage in diplomacy in order to protect the Nation. The stakes of this case are indisputably high.

Pet. at 33-34.

ARGUMENT

I. THE COURTS DO NOT HAVE THE AUTHORITY TO PREVENT THE PRESIDENT FROM RESTRICTING THE ENTRY OF ALIENS WHO HAVE THE PROPENSITY TO HARM THE UNITED STATES.

As stated by this Court:

> At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe. It must be exercised in accordance with the procedure which the United States provides. . . .
>
> Petitioner contends that the 1941 Act and the regulations thereunder are void to the extent that they contain unconstitutional delegations of legislative power. But there is no question of inappropriate delegation of legislative power involved here. The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power *but is inherent in the executive power to control the foreign affairs of the nation*. . . . When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. *It is implementing an inherent executive power*.
>
> Thus the decision to admit or to exclude an alien may be lawfully placed with the President, who

may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. *The action of the executive officer under such authority is final and conclusive*. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, *it is not within the province of any court*, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien. . . . Normally Congress supplies the conditions of the privilege of entry into the United States. But because the power of exclusion of aliens *is also inherent in the executive department of the sovereign*, Congress may in broad terms authorize the executive to exercise the power, *e. g*., as was done here, for the best interests of the country during a time of national emergency. Executive officers may be entrusted with the duty of specifying the procedures for carrying out the congressional intent. What was said in *Lichter v. United States*, 334 U.S. 742, 785, is equally appropriate here:

> "It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. . . . Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied. 'They derive much meaningful content

> from the purpose of the Act, its factual background and the statutory context in which they appear.'"
>
> Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned. . . .

United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542-44 (1950) (internal citations omitted) (emphasis added).

After an extensive, worldwide review by multiple government agencies of whether foreign governments provide sufficient information and have adequate practices to allow the United States to properly screen aliens seeking entry into our country from abroad, the President issued the challenged Proclamation, which suspended entry (subject to exceptions and case-by-case waivers) of certain foreign nationals from eight countries: Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia.

In reaching his decision, the President considered a number of factors, including each country's "capacity, ability, and willingness to cooperate with our identity-management and information-sharing policies and each country's risk factors," as well as "foreign policy, national security, and counterterrorism goals." Procl. §1(h)(i).

A principal issue at stake in this litigation is the concept of vetting. And concurrent with that, it is who gets to decide what "vetting" is necessary to protect our national security. Is it the President and Congress or is it the courts? Each of the prior executive orders was conceived as a temporary step, a "hold in place"

measure while a more permanent solution, *vetting*, was carefully crafted and ultimately implemented. That more permanent solution, in the current form of the Proclamation, has now been forestalled by the courts.

The scope of this Court's decision here will have an impact on this (and future) President's ability to protect our national security interests as he (and Congress) sees fit. At the end of the day, it is not the role of the judiciary to intercede in such matters, and this Court should clearly say so.

Ultimately, as the petition lays bare, the lower courts enjoined the Proclamation not because it transgressed the theoretical constitutional rights of lawful permanent residents with relatives in at least some of the identified countries who seek immigrant or nonimmigrant visas or the rights of a non-profit Muslim organization that operates mosques in Hawaii.[2] The judges struck it down because they have a *policy objection* to the notion of subjecting any Muslims to heightened immigration scrutiny. That is, they have a *policy objection* to Government recognition of the nexus between Islamic scripture and terrorism committed by Muslims.

Thus, for the lower courts, the law is not a corpus of constitutional and statutory principles to be applied. It is a pliable weapon for achieving policy goals, enabling will-to-power to masquerade as a "legal

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[2] Noticeably, Respondents did not challenge the Proclamation's application to nationals from Venezuela and North Korea—the two non-Muslim countries of the eight identified. Pet. at 11.

process." No tweaking of a permanent vetting solution will overcome that.

Tweaking the Proclamation is not going to bring the lower courts around in a way that will ultimately permit the President to implement this or any other permanent solution that will in fact promote our national security interests. Indeed, under the current judicial climate and absent clear guidance from this Court, there will likely be no way to craft any executive proclamation or order restricting immigration from Muslim countries that will satisfy the lower courts no matter how rife with jihadism the countries are or how manifest it is that their dysfunctional or anti-American regimes make visa background checks impossible. As a result, *Amici* contend that perhaps the most important objective the Court can achieve through this litigation is to put the lower courts back on track and in their proper place, particularly when it comes to policy affecting national security.

Indeed, the parties are not involved in a real, *bona fide* legal dispute, as if a few modifications in response to the lower courts' express legal objections were going to make their implacable policy objection go away. It was never going to work that way.

The lower courts were never going to grapple with the four corners of the Proclamation in any serious way, or the undeniable, unambiguous, sweeping legislative authority vested in the President to restrict alien entry into the United States. Nor were the lower courts prepared to genuinely accept the legal reality that non-immigrant aliens outside the United States do not have constitutional rights or the fact that our system makes border security against foreign threats

the responsibility of the accountable political branches, not the unaccountable judiciary.

Indeed, what we have seen in the courts below is politics of a most demagogic kind, not legal analysis. Consequently, what the lower courts offer instead of a proper legal analysis is a dark theory of purportedly rabid anti-Muslim bias.[3]

Make no mistake, the ultimate and *legitimate* national security policy goal here is to achieve a screening system that in large measure vets for *Islamic radicalism*. However, how do you ever achieve this goal if, in order to satisfy a judiciary that is hostile to your policy objective in the first instance, you are forced to disavow a purpose to subject alien Muslims to heightened scrutiny?

Here is the inescapable fact: The United States is in a defensive war against what is imprecisely called "radical Islam." The war proceeds on two tracks: the kinetic militancy of jihadists, and the cultural challenge of anti-Western, anti-constitutional Islamic law and mores. The ideology that catalyzes both tracks is sharia supremacism. The implementation and spreading of sharia, classical Islam's societal structure and legal code, is the rationale for all jihadist terror

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[3] *Hawaii v. Trump*, 878 F.3d 662, 700 (9th Cir. 2017) (citing alleged "increased violence directed at persons of the Muslim faith as one of the Proclamation's consequences" and allegations "that by singling out nationals from primarily Muslim-majority nations, the Proclamation has caused Muslims across the country to suffer from psychological harm and distress, including growing anxiety, fear, and terror").

and of all the Islamist cultural aggression that slipstreams behind it. Europe is a case in point.

The dividing line is sharia supremacism. On one side of it we find patriotic, pro-American Muslims who are spiritually devout but reject the imposition of sharia on civil and political life. On the other side are the Islamists—the sharia supremacists. The challenge posed by the latter is not merely that some percentage of them are jihadists; it is that as a population—or as enclaves that take hold in the West—they are assimilation-resistant, and their ideological havens will breed the jihadists of the future while stifling the Constitution in the here and now. Europe, once again, is a case in point.

The Government must vet for this. Indeed, that is, we suggest, what the majority of the American people want: Muslims who embrace our way of life invited in and Muslims who threaten our way of life kept out. But you cannot achieve that objective without subjecting Muslim aliens to more-extensive inspection (*i.e.*, *extreme vetting*). In *Amici*'s view, the Proclamation does not go too far; rather, it does not go far enough. Yet, it was thwarted by the courts. This is a national security tragedy.

Of course, it is unfortunate that innocent, pro-American Muslims have to be put through more paces than other aliens. But it is not quite as unfortunate as the incontestable fact that inadequately vetted Muslims commit mass-murder attacks. While some of the innocent, pro-American Muslims will resent the heightened scrutiny (though many will see the need for it), those who are eventually admitted to our country will be safer because of it—a matter of no small

consequence since peaceful Muslims, more than any other group, are killed and persecuted by jihadists and other sharia supremacists. In any event, the security burden has to be imposed on someone, and as between Americans and aspiring Muslim immigrants, it is less the responsibility of Americans than of alien Muslims that Islam endorses war and conquest. The United States didn't create this problem.

This is the vetting that the lower courts are determined to prevent. They would have us believe that the Constitution is a suicide pact: that alien Muslims somehow have a *right* against enhanced inspection and thus an immigration system that has always vetted against totalitarian political ideologies cannot vet against *this one*, sharia supremacism, because it shrouds itself in religion.

The Government will never accomplish its legitimate policy objective by denying that Islam is at the heart of the matter because that is what the judiciary demands, and it is quite likely that the judiciary knows that. The consequences are grave. The lower courts' rulings against the Proclamation empower both radical Islam and judicial imperialism. The combination portends lasting damage to the United States.

As we noted above, in order to install the vetting system we need, the challenge of Islam must be confronted head-on and without apology. That is unavoidable. If this Court decides this case in a way that gives credence to the lower courts' policy objections, then it is over. The proper vetting will never be allowed to take place.

There is a single political battle that must be won in this Court—an unfortunate battle because the courts have usurped for themselves the power to intercede in this policy dispute—in order for the Government to achieve its ultimate policy objective and thus provide for our national security. And that battle is this: The Court must recognize that Islam, while it has plenty of diversity, has a mainstream strain—sharia supremacism—that is less a religion than it is *a totalitarian political ideology* hiding under a religious veneer.

Intellectually, this should not be a difficult thing to do. Sharia supremacism does not accept the separation of religion from political life (which is why it is lethally hostile to reform-minded Muslims). It requires the imposition of classical, ancient sharia-centered law, which prohibits individual liberty (particularly freedom—of religion, of speech, and in economic affairs). It systematically discriminates against women and non-Muslims. It is cruel in its enforcement. And it endorses violent jihad to settle political disputes (since such disputes boil down to whether sharia is being undermined—a capital offense).

What we have just outlined is not a "theory." Quite apart from the fact that sharia supremacism is the subject of numerous books, studies,[4] public-opinion

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[4] Indeed, a peer-reviewed study conducted in the United States revealed the statistically relevant correlation between sharia adherence and the propensity to preach and to propagate violent jihad against the West. *See* Mordechai Kedar & David Yerushalmi, *Correlations Between Sharia Adherence and Violent Dogma in U.S. Mosques*, V Perspectives on Terrorism 81-138 (2011), at http://www.terrorismanalysts.com/pt/articles/issues/PTv5i5.pdf (last visited Aug. 10, 2017).

polls, and courtroom prosecutions, one need only look at life in Saudi Arabia and Iran, societies in which the regime imposes sharia. Indeed, one need only look at the State Department's warnings to Americans who travel to Saudi Arabia.[5] These warnings include, *inter alia*, the following:

> **Criminal Penalties:** You are subject to local laws. If you violate local laws, even unknowingly, you may be expelled, arrested, imprisoned, subject to physical punishments, or even executed. Penalties for the import, manufacture, possession, and consumption of alcohol or illegal drugs in Saudi Arabia are severe. Convicted offenders can expect long jail sentences, heavy fines, public floggings, and/or deportation. The penalty for drug trafficking is death. . . .
>
> **Faith-Based Travelers:** Islam is the official religion of the country and pervades all aspects of life in Saudi Arabia.
>
> • Saudi authorities do not permit criticism of Islam, religious figures, or the royal family.
>
> • The government prohibits the public practice of religions other than Islam. Non-Muslims suspected of violating these restrictions have been jailed. Church services in private homes have been raided, and participants have been jailed.

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[5] *See* https://travel.state.gov/content/passports/en/alertswarnings/saudi-arabia-travel-warning.html (last visited Aug. 9, 2017).

> • Muslims who do not adhere to the strict interpretations of Islam prevalent in much of Saudi Arabia frequently encounter societal discrimination and constraints on worship.
>
> • Public display of non-Islamic religious articles, such as crosses and Bibles, is not permitted.
>
> • Non-Muslims are forbidden to travel to Makkah (Mecca) and Medina, the cities where two of Islam's holiest mosques are located. . . .

The State Department guidance suggests that readers consult the International Religious Freedom Report produced in 2015 by State's Bureau of Democracy, Human Rights and Labor. *See* https://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper (last visited Aug. 9, 2017). This report relates the brutal punishments meted out by some Islamic countries—not jihadists organizations, but governments in Muslim-majority countries—for blasphemy and apostasy. The paragraph on Saudi Arabia is noteworthy:

> In Saudi Arabia, media and local sources reported that the General Court in Abha sentenced Palestinian poet Ashraf Fayadh to death for apostasy in November, overturning a previous sentence of four years' imprisonment and 800 lashes (the death sentence was subsequently overturned in February 2016 and a sentence of eight years' imprisonment and 800 lashes imposed). Officials from the Committee for the Promotion of Virtue and Prevention of Vice initially arrested Fayadh in August 2013, after reports that he had made disparaging

> remarks about Islam. In a separate incident in January, authorities publicly lashed Raif Badawi 50 times in accordance with a sentence based on his 2013 conviction for violating Islamic values, violating sharia, committing blasphemy, and mocking religious symbols on the Internet.

Nevertheless, what is simple to establish intellectually is difficult as a practical matter in light of the judiciary's willful blindness. The lower courts essentially maintain that Islam may not be parsed into different strains. For legal purposes, they insist it is a monolith that is protected by religious-liberty principles, notwithstanding that sharia supremacists themselves would destroy religious liberty. Perversely, then, they argue that the First Amendment is offended by national-security measures against anti-American alien radicals who would, given the chance, eviscerate the protections of the First Amendment in favor of sharia.

It is essential that this Court understands the political nature of sharia supremacism. Our law has a long constitutional tradition, rooted in the natural and international law of self-defense, of excluding aliens on the basis of radical, anti-American political ideology. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (upholding deportation orders of former Communist Party members and stating, "It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted

to the political branches of government as to be largely immune from judicial inquiry or interference."); *see also Reno v. Flores*, 507 U.S. 292, 305-06 (1993) ("Thus, 'in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'") (internal quotations and citations omitted). Thus, if sharia supremacism is properly understood to be a political ideology—even a religious political ideology—the President has no obstacle to banning alien adherents of a doctrinal cause that both inspires the terrorists of today and, wherever it is allowed to take root, produces the terrorists of tomorrow. Europe, once again, is a case in point.

There is no question that we also have a strong commitment to religious freedom. However, if the Court's conclusion is that sharia supremacism equals Islam, equals religion, equals immunity from governmental protective measures, then the Constitution really will have become a suicide pact. We will have decided that anti-constitutional sharia radicals are just as welcome as any other law abiding, patriotic Muslims.

May the U.S. Government legally vet for sharia supremacism? Not only is it lawful to engage in such vetting, *see, e.g., id.*, it must do so lest we surrender our national security to the policy choices of unelected judges. To reject such vetting not only will permit trained terrorists to infiltrate refugee populations and thus enter our borders. It would precipitate the resistance of sharia supremacism to Western assimilation, which inevitably leads to the phenomenon of sharia enclaves and to the creation of the conditions

in which the jihadists of tomorrow are bred. As noted, Europe is experiencing this self-destructive phenomenon now. Vetting is what we absolutely have to do to protect the country. And even then, the threat from the cited countries is less severe than from other cauldrons of sharia supremacism that are not covered in the Proclamation. It is in our national security interest to ensure that adherents to a radical political ideology rooted in Islamic scripture are lawfully kept out of our country. The courts should not say otherwise.

Unfortunately, as this litigation has exposed, the courts are no longer constrained in the exercise of their power. They are no longer the peer judicial branch of a government of divided powers in which each branch respects the constitutional authorities and competencies of the others. The courts now claim supremacy over the two political branches. And this was done gradually by dismantling the separation-of-powers doctrine and structure we inherited from the Framers. *See, e.g., INS v. Chadha*, 462 U.S. 919, 946 (1983) ("We have recently noted that '[the] principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.'") (quoting *Buckley v. Valeo*, 424 U.S. 1, 124 (1976)).

This doctrine always held that the judiciary did not intrude on matters like immigration, national security against foreign threats, and war fighting—matters constitutionally committed to the branches politically accountable to the voters whose lives are at stake. Under the new dispensation, it is not the *Constitution*

but the *judiciary* that determines the legitimacy of executive and legislative action in defense of the nation.

When this Court ignores the settled jurisprudence of judicial modesty (what we might call, "know your place"), it permits the lower courts to do the same. Thus did the lower courts in neutering the Proclamation ignore binding Court precedent, *Kleindienst v. Mandel*, 408 U.S. 753 (1972), which prohibits federal courts from second-guessing executive discretion in the immigration context. *See, e.g., id*. at 766 ("The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.") (internal quotations and citation omitted). *Mandel* should have compelled a ruling in favor of Petitioners. Thus, if there is any objection to the Proclamation's reach, that objection should come from Congress, not the courts.

It is evident that the judges' values tend not to be the values of the electorate. By electing President Trump, the voters demonstrated that they value American national security. The judiciary, however, values a new, aggressive, and indiscriminate protection of religion—provided that the religion is Islam. The voters' value is a trifle. The judges' value is transformed into a right of Muslim immigration, derived from the new, judicially manufactured right of America-based Muslims not to have their self-esteem bruised.

In the final analysis, without taking Islam into account—that is, without sorting anti-American sharia supremacists from pro-American Muslims supportive of the Constitution—there is no way to restrict the entry of Muslims who would increase the threat of jihadism and undermine our society. Consequently, if the courts are permitted to interpose their policy preferences—that is, if the Government cannot vet for sharia supremacism—there is little point in what the Government has called "extreme vetting," which is the goal of the national security policy at stake. And if that is the result, then the courts have, by judicial fiat, become the policymakers for national security, thereby undermining our security and our Constitution in the process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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