Nos. 16-1436, 16A1190

In the

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *ET AL.*, Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *ET AL.*, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNOPPOSED MOTION FOR LEAVE AND BRIEF OF *AMICUS CURIAE* AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS' STAY APPLICATION AND CERTIORARI PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Cases

Other Cases

Constitutions, Statutes, Executive Orders, and Regulations

Other Authorities

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF IN SUPPORT OF STAY APPLICATION AND CERTIORARI PETITION

Amicus American Center for Law and Justice respectfully moves for leave of Court to file the accompanying brief in support of Petitioners' application for a stay and petition for a writ of certiorari concerning a preliminary injunction barring enforcement of Section 2(c) of Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) ("EO"). Counsel for all parties have been notified of this brief and consent to its filing.

STATEMENT OF INTEREST[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. Counsel for the ACLJ have presented oral argument, represented parties, and submitted *amicus* briefs before this Court and other courts around the country in cases involving the Establishment Clause and immigration law. *See, e.g., United States v. Texas*, 136 S. Ct. 2271 (2016); *Pleasant Grove v. Summum*, 555 U.S. 460 (2009); *FEC v. Wisc. Right to Life*, 551 U.S. 449 (2007); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Washington v.*

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

Trump, 847 F.3d 1151 (9th Cir. 2017); *Int'l Refugee Assistance Project v. Trump*, 2017 U.S. App. LEXIS 9109 (4th Cir. 2017).

The ACLJ has actively defended, through advocacy and litigation, immigration-related policies that protect American citizens. This brief is supported by members of the ACLJ's Committee to Defend Our National Security from Terror, which represents more than 230,000 Americans who support the President's Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States.

ARGUMENT

This brief addresses the challenged Executive Order's constitutionality under the Establishment Clause of the First Amendment, which is an issue that has a direct bearing on the various factors considered when a stay application or certiorari petition is filed.

I. The Fourth Circuit's decision conflicts with this Court's precedent because it failed to review the Executive Order under the deferential standards applicable to the immigration policymaking and enforcement decisions of the political branches, which the Order satisfies.

The United States Court of Appeals for the Fourth Circuit accepted Respondents' invitation to treat this case as if it were a run-of-the-mill Establishment Clause case. It is not. The cases that

the court of appeals primarily relied upon, which green-lighted a detailed inquiry into the primary purpose of the government's actions, involved factual contexts such as the public display of the Ten Commandments. *See, e.g.,* App. to Pet. Cert. 47a-48a (S.Ct. No. 16-1436).

In stark contrast, the case at hand involves the special context of an EO concerning the entry into the United States of refugees and nationals of six countries of particular concern, enacted pursuant to the President's constitutional and statutory authority. When this Court has considered constitutional challenges to immigration-related actions of this sort, it has declined to subject those actions to the same level of scrutiny applied to non-immigration-related actions, choosing instead to take a considerably more deferential approach. The EO is valid under this standard.

A. Judicial review of the immigration-related actions of the political branches is deferential.

This Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)). Indeed, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459

U.S. 21, 32 (1982). Moreover, the Constitution "is not a suicide pact," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963), and the President has broad national security powers that may be exercised through immigration restrictions. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952).

Not only does the Fourth Circuit's decision undercut the President's national security powers, it also undermines the considered judgment of Congress that

> [w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f) (2012). Where, as here, a President's action is authorized by Congress, "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Frankfurter, J., concurring)). The EO falls squarely within the President's constitutional and statutory authority.

B. The Executive Order is constitutional under this Court's deferential standards applicable to constitutional challenges to the political branches' immigration-related actions.

In *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), the Court rejected a First Amendment challenge to the Attorney General's decision to decline to grant a waiver that would have allowed a Belgian scholar to enter the country on a visa in order to speak to American professors and students. The Court held that "the power to exclude aliens is 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers--a power to be exercised exclusively by the political branches of government.'" *Id.* at 765 (citations omitted). The Court concluded by stating that

> plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. In the case of an alien excludable under § 212 (a)(28), Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.

Id. at 769-70; *see also Kerry v. Din*, 135 S. Ct. 2128, 2139-41 (2015) (Kennedy, J., concurring) (the government's statement that a visa application was denied due to suspected involvement with terrorist activities "satisf[ied] *Mandel*'s 'facially legitimate and bona fide' standard").

Similarly, in *Fiallo*, the Court rejected a challenge to statutory provisions that granted preferred immigration status to most aliens who are the children or parents of United States citizens or lawful permanent residents, except for illegitimate children seeking that status by virtue of their biological fathers, and the fathers themselves. 430 U.S. at 788-90. The Court stated:

> At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens.

Id. at 792 (citations omitted). The Court noted that it had previously "resolved similar challenges to immigration legislation based on other constitutional rights of citizens, and has rejected the suggestion that more searching judicial scrutiny is required." *Id.* at 794. Additionally, the Court stated, "[w]e can see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*, a First Amendment case." *Id.* at 795. The Court emphasized that "it is not the judicial role in cases of this sort to

probe and test the justifications for the legislative decision." *Id.* at 799.

Although this Court's precedent establishes that courts should not second-guess the wisdom of, or evidentiary support for, the political branches' decision-making concerning immigration, the Fourth Circuit did exactly that. Contrary to what that court held, the legality of executive orders related to immigration does *not* turn on a judicial guessing game of what the President's subjective motives were at the time; rather, *Mandel*, *Fiallo*, and other cases dictate that courts should rarely look past the face of such orders. *See Washington v. Trump*, 853 F.3d 933, 939 n.6 (9th Cir. 2017) (Bybee, J., dissenting from denial of reconsideration en banc) (the panel's "unreasoned assumption that courts should simply plop Establishment Clause cases from the domestic context over to the foreign affairs context ignores the realities of our world"). The EO is valid under this standard. It is closely tethered to well-established discretionary powers vested in the Executive Branch by the Constitution and statute. Respondents' objection to the EO is a policy dispute that should be resolved by the political branches.

II. The Executive Order is constitutional even under a traditional Establishment Clause analysis.

Consideration of the EO must take into account the deferential nature of judicial review of immigration-related actions (as noted previously). Nevertheless, the EO is constitutional even under

non-immigration-related Establishment Clause jurisprudence.

The EO satisfies the "purpose prong" of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which asks whether the challenged government action has "a secular legislative purpose." *Id.* at 612-13. Here, the EO's predominant purpose is its stated purpose, namely, protecting national security.

The EO is similar in principle to the National Security Entry Exit Registration System ("NSEERS"), implemented after the terrorist attacks of September 11, 2001, which was upheld by numerous federal courts. *Rajah v. Mukasey*, 544 F.3d 427, 438-39 (2d Cir. 2008) (citing cases). Under this system, the Attorney General imposed special requirements upon foreign nationals present in the United States who were from specified countries. The first group of countries designated by the Attorney General included Iran, Libya, Sudan and Syria, and a total of twenty-four Muslim majority countries and North Korea were eventually designated. *Id.* at 433 n.3.

In one illustrative NSEERS case, the United States Court of Appeals for the Second Circuit rejected arguments that are strikingly similar to the arguments accepted by the Fourth Circuit here:

> There was a rational national security basis for the Program. The terrorist attacks on September 11, 2001 *were facilitated by the lax enforcement of immigration laws*. The Program was [rationally] designed to monitor

> more closely aliens from *certain countries selected on the basis of national security criteria*. . . .
>
> To be sure, the Program did select countries that were, with the exception of North Korea, predominantly Muslim. . . . However, one major threat of terrorist attacks comes from radical Islamic groups. The September 11 attacks were facilitated by violations of immigration laws by aliens from predominantly Muslim nations. The Program was clearly tailored to those facts. . . . The program did not target only Muslims: non-Muslims from the designated countries were subject to registration. There is therefore no basis for petitioners' claim.

Id. at 438-49 (emphasis added) (citation omitted).

Similarly, the EO at issue here is constitutional. There is ample justification for the determination of multiple administrations that the six designated countries pose a particular risk to American national security. The EO does *not* single out Muslims for disfavored treatment. Rather, the countless millions of non-American Muslims who live outside the six countries of particular concern are not restricted by the EO. Neither does the EO limit its application to Muslims in the six designated countries; instead, it applies to all citizens of the six enumerated countries irrespective of their faith.

Furthermore, the fact that enforcement of a previous order—which was substantively different

from the present EO in numerous ways—was preliminarily enjoined on an expedited basis does not support the Fourth Circuit's decision here. Under the Fourth Circuit's analysis, any hypothetical future immigration-related orders issued by the current President will be irredeemably tainted by the alleged subjective, predominantly anti-Muslim intent of the President and his surrogates, which runs contrary to this Court's admonition that the government's "past actions" do not "forever taint any effort . . . to deal with the subject matter." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 874 (2005).[2]

The many substantive differences between the prior executive order and the existing EO constitute "genuine changes in constitutionally significant conditions" that cured any actual or perceived Establishment Clause deficiencies. *See id.*; *Sarsour v. Trump*, 2017 U.S. Dist. LEXIS 43596, at *33 (E.D. Va. 2017) ("[T]he substantive revisions reflected in [the EO at issue here] have reduced the probative value of the President's statements to the point that it is no longer likely that Plaintiffs can succeed on their claim that the predominant purpose of [the EO]

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[2] *See also ACLU of N.J. v. Schundler*, 168 F.3d 92, 105 (3d Cir. 1999) (Alito, J.) ("The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked 'a secular legislative purpose,' or that it was 'intended to convey a message of endorsement or disapproval of religion.'") (citations omitted); *Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556 (8th Cir. 2009) ("Another reason we reject the district court's *Lemon* analysis is that . . . [it] would preclude the District from *ever* creating a limited public forum in which religious materials may be distributed in a constitutionally neutral manner.").

is to discriminate against Muslims based on their religion and that [the EO] is a pretext or a sham for that purpose.").

The EO was narrowly crafted to address concerns raised during litigation over the prior order, with the secular goal of protecting national security in mind. Addressing actual or perceived flaws in previous iterations of a law or policy, in order to bolster the likelihood that it will be upheld in litigation, is itself a valid secular purpose. *See, e.g., ACLU of Ky. v. Rowan Cnty.*, 513 F. Supp. 2d 889, 904 (E.D. Ky. 2007) (in Establishment Clause cases, changing a policy in "an attempt to avoid litigation . . . is an acceptable purpose").

Moreover, the Fourth Circuit's decision to sidestep the EO's obvious secular purposes by focusing on comments made by then-candidate Trump, or one of his advisors, is flawed for at least three reasons.

First, this Court has stated that the primary purpose inquiry concerning statutes may include consideration of the "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history [and] the historical context of the statute . . . and the specific sequence of events leading to [its] passage." *McCreary Cnty.*, 545 U.S. at 862; *see also id.* (noting that the inquiry is limited to consideration of "the 'text, legislative history, and implementation of the statute,' or comparable official act") (citation omitted). Although the Fourth Circuit relied upon quotes made by then-candidate Trump and

individuals holding some non-governmental position within his political campaign, comments made by a private citizen while a candidate for public office (or his or her advisors) *while on the campaign trail* are not "official" *government* acts, and do not constitute "*contemporaneous* legislative history." *Id.*; *cf. Clinton v. Jones*, 520 U.S. 681, 686 (1997) (alleged misconduct occurring before Bill Clinton became President was not an "official" act). Indeed, "one would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002).

Second, the Fourth Circuit's reliance upon purported evidence of a subjective, personal anti-Muslim bias of the President and some of his advisors is improper because "what is relevant is the legislative purpose of *the statute*, not the possibly religious motives of *the legislators* who enacted the law." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) (plurality opinion) (emphasis added). The Fourth Circuit engaged in the kind of "judicial psychoanalysis of a drafter's heart of hearts" that is foreclosed by this Court's precedent. *McCreary Cnty.*, 545 U.S. at 862. The EO, on its face, serves secular purposes, and no amount of rehashing of miscellaneous campaign trail commentary can change that. A foray into the malleable arena of legislative history is not a *requirement* in all Establishment Clause cases. *See, e.g., Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (noting the Court's "reluctance to attribute unconstitutional motives to the [government], particularly when a plausible

secular purpose . . . may be discerned from the face of the statute"); *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring) (inquiry into the government's purpose should be "deferential and limited").

As Judge Niemeyer explained in his dissenting opinion in the instant action, the majority's use of campaign statements to convert the facially neutral EO into an Establishment Clause violation was improper. The "Supreme Court has never applied the Establishment Clause to matters of national security and foreign affairs." App. 173a (Niemeyer, J., dissenting). In the few cases in which the Court invalidated government actions based on a religious purpose, for example, *Edwards v. Aguillard*, 482 U.S. 578 (1987), "the Court found the government action inexplicable *but for* a religious purpose, and it looked to extrinsic evidence only to confirm its suspicion, prompted by the face of the action, that it had religious origins." App. 173a-174a (Niemeyer, J., dissenting). Those cases are manifestly distinguishable from the EO, which "is framed and enforced without reference to religion, and the government's proffered national security justifications . . . are consistent with the stated purposes of the [EO]." *Id.* 175a. "Conflicting extrinsic statements made prior to the [EO]'s enactment surely cannot supplant its facially legitimate national security purpose." *Id.*[3]

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[3] Further evidence to dispel the notion that the EO is a cover for anti-Muslim discrimination is found in the May 3, 2017, testimony by then-FBI Director James Comey before the Senate Judiciary Committee on FBI Oversight. Comey testified that

(Text of footnote continues on following page.)

Finally, the mere suggestion of a possible religious or anti-religious motive, mined from past comments of a political candidate or his supporters, and intermixed with various secular purposes, is not enough to doom government action (along with all subsequent attempts to address the same subject matter). "[A]ll that *Lemon* requires" is that government action have "*a* secular purpose," not that its purpose be "*exclusively* secular," and a policy is invalid under this test only if it "was motivated *wholly* by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680-81 & n.6 (1984) (emphasis added); *see also Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) ("[A] court may invalidate a statute only if it is motivated wholly by an impermissible purpose . . . ."). The EO clearly serves secular purposes and, therefore, it satisfies *Lemon*'s purpose test.

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the FBI has over 2000 "violent extremist investigations" and "about 300 of them [roughly 15%] are people who came to the United States as refugees." Transcript of Testimony of James Comey, www.washingtonpost.com/news/post-politics/wp/2017/05/03/read-the-full-testimony-of-fbi-director-james-comey-in-which-he-discusses-clinton-email-investigation/; *see also* Mark Krikorian, *Comey: 15 Percent of Terror Cases Came as Refugees*, www.nationalreview.com/corner/447423/comey-terror-cases-refugees.

CONCLUSION

The stay application and certiorari petition should be granted.

Respectfully submitted,

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