Nos. 16-1436 & 16A1191

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, A PROJECT OF THE URBAN JUSTICE CENTER, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, *et al.*,

Respondents.

DONALD J. TRUMP, *et al.*,

Applicants,

v.

STATE OF HAWAII, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE** OPPOSING THE GOVERNMENT'S APPLICATION FOR STAY

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* See Appendix for a complete list of *Amici*.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

Amici are constitutional law scholars. They submit this brief to identify a distinct legal principle compelling the conclusion that the revised executive order is unconstitutional: the long-settled prohibition on governmental acts based on animus toward a particular religious group.

A full list of *Amici* is attached as an appendix to this brief.[1]

SUMMARY OF ARGUMENT

The court of appeals safeguarded the religious liberty guaranteed by the Constitution by finding Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (the "Order") unconstitutional and affirming the preliminary injunction granted by the district court. That liberty should not be imperiled by granting the Government's motion for a stay. The Fourth Circuit relied on *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844 (2005), and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), to find that the Order lacked a secular purpose—that, instead, its "primary purpose is religious," namely effectuating President Trump's stated intent to "ban Muslims from the United

[1] Pursuant to Sup. Ct. R. 37.6, *Amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amici* and their counsel—contributed money that was intended to fund preparing or submitting the brief. The parties have consented to the filing of this brief or provided blanket consent for the filing of *amicus* briefs.

States." App. 48a-49a.[2] Under settled precedent, that conclusion was correct and should be affirmed.

But the Fourth Circuit's conclusion is also supported by an independent line of Establishment Clause precedent—repeatedly confirmed in Religion Clause cases—that forbids the government from acting on the basis of animus toward any particular religion. *See, e.g.*, *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1822 (2014); *id.* at 1831 (Alito, J., concurring); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 722, 728 (1994) (Kennedy, J., concurring in the judgment); *Larson* v. *Valente*, 456 U.S. 228, 244 (1982); *see also Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993); *Romer* v. *Evans*, 517 U.S. 620, 632-35 (1996). This longstanding, fundamental principle has been adopted by judges of many different persuasions in cases arising under the Establishment Clause. And it is directly applicable here. This Court should vindicate this core principle by denying the Government's request for a stay of the preliminary injunction.

While the courts below focused on whether the Order lacked a secular purpose under *Lemon*, the same facts even more clearly demonstrate anti-Islamic animus under familiar means of discerning improper motive. *See, e.g.*, *Town of Greece*, 134 S. Ct. at 1824-26; *Locke* v. *Davey*, 540 U.S. 712, 724-25 (2004); *Lukumi*, 508 U.S. at 534-36; *see also, e.g.*, *United States* v. *Windsor*, 133 S. Ct. 2675, 2693-94 (2013); *City of Cleburne* v. *Cleburne Living Ctr.*, 473

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[2] References to the Petition ("Pet.") and the Appendix thereto ("App.") are to those filed in *Donald J. Trump, et al.* v. *International Refugee Assistance Project, et al.*, No. 16-1436.

U.S. 432, 447 (1985). That conclusion is compelling even without consideration of President Trump's admissions of animus prior to his inauguration. But it is even more forcefully confirmed by a careful review of those remarks, which, as a matter of precedent, *must* be considered as part of the constitutional analysis, and which are reiterated in the President's most recent statements.

The extraordinary record in this case demonstrates that President Trump's principal motive in issuing the Order was anti-Islamic animus. After repeatedly promising voters during the campaign that he would ban Muslims from entering the United States, upon taking office, President Trump promptly issued a sweeping, unprecedented, and bizarrely-structured Order with no discernible connection to an actual national security threat. While not explicitly denominated a "Muslim Ban," that order (even as subsequently revised) came close enough to realizing that goal to satisfy his campaign promise. And in case the point somehow remained unclear, President Trump has since made numerous statements—as recently as a series of tweets on June 5, 2017—to the effect that excluding Muslims was the Order's true purpose. The extensive public record thus establishes that in issuing the Order, President Trump was following through on his animus-laden campaign promise, rather than acting for any constitutionally legitimate reason.

Even if national security concerns played some role, that would still not save the Order. Animus may co-exist with legitimate motives. As this Court has explained, where the government acts on the basis of mixed motives, courts do not hesitate to

invalidate official acts when animus was a *primary* or *essential* motive, as it plainly was here. *See Windsor*, 133 S. Ct. at 2693; *Lukumi*, 508 U.S. at 535; *Larson*, 456 U.S. at 248.

The animus presented in this case does not require the Court to peer into the "veiled psyche of government officers[.]" *McCreary*, 545 U.S. at 863. "[T]his wolf comes as a wolf." *Morrison* v. *Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). President Trump has repeatedly and ostentatiously expressed the animus that motivated his promises, and subsequent acts, to ban persons of a single faith from entering the United States. For religious liberty to endure, the Order must never go into effect.

ARGUMENT

I. THE CONSTITUTION PROHIBITS GOVERNMENTAL ACTION BASED ON ANIMUS TOWARD DISFAVORED RELIGIONS

"In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." *Lukumi*, 508 U.S. at 532. This prohibition against governmental action motivated by animus toward a religious group is so fundamental that it has been expressed not only in Establishment Clause doctrine, but also in cases arising under the Free Exercise and Equal Protection Clauses. Together, these precedents teach that the anti-animus rule rests upon an abiding national commitment to equal treatment and religious freedom. Indeed, "the Free Exercise Clause, the Establishment Clause, the

Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion [] all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring).

A. The Establishment Clause

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. This rule is "inextricably connected with the continuing vitality of the Free Exercise Clause." *Id.* at 245. Religious freedom "can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Id*. As Justice Goldberg explained, the Religion Clauses recognize that "[t]he fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

This Court has thus held time and again that the Establishment Clause forbids official acts based on animus toward any particular religious group. This principle transcends many of the familiar divisions in Establishment Clause jurisprudence, and has been embraced by strict separationists, devotees of the endorsement test, those who believe that the Clause targets coercion, and jurists who see a very

broad role for religion in public life. *See, e.g.*, *Locke*, 540 U.S. at 725 (Rehnquist, C.J.) (upholding a scholarship program against Establishment Clause attack because "we find neither in the history or text of [the state law], nor in the operation of the [program], anything that suggests animus toward religion"); *Kiryas Joel*, 512 U.S. at 703 (holding courts must safeguard "a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion"); *id.* at 714 (O'Connor, J., concurring) ("[T]he government generally may not treat people differently based on the God or gods they worship, or do not worship."); *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984) (holding the Establishment Clause "forbids hostility toward any [religion]"); *Epperson* v. *Arkansas*, 393 U.S. 97, 106 (1968) (holding that "[t]he State may not adopt programs or practices . . . which 'aid or oppose' any religion"). There is a jurisprudential consensus that government may not act on the basis of animus toward disfavored religious groups.

This Court recently reaffirmed the rule against governmental animus toward religion in *Town of Greece*, which upheld a town's practice of holding a prayer program at the start of monthly board meetings. 134 S. Ct. 1811 (2014). A crucial issue in *Town of Greece* was whether the town had established Christianity by adopting a rotational policy that led to mostly Christian prayers. The Court upheld the town's policy, concluding that some sectarian prayer is consistent with the nation's historical traditions, and that the town's prayer program did not result in religious coercion. *See id.* at 1819-25.

However, the Court's opinion contained a critical limitation:

> If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.

Id. at 1823. The Court explained that the town could not "signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished," *id.* at 1826, because practices serving to "denigrate, proselytize, or betray an impermissible government purpose" would violate the Constitution. *Id.* at 1824; *accord Kiryas Joel*, 512 U.S. at 722 (Kennedy, J., concurring) (stating religious accommodations would violate the Establishment Clause if they "discriminate against other religions").

In a concurrence in *Town of Greece*, Justice Alito echoed the majority's warning against official acts based on animus toward a disfavored religion. He noted that the town's lack of non-Christian prayer leaders "was at worst careless,"—adding, "I would view this case very differently if the omission of these synagogues were intentional." *Town of Greece*, 134 S. Ct. at 1831. Similarly, Justice Breyer made clear that he would have viewed the case differently had

there been proof of discriminatory intent. *See id.* at 1840 (Breyer, J., dissenting) ("The plaintiffs do not argue that the town intentionally discriminated against non-Christians when choosing whom to invite[.]").

As *Town of Greece* showed, and as many other precedents confirm, the Establishment Clause's longstanding prohibition against animus enjoys wide support among jurists of all methodological persuasions. The rule is also supported by historical evidence concerning the original understanding of the First Amendment. "A large proportion of the early settlers of this country came here from Europe to escape [religious persecution]." *Everson* v. *Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 8 (1947). By the time the Bill of Rights was ratified, "the American states had already experienced 150 years of a higher degree of religious diversity than had existed anywhere else in the world." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421 (1990). The Framers thus understood that their task was to design a "government for a pluralistic nation—a country in which people of different faiths had to live together." Jon Meacham, *American Gospel: God, the Founding Fathers, and the Making of a Nation* 101 (2006).

Governmental acts based on animus toward a disfavored religious group are thus at war with the Establishment Clause, as a matter of history, principle, and precedent. This anti-animus rule follows directly from the Clause's purpose of protecting religious freedom for those sects not favored by the political majority: just as the government cannot coerce (or endorse) religious belief

or practice, neither can it take action based on a desire to harm or suppress any faith.

This does not mean that government is unable to recognize the importance of religion—including majority religions—in our nation. Far from it: this rule is perfectly consistent with broad views of religion's permissible role in public life. Rather, the Establishment Clause forbids officials from exercising governmental power on the basis of a desire to suppress, harm, or denigrate any particular religious sect or denomination. This limit, though narrow, is essential to religious liberty in America.

B. The Free Exercise Clause

The Free Exercise and Establishment Clauses speak as one against laws designed to oppress disfavored faiths. This reflects "the common purpose of the Religion Clauses," which is "'to secure religious liberty.'" *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 313 (2000) (quoting *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962)). Indeed, it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." *Bowen* v. *Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.).

This principle received its fullest elaboration in *Lukumi*, where the Court struck down a local ordinance on the ground that it was based on animosity toward Santeria religious practices. *See* 508 U.S. at 542. The Court explained that "[t]he Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all

officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Id.* at 547. Thus, "Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Id.*

Governmental acts based on religious animosity are accordingly forbidden by the Free Exercise Clause. *Id*. That is true even if officials "did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom." *Id.* at 524.

Furthermore, in discerning animus, "[f]acial neutrality is not determinative" because the "Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination." *Id.* at 534. Rather, when government classifies on religious lines, courts guard against "impermissible attempt[s] to target [religious people] and their religious practices." *Id.* at 535.

Under *Lukumi*, evidence of improper purpose may come from the text and structure of an order, the order's real-world effect, or the degree to which the order is tailored to achieve legitimate ends. *See id.* at 533-38. Courts must also consider "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.* at 540 (opinion of Kennedy, J.).

Thus, if the full circumstances of an official act disclose that it was based on animus toward a religious group, that act must be invalidated.

C. The Equal Protection Clause

Precisely because the Religion Clause rule against animus is grounded in equal treatment for all religions, Justice Kennedy has explained that it should be informed by insights from equal protection doctrine. *See Lukumi*, 508 U.S. at 540 (opinion of Kennedy, J.) ("In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases.").

The Equal Protection Clause is instructive in the Establishment Clause context in at least three respects. First, on many occasions, this Court has equated race with religion as reasons for discrimination inimical to our constitutional order. *See, e.g.*, *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303-04 (1976). This principle has been invoked in a wide array of circumstances: "Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial." *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment); *see also Shaw* v. *Reno*, 509 U.S. 630, 648 (1993).

Second, equal protection jurisprudence offers a nuanced account of animus. In many cases, the Court has invalidated acts on animus grounds, without any finding that particular individuals were subjectively motivated by bigotry. *See, e.g.*, *Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 634. Rather,

as Justice Kennedy has explained: "Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring); *accord Lukumi*, 508 U.S. at 524 (recognizing the possibility that officials "did not understand" or "failed to perceive" their animus toward Santeria).

Thus, the Court has remained sensitive to the subtle dangers posed by "unconscious prejudices and disguised animus," as well as the social harms of "covert and illicit stereotyping." *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522 (2015). "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

Finally, equal protection cases shed additional light on how to recognize animus. Several objective factors are often considered relevant here: the text of an act; its novelty in our constitutional tradition; the full context leading up to and following enactment; the act's real-world effects; and the degree of fit between an act's stated purpose and its actual structure. *See Windsor*, 133 S. Ct. at 2693-95; *Romer*, 517 U.S. at 634-35; *Cleburne*, 473 U.S. at 448; *Village of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-67 (1977); *United States Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 536-38 (1973). The Religion Clause precedents consider the same

factors, including those addressing official acts based on animus toward specific religious denominations. *See Kiryas Joel*, 512 U.S. at 698-705; *Lukumi*, 508 U.S. at 534-36; *Edwards* v. *Aguillard*, 482 U.S. 578, 594-95 (1987); *see also Town of Greece*, 134 S. Ct. at 1824-26 (describing when a pattern of prayers would be unconstitutional because it functioned to "denigrate" or "betray an impermissible government purpose"). The link between the Religion Clauses and the Equal Protection Clause thus promotes a more refined application of the Establishment Clause's ban on official animus toward religion.

II. THE ORDER VIOLATES THE CONSTITUTION BECAUSE IT IS BASED ON ANIMUS AGAINST ISLAM

"For centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom." *Town of Greece*, 134 S. Ct. at 1841 (Kagan, J., dissenting). Yet the President has issued an Order targeting six Muslim-majority nations—while maintaining a campaign website that, for months following his inauguration, included his statement supporting "a total and complete shutdown of Muslims entering the United States." App. 10a. Even acknowledging the deference due to the President in matters of immigration and national security, it is hard to imagine a clearer case of governmental action motived by animus toward a single religion.

A. Evidence of Animus—Including But Not Limited to Campaign Statements—Is Overwhelming

In upholding the preliminary injunction, the Fourth Circuit relied on myriad statements by Mr. Trump expressing "anti-Muslim sentiments that animated his desire to ban Muslims from the United States." App. 49a. Among the evidence it considered was a "Statement on Preventing Muslim Immigration" posted by then-candidate Trump on his campaign website—and maintained there until shortly before oral argument in the Fourth Circuit on May 8—calling for a "total and complete shutdown of Muslims entering the United States." App. 10a-11a. The Fourth Circuit also considered statements by President Trump coinciding with entry of the Order, including: "Islam hates us"; "[w]e can't allow people coming into this country who have this hatred"; and "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." App. 49a. Such voluminous evidence, standing on its own, overwhelmingly supports the Fourth Circuit's finding that the Order "cannot be divorced from the cohesive narrative linking it to the animus that inspired it[.]" App. 64a.

And while the Fourth Circuit relied on this evidence of animus primarily to determine that the Order did not satisfy the *Lemon* test, the same facts illustrate anti-Islamic animus even more clearly: President Trump's Order and the oft-repeated campaign promise it fulfilled are based on a desire to exclude Muslims from the United States. Indeed, as explained above, this kind of evidence—the text of an order, its novelty, its real-world effects, the full

context of its enactment, statements made by decisionmakers, and the degree of fit between an order's stated purpose and actual structure—is the standard fare of courts engaged in animus analysis. *See Town of Greece*, 134 S. Ct. 1824-26; *Locke*, 540 U.S. at 725; *Lukumi*, 508 U.S. at 534-36; *see also, e.g.*, *Windsor*, 133 S. Ct. at 2693-95; *Romer*, 517 U.S. at 634-35; *Cleburne*, 473 U.S. at 448. And as the Fourth Circuit and many others have concluded, the immigration and national security context of this litigation does not alter that bottom line. *See* App. 64a-65a. While the Court in *Kleindienst* v. *Mandel* deferred to a decision to exclude aliens based on "a facially legitimate and bona fide reason," 408 U.S. 753, 770 (1972), here the improper anti-Muslim animus means that the Order was not bona fide and was not issued in good faith.

While the Government repeatedly asserts that the Fourth Circuit's decision was "based on speculation about officials' subjective motivations drawn from campaign-trail statements by a political candidate," which should not be considered, Pet. 13, 28-30, that is not correct.

First, setting aside the campaign, a review of *only* post-election and post-inauguration statements by the President and his senior advisors demonstrates that the Order is based on anti-Islamic animus. Some of the more notable statements from this period include:

> (1) More than a month after the election, President Trump was asked whether he would reevaluate his intention to ban

Muslims. He responded: "You know my plans all along, and I've been proven to be right."[3]

(2) Upon signing the initial Executive Order, President Trump read its oblique title "Protecting The Nation From Foreign Terrorist Entry Into The United States" and said, "We all know what that means."[4]

(3) On January 28, 2017, Rudy Giuliani stated, "When [President Trump] first announced it, he said 'Muslim ban.' He called me up, he said, 'Put a commission together, show me the right way to do it legally.'"[5]

(4) When President Trump's second Order was enjoined, he said he would rather "go all the way, which is what I wanted to do in the first place."[6]

(5) On June 5, 2017, five days after the Government filed this Petition, the President tweeted: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a

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[3] *Trump: "You've Known My Plans" On Proposed Muslim Ban*, WASH. POST (Dec. 21, 2016).

[4] *Trump Signs Executive Orders at Pentagon*, ABC NEWS (Jan. 27, 2017).

[5] Amy B. Wang, *Trump Asked for a "Muslim Ban,' Giuliani Says*, WASH. POST (Jan. 29, 2017).

[6] Bob Van Voris & Erik Larson, *Trump on Travel Ban Ruling: "Go Back To the First One,"* BLOOMBERG (Mar. 15, 2016).

> TRAVEL BAN!"[7] He continued: "The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to the S.C."[8]

These statements alone reveal the President's motives. Neither the adjudication of the Government's request for a stay nor the ultimate resolution of this case turns on whether the Court considers pre-election expressions of animus.

Second, as a matter of law, this Court has never suggested that campaign statements are uniquely irrelevant to motive analysis. To the contrary, courts must consider "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Lukumi*, 508 U.S. at 540 (opinion of Kennedy, J.) (citing *Arlington Heights*,

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[7] @realDonaldTrump, TWITTER (Jun. 5, 2017, 3:25 AM), https://twitter.com/realDonaldTrump/status/871674214356484096. President Trump's tweets are properly among the "'readily discoverable fact[s]'" in which the "'official objective' of a government order may be discerned." App. 48a (citing *McCreary*, 545 U.S. at 862.). As Deputy White House Press Secretary Sarah Sanders explained, Twitter "gives [President Trump] the ability to speak directly to the people without the bias of the media filtering those types of communications." Callum Borchers, *Kellyanne Conway had a lousy Monday. Sean Spicer's wasn't much better.* WASH. POST (Jun. 5, 2017).

[8] @realDonaldTrump, TWITTER (Jun. 5, 2017, 3:29 AM), https://twitter.com/realDonaldTrump/status/871675245043888128.

429 U.S. at 268).[9] These considerations reflect simple common sense: "[T]he world is not made brand new every morning." *McCreary*, 545 U.S. at 866.

Here, where President Trump issued this policy almost immediately upon taking office, the "series of events leading to the . . . official policy," and the "contemporaneous statements made by members of the decisionmaking body," necessarily include statements made by President Trump *while he was crafting the policy*—a process that unquestionably began *during* the campaign and pre-inauguration period. *Cf. Romer*, 517 U.S. at 623 (emphasizing "the contentious campaign that preceded" the adoption of a state constitutional amendment). Indeed, the connection in time, subject matter, scope, and substance between the President's campaign statements and the Order under review is extraordinarily tight.

The Government's attempt to disassociate the second Order from the first by asserting that the Order was revised to "address the Ninth Circuit's concerns" and that these revisions "demonstrate good faith" (Pet. 6, 25) is futile. Any material distinction in the motivation behind the orders is belied by the President's own words, including a tweet in which he stated that the Order is merely "the watered down, politically correct version" of the original order.[10]

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[9] Unlike in *Lukumi*, where the Court determined a multi-member body's purpose, here the only question is why one man (President Trump) undertook one official act (issuing the Order).

[10] @realDonaldTrump, TWITTER (Jun. 5, 2017, 3:29 AM), https://twitter.com/realDonaldTrump/status/871674214356484096. The continuity of the orders has been reaffirmed by President Trump's top advisors. *See* App. 14a; *see also Chris*

The President's own prior statements—which often explicitly tied his refusal to be "politically correct" with his pledge to ban Muslim immigration[11]—leave no doubt that the "political correct[ness]" of the Order lies in its use of nationality as a pretext for religion.

Third, excluding President Trump's pre-inauguration statements would render unintelligible many of his post-inauguration statements which explicitly reference his earlier remarks. For example, on the morning of June 5, the President tweeted: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!"[12] Thus, contrary to the Government's characterization of the second Order as a facially neutral executive action distinct from the prior order or campaign promises (*see* Pet. 2, 29), the President's statements make clear the continuity between his call for a "total and complete shutdown of Muslims entering the United States" and the Order he enacted. App. 10a.

Cuomo, Trump aide tangle over 'travel ban' tweets, CNN: POLITICS (Jun. 5, 2017), http://www.cnn.com/2017/06/05/politics/cuomo-and-gorka-spar-cnntv/. (Sebastian Gorka, Deputy Assistant to the President, stating: "The fact is, it's been the same since the beginning—from the first EO to the second EO, it's one thing.").

[11] Donald Trump, Remarks at Saint Anselm College in Manchester, NH (Jun. 13, 2016), *in* Gerhard Peters & John Woolley, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/index.php?pid=117775; Donald Trump, Address at a Rally in Manchester, NH (Aug. 25, 2016), video available, http://www.dailymotion.com/video/x4qli4h.

[12] @realDonaldTrump, TWITTER (Jun. 5, 2017, 3:25 AM), https://twitter.com/realDonaldTrump/status/871674214356484096.

Fourth, protected speech would not be chilled by consideration of the President's campaign statements. *Washington* v. *Trump*, No. 17-35105 (9th Cir. Mar. 17, 2017), Slip. Op. at 9-14 (Kozinski, J., dissenting from denial of reconsideration en banc). Could a candidate run an explicitly racist campaign, win an election, enact facially neutral measures that distinctively injure the racial minority he had attacked for months, and then prevail against an equal protection challenge? Surely not. The First Amendment protects speech, but it does not allow politicians to evade all accountability if their words reveal that an unconstitutional purpose motivated their actions.

That is true *throughout* a politician's career. The Government's bizarre insistence that Donald J. Trump was a mere private citizen on January 19, 2017—one whose promises to the electorate meant nothing at all—"taxes the credulity of the credulous." *Maryland* v. *King*, 133 S. Ct. 1958, 1980 (2013) (Scalia, J., dissenting).

Finally, the Government's analysis is unworkable. If an incumbent were running for office, how would campaign statements be distinguished from others? The Government's proposed rule is at odds with precedent and arbitrary in application.

B. Invalidating the Second Order Is Not Novel

The Government's assertion that the decision below is "novel" because it is "based on speculation about its drafters' supposedly implicit purpose," Pet. 27, is mistaken. The purpose of the Order is not "implicit"; it is clear from its express terms and

operation. The Order makes express reference to honor killings—an anti-Islamic dog whistle that, as the Fourth Circuit found, underscores its lack of a secular purpose. (*See* App. 53a n.17.) The Order also by its terms applies to six majority-Muslim nations. Put simply, the Order has a recognized meaning that "denigrate[s]" Islam. *See Town of Greece*, 134 S. Ct. at 1823-26.

Nor would it be novel for the Order to be struck down based on a finding of animus. After all, if this were the rule, a similar objection could have been raised each time the Court has identified animus in an Establishment Clause challenge. *See*, *e.g.*, *Kiryas Joel*, 512 U.S. at 722, 728 (Kennedy, J., concurring in the judgment); *Larson*, 456 U.S. at 246. And the prohibition on animus is familiar in Free Exercise or Equal Protection challenges, where the Court has repeatedly invalidated state action based on a finding of animus. *See*, *e.g.*, *Lukumi*, 508 U.S. at 542; *Cleburne*, 473 U.S. at 450; *Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 634.

C. The Order Is Unlawful Even if Animus Was Not Its Sole Motive

Given the exceptional record in this case—and, in particular, the utter lack of any serious national security justification for a travel ban structured like the Order—there is compelling reason to believe that the Order was motivated solely by anti-Islamic animus or, at the very least, by a decision to follow through on avowedly and explicitly anti-Islamic campaign promises. From that perspective, the Order—whose scope and structure do not match even its own professed purposes—is analogous to the

constitutional amendment invalidated in *Romer*: "Its sheer breadth is so discontinuous with the reasons offered for it that the [Order] seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." 517 U.S. at 632.

In this regard, it is important to recognize that animus can co-exist with other motives. Thus, in *Lukumi*, the Court recognized that the subject did implicate "multiple concerns unrelated to religious animosity." 508 U.S. at 535. But those concerns were so "remote" from the ordinance under review that they could not save it. *Id.* So, too, in *Windsor*, where the Court acknowledged other legislative purposes, but nevertheless concluded that the Defense of Marriage Act's "principal effect" and "principal purpose" were to "impose inequality, not for other reasons like governmental efficiency." 133 S. Ct. at 2694; *see also Larson*, 456 U.S. at 248 (Minnesota's interest in "protecting its citizens from abusive practices in the solicitation of funds for charity" could not explain its *de facto* denominational line-drawing).

The mere façade of a national security justification, even if actually in the mix of presidential motives, should not have saved an Order that rested ultimately on prejudice and stereotype. When otherwise valid motives are mixed with forbidden animus, inevitably the legitimate justification is itself corrupted and distorted. *See Powers* v. *Ohio*, 499 U.S. 400, 416 (1991) (warning that "race prejudice stems from various causes and may manifest itself in different forms."). In short, where the government acts on the basis of mixed

motives—as it often does—courts do not hesitate to invalidate governmental action when animus was a *primary* or *essential* motive. *Cf. McCreary*, 535 U.S. at 865. And here, for reasons well stated by the Fourth Circuit, that conclusion is inevitable.

Ultimately, perhaps the most instructive precedent is *Korematsu* v. *United States*, 323 U.S. 214 (1944). There, too, an executive order built on animus was presented to courts as justified by national security concerns, which courts were forcefully urged to take at face value. There, too, the President acted on the basis of various motives, some legitimate and others (the decisive ones) emphatically not so. And there, too, internal executive branch evidence undercut much of the Government's factual argument to the Judiciary—but, unlike in this case, that evidence was not available to the Court in 1944. *See* Peter Irons, *Justice At War: The Story of the Japanese-Internment Cases* (1993); Leah Litman & Ian Samuel, *No Peeking?: Korematsu and Judicial Credulity*, TAKE CARE (Mar. 22, 2017).

Of course, in *Korematsu*, the Court went along with a presidential demand for boundless deference over a courageous and strongly-worded dissent from Justice Murphy. *See* 323 U.S. at 233 (Murphy, J., dissenting) ("Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."). For good reason, *Korematsu* is now taught as one of the most painful cases in our nation's history. *See Hassan* v. *City of N.Y.*, 804 F.3d 277, 307 (3d Cir. 2015) ("Given that unconditional deference to [the] government['s] . . . invocation of 'emergency' . . . has a lamentable place in our history,

the past should not preface yet again bending our constitutional principles merely because an interest in national security is invoked." (citing *Korematsu*, 323 U.S. at 223)).

This Petition tests the lesson of *Korematsu* in our own time. One of the very reasons this country was founded was to welcome people of all faiths and to reject religious intolerance. Issuing an Order to keep Muslims out is inconsistent with that principle as expressed through the First and Fourteenth Amendments. Nor can the President's Order be saved by a pretextual, after-the-fact appeal to national security. Respectfully, this Court should not abide an Order widely—and correctly—understood to flow from anti-Islamic animus.

III. A FINDING OF ANIMUS WOULD ONLY HEIGHTEN THE NEED FOR THE PRELIMINARY INJUNCTION TO REMAIN IN FORCE

The Order's grounding in religious animus deepens both the irreparable injury that Plaintiffs would suffer in the absence of the preliminary injunction and the public's interest in keeping the stay in force. As the Fourth Circuit explained, "the risk of [irreparable] harms is particularly acute here, where from the highest elected office in the nation has come an Executive Order steeped in animus and directed at a single religious group." App. 71a. The President's continued underscoring of the animus motivating the Order through tweets and other public statements, even as contrary arguments are being made to this Court, only reaffirms the need for a stay to remain in place to preserve the essential

rights guaranteed by the Constitution. Given the extraordinary risk of irreparable harm and the fact that "upholding the Constitution undeniably promotes the public interest[,]" the preliminary injunction should remain in effect. App. 70a.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that this Court should deny the Government's motion to stay the preliminary injunction.

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