Nos. 16-1436, 16A1190 & 16A1191

In the Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Petitioners-Applicants,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, *et al.*,
Applicants,

v.

STATE OF HAWAII, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit and Applications for a Stay to the U.S. Courts of Appeals for Fourth and Ninth Circuits

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MOTION FOR LEAVE TO FILE *AMICUS* BRIEF IN THREE RELATED PROCEEDINGS AND BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONERS-APPLICANTS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to this Court's Rule 21.2(b) and 37.2(b), Eagle Forum Education & Legal Defense Fund ("EFELDF") respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the federal petitioners and applicants in three related proceedings: the two stay applications in *Trump v. Int'l Refugee Assistance Project*, No. 16A1190, and *Trump v. Hawaii*, No. 16A1191, and the petition for a writ of *certiorari* in *Trump v. Int'l Refugee Assistance Project*, No. 16-1436. The parties have consented to this motion, and in the petition (No. 16-1436) have consented to the filing of the *amicus* brief with 10 days written notice.*

EFELDF is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For more than thirty-five years, EFELDF has defended American sovereignty, a strong national defense, and adherence to the separation of powers under the U.S. Constitution, including judicial restraint under both Article III and separation-of-powers principles. For the foregoing reasons, EFELDF has direct and vital interests in the issues before this Court.

Movant EFELDF respectfully submits that a joint brief would aid the Court because the two rulings under review – *Int'l Refugee Assistance Project v. Trump*, No. 17-1351 (4th Cir. May 25, 2017) ("*IRAP*")

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* In No. 16-1436, petitioners lodged their blanket consent to *amicus* briefs with the Clerk, and movant has lodged the respondents' written consent with the Clerk.

and *Hawaii v. Trump*, No. 17-00050 DKW-KSC (D. Haw. Mar. 29, 2017) ("*Hawaii*") – both enjoin the same executive order and involve common legal issues. Moreover, because both courts issued a nationwide injunction, lifting the injunction in *IRAP* would not redress the Government's injuries: *Hawaii* would continue to enjoin the challenged order.

At its core, the accompanying *amicus* brief is a petition-stage *amicus* brief in support of petitioners filed with the consent of all parties, more than 10 days prior to the deadline. *See* S.Ct. Rule 37.2(a) (deadline is 30 days from the docketing of the petition, or July 1, 2017). Consistent with that context, the *amicus* brief has no more than 6,000 words. If that were the only filing at issue, EFELDF could proceed without a motion. *Id.*

Here, however, EFELDF respectfully submits that the same brief is also applicable in the two stay applications, which requires this motion. Although the Court has not consolidated the three proceedings, nothing precludes the Count's considering the same brief in the other two matters. Mara Silver in the Office of the Clerk advised the undersigned counsel that the Court would not need more than its usual 40 copies, notwithstanding that the same brief would be filed in three distinct proceedings.

Movant EFELDF respectfully submits that its proffered brief *amicus curiae* will bring several relevant matters to the Court's attention:

- Although the lower courts evaluated plaintiffs' claims under the Establishment Clause, the EFELDF brief demonstrates that the claims arise under the Free Exercise Clause, EFELDF Br. at

15-17, which has implications for plaintiffs' standing. *See id.* at 7.

- Jurisdictionally under sovereign immunity, the EFELDF brief analyzes not only the doctrine of consular nonreviewability, *id.* at 8-10, but also the extent to which the statute leaves a reviewing court with no law to apply and thus commits the challenged action to agency discretion. *See id.* at 10-11.
- The EFELDF brief analyzes the inapplicability of the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb-2000bb-4 ("RFRA"), which would affect the standard of review if it applied. *See* EFELDF Br. at 14-15.
- The EFELDF discusses *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 84-86 (1961), in which this Court acknowledged that courts cannot hold initial proposals against the government when the proposals are amended subsequently to address constitutional concerns. *See* EFELDF Br. at 21-22.
- The EFELDF explains why the President's extra-record statements do not evince impermissible discrimination against Muslims. *See id.* at 23-24.
- The EFELDF brief demonstrates why courts should not countenance indirect class actions or facial challenges via nationwide injunctions in as-applied challenges with atypical, cherry-picked facts, thereby sidestepping procedural protections that defendants have in actual class actions and facial challenges, such as dismissing facial challenges under *U.S. v. Salerno,* 481 U.S. 739, 745 (1987). *See* EFELDF Br. at 25-26.

These issues all are relevant to whether this Court grants the writ and the stay applications and to how the Court resolves them.

For the above reasons, EFELDF respectfully requests that the Court grant this motion for leave to file the accompanying *amicus* brief in each of these three matters.

Dated: June 12, 2017

Respectfully submitted,

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QUESTIONS PRESENTED

The Constitution and Acts of Congress confer on the President broad authority to prohibit or restrict the entry of aliens outside the United States when he deems it in the Nation's interest. Exercising that authority, the President issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). Section 2(c) of that Order suspends for 90 days the entry of foreign nationals from six countries that Congress or the Executive previously designated as presenting heightened terrorism-related risks, subject to case-by-case waivers. The district court issued, and the court of appeals upheld, a preliminary injunction barring enforcement of Section 2(c) against any person worldwide, because both courts concluded that the suspension violates the Establishment Clause.

The questions presented in No. 16-1436 are:

1. Whether respondents' challenge to the temporary suspension of entry of aliens abroad is justiciable.
2. Whether Section 2(c)'s temporary suspension of entry violates the Establishment Clause.
3. Whether the global injunction, which rests on alleged injury to a single individual plaintiff, is impermissibly overbroad.

These questions also predominate in the related stay applications – Nos. 16A1190 & 16A1191 – in addition to the stay factors.

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Rules, Regulations and Orders

Other Authorities

Nos. 16-1436, 16A1190 & 16A1191

In the Supreme Court of the United States

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("EFELDF") is a nonprofit organization founded in 1981 and headquartered in Saint Louis, Missouri.[1] For more than thirty-five

[1] *Amicus* files this brief with the accompanying motion for leave to file and with consent by all parties, with 10 days' prior written notice; *amicus* has lodged the respondents' written consent with the Clerk, and petitioners have lodged their blanket consent to all

years, EFELDF has defended American sovereignty, a strong national defense, and adherence to the separation of powers under the U.S. Constitution. For all these reasons, EFELDF has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

These related matters concern the lawfulness of Executive Order No. 13,780, 82 Fed. Reg. 13,209 (2017) (the "Order")[2]. Section 2 of the Order paused and directed study of immigration from six state, sponsors or shelters of terrorism; Section 6 of the Order similarly paused and directed study of refugee admissions and caps the number of refugees for 2017. Both sections implement authority delegated to the President by the Immigration and Naturalization Act, 8 U.S.C. §§1101-1537 ("INA"). *See* 8 U.S.C. §§1182(f), 1157(a)(2)-(3). The plaintiffs are the State of Hawaii, various individuals, and various organizations who claim that the Order violates due process and discriminates against Islam because the six covered nations all are Muslim-majority countries.

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amicus briefs. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the brief's preparation or submission.

[2] The Order is reprinted at Pet. App. 289a-312a. The Order followed on – and superseded – an earlier executive order, 82 Fed. Reg. 8977 (2017), which was also preliminarily enjoined. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

In this Court, the federal defendants filed two stay application and petitioned for a writ of *certiorari*. In No. 16-1436 and No. 16A1190, the Government seeks review and a stay of the preliminary injunction upheld by the U.S. Court of Appeals for the Fourth Circuit in *Int'l Refugee Assistance Project v. Trump*, No. 17-1351 (4th Cir. May 25, 2017) ("*IRAP*"). In No. 16A1191, the Government seeks to stay the preliminary injunction granted by the U.S. District Court for the District of Hawaii in *Hawaii v. Trump*, No. 17-00050 DKW-KSC (D. Haw. Mar. 29, 2017) ("*Hawaii*"). Although the Order is facially neutral with respect to religion, *IRAP* and *Hawaii* perceive violations of the Establishment Clause from the animus allegedly demonstrated in extra-record statements, primarily from the election campaign.

SUMMARY OF ARGUMENT

At the outset, no party has standing to press the alleged religious-freedom issues found below because the Order does not affect *the plaintiffs'* religious rights and aliens abroad have no constitutional rights here (Sections I.B.2-I.B.3); similarly, plaintiffs would lack third-party standing to assert aliens' rights, if aliens abroad had any rights (Section I.B.1). The plaintiffs' claim that the Order stigmatizes them as Muslims fails because the Order does not target these plaintiffs and subjective, third-party stigma is insufficiently concrete for Article III (Section I.B.4); the plaintiffs' other injuries are insufficiently concrete or speculative (Section I.B.5). Similarly, with respect to jurisdiction, the Order falls under the consular nonreviewability doctrine (Section I.C) and outside the waiver of sovereign immunity in the

Administrative Procedure Act ("APA") as committed to agency discretion by law (Section I.D).

On the immigration merits, the Order implements plenary authority that INA delegates to the President with no law for a reviewing court to apply in checking the President's power (Section II.A). On religion, the Order is facially neutral, lacking the selective persecution necessary for facially neutral laws to violate the Free Exercise Clause (Sections II.B.2, II.B.3). Significantly, because the Order does not disparately regulate religiosity or any religion (or atheism) but merely allegedly persecutes Muslims, the Establishment Clause is not applicable (Section II.B.2). The Religious Freedom Restoration Act, 42 U.S.C. §§2000bb-2000bb-4 ("RFRA") does not apply because an alien abroad is not a protected RFRA "person" and plaintiffs here suffer no RFRA injuries (Section II.B.1). Finally, the plaintiffs have not made the strong showing needed to go beyond the administrative record to demonstrate impropriety (Section II.C.1) and – indeed – would exceed this Court's powers to fault the government for allegedly unconstitutional policy proposals (from the election campaign, no less) that both the campaign and subsequently the President amended to address constitutional concerns raised against the initial proposal (Section II.C.2), as recognized in *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 84-86 (1961).

Even if it finds jurisdiction and an entitlement to a preliminary injunction, this Court should narrow the injunctions' overbroad scope. For a court to issue a nationwide injunction on slender and atypical bases

for standing violates not only Article III (Pet. at 31) but also the limitations on facial challenges and class action put in place to protect defendants: put simply, rather than a nationwide injunction based on cherry-picked and atypical facts, the plaintiffs deserved dismissal for failing to show the Order facially invalid under all circumstances (Section III.B). In any event, this type of overbroad injunction effectively denies the Court the opportunity for multiple circuits to address an issue and should thus be rejected (Section III.A).

ARGUMENT

I. THIS COURT HAS JURISDICTION, BUT THE PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE.

Although this Court has jurisdiction over these matters, the plaintiffs lack jurisdiction to press their claims:

> Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review[. …] And if the record discloses that the lower court was without jurisdiction[, … and] we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 95 (1998) (quotations and citations omitted). Because plaintiffs' claims are not justiciable, this Court must remand these cases with orders to dismiss them.

A. These actions are not moot.

Although the travel restrictions enjoined in *IRAP* are time-limited, the Executive functions enjoined in *Hawaii* are not. *Compare*, *e.g.*, Order §2(c) *with id.* §2(e). As such, these cases would still require this Court's intervention, even if the time-limited provisions were not tolled during the pendency of the injunctions. The issues here are not moot.

B. The plaintiffs lack standing.

Under Article III, federal courts are limited to hearing cases and controversies, U.S. CONST. art. III, §2, which is relevant here primarily in the "bedrock requirement" of standing. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 471 (1982). This limit is "fundamental to the judiciary's proper role in our system of government." *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 37 (1976). In both its constitutional and prudential strands, standing is "founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Bennett v. Spear,* 520 U.S. 154, 162 (1997) (interior quotations and citations omitted).

Plaintiffs must – and cannot – establish standing for each form of relief they seek: "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). The following five subsections emphasis how plaintiffs have failed to establish standing.[3]

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[3] Two related concepts also bear mention. First, the Order allows for case-by-case waivers for instances of undue hardship, and entries in the national interest and not posing national-security threats. Pet. App.

1. Plaintiffs lack standing to raise the rights of aliens abroad.

Even if aliens abroad had constitutional rights, the plaintiffs here would lack third-party standing to assert those rights. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004). While plaintiffs may assert their own rights, if any, they must do so under the standards applicable to those rights, without any heightened scrutiny applicable to the third parties' rights. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 263 (1977).

2. Plaintiffs do not – themselves – suffer cognizable religious injury.

To the extent that they seek to assert free-exercise claims against the Order, plaintiffs must show how the Order coerces *their* religion, not the rights of third parties. *Harris v. McRae*, 448 U.S. 297, 320 (1980). As in *McRae*, however, the challenged action has no effect whatsoever on plaintiffs' religious exercise. *Id.* By the same token, membership groups cannot press these claims. *Id.* at 321 (*citing Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963)). Consequently, plaintiffs cannot assert religious rights of their own.

301a-303a. The Government suggests that this renders this action unripe because entry may not be denied. Appl. No. 16A1191, at 22. Similarly, injuries can satisfy Article III's immediacy test but not the higher bar of irreparable harm. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149-50, 162 (2010). Either issue would independently justify reversal.

3. Aliens abroad lack cognizable rights under the Constitution.

The only people whom the Order affects directly – aliens abroad – simply do not have rights under our Constitution relevant to this litigation. *Boumediene v. Bush*, 553 U.S. 723, 755-62 (2008). Particularly, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Even an order banning Muslims on the basis of religion would not violate constitutional rights of would-be immigrants. Without a right, aliens abroad cannot suffer cognizable Article III injury.

4. Plaintiffs' claimed stigmatic injury is insufficiently concrete.

The claimed stigma injuries from the Order are insufficient because, as the petition explains, "only … 'those … personally denied equal treatment' by the challenged discriminatory conduct" can assert stigma injuries. Pet. at 17 (*quoting Allen v. Wright*, 468 U.S. 737, 755 (1984)). With religious rights, a contrary holding effectively would eliminate the restrictions that this Court has placed on such litigation under *Abington Township*, *McRae*, and their progeny. If subjectively hurt feelings could satisfy Article III, anyone could sue about anything.

5. Plaintiffs' economic and other non-religious injuries are speculative.

The plaintiffs' other asserted injuries also fail. For example, Hawaii claims economic loss from tourists and lost student and faculty interactions with state universities. Without concrete particulars, this type of future injury is insufficient: "'some day' intentions –

without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). Conversely, where sufficiently imminent injury is involved, the injury could be ameliorated under the Order's hardship provisions.

C. The "consular nonreviewability" doctrine precludes judicial review.

In a doctrine related to aliens abroad lacking any cognizable right to enter the United States, courts also have found consular decisions to exclude aliens not open to judicial review. This doctrine of consular nonreviewability also precludes plaintiffs' suits to the extent that the suits rely on the rights or injuries of aliens abroad.

By way of analogy, for most of our history, aliens detained *at our border* could challenge the detention only by *habeas corpus*, *Ekiu v. U.S.*, 142 U.S. 651, 660 (1892), although *Brownell v. We Shung*, 352 U.S. 180, 184-85 (1956), *abrogated by* PUB. L. NO. 87-301, §5(b), 75 Stat. 650, 653 (1961) ("[n]otwithstanding the provisions of- any other law, any alien against whom a final order of exclusion has been made … may obtain judicial review of such order by habeas corpus proceedings and not otherwise"[4]), allowed such aliens also to proceed via an APA suit. Even there, however, this Court expressly did "not suggest, of course, that an alien who has never presented himself at the

[4] The post-1996 version of this provision is codified at 8 U.S.C. §1252(g).

borders of this country may avail himself of the declaratory judgment action by bringing the action from abroad." 352 U.S. at 184 n.3. Thus, even there, aliens abroad had no right to litigate the bases for their admission into the United States.

Other than that inapposite short window – which Congress slammed shut in 1961 – the federal courts have uniformly held consular immigration decisions regarding aliens abroad immune from judicial review. *See Saavedra Bruno v. Albright*, 197 F.3d 1153, 1160 (D.C. Cir. 1999) (collecting cases). As this Court recently reiterated, such history provides "convincing support for the conclusion that Congress accepted and ratified the unanimous" judicial interpretations of a statute. *Texas Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2520 (2015). In APA parlance, the "agency action [here] is committed to agency discretion by law" under 5. U.S.C. §701(a)(2), and thus falls under one of the "limitations on judicial review" recognized in 5 U.S.C. §702(1), notwithstanding APA's otherwise generous judicial review.[5]

D. Sovereign immunity bars the *Hawaii* injunction.

"The United States, as sovereign, is immune from suit save as it consents to be sued." *U.S. v. Sherwood*, 312 U.S. 584, 586 (1941). "Absent a waiver, sovereign

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[5] The lack of APA-INA review would not necessarily preclude *constitutional* review, *Webster v. Doe,* 486 U.S. 592, 603-04 (1988); *Fong Yue Ting v. U.S.*, 149 U.S. 698, 713 (1893), but plaintiffs here cannot establish any constitutional violations.

immunity shields the Federal Government and its agencies from suit," without regard to any perceived unfairness, inefficiency, or inequity. *Dept. of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999).[6] Moreover, such waivers are strictly construed, in terms of their scope, in favor of the sovereign. *Lane v. Pena*, 518 U.S. 187, 192 (1996). In the 1976 amendments to 5 U.S.C. §702, Congress "*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity." *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (*quoting* S. Rep. No. 996, 94th Cong., 2d Sess. 8 (1976); H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9 (1976), 1976 U.S. Code Cong. & Admin. News 6121, 6129) (R.B. Ginsburg, J.). But that waiver has restrictions, 5. U.S.C. §§701(a)(2), 702(1); Section I.C, *supra* (discussing doctrine of consular nonreviewability), which preclude the *Hawaii* relief.

Specifically, review is limited to agency action either made reviewable by statute or final but not otherwise reviewable. 5. U.S.C. §704; *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 243 (1980). By enjoining not only §2(c)'s visa suspension but also intra-Executive deliberations, analysis, and reporting under §2(a)-(b), (d)-(g), the *Hawaii* injunction improperly and without jurisdiction enjoined agency action not reviewable by statute and

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[6] The officer-suit exception in *Ex parte Young*, 209 U.S. 123 (1908), offers a limited exception to sovereign immunity, but only with *ongoing violations* of federal law. *Green v. Mansour,* 474 U.S. 64, 66-67 (1985). Here, there is no ongoing violation of law.

not final. Indeed, the *Hawaii* court also enjoined the President himself, where the waiver of sovereign immunity does not extend to the President. *See* Appl. No. 16A1191, at 22. By not immediately staying that overbroad injunction in response to the Government's stay application, the Ninth Circuit has sanctioned a lower court's egregious departure from the accepted course of judicial proceedings (namely, the separation of powers), which should compel this Court to exercise its supervisory power over the lower federal courts. *See* S.Ct. Rule 10(a).

II. THE EXECUTIVE ORDER IS ENTIRELY LAWFUL.

To the extent that jurisdiction exists for plaintiffs' claims, the claims lack merit under both INA and the Constitution. Accordingly, this Court should grant review and summarily vacate the injunctions on the merits.

A. Plaintiffs lack an INA cause of action, and the Order is lawful under INA.

The Constitution gives Congress, and thus its enforcement and rulemaking delegates in the Executive, plenary authority over immigration. U.S. CONST. art. I, §8, cl. 4; *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972).

INA delegates exceedingly broad power to the President to regulate immigration in this context:

> Whenever 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). In doing so, Congress neither gave plaintiffs nor the judiciary a basis for second-guessing (or even reviewing) the President's actions.

At the outset, as indicated, aliens abroad have "no constitutional rights" regarding admission into the United States. *Plasencia*, 459 U.S. at 32. Moreover and more generally under INA, "[j]udicial power over immigration and naturalization is extremely limited," *Miller v. Albright*, 523 U.S. 420, 455 (1998) (Scalia, J., concurring in judgment), because of the relative interests and powers of the three branches:

> "Our cases 'have 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.'"

Id. (*quoting Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (*quoting Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 210 (1953)). Accordingly, *amicus* EFELDF respectfully submits that the lower courts' reliance on Justice Kennedy's concurrence – with Justice Alito – in *Kerry v. Din*, 135 S.Ct. 2128 (2015), is misplaced.

The concurrence posits that the wife of a denied applicant could "look behind" exclusion of an alien abroad, notwithstanding *Mandel*, upon making "an affirmative showing of bad faith on the part of the consular officer" who denied the alien's visa. *Id.* at 2141 (Kennedy, J., concurring). In making that claim,

however, the concurrence expressly distinguished the statute at is issue in *Din* from the one in *Mandel*:

> [U]nlike the waiver provision at issue in *Mandel*, which granted the Attorney General nearly unbridled discretion, §1182(a)(3)(B) specifies discrete factual predicates the consular officer must find to exist before denying a visa.

Id. at 2140-41. To say one consular officer of hundreds may be called upon for more specificity in that context does not authorize a reviewing court to compel *the President* to do so under §1182(f).

The consular officer is not entitled to policy-based deference, *U.S. v. Mead Corp.,* 533 U.S. 218, 227-28 (2001), and must make a factual finding. 8 U.S.C. §1182(a)(3)(B). By contrast, Congress did not require the same specificity from the President, 8 U.S.C. §1182(f), and a reviewing court would have "no law to apply" in reviewing the President's action. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). In the President's case, judicial review is not available. 5 U.S.C. §701(a)(2).

B. The Order does not violate the religious freedoms of anyone.

The lower courts enjoined the Order to halt the purportedly ongoing violation of religious rights. As explained in this section, no such rights have been violated.

1. Plaintiffs lack a RFRA cause of action.

Significantly, RFRA does not protect the religious interests of aliens abroad, and the plaintiffs here do not suffer RFRA injuries.[7] RFRA applies to "persons," and the scope of that term is not defined, but can be inferred from the pre-RFRA usage that Congress intended to restore. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2773-74 (2014); *cf. Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 315-16, 318-19 (1978). Our courts have never entertained the free-exercise rights of aliens abroad, and the plaintiffs are not burdened in the exercise of *the plaintiffs'* religion. *See* Section I.B.2, *supra*. Accordingly, RFRA does not apply.

2. Plaintiffs' religious claims fall under the Free-Exercise Clause, not the Establishment Clause.

Our Constitution both prohibits establishment of religion and protects the free exercise of religion. U.S. CONST. amend. I, cl. 1-2. "Although these two clauses

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[7] RFRA concerns laws that "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. §2000bb-1(a), which Congress enacted to restore strict-scrutiny requirements for Free-Exercise claims under *Sherbert v. Verner,* 374 U.S. 398 (1963), in response to *Employment Division v. Smith,* 494 U.S. 872, 890 (1990) (allowing as-applied infringement of religious freedom by facially neutral government actions). *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 424 (2006).

may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom." *Engel v. Vitale*, 370 U.S. 421, 430 (1962); *see generally* Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. CHURCH & ST. 311 (2000). Although the lower courts analyzed these cases as Establishment-Clause cases, the gravamen of plaintiffs' claims is that the Order singles Muslims out for ill treatment, which – if true – would violate the Free Exercise Clause.

Even as plaintiffs misread it, the Order does not "demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)" under the Establishment Clause. *See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 605 (1989). Instead, they see the Order as pitting Muslims against every other conceivable form of religiosity or non-religiosity (*e.g.*, atheists, Buddhists, Christians, Druids, Hindus, Jews, pagans). That would constitute persecution, not establishment:

> At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs… Indeed, it was historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause. These principles, though not often at issue in our Free Exercise Clause cases, have played a role in some. In *McDaniel v. Paty*, for example, we invalidated a state law that disqualified members of the clergy from holding certain public offices, because it

> imposed special disabilities on the basis of religious status. On the same principle, in *Fowler v. Rhode Island*, we found that a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service.

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532-33 (1993) (internal quotations, citations, and Court's alterations omitted). Of course, a secondary "purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand." *Engel*, 370 U.S. at 432. But the Order advances neither atheism nor any one religion, even if it did punish Islam.

While the Establishment Clause applies to both "the advancement or inhibition of religion," *Sch. Dist. of Abington Twp.*, 374 U.S. at 222, the inhibition prong has always required some form of affirmative disparate regulation. *Larson v. Valente*, 456 U.S. 228, 246 (1982) (rule "clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents").[8] The Order is religiously neutral, but even as plaintiffs misread it, the Order is simply an attack on Muslims, with no preference for any other religion or atheism. This

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[8] In more typical Establishment-Clause cases, the government *advances* religion, such as school prayers. *See*, *e.g.*, *Engel*, 370 U.S. at 430.

Court should not extend the Establishment Clause to cover subjectively perceived targeting of one religion, with no governmental attempt to regulate religion.

3. The Order does not violate religious freedom.

Under *Smith*, 494 U.S. at 879 (interior quotation omitted), "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." Because the Order is such as "valid and neutral law," plaintiffs fail to state a claim under the religious clauses, *unless* the Court not only allows the entry of information outside the Order's administrative record but also credits the information as establishing an impermissible motive. Section II.C, *infra*, rebuts the non-record information, and this section demonstrates the appropriateness of the Order under the religious clauses.

On its face, the Order is neutral with respect to religion, applying not only to the Muslim majorities in the affected countries but also to religious minorities who seek to emigrate. Similarly, the Order does not affect the vast majority of Muslims worldwide, further belying the suggestion of disparate treatment *because of religion*. While the Order disparately impacts Muslims, that correlation is not surprising, given the current historical correlation between Islam and both failed states and sponsors of terrorism.

A famous statistical study showed that birthrates in seventeen countries correlate heavily with those countries' stork populations. Robert Matthews, *Storks Deliver Babies (ρ = 0.008),* 22:2 TEACHING STATISTICS: AN INT'L JOURNAL FOR TEACHERS, at 36 (2000). The statistical inference that storks deliver babies clearly

"mistakes correlation for causation." *Woodford v. Ngo,* 548 U.S. 81, 94 n.4 (2006); Matthews, *Storks Deliver Babies,* 22:2 TEACHING STATISTICS, at 36-37. The same type of mistake underlies the lower court's reasoning from disparate impacts to intentional discrimination. Mere correlation *with religion* is not discrimination *because of religion*. *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979); *Larson*, 456 U.S. at 246 n.23; *McGowan v. Maryland*, 366 U.S. 420, 564 (1961). On its face, at least, the Order is entirely neutral with respect to religion.

Even religion is not sacrosanct under the Constitution. Thus, while "for temporal purposes, murder is illegal, … the fact that this agrees with the dictates of the Judeo-Christian religions while it may disagree with others does not invalidate the regulation." *McGowan*, 366 U.S. at 442. Sadly, recent history and the record here suggest that significant segments of worldwide Islam support harming Americans. Pet. App. 10a n.5. While most Muslims are not murderous jihadis, significant numbers are, and our enemies actively use immigration to gain access. Pet. App. 293a-297a. Under the circumstances, pausing immigration from countries associated with terrorism is not irrational: "while the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). In any event, aliens abroad have no religious rights here, Section I.B.3, *supra*, so the Court need not decide whether the Order violates religious-freedom rights.

C. Non-record statements – especially ones predating the President's oath of office – do not control here.

Recognizing that no one protested when the prior administration acted against the same countries, *see* Pet. at 4 & n.2; *see also* Kate M. Manuel, Acting Section Research Manager. Congressional Review Service, *Executive Authority to Exclude Aliens: In Brief*, at 6-10 (2017) (listing prior presidents' exclusions), plaintiffs seek to find discriminatory intent by the current administration officials based on non-record statements, primarily ones predating the defendants' oaths of office. As explained, however, the extra-record statements are simply not relevant here.

To some extent, courts' willingness to look behind executive or legislative action depends on the context. With regard to immigration decisions regarding aliens abroad and the First Amendment, it is enough that Congress or its delegates in the Executive Branch provide a "facially legitimate and bona fide" basis for exclusion, *Mandel*, 408 U.S. at 769, which equates to rational-basis review. Pet. App. 40a n.14 (collecting cases); *accord Fiallo*, 430 U.S. at 794. Under that deferential review, legislative choices are "not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data," *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993). Deference is particularly appropriate here, given the "extremely limited" review available in this context. *See* Section II.A, *supra*. This Court should follow *Mandel* and *Fiallo* by declining to second-guess the Executive on issues of national security.

By contrast, with regard to the religious rights of those already within the U.S., the inquiry can be more searching: "Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Lukumi Babalu*, 508 U.S. at 547. Because no one in this litigation has standing to assert religious rights, *see* Sections I.B.1-I.B.3, *supra*, the Court need not consider this line of inquiry. To the extent that the Court pursues this line of inquiry, the plaintiffs cannot make the selective-enforcement showing that the *Lukumi Babalu* plaintiffs made, see Section II.B.3, *supra*; Sections II.C.2-II.C.3, *infra*, so the plaintiffs cannot prevail.

1. The plaintiffs have not made an *Overton Park* showing for going beyond the administrative record.

Courts typically base judicial review of executive action on the administrative record before the agency when it acted, *Overton Park*, 401 U.S. at 420. Assuming *arguendo* it were otherwise permissible and relevant to go outside the record to review statements during the election campaign, on Twitter, and the like, the plaintiffs would need "a strong showing of bad faith or improper behavior" before expanding review to include materials in addition to the governmental findings that accompanied the Order. *Id.*; *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) ("only the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground of [improper legislative motive]"). "[J]udicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government" and are "therefore 'usually to be

avoided.'" *Arlington Heights*, 429 U.S. at 268 n.18 (*quoting Overton Park*, 401 U.S. at 420). As explained below, the plaintiffs have not produced anything near the "clearest proof" or even made a "strong showing" of anything improper.

2. Statements about prior policy iterations are irrelevant.

The lower courts erred by reaching back into pre-election campaign statements, including original statements that the candidate subsequently revised to accommodate constitutional concerns. The courts' error lies not only in practical import and equity but also in the institutional competences of the respective branches of government.

As a matter of simple fairness and equity, a court should not hold an officer to initial plans when that officer changes plans based on input from stakeholder groups and affected agencies. Particularly for political outsiders, learning on the job is necessary.

More importantly, however, the lower courts' approach is outside the judicial power. Specifically, "treat[ing an amended] Act as merely a ruse by Congress to evade constitutional safeguards" "would be indulging in a revisory power over enactments as they come from Congress – a power which the Framers of the Constitution withheld from this Court – if we so interpreted what Congress refused to do and what in fact Congress did." *Subversive Activities Control Bd.*, 367 U.S. at 85. There, like here, when presented with the argument that regulating one way would violate the Constitution, the Government changed the focus of the legislation to achieve a desired end lawfully. The Court did not

inquire whether "the Act is only an instrument serving to abolish the Communist Party by indirection" because the "true and sole question before us is whether the effects of the statute as it was passed and as it operates are constitutionally permissible." *Id.* at 84-86. Similarly here, the Court must evaluate what the Government did, once the new administration was fully installed, not what they thought about doing before they took office.

3. The President's recent tweets in defense of the first order and against "political correctness" are neither relevant nor anti-Muslim.

As this Court has said of Twitter, "[p]rejudice can come through a whisper or a byte." *Dietz v. Bouldin*, 136 S.Ct. 1885, 1895 (2016). After the Government's petition and applications were filed, the President went online to lament courts as "slow and political," to characterize the Order as a "watered down" and "politically correct version" of the first order, and to identify the need for a "much tougher version." Glenn Thrush, *National Desk*: *Online Defiance Starts Early at the Oval Office*, N.Y. TIMES, June 7, 2017, at A18. These tweets are irrelevant because they do not constitute anti-Muslim prejudice and cannot elevate review of the second Order into review of the superseded first order. In effect, the tweets are inadmissible because they are irrelevant.

At the outset, however much the President or the plaintiffs want this Court to evaluate the first order, this Court lacks jurisdiction for an advisory opinion on that topic. Federal courts cannot render advisory opinions because their Article III jurisdiction extends

only to cases or controversies presented by affected parties. *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911). If the President wants to do another order, courts will have to wait for that eventuality; whatever was in the first order is now moot.

Similarly, as explained in Sections II.B.3 (no anti-Muslim prejudice) and II.C.2 (prior versions do not impugn amended policies), *supra*, these tweets do not express any unconstitutional or otherwise improper motive. If the tweets portend any future action, courts will have to assess the legality of those actions when that future action occurs.

On the question of political correctness, however, the President's tweet did not reflect prejudice against peaceful and lawful Muslims. Instead, the President campaigned on frustration with political correctness, including official classifying Islamic terrorist action with euphemisms such as "workplace violence." Brooke Goldstein & Benjamin Ryberg, *The Emerging Face of Lawfare: Legal Maneuvering Designed to Hinder the Exposure of Terrorism and Terror Financing*, 36 FORDHAM INT'L L.J. 634, 653 (2013). Calling Islamic terrorism by its name and trying to understand its roots should not offend anyone – Muslim or not – who opposes terrorism.

III. THE NATIONWIDE INJUNCTIONS WOULD BE OVERBROAD, EVEN ASSUMING THAT ANY ONE PLAINTIFF HAD STANDING AND A VALID CLAIM.

For practical, jurisprudential, and jurisdictional reasons, "[i]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v.*

Yamasaki, 442 U.S. 682, 702 (1979). Thus, even if this Court finds that some aspect of the injunction should remain in place, the Court nonetheless should narrow the injunction.

A. Overbroad nationwide injunctions deprive this Court to the percolating effect of multiple circuits reaching an issue.

Nationwide injunctions effectively preclude other circuits from ruling on the constitutionality of the enjoined agency action. In addition to conflicting with the principle that federal appellate decisions are binding only within the court's circuit, *see*, *e.g.*, *U.S. v. Glaser*, 14 F.3d 1213, 1216 (7th Cir. 1994), nationwide injunctions "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," which deprives the Court of the benefit of decisions from several courts of appeals. *U.S. v. Mendoza*, 464 U.S. 154, 160 (1984). That practical harm is reason enough to trim the nationwide injunctions.

B. Providing facial relief in as-applied challenges frustrates this Court's precedents on facial challenges and can exceed lower courts' Article III jurisdiction.

Overbroad injunctions can convert an as-applied challenge into a facial challenge or class action, without the procedural safeguards that protect defendants. Where relief would reach beyond the particular parties' circumstances, the party seeking that relief "must … satisfy [the] standards for a facial challenge to the extent of that reach." *Doe v. Reed*, 561

U.S. 186, 194 (2010). Indeed, where "claims are better read as facial objections" to a law, courts need "not separately address the as-applied claims." *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2340 n.3 (2014). Of course, a "facial challenge to a legislative Act is … the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *U.S. v. Salerno,* 481 U.S. 739, 745 (1987). Because "[t]he fact that [the law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid," *id.,* prevailing in an as-applied challenge is simply not the same as prevailing in a facial challenge. *Sorrell v. IMS Health Inc.,* 564 U.S. 552, 568 (2011). Especially where the Order allowed case-by-case waivers for instances of undue hardship, this Court should not allow hijacking national policy based on atypical, cherry-picked facts.

CONCLUSION

For the foregoing reasons and those argued by the Government, this Court should reverse the Fourth Circuit's decision and enter the requested stays in both cases.

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Respectfully submitted,

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