Nos. 16-1436 & 16-1540

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,

Respondents.

DONALD J. TRUMP, *et al.*,

Petitioners,

v.

STATE OF HAWAII, *et al.*,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

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BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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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 Fourth Circuit properly protected religious liberty by affirming a preliminary injunction against Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (the "Order"). Relying on *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844 (2005), and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), it held that the Order is unconstitutional because a "reasonable observer would likely conclude that [its] primary purpose is to exclude persons from the United States on the basis of their religious beliefs." J.A. 236. Under settled law, that ruling should be affirmed.

But the Fourth Circuit also concluded that the Order cannot stand under a distinct legal principle—repeatedly confirmed in Religion Clause cases—that forbids the government from acting on the basis of animus toward any particular religious group. *See, e.g.*, *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1822

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[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 intended to fund preparing or submitting the brief. Petitioners have filed a blanket letter of consent. Respondents have consented to the filing of this brief.

(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 fundamental rule has been recognized by jurists of many different persuasions in Establishment Clause cases. And as the Fourth Circuit concluded, it is directly applicable here. *See* J.A. 236 n.22 ("There is simply too much evidence that [the Order] was motivated by religious animus for it to survive any measure of constitutional review.").

Indeed, while the Fourth Circuit focused on *Lemon*'s secular purpose requirement, the facts that it considered even more clearly demonstrate anti-Muslim 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 U.S. 432, 447 (1985). That conclusion is compelling based solely on President Trump's *post*-inauguration statements. But it is even more forcefully confirmed by a careful review of his *pre*-inauguration admissions of anti-Muslim animus—which, under precedent, must be considered as part of the legal analysis, and which are necessarily incorporated by reference into more recent presidential statements.

The extraordinary record in this case demonstrates that President Trump's principal motive in issuing the Order—and in gerrymandering it in peculiar ways—was anti-Muslim 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," the Order (even as subsequently revised) came close enough to realizing that goal to satisfy his anti-Muslim election-season 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. An 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.

While the Government appears keen to distance itself from the President's troubling statements over the past year, the purpose of an Executive Order directed by the President can hardly be deemed speculative when the President himself has traveled the country telling us why he issued it. As the Fourth Circuit found, time and again President Trump has told the public that the Order exists to ban Muslims because they are a problem and they are not welcome here. Even as that message has come through loud and clear, on Twitter and at political rallies, virtually none of his statements have evinced concern for supposedly unique threats from the six Muslim-majority nations covered by the Order. His motives here are not inscrutable, as his lawyers have repeatedly (but implausibly) insisted.

Great mischief could follow from a holding that allowed the President to speak about the nature and

purpose of his own executive orders without any legal consequence. If the President's words mean nothing to this Court—even as they mean everything to millions of people affected by his Order—then the rule of law may suffer. Indeed, if the Judiciary were to disregard President Trump's statements, the gap between lived reality and constitutional law would grow intolerably vast. As a matter of law and public legitimacy, it would be anomalous for this Court to test the constitutionality of the Order in a parallel reality, where statements broadcast (and tweeted) on a global stage are treated as non-existent.

This Court's decision will reverberate throughout American life. It will teach the people of this Nation—and migrants worldwide—about the meaning of freedom and the Constitution. If this Court upholds the Order, people of all faiths, but especially Muslims, will learn that the First Amendment permits the President to ban people from this Nation because he disapproves of their faith. Respectfully, that is not the law and this Court should not make it so.

Further, even if this Court were to conclude that national security concerns played some role in the Order's original enactment (and its baffling continuation over eight months later), that still would not save it. 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 was here. *See Windsor*, 133 S. Ct. at 2693; *Lukumi*, 508 U.S. at 535; *Larson*, 456 U.S. at 248.

In that respect, *Korematsu v. United States*, 323 U.S. 214 (1944), is instructive. As *Korematsu* teaches,

the combination of animus and an actual (or perceived) national security threat is uniquely toxic: a veneer of noble motive can be invoked to justify the most horrid abuses. Even if an official begins with some good intentions, animus corrupts and distorts any motive it touches. Here, only by ignoring months of clear and consistent statements by the President could it be thought that he did not act on the basis of animus toward Muslims in following through on his promise to ban them from entering the United States. Not only did he ban many Muslims from entering the nation, but he has also repeatedly made anti-Muslim claims inflicting stigma and disability on Muslims nationwide. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) ("We refuse to turn a blind eye to the context in which this policy arose . . . ."). While the President often enjoys a presumption of regularity, here that presumption is rebutted by myriad instances of irregularity that comprise an assault on religious liberty in America.

In 1785, James Madison warned against any law departing "from that generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens." Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 9 (1785). He added:

> Instead of holding forth an Asylum to the persecuted, [the Bill] is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the

> last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthropy in their due extent, may offer a more certain repose from his Troubles.

Id. The bill against which Madison remonstrated has been consigned to the dustbin of history. But the underlying evils against which Madison warned are still with us. This case does not present them in disguise. No, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). President Trump has repeatedly 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 be enjoined.

ARGUMENT

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

As Justice Kennedy has explained, "[i]n 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

"[T]he Establishment Clause . . . [protects] one of our most cherished founding principles—that government shall not establish any religious orthodoxy, or favor or disfavor one religion over another." J.A. 171-72; *see also Larson*, 456 U.S. at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). 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 non-religion, 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. That

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 constitutional 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 judicial consensus that government may not act on the basis of animus toward disfavored religious groups.

The 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 thus made clear 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. Practices serving to "denigrate, proselytize, or betray an impermissible government purpose" would violate the Constitution and demean adherents of disfavored faiths. *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 stated 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 prohibition against animus enjoys wide support among jurists of all methodological persuasions. This 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). As George Washington wrote, "the government of the United States . . . gives to [religious] bigotry no sanction, to persecution no assistance." Letter from George Washington to the Jews (Aug. 18, 1790), in *The Separation of Church and State: Writings on a Fundamental Freedom by America's Founders* 110 (Forrest Church ed., 2004). Thomas Jefferson, in turn, saw the Establishment Clause as "proof that [the people] meant to comprehend, within the mantle of [the law's] protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo and infidel of

every denomination." Thomas Jefferson, *Writings* 40 (Merrill D. Peterson ed., Library of Am. 1984).

Governmental acts based on animus toward a disfavored religious group are thus at war with the Establishment Clause, as a matter of principle, precedent, and history. 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. Given the centrality of religion in many peoples' lives—to their identity, social relations, and concept of the universe—courts look with the utmost doubt upon official acts based on hostility to any particular religion. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) ("The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.").

This does not mean that government is unable to recognize the importance of religion—including majority religions—in our nation. Far from it: the anti-animus 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 vital to religious liberty. *See Am. Commc'ns Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 448 (1950) (Black, J., dissenting) ("Centuries of experience testify that laws aimed at one . . . religious group . . . generate hatreds and prejudices which rapidly spread beyond control.").

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 wholly 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 effectively 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 also assess "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 the principle of equal treatment for all religions, Justice Kennedy has explained that application of that rule 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 religion and race as bases of discrimination inimical to our constitutional order. *See, e.g.*, *City of New Orleans*

v. *Dukes*, 427 U.S. 297, 303-04 (1976). That 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 what constitutes impermissible 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: 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). Religion Clause precedents, including those addressing official acts based on animus toward specific religious denominations, consider the same factors. *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 impermissibly function 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 governmental animus toward religion.

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

"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). In defiance of that tradition, the President of the United States issued the

Order while maintaining a campaign website that—until May 2017—included his statement seeking "a total and complete shutdown of Muslims entering the United States." J.A. 219. 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. *See* J.A. 171 (concluding that the Order "speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination").

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

In upholding the preliminary injunction, the Fourth Circuit relied in large part on public remarks by the President expressing anti-Muslim sentiments that animated his desire to ban Muslims from the United States. This evidence included a "Statement on Preventing Muslim Immigration," posted by then-candidate Trump on his campaign website, calling for a "total and complete shutdown of Muslims entering the United States." J.A. 219. (That statement was not removed until the eve of argument below.) 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." J.A. 220. Such voluminous evidence, on its own, supports the Fourth Circuit's finding that the Order "cannot be divorced from the cohesive narrative linking it to the animus that inspired it[.]" J.A. 236.

While the Fourth Circuit discussed these facts in relation to the *Lemon* test, the same evidence also reveals improper anti-Muslim animus: President Trump's Order and the oft-repeated campaign promise it fulfilled were based on a desire to exclude Muslims from the United States. While the Order does not exclude *all* Muslims, and does not single out Muslims by name, the unsubtle (and widely-noted) goal of the Order is to ban a large number of Muslims from the United States in satisfaction of President Trump's well-known promise to do just that.

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* J.A. 206. To be sure, 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). But here the President's improper anti-Muslim motive means that the Order was not "bona fide." *See id.*

The Government has asserted 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. To be clear, that

contention is a red herring. It is also incorrect as a matter of law and logic.

First, setting aside campaign statements, 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-Muslim 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."[2]
>
> (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."[3]
>
> (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.'"[4]
>
> (4) When President Trump's second Order was enjoined, he said he would rather "go all

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

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

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

> the way, which is what I wanted to do in the first place."[5]
>
> (5) On June 5, 2017, 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!"[6] 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."[7]

These statements alone reveal the President's motives concerning the Order. And they must be considered in the context of other remarks by the President about Muslims. *See Santa Fe*, 530 U.S. at 315. For example, on March 16, 2017—the day that the Order was due to go into effect—President Trump sweepingly asserted that "the assimilation [of Muslims in the U.S.] has been very, very hard." More recently, invoking a false story about General John Pershing, he implied in a tweet that "Radical Islamic" terrorists should be executed with bullets dipped in

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

[6] @realDonaldTrump, TWITTER (Jun. 5, 2017, 3:25 AM), https://twitter.com/realDonaldTrump/status/871674214356484096. As then-White House Press Secretary Sean Spicer explained, President Trump's tweets are "considered official statements by the President of the United States." Elizabeth Landers, White House: Trump's tweets are "official statements," CNN (Jun. 6, 2017).

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

pig's blood.[8] The President has not suggested committing such atrocities against terrorists—foreign or domestic—of any of other faith.

Accordingly, the resolution of this case does not turn on whether the Court considers pre-election expressions of animus. An assessment of the post-election record suffices to establish improper motive.

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*, 429 U.S. at 268). 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,

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[8] Katie Reilly, *President Trump Praises Fake Story About Shooting Muslims With Pig's Blood-Soaked Bullets*, TIME (Aug. 17, 2017).

subject, scope, and substance between the President's campaign statements and the Order he then issued is extraordinarily tight.

As the Fourth Circuit properly concluded, 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—is futile. Any 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.[9] The President's own prior statements—which often explicitly tied his refusal to be "politically correct" with his pledge to ban Muslim immigration[10]—leave no doubt that the "political correct[ness]" of the Order lies in its use of nationality as a pretext for religion. *See* J.A. 232-33 ("[T]here is a direct link between the President's numerous campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and EO-2, the

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[9] @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 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, then-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.").

[10] 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.

'watered down' version of that plan that 'get[s] just about everything,' and 'in some ways, more.'").

Third, it would be improper to ignore President Trump's pre-inauguration statements because doing so would render unintelligible his post-inauguration statements that explicitly reference 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!"[11] 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, 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.

Fourth, political speech protected by the First Amendment would not be chilled by consideration of the President's campaign statements. Contra *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). What if a candidate announced a day before being sworn in that she planned to implement three policies for the sole purpose of harming Catholics—would that evidence be excluded in a subsequent lawsuit challenging policies apparently targeted at Catholics? 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.

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

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 about how he would wield governmental power 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? That concern is not hypothetical in this age of the permanent presidential campaign. Indeed, the current president regularly holds assemblies that he describes as campaign rallies; are remarks made there uniquely off-limits to any future constitutional analysis? The Government's proposed rule is at odds with precedent and arbitrary in application.

It is therefore necessary and appropriate to consider all of President Trump's statements relating to the Order in assessing its constitutionality.

B. Invalidating the Order Is Not Novel

The Government asserts that the decision below is "novel" because it is "based on speculation about its drafters' supposedly illicit purpose." Petr. Br. at 27. That is mistaken.

To start, the animus motivating the Order is reflected on the very face of the document: for example, the Order calls on federal agencies to publicize so-called "honor killings" committed "in the United States by foreign nationals." As the Fourth Circuit concluded, this provision amounts to little more than an anti-Muslim dog whistle. *See* J.A. 224 n.17. Some context is important here: although "'honor killings' are believed to be rare in the U.S.," they are most often

invoked by extremist groups to warn against "the potential 'Islamization' of America posed by allowing Muslim immigrants into the U.S." Nahal Toosi, *'Honor Killings' Highlighted Under Trump's New Travel Ban*, Politico (Mar. 3, 2017).

Nor would it be novel for the Order to be struck down based on a finding of animus. Indeed, 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 and 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.

If anything, the Government's argument is especially weak compared to similar objections in analogous cases. Usually this Court seeks to discern the motives of a multi-member body, such as a town council or legislature, and faces hard questions about identifying group motive. Here, in contrast, the Court need only consider the motives of a single man who has made dozens of statements explaining his actions—none of which display a unique concern for distinct threats from the six covered nations, but all of which cohere into a narrative about excluding Muslims because they are not wanted here.

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

Given the exceptional record in this case, it is reasonable to conclude that the Order was motivated *solely* by anti-Muslim animus (or, at the very least, by

a decision to follow through on anti-Muslim campaign promises). Viewed from that perspective, the Order—whose scope and structure do not match even its own professed security purposes—is analogous to the amendment invalidated in *Romer v. Evans*: "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 the alternative, it might be concluded that the animus documented by the Fourth Circuit co-exists with other motives. That is often true in cases evoking the animus principle. 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. And again in *Larson*, where Minnesota had a valid interest in "protecting its citizens from abusive practices in the solicitation of funds for charity," but where that interest could not explain the State's *de facto* denominational line-drawing. 456 U.S. at 248.

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; *see also* J.A. 236 n.22 ("[W]e think EO-2

would likely fail any purpose test, for whether religious animus motivates a government action is a fundamental part of our Establishment Clause inquiry no matter the degree of scrutiny that applies."). And here, for reasons well stated by the District Court and the Fourth Circuit, that conclusion is inevitable: both with respect to the existence of a travel ban in general, and with respect to the strange way that the Order is structured.

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 of them legitimate and others (the decisive ones) emphatically not so. And there, too, evidence about the true motivations of the Executive Branch undercut much of the Government's factual argument to the Judiciary—though in 1944 that evidence remained buried, whereas here the President has admitted his motives and his own agencies have undercut his lawyers' claims. *See* Nora Ellingsen, *Leaked DHS Report Contradicts White House Claims on Travel Ban*, Lawfare (Feb. 27, 2017); Peter Irons, *Justice At War: The Story of the Japanese-Interment Cases* (1993); Leah Litman and Ian Samuel, *No Peeking?: Korematsu and Judicial Credulity*, Take Care (Mar. 22, 2017).

In *Korematsu*, the Supreme Court went along with a presidential demand for boundless deference, over a courageous dissent that called out the Court for upholding bigotry. *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."). The mere facade 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. As that case teaches, when otherwise valid motives are mixed with forbidden animus, inevitably the legitimate justification is itself corrupted and distorted. *See also Powers v. Ohio*, 499 U.S. 400, 416 (1991) (warning that "race prejudice stems from various causes and may manifest itself in different forms"). For good reason, *Korematsu* is now taught as one of the most painful lessons in our history. *See Hassan v. City of N.Y.*, 804 F.3d 277, 307 (3d Cir. 2015) ("[T]he past should not preface yet against bending our constitutional principles merely because an interest in national security is invoked." (citing *Korematsu*, 323 U.S. at 223)).

This case tests the lesson of *Korematsu* in our own time. One of the most important reasons this country was founded was to welcome people of all faiths and to reject religious intolerance. Issuing an order with the primary purpose of keeping a large number of Muslims locked out is inconsistent with that principle as expressed through the First and Fourteenth Amendments. The President's Order cannot be saved by a *post hoc* (and ever-shifting) appeal to national security—particularly now that over eight months have passed since he first sought to justify this policy as a brief pause on entry pending review. It is now apparent that the President's many public statements about this Order's purpose, rather than the delicate veneer spun by his lawyers, explain why this Order was issued. Respectfully, the Court should not abide an Order widely—and correctly—understood to flow from anti-Muslim animus.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that this Court should affirm the judgment below.

Respectfully submitted,

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APPENDIX

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