Nos. 16-1436 and 16-1540

IN THE

Supreme Court of the United States

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

Petitioners,

v.

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, *et al.*,

Respondents.

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, *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

BRIEF OF *AMICI CURIAE* CERTAIN IMMIGRANT RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amici are the following organizations:

1. Kids in Need of Defense ("KIND") is a national non-profit organization that works to ensure that no child faces immigration court alone. KIND provides direct representation, as well as working in partnership with law firms, corporate legal departments, law schools, and bar associations that provide *pro bono* representation, to unaccompanied children in their removal proceedings. KIND advocates for changes in law, policy, and practices to improve the protection of unaccompanied children in the United States. KIND staff and KIND *pro bono* attorneys seek to ensure that every child in removal proceedings receives the full measure of due process protections that the law affords.

2. Public Counsel is the nation's largest *pro bono* law firm based in Los Angeles, California. Founded in 1970, Public Counsel's primary goals are to: (1) protect the legal rights of disadvantaged children; (2) represent immigrant victims of torture, persecution, domestic violence, trafficking, and other crimes; and (3) foster economic

1. Pursuant to Rule 37.3(a), *amici* certify that Petitioners have filed a blanket consent with the Clerk, and Respondents have consented to the filing of this brief. Copies of the consents have been filed with the Clerk. Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

justice by providing underserved communities with access to quality legal representation. In support of these goals, Public Counsel represents indigent immigrants from around the world in their claims before the United States Citizenship & Immigration Services, the Executive Office for Immigration Review, and the federal courts. Public Counsel attorneys provided free legal services to individuals detained at Los Angeles International Airport after the issuance of President Trump's Executive Orders, dated January 27, 2017 and March 6, 2017.

3. Immigration Justice Corps ("IJC") is the country's first immigration legal fellowship program. IJC seeks to expand access to counsel by increasing the quantity of immigration lawyers and the quality of the immigration bar. IJC currently has over 75 Justice and Community Fellows placed with more than 30 legal service providers in the greater New York area. IJC has two Fellows placed at the Arab American Association of New York. IJC's Fellows regularly represent clients from countries subject to the Executive Order, including clients from Yemen and Syria.

4. The Legal Aid Society ("the Society") is the oldest and largest program in the nation providing direct legal services to low-income families and individuals. Founded in 1876, The Society has a long-standing proven track record of providing targeted services to meet the essential legal needs for the most vulnerable New Yorkers in all five boroughs of the City. With its annual caseload of more than 300,000 legal matters, the Society brings a depth and breadth of perspective that is unmatched in the legal profession. In addition, the Society's law reform representation for clients benefits some 2 million

low-income families and individuals in New York City and the landmark rulings in many of these cases have a Statewide and national impact. Its Immigration Law Unit has represented and filed habeas petitions in federal court on behalf of noncitizens affected by the Executive Order.

5. HIAS and Council Migration Services, Inc. of Philadelphia d/b/a HIAS Pennsylvania ("HIAS Pennsylvania") is a non-profit 501(c)(3) organization that was founded in 1882 to assist Jewish immigrants fleeing persecution from Europe. Today it provides legal and supportive services to immigrants, refugees and asylum seekers from all backgrounds in order to assure their fair treatment and full integration into American society. HIAS Pennsylvania advocates for just and inclusive public policies and practices.

6. Americans for Immigrant Justice ("AI Justice"), formerly Florida Immigrant Advocacy Center, is a non-profit law firm dedicated to promoting and protecting the basic rights of immigrants. Since its founding in 1996, AI Justice has served over 100,000 immigrants from all over the world. AI Justice's clients are unaccompanied immigrant children; survivors of domestic violence, sexual assault, and human trafficking; immigrants facing removal proceedings; as well as immigrants seeking assistance with work permits, legal permanent residence, asylum, and citizenship. Part of AI Justice's mission is to ensure that immigrants are treated justly, and to help bring about a society in which the contributions of immigrants are valued. In Florida and on a national level, AI Justice champions the rights of immigrants, serves as a watchdog on immigration detention policies, and speaks for immigrant groups who have compelling claims to justice.

7. The Door's Legal Services Center ("LSC") has provided legal representation and advice to at-risk youth, ages 12-24, for 25 years on matters including public assistance, housing, foster care, education, family law, and immigration. In particular, the LSC focuses on representing undocumented children and youth who have fled violence around the world to seek safety and opportunity in the United States. The LSC seeks to ensure that its clients remain safely in the United States, obtain lawful status, and make a successful transition to adulthood.

8. Central American Legal Assistance has been representing Central American and other asylum seekers since 1985 and has a current caseload of over 2,000.

9. The U.C. Davis School of Law Immigration Law Clinic ("the Clinic") is an academic institution dedicated to defending the rights of detained noncitizens in the United States. The Clinic provides direct representation to detained immigrants who are placed in removal proceedings. In addition, the Clinic screens unrepresented individuals in order to facilitate placement with *pro bono* attorneys and presents legal orientation programs for detained individuals in removal proceedings who are unable to obtain direct representation.

10. Sanctuary for Families ("Sanctuary") is New York State's largest dedicated service provider and advocate for survivors of domestic violence, human trafficking, and related forms of gender violence. Each year Sanctuary provides legal, clinical, shelter, and economic empowerment services to approximately 15,000 survivors and their children. Sanctuary's legal

arm, The Center for Battered Women's Legal Services ("The Center"), specializes in providing legal assistance and direct representation to indigent victims, mostly in family law and humanitarian immigration matters such as asylum, Violence Against Women Act Self-Petitions, and petitions for U and T nonimmigrant status. Legal services at The Center are carried out by Center staff through direct representation, in collaboration with volunteers from the private bar, law schools, and New York City's public interest community. In addition, The Center provides training on domestic violence and trafficking to community advocates, *pro bono* attorneys, law students, service providers, and the judiciary, and, in collaboration with a diverse range of local, national, international, private, and community organizations, plays a leading role in advocating for legislative and public policy changes that further the rights and protections afforded battered women and their children.

11. The Michigan Immigrant Rights Center ("MIRC") is a statewide legal resource center for Michigan's immigrant communities, including Michigan's large and diverse Arab American community. MIRC takes calls daily from immigrant and refugee community members seeking clarity about the law and assistance with travel and family reunification.

12. Washtenaw Interfaith Coalition for Immigrant Rights ("WICIR") was called into action nine and a half years ago to address the urgent needs of people victimized by punitive immigration enforcement tactics—people who make up a vital part of the fabric of our communities. WICIR believes in the right of all people to live in a safe and just society without fear of family separation

or removal from this country, which may be the only country they have known. WICIR provides advocacy, resources (financial and material), and legal referrals to unauthorized people; education to both the affected population and to the ally community; and support for the children and youth affected by the loss through removal of a parent or significant family member.

13. Safe Passage Project ("Safe Passage") is a small, highly-focused, nonprofit immigration legal services organization. Safe Passage provides free lawyers to refugee children living in the New York area who face deportation back to life-threatening situations, despite their strong legal claim to stay in the United States. Safe Passage was founded in 2006 at New York Law School and in 2013 fully incorporated as an independent nonprofit.

14. Catholic Migration Services ("CMS") is a nonprofit legal services provider whose mission is to serve and empower low-income immigrants in Brooklyn and Queens, regardless of religion, ethnicity, or national origin. Since 1971, CMS has defended immigrants facing deportation and has assisted hundreds of immigrants seeking to apply for asylum and other forms of relief. CMS has also helped thousands of immigrants file applications on behalf of their family members. In 2006, CMS began providing housing, legal, and advocacy services to low-income immigrant tenants. In 2009, CMS created a workers' rights program to help immigrant workers recover unpaid wages, report unsafe and life-threatening working conditions, and fight discrimination in employment. CMS is committed to protecting the human and civil rights of all immigrants.

15. The Asian Law Alliance ("ALA"), founded in 1977, is a non-profit public interest legal organization with the mission of providing equal access to the justice system to the Asian and Pacific Islander communities in Santa Clara County, California. Through ALA's immigration program, it has assisted immigrants with immigration issues since 1980.

16. Community Legal Services in East Palo Alto ("CLSEPA") provides legal assistance to low-income individuals and families in East Palo Alto, California and the surrounding community. CLSEPA's practice areas include immigration, housing, and economic advancement. CLSEPA's mission is to provide transformative legal services, policy advocacy, and impact litigation that enable diverse communities in East Palo Alto and beyond to achieve a secure and thriving future. CLSEPA provides legal assistance and advice to over 6,000 community members per year, and has assisted hundreds of people seeking asylum.

17. New York Legal Assistance Group ("NYLAG") is a not-for-profit law office that provides free civil legal services to poor and near poor New Yorkers in the areas of immigration, government benefits, family law, disability rights, housing law, special education, and consumer debt, among others. NYLAG is one of the largest immigrant services providers in New York City. Its Immigrant Protection Unit provides low-income immigrants with comprehensive legal services, including assistance with adjustment of status, family-based immigrant petitions, humanitarian parole, immigrant community education, and many others. NYLAG represents immigrants and refugees regardless of their beliefs or nationality,

including immigrants and refugees from, or with family in, the six countries subject to the Executive Order. NYLAG's clients have experienced acute hardship because of the Executive Order, including harm to their and their families' well-being.

18. The Public Law Center ("PLC") is a non-profit legal services organization located in Santa Ana, California serving low-income residents of Orange County, California. Founded in 1981, PLC's 35 staff members work with over 1,400 Orange County lawyers, paralegals, law students, and other volunteers annually to provide free civil legal services. Since 2003, PLC has operated an immigration program which has served thousands of low-income clients with immigration legal problems.

19. The City Bar Justice Center is the non-profit, legal services arm of the New York City Bar Association. Its mission is to leverage the resources of the New York City legal community to increase access to justice. Each year, the City Bar Justice Center assists more than 20,000 low-income and vulnerable New Yorkers to access critically needed legal services and matches over 1,200 cases with *pro bono* attorneys. Through direct representation and *pro bono* legal programs, the City Bar Justice Center's Immigrant Justice Project annually helps hundreds of immigrants who are at their most vulnerable: asylum seekers fleeing persecution, survivors of violent crimes and trafficking, and others seeking humanitarian protection. Operating within the New York City metropolitan area, which has long served as a gateway to America, the City Bar Justice Center is committed to helping immigrants and their families find safety and live in dignity in the United States.

20. The New York Immigration Coalition ("NYIC") represents nearly 200 organizational members and partners working on behalf of immigrants throughout New York State. The NYIC has taken a lead in coordinating legal services for immigrants, including running the legal efforts at JFK Airport during the travel ban and, more recently, organizing and running a collaborative of over 60 groups to provide legal rapid response to ICE enforcement, the end of the DACA program, and much more.

21. The Northwest Immigrant Rights Project ("NWIRP") is a Washington State nonprofit organization that promotes justice by defending and advancing the rights of immigrants through direct legal services, systemic advocacy, and community education. NWIRP strives for justice and equity for all persons, regardless of where they were born.

22. Dolores Street Community Services ("Dolores Street") nurtures individual wellness and cultivates collective power among low-income and immigrant communities. Dolores Street's Deportation Defense and Legal Advocacy Program provides *pro bono* legal services in San Francisco, California, specializing in complex removal defense cases. Dolores Street's clients include asylum seekers fleeing persecution and torture and individuals with impaired mental competency. Dolores Street's particularly vulnerable clients and their families depend on meaningful judicial review of unconstitutional executive action.

23. The Community Activism Law Alliance ("CALA") is a nonprofit organization that provides free legal assistance

to low-income, underserved populations in Illinois. CALA partners with community activist organizations to create community-located, community-operated, and community-directed law programs. CALA serves over 4,000 people each year, the majority of whom are immigrants and refugees. Additionally, CALA supports the work of many community partner organizations that assist and advocate on behalf of immigrants and refugees. CALA has experience with and knowledge of the actual and potential harm the Executive Order has had and would further have upon immigrants and their communities across the country.

SUMMARY OF ARGUMENT

As President George Washington wrote to a religious minority immigrant community, "the Government of the United States . . . gives to bigotry no sanction, to persecution no assistance."[2] From as early as the arrival of the Pilgrims, the Quakers, the Baptists, and the Anabaptists, this land has been a haven for immigrants, regardless of their faith and country of birth. Freedom of religion and freedom from the establishment of religion are, of course, enshrined in our First Amendment.

The President's Executive Order, issued on March 6, 2017 and entitled "Protecting The Nation From Foreign Terrorist Entry Into The United States" (the "Executive Order"), hews away at these foundations of our nation, baselessly labeling more than one hundred and eighty

2. *From George Washington to the Hebrew Congregation in Newport, Rhode Island, 18 August 1790*, Nat'l Archives, https://founders.archives.gov/documents/Washington/05-06-02-0135.

million citizens of Iran, Libya, Somalia, Sudan, Syria, and Yemen as potential terrorist threats and banning them from traveling here as immigrants or non-immigrants.[3] That the targeted countries are all predominantly Muslim nations,[4] and that the President repeatedly campaigned on a promise to ban the entry of Muslims, suggests that the Order was motivated by an unconstitutional disfavoring of Islam. This is not who we are as a country, and this is not allowed by our Constitution.

I. The Government is wrong when it argues that this Court is powerless to decide whether the Executive Order violates the Constitution or the INA because such claims are "not justiciable."[5] The President's powers are derived from and circumscribed by the Constitution and delegated congressional authority. And, because we live in a nation "of laws, and not of men," *Marbury v. Madison*, 5 U.S. 137, 163 (1803), it is the responsibility of federal courts to determine when that authority has been exceeded. Judicial review of executive action is part of the "fundamental structure of our constitutional democracy," *Washington v. Trump*, 847 F.3d 1151, 1161 (9th Cir. 2017) (per curiam), *recons. en banc denied*, 853 F.3d 933 (9th Cir. 2017), *and*

3. *See Country Comparison :: Population*, U.S. CIA World Factbook, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html (citing country populations).

4. The six targeted countries are all at least 90% Muslim, and some are 99% Muslim. *See Table: Muslim Population by Country*, Pew Research Ctr. (Jan. 27, 2011), http://www.pewforum.org/2011/01/27/table-muslim-population-by-country/; *About Sudan*, United Nations Development Programme, http://www.sd.undp.org/content/sudan/en/home/countryinfo.html.

5. Br. for Petitioners at 22-35.

recons. en banc denied, 858 F.3d 1168 (9th Cir. 2017), and now, more than ever, it is important to reaffirm this vital check and balance. The courts below had the authority—and, in fact, the duty—to review the Executive Order for compliance with the Constitution and federal law, *and* in finding that Respondents had a strong likelihood of success on the merits of their claims, did not abuse their discretion in ordering preliminary injunctive relief.

II. The Executive Order violates the Establishment Clause because it was issued with the purpose of disfavoring Islam. This Court should so hold regardless of which standard of review applies. Contrary to the Government's argument, it does not require "judicial psychoanalysis" to determine that a presidential candidate who repeatedly vows to implement a "Muslim ban" if elected, and who within one week of inauguration orders that nationals of seven countries (now six) that are at least 90 percent Muslim be temporarily banned from entry to the United States, is motivated by an improper religious purpose. That most such statements were made by the President "before assuming office, while still a private citizen and political candidate,"[6] is no reason for this Court to ignore them. Those statements form part of the record on which this Court must determine whether an improper religious purpose motivated the Executive Order. Words matter. When they are the words of a sitting President or a candidate for that highest office, they matter profoundly.

Further, this Court should be particularly vigilant in reviewing potential Establishment Clause violations that affect immigrants. As a country that welcomes refugees

6. Br. for Petitioners at 71.

and asylees escaping persecution, it would be the height of hypocrisy to permit a travel ban that bears the hallmarks of the discrimination from which many such immigrants seek to escape.

III. In entering injunctions preliminarily enjoining implementation and enforcement of the Executive Order, the lower courts correctly took into account the broader public harm that the Executive Order would otherwise cause. As organizations committed to serving and advocating on behalf of the nation's immigrant communities, *amici* are acutely aware of these potential harms. Every U.S. resident who has family members in one of the targeted countries would be deprived of visits from those family members, as well as the ability to sponsor family members for immigrant visas. Our nation's colleges and universities would be unable to admit students or recruit faculty from the targeted countries, hindering their ability to foster and maintain a rich, diverse, and inclusive educational environment. And employers in the public and private sectors would be unable to hire workers from the targeted countries, to the detriment of public institutions and businesses alike.

Aside from these concrete and tangible harms, the Executive Order works another less tangible but no less insidious harm: the marginalization of religious communities based on promulgation by executive action of the false notion that nationals of the six targeted countries are "the 'bad'"[7] and must be excluded on a blanket basis

7. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 30, 2017, 5:31 AM), https://twitter.com/realDonaldTrump/status/826060143825666051.

in the purported interests of national security. This is no mere "message"[8]—it is an egregious falsehood with the veneer of presidential approval. These harms are real and cannot be undone, as the lower courts recognized in granting preliminary injunctive relief.

Amici accordingly urge this Court to affirm.

ARGUMENT

I. THE COURTS SERVE A CRITICAL ROLE IN REVIEWING EXECUTIVE ACTIONS ON IMMIGRATION

More than two centuries of precedent instructs that we have a government "of laws, and not of men." *Marbury*, 5 U.S. at 163. The President's powers are derived from and circumscribed by the Constitution and federal law. The President may not "switch the Constitution on or off at will." *Boumediene v. Bush*, 553 U.S. 723, 765 (2008). To constrain unlawful excesses of the executive branch, our democratic system obligates the judiciary to review and check executive actions alleged to be unconstitutional or to exceed delegated congressional authority. *See Marbury*, 5 U.S. at 177 ("It is emphatically the province *and duty* of the judicial department to say what the law is." (emphasis added)). Contrary to the Government's argument, that judicial duty does not dissipate simply because the challenged actions relate to immigration or national security, or even where the legislative branch has delegated significant discretion to

8. Br. for Petitioners at 79.

the Executive.[9] As the Ninth Circuit held in rejecting the Government's argument that the first Executive Order was "unreviewable," "[t]here is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy." *Washington v. Trump*, 847 F.3d at 1161.

Decisions of this Court emphasize that, notwithstanding the deference afforded to the political branches with respect to many aspects of immigration law, the political branches remain "subject to important constitutional limitations" in the immigration context. *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *see also INS v. Chadha*, 462 U.S. 919, 940-41 (1983) (courts can review "whether Congress has chosen a constitutionally permissible means of implementing" its power over the regulation of noncitizens); *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("In the enforcement of [immigration] policies, the Executive Branch of the Government must respect the procedural safeguards of due process."). Indeed, the judiciary stands as a critical bulwark against invidious immigration exclusions by the political branches. *See, e.g.*, *Lesbian/Gay*

9. The Government's argument that this Court is powerless to decide whether the Executive Order violates the Constitution (Br. for Petitioners at 22-35) echoes assertions by the President's senior policy advisor that the President's exercise of powers concerning immigration and national security "will not be questioned." *See* Aaron Blake, *Stephen Miller's authoritarian declaration: Trump's national security actions 'will not be questioned,'* Wash. Post, Feb. 13, 2017, https://www.washingtonpost.com/news/the-fix/wp/2017/02/13/stephen-millers-audacious-controversial-declaration-trumps-national-security-actions-will-not-be-questioned/ (reporting televised public statements by President Trump's senior policy advisor, Stephen Miller, regarding the first Executive Order).

Freedom Day Comm., Inc. v. INS, 541 F. Supp. 569 (N.D. Cal. 1982), *aff'd sub nom. Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983) (invalidating an Immigration and Naturalization Service policy of excluding noncitizen homosexuals from entry into the United States); *Landon v. Plasencia*, 459 U.S. 21, 32-35 (1982) (holding that a permanent resident returning from a brief trip abroad is entitled to due process in her exclusion hearing, and "[i]n evaluating the procedures in any case, the courts must consider the interest at stake for the individual," including whether the person "may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual").

Nor does the presence of national security considerations immunize government actions from review. *See Aptheker v. Sec'y of State*, 378 U.S. 500, 514 (1964) (upholding constitutional rights despite national security concerns); *see also Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (denying that the president has "totally unrestricted freedom of choice" where a statute deals with foreign relations). Rather, complete deference to executive actions in the national security context would be an impermissible abdication of judicial authority. *Cf. Ex parte Quirin*, 317 U.S. 1, 19 (1942) ("[I]n time of war as well as in time of peace, [courts are] to preserve unimpaired the constitutional safeguards of civil liberty . . . ."); *Ex parte Milligan*, 71 U.S. 2, 120-21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace . . . under all circumstances."). As this Court has noted, "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of this Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264 (1967).

Moreover, even where, as here, Congress has delegated a measure of discretion to the President, that discretion is not unchecked. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) (the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake"). Here, the President relies on 8 U.S.C. § 1182(f) as the legal basis for the Executive Order. But that statute's grant of discretion to the President cannot plausibly be read to strip the courts of jurisdiction to review the President's actions. The Court has required "'clear and convincing' evidence of congressional intent . . . before a statute will be construed to restrict access to judicial review." *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974). There is no evidence here of congressional intent to strip the courts of jurisdiction. To the contrary, the Immigration and Nationality Act's subsequent prohibition of immigration determinations based on nationality and other criteria squarely precludes any conclusion that the legislature intended to shield such discriminatory actions from review. 8 U.S.C. § 1152(a)(1)(A).

Finally, the Government's reliance on the so-called "doctrine of consular nonreviewability,"[10] a doctrine that this Court has not embraced and that "has a tarnished pedigree, having been first recognized by the Supreme Court in cases that authorized the expulsion of hapless Chinese laborers," *Samirah v. Holder*, 627 F.3d 652, 662 (7th Cir. 2010), is wholly misplaced. This Court's decisions in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Kerry v. Din*, 135 S. Ct. 2128 (2015), make clear that judicial review is available where, as here, a U.S. citizen asserts that the

10. Br. for Petitioners at 24-25.

exclusion of a noncitizen abroad infringes on the citizen's own constitutional rights. *See Mandel*, 408 U.S. 753 (considering the claim of U.S. citizens that a noncitizen's exclusion violated their First Amendment rights); *Din*, 135 S. Ct. at 2132 (plurality opinion) (reviewing visa denial where U.S. citizen asserted that the exclusion of her noncitizen husband violated her due process rights). Even lower courts that have endorsed the doctrine of consular nonreviewability have held that *Mandel* dictates an "exception" to the doctrine of consular nonreviewability where "the denial of a visa implicates the constitutional rights of American citizens." *Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016) (citations omitted).[11]

The Government does not dispute this. *See* Br. for Petitioners at 26-27 (conceding that judicial review was available in *Mandel* and *Din* "because the plaintiffs asserted violations of their own constitutional rights as U.S. citizens"). In fact, as the Government's own authority reflects, judicial review is proper in cases that, like this one, involve "claims by United States citizens rather than

11. In addition to the Establishment Clause rights implicated here, U.S. citizens and lawful permanent residents ("LPRs") with family members in the six targeted countries also have cognizable family reunification claims. *See Moore v. City of E. Cleveland*, 431 U.S. 494 (1977). "[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* at 503; *see also id.* at 504 (noting that the constitutional protection of the family "is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family"); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Din*, 135 S. Ct. at 2139 (Kennedy, J., concurring) (assuming *arguendo* that U.S. citizen had protected liberty interest in living with her noncitizen spouse in the United States).

by aliens . . . and statutory claims that are accompanied by constitutional ones." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1163 (D.C. Cir. 1999) (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1051 n.6 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987)).

Further, even absent the constitutional challenges present here, this case falls outside the narrow scope of the doctrine of consular nonreviewability. The doctrine accords deference to consular officers' decisions to grant or deny visas to *individual* applicants. *Saavedra*, 197 F.3d at 1159 (the doctrine of consular nonreviewability concerns the availability of judicial review of "the determination of the political branch of the Government to exclude a *given* alien" (emphasis added)); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543-44 (1950) (finding that the exclusion of a noncitizen war bride was a valid exercise of executive authority where the Attorney General possessed "confidential information" specific to the excluded individual). The doctrine provides no immunity from constitutional or statutory review of the President's sweeping attempt here to temporarily ban all nationals from the six targeted countries, without factual justification for the exclusion of any given person.

The Government does not (because it cannot) cite any authority to the contrary. The Government seeks to rely on *Mandel* for the proposition that, where the Executive gives "a facially legitimate and bona fide reason" for the exclusion of a noncitizen, "courts will [not] look behind the exercise of that discretion."[12] But the executive action at issue in *Mandel* was based on facts particular

12. Br. for Petitioners at 63.

to an individual. *Mandel*, 408 U.S. at 770.[13] The consular nonreviewability doctrine does not mandate the kind of extreme deference that would block this Court's review of the Executive Order.

In short, the courts below had the authority—and, in fact, the duty—to review the Executive Order for compliance with the Constitution and federal law, and they did not abuse their discretion in ordering preliminary injunctive relief.

II. THE EXECUTIVE ORDER VIOLATES THE ESTABLISHMENT CLAUSE

The Executive Order violates the Establishment Clause under the *Mandel* test as well as the *Lemon* test. The former instructs courts to look beyond the facial explanation given for an Executive Order where there has been a showing that the explanation is in bad faith. *Mandel*, 408 U.S. 753. The latter provides a framework for determining whether a government action violates the Establishment Clause. *Lemon v. Kurtzman,* 403

13. *See also Washington v. Trump*, 847 F.3d at 1162 ("[T]he *Mandel* standard applies to lawsuits challenging an executive branch official's decision to issue or deny an *individual* visa based on the application of a congressionally enumerated standard to the *particular facts* presented by that visa application." (emphasis added)); *Cardenas v. United States*, 826 F.3d 1164, 1172 (9th Cir. 2016) (holding that, after *Din*, the *Mandel* "facially legitimate and bona fide reason test" requires that the consular official "cite an admissibility statute that 'specifies *discrete factual predicates* the consular officer must find to exist before denying a visa,' or there must be *a fact in the record* that 'provides at least a facial connection to' the statutory ground of inadmissibility" (emphasis added)).

U.S. 602 (1971) (requiring the government to show that an action challenged under the Establishment Clause: (1) has a secular purpose; (2) has a primary effect that does not advance or inhibit religion; and (3) does not foster government entanglement with religion).

Here, the President's numerous public statements consistently and unmistakably demonstrate the discriminatory motives for the Executive Order, highlighting not only the bad faith nature of the proffered justification, but also the lack of a secular purpose. Based on this record, the Court of Appeals for the Fourth Circuit, in ruling on the Executive Order, held that Respondents had "more than plausibly alleged" a bad faith reason for the Order under *Mandel*. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 592 (4th Cir. 2017). Likewise, the Fourth Circuit found that the available evidence created a "compelling case" that the Executive Order's "primary purpose is religious," concluding that it violated the Establishment Clause under the *Lemon* test. *Id.* at 594, 601.

Determining that the Executive Order has a discriminatory religious motive does not require "judicial psychoanalysis" or complicated inferences, contrary to what Petitioners argue.[14] Courts routinely review past statements and actions as evidence of intent in all areas of the law. Indeed, the"[e]xamination of purpose" is "the daily fare of every appellate court in the country." *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 861-62 (2005). In this case, the President and his advisors made repeated calls for a "total and complete shutdown

14. Br. for Petitioners at 71.

of Muslims entering the United States"[15] and for the implementation of a "Muslim ban."[16] Moreover, as revealed by a senior policy advisor to the President, the revised Executive Order still has "the same basic policy outcome for the country" as did the first Executive Order.[17] After the repeated pronouncements by the President and his aides, the President's signing of an Order with a vastly disproportionate detrimental effect on Muslim immigrants creates a "direct link" between stated motive and action that allows for a straightforward analysis of purpose. *See Int'l Refugee Assistance Project v. Trump*, 857 F.3d at 599-600.

To say that such a finding requires "judicial psychoanalysis" where the President repeatedly promised a "Muslim ban," and then acted to substantially keep that promise, is to leave no role at all for the judiciary to

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15. *See* Jessica Estepa, *'Preventing Muslim immigration' statement disappears from Trump's campaign site*, USA TODAY (May 8, 2017), https://www.usatoday.com/story/news/politics/onpolitics/2017/05/08/preventing-muslim-immigration-statement-disappears-donald-trump-campaign-site/101436780/ (providing the full text of President Trump's December 7, 2015 Statement on Preventing Muslim Immigration).

16. Amy B. Wang, *Trump asked for a 'Muslim ban,' Giuliani says — and ordered a commission to do it 'legally,'* WASH. POST (Jan. 29, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/.

17. *Miller: New order will be responsive to the judicial ruling; Rep. Ron DeSantis: Congress has gotten off to a slow start*, FOX NEWS (Feb. 21, 2017), http://www.foxnews.com/transcript/2017/02/21/miller-new-order-will-be-responsive-to-judicial-ruling-rep-ron-desantis.html.

review executive actions in any of the myriad areas of law that demand an analysis of intent. If explicit statements do not demonstrate purpose, then this Court's carefully developed Establishment Clause jurisprudence will be rendered toothless.

Contrary to the Government's argument,[18] the Court's purpose analysis is in no way complicated by the fact that many of the President's probative statements of intent were made while he was still a candidate for office. Although courts have acknowledged that many elected officials fail to keep promises made during election campaigns, it does not follow that such statements are irrelevant in determining the purpose of a subsequent government action. Courts should not ignore government actors' pre-election statements when analyzing discriminatory intent. *See, e.g.*, *Glassroth v. Moore*, 335 F.3d 1282, 1284-85 (11th Cir. 2003) (analyzing the campaign promises of an elected state judge in holding that his decision to erect a Ten Commandments monument in the state judicial building violated the Establishment Clause).

Even outside the Establishment Clause context, courts have readily accepted campaign rhetoric, advertisements, and private or unofficial statements as evidence of the purpose of a government action. *See, e.g.*, *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1222 (2d Cir. 1987) (citing the campaign platform of the Mayor of Yonkers as evidence of discriminatory intent in an Equal Protection housing case); *Gonzalez v. Douglas*, No. CV 10-623 TUC AWT, 2017 WL 3611658, at *14 (D. Ariz. Aug. 22, 2017) (finding racial animus where a state senator, who later

18. Br. for Petitioners at 73-78.

became Superintendent of Public Instruction, had posted discriminatory comments on a blog, reasoning that "[t]he blog comments are more revealing of . . . state-of-mind than his public statements because [the blog] provided . . . a seeming safe-harbor to speak plainly").

The Government argues that pre-inauguration statements by "candidate Trump" should be completely ignored by this Court when conducting its purpose analysis, on the grounds that the ceremony of inauguration washed away all previously expressed discriminatory religious animus and marked "a profound transition from private life to the Nation's highest public office."[19] The Government goes on to contend that this supposed rebirth upon taking the oath of office mandates that this Court determine the purpose of post-inauguration executive actions without having to navigate the quagmire of campaign rhetoric.[20] But the Government's argument would require the Court to cover its eyes and ears to salient evidence of intent. The Court is not being asked to enforce a candidate's campaign promise as if it were a binding contract; the Court is merely being asked to take into consideration pre-election statements by the President when determining the purpose of his post-election actions. No support can be found in case law or common sense for this Court to pretend that statements by a candidate for the highest office in the nation were never made and don't matter. They were made and they do matter.

19. Br. for Petitioners at 73.

20. Br. for Petitioners at 73-78.

Further, since his inauguration the President has continued to make statements that bear upon his intent in issuing the Executive Order, which this Court should take into account as well. Many of these statements relate back to the President's purpose in issuing the first Executive Order. For instance, on February 16, 2017, following the Ninth Circuit's decision to enjoin implementation of the first Executive Order, President Trump said, "We can tailor the [second Executive Order] to that decision and get just about everything, in some ways more."[21] The following month, at a March 15, 2017 rally in Tennessee, the President asserted that the second Executive Order "is a watered down version of the first one. . . . I think we ought to go back to the first one and go all the way, which is what I wanted to do in the first place."[22] These and other statements revive the President's earlier campaign promises about the travel ban and make clear that there is no basis to draw a line between pre-election, post-election, and post-inauguration statements by this President when determining his purpose in issuing the Executive Order.

This Court should be especially vigilant in reviewing potential Establishment Clause violations that impact immigrant populations. The very founders of this country were immigrants seeking relief from persecution abroad, and this Court has recognized that the United States

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21. Stephanie Castillo, *Justice Department Says President Trump Will Pursue a New Travel Ban*, FORTUNE (Feb. 16, 2017), http://fortune.com/2017/02/16/trump-new-travel-ban/.

22. Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak*,' TIME MAG. (March 16, 2017), http://time.com/4703622/president-trump-speech-transcript-travel-ban-ruling/.

is "a country whose life blood came from an immigrant stream." *Ex parte Kumezo Kawato*, 317 U.S. 69, 73 (1942). The United States is a world leader in accepting refugees and asylum-seekers,[23] and U.S. immigration laws reflect a pronounced focus on protecting victims of persecution. *See, e.g.*, 8 U.S.C. § 1158(b)(1)(B)(i) (providing asylum eligibility for applicants who have been persecuted on the basis of "race, religion, nationality, membership in a particular social group, or political opinion"). An Executive Order that codifies the same type of discrimination so many of these immigrants are fleeing undermines the immigration policies and constitutional values of the United States.

III. THE EXECUTIVE ORDER HAS ALREADY CAUSED IRREPARABLE HARM, AND WILL CAUSE MORE HARM IF FULLY IMPLEMENTED

In their work with immigrants, *amici* seek to strengthen diversity and promote justice and equality. Connected by our common humanity, *amici* believe that protection of the interests of individuals and organizations affected by the Executive Order reinforces the broader interests of American society. The individual and organizational harms faced by those affected by the Executive Order are irreparable, weighing in favor of affirming the preliminary injunctions below.

The harms caused by the deprivation of a constitutional right, no matter how brief the duration, are by their very

23. *See Refugee Admissions*, U.S. Dep't of State, https://www.state.gov/j/prm/ra/ ("While UNHCR reports that less than 1 percent of all refugees are eventually resettled in third countries, the United States welcomes almost two-thirds of these refugees, more than all other resettlement countries combined.").

nature irreparable. Unlike pecuniary harms, constitutional harms generally cannot be fully compensated *post hoc*. That is particularly true for harms to First Amendment rights. As this Court has recognized, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).[24] Here, the Executive Order threatens the constitutionally protected rights to be free of a government-established religion, to equal protection of the law, to international travel, and to family integrity.

As *amici* know from their work with immigrants and refugees, U.S. citizens and lawful permanent residents ("LPRs") with family members in the six targeted countries will suffer concrete harms to their familial

24. While *Elrod* dealt with freedom of speech, five circuits have recognized that *Elrod* applies to violations of the Establishment Clause. *See Int'l Refugee Assistance Project v. Trump*, 857 F.3d at 602; *Chaplaincy of Full Gospel Churches v. Eng.*, 454 F.3d 290, 302 (D.C. Cir. 2006); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996); *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2d Cir. 1986); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 274 (7th Cir. 1986). Moreover, the Third, Sixth, and Ninth Circuits have recognized that *Elrod's* reasoning applies to other constitutional rights. *See Latta v. Otter*, 771 F.3d 496, 500 (9th Cir. 2014) (per curiam) (deprivation of right to marry constitutes an irreparable harm); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (violations of Fourth Amendment inflict irreparable harm); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 178 (3d Cir. 2002) (limitation of Free Exercise Clause inflicts irreparable harm); *Ramirez v. Webb*, 787 F.2d 592 (6th Cir. 1986) (per curiam opinion) ("Unreasonable searches and seizures, particularly when premised on race and alienage, are demeaning to such a degree as to be practically uncompensatable.").

interests. Under the Executive Order's discriminatory nationality-based test, U.S. citizens and LPRs will be unable to receive visits from loved ones who live in the banned countries or to sponsor family members from those countries for lawful permanent residence in the United States, absent a waiver of the Executive Order's application to a particular individual. If fully implemented, the Executive Order would separate spouses and fiancés across continents, deprive family members of time with ill or elderly relatives, and force overseas visa applicants to miss births, weddings, funerals, and other important family events.

Immigrants and visitors from the targeted countries contribute to local and national life in numerous ways that will be stymied by the Executive Order. For instance, public and private colleges and universities recruit students, permanent faculty, and visiting faculty from the targeted countries. The Executive Order will prevent visa applicants from the banned countries from studying or teaching at U.S. universities, irrevocably damaging their personal and professional lives and harming our educational institutions throughout the country.[25] By

25. For example, according to the Department of State, before the Executive Order was issued, thousands of Iranian students studied in the United States each year. *Study in the U.S.A.*, U.S. Virtual Embassy Iran, https://ir.usembassy.gov/education-culture/study-usa/; *see also* Anna Maria Barry-Jester, *Trump's Immigration Order Could Affect Thousands of College Students*, FiveThirtyEight.Com (Jan. 30, 2017), https://fivethirtyeight.com/features/trumps-immigration-order-could-affect-thousands-of-college-students/ (citing statistics from the Institute of International Education showing that more than 15,000 students from the six targeted countries studied in the United States during the academic year 2015-16).

way of further example, recent research by economists affiliated with Harvard and MIT shows that, across the United States, "14 million doctors' appointments are provided each year by physicians" from the six affected countries.[26] Preventing doctors from these countries from coming to the United States—or discouraging those already here from staying by preventing their family members from visiting or joining them here—will adversely impact medical institutions and curtail medical care throughout the United States.

Singling out and banning nationals from the six predominantly Muslim targeted countries, as the Executive Order does, causes further harm by stigmatizing not only immigrants and refugees, but also Muslim citizens of the United States. While the Government seeks to belittle this harm and claims it to be not cognizable,[27] courts have recognized the inherent harm to a faith community "[w]here, as here, the charge is one of official preference of one religion over another," acknowledging that "such governmental endorsement 'sends a message to nonadherents [of the favored denomination] that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *See Chaplaincy of Full Gospel Churches*, 454 F.3d at 302 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

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26. The Immigrant Doctors Project, https://immigrantdoctors.org (analyzing statistics from Doximity, an online networking site for doctors that assembled this data from a variety of sources, including the American Board of Medical Specialties, specialty societies, state licensing boards, and collaborating hospitals and medical schools).

27. Br. for Petitioners at 31-33.

The relentless anti-Muslim drumbeat during the President's campaign, coupled with the Executive Order itself, has made immigrants and Muslim citizens justifiably fearful. Against the backdrop of the recent rise in crimes targeting Muslims in the United States,[28] the Executive Order amplifies the sense of persecution that citizens and recent immigrants of Muslim faith are forced to suffer.

Further, the Executive Order's suspension of the U.S. Refugee Admissions Program ("USRAP") has had and will continue to have catastrophic consequences for innumerable individuals and families fleeing war, violence, and political or religious persecution. In the words of the United Nations High Commissioner for Refugees, the Executive Order "compound[s] the anguish" for people "who remain in urgent need of life-saving assistance and protection."[29] Individuals and families fleeing political

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28. *See, e.g.*, Matt Zapotosky, *Hate crimes against Muslims hit highest mark since 2001*, Wash. Post (Nov. 14, 2016), https://www.washingtonpost.com/world/national-security/hate-crimes-against-muslims-hit-highest-mark-since-2001/2016/11/14/7d8218e2-aa95-11e6-977a-1030f822fc35_story.html; *see also* Albert Samaha and Talal Ansari, *Four Mosques Have Burned in Seven Weeks – Leaving Many Muslims and Advocates Stunned*, BuzzFeed News (Feb. 28, 2017), https://www.buzzfeed.com/albertsamaha/four-mosques-burn-as-2017-begins; David Neiwert, *Is Kansas' 'Climate of Racial Intolerance' Fueled by Anti-Muslim Political Rhetoric?*, Southern Poverty L. Ctr. (Mar. 2, 2017), https://www.splcenter.org/hatewatch/2017/03/02/kansas'-'climate-racial-intolerance'-fueled-anti-muslim-political-rhetoric.

29. *UNHCR underscores humanitarian imperative for refugees as new U.S. rules announced*, UNHCR (Mar. 6, 2017), http://www.unhcr.org/en-us/news/press/2017/3/58bdd37e4/unhcr-underscores-humanitarian-imperative-refugees-new-rules-announced.html.

or religious persecution in the six targeted countries are in a precarious state of limbo. The refugees hurt by the ban have included some of the most vulnerable individuals in the world, from children born with physical disfigurements, to trafficked girls who have suffered sexual violence, to LGBT persons persecuted around the world.[30]

Likewise, suspension of refugee admissions under the Executive Order entails suspension of the Central American Minors ("CAM") Refugee Program. CAM was established in 2014, and expanded in 2016, to provide a process for Central American parents lawfully present in the United States to request refugee status for their children at risk of harm in El Salvador, Honduras, or Guatemala via the U.S. Refugee Admissions Program.[31] The program offers a safe, legal way for children in danger to reunite with family in the United States, as an alternative to the risk-filled journey that many children endure in order to seek protection in the United States. Yet the Executive Order has suspended interviews of children seeking protection through CAM, halted the processing of applications in the pipeline, and left children eligible to enter the United States stranded in harm's way.[32]

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30. *See* Human Rights First, U.S. Leadership Forsaken: Six Months of the Trump Refugee Bans 2 (2017), *available at* http://www.humanrightsfirst.org/resource/us-leadership-forsaken-six-months-trump-refugee-bans.

31. *See Central American Minors (CAM) Program*, U.S. Dep't of State, https://www.state.gov/j/prm/ra/cam/index.htm.

32. *See* Nina Lakhani, *Thousands of young Central Americans at risk as refugee ban halts key program*, The Guardian (Feb. 2, 2017), https://www.theguardian.com/us-news/2017/feb/02/central-america-young-refugees-cam-trump-travel-ban.

These and other harms that would be caused by full implementation and enforcement of the Executive Order are not fleeting. The record in these two cases, and in the numerous other actions pending across the country that have challenged the Executive Order, shows that many people have already been affected in myriad ways following partial implementation of the Executive Order, and the upheaval they have experienced cannot be undone. *Amici* accordingly urge this Court to recognize these harms when considering affirmance of the courts below.

CONCLUSION

For the foregoing reasons, *amici* respectfully support Respondents' request that the Court affirm in full the judgments of the courts of appeals.

Respectfully submitted,

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