No. 17-17168

IN THE

United States Court of Appeals for the Ninth Circuit

STATE OF HAWAII, *et al.*,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawaii, No. 1:17-cv-00050-DKW-KSC
District Judge Derrick K. Watson

BRIEF FOR MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICI CURIAE*[1]

Amici are members of Congress who are familiar with the Immigration and Nationality Act and other immigration laws. *Amici* are committed to ensuring that our immigration laws and policies both protect the nation from foreign and domestic attacks and comport with fundamental constitutional principles. *Amici* are thus particularly well-situated to provide the Court with insight into the limitations that both the Constitution and federal immigration laws impose on the Executive Branch's discretion to restrict admission into the country, and have a strong interest in seeing those limitations respected.

A full listing of *amici* appears in the Appendix.

SUMMARY OF ARGUMENT

The First Amendment reflects our Founding promise that "no sect here is superior to another." 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 194 (Jonathan Elliot ed., 1836) ("*Elliot's Debates*"). Consistent with this heritage of religious liberty, our nation's immigration laws regulate entry based on an individualized assessment of an individual's "fitness to reside in this country," *Judulang v. Holder*, 565 U.S. 42, 53 (2011), not on

[1] *Amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

the basis of religious belief.

In a Presidential Proclamation (the "Proclamation") issued on September 24, 2017—the third such order issued since President Trump took office—the President seeks to rewrite our immigration laws to categorically prohibit immigration into the United States by nationals of seven countries: Iran, Libya, Syria, Yemen, Somalia, Chad, and North Korea, virtually all countries with overwhelmingly Muslim populations. The sole exception—North Korea, which sent fewer than 100 nationals, including many diplomats, to the United States last year—is entirely symbolic. The Proclamation also prohibits the issuance of non-immigrant visas to nationals from Syria and North Korea, certain non-immigrant visas to nationals of Iran, Libya, Yemen, and Chad, and business and tourist visas to a tiny number of Venezuelan government officials.

The Proclamation purports to be data-driven, focused on countries that failed to comport with information-sharing and identity management protocols. But the Proclamation was jerry-rigged to target Muslims. Numerous countries failed to meet one or more of the Proclamation's criteria, but were not included in its travel ban. Somalia, a Muslim-majority nation, satisfied the information-sharing criteria, but was nevertheless subjected to the ban; Venezuela, which is less than 1% Muslim, failed the same criteria, but its nationals—other than a small number of gov-

ernment officials—are permitted to travel to the United States. Like its predecessors, the Proclamation targets Muslim-majority nations; it imposes a religiously gerrymandered test for immigration. All told, the Proclamation excludes tens of millions of individuals from the United States—overwhelmingly from Muslim-majority nations—and prevents U.S. citizens and others from sponsoring and reuniting with relatives from the targeted countries. The Proclamation reflects President Trump's view that "'there is great hatred towards Americans by large segments of the Muslim population'" and that "'Islam hates us.'" ER 78, 141.

The Proclamation cannot be squared with our Constitution's system of separation of powers. Our nation revolted in opposition to a king's tyrannical rule, and the Framers of our Constitution took pains to deny the President the power to both make the law and execute it, recognizing that such concentrated power "in the hands of a single branch is a threat to liberty." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). The Framers gave the legislative power, including the authority to make rules concerning immigration, to Congress, ensuring that control of our borders would not be left to the "absolute dominion of one man." Kentucky Resolutions of 1798, *in* 4 *Elliot's Debates* at 543.

Congress delegated a limited portion of these powers to the Executive in the Immigration and Nationality Act ("INA"). The government relies on Section 212(f) to defend the Proclamation, but that section does not give the President the

power to override the parts of the INA he dislikes in favor of his own preferred policy. That is what he has done here. By treating all persons from the designated Muslim-majority countries as potential terrorists, the Proclamation ignores Congress's carefully chosen, "specific criteria for determining terrorism-related inadmissibility," *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring); 8 U.S.C. § 1182(a)(3)(B), and flouts Congress's explicit prohibition against discrimination on account of "nationality, place of birth, or place of residence," 8 U.S.C. § 1152(a)(1)(A), in the issuance of immigrant visas. Further, the Proclamation lacks a credible finding that entry of the targeted nationals—almost exclusively from Muslim-majority nations—"would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). In short, the Proclamation "does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952).

Incredibly, the government says that no court can review the President's arrogation of legislative power. But "[a]bdication of responsibility is not part of the constitutional design." *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring). The President may not switch the Constitution's separation of powers "on or off at will." *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

The Proclamation also violates the First Amendment, which prevents official disapproval of a religious minority, "secur[ing] universal religious liberty, by putting all sects on a level—the only way to prevent persecution." 4 *Elliot's Debates* at 196. Where, as here, the government "classif[ies] citizens based on their religious views" and "single[s] out dissidents for opprobrium," *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014), it violates the "clearest command of the Establishment Clause": "one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Because the Proclamation is shot through with anti-Muslim animus, it violates the Establishment Clause.

The best way to protect the nation's security, while also upholding foundational American values, is to respect the Constitution's fundamental protections and the laws passed by Congress. "Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." *Boumediene*, 553 U.S. at 798.

ARGUMENT

I. SEPARATION-OF-POWERS PRINCIPLES DO NOT PERMIT THE PRESIDENT TO WRITE RELIGIOUS DISCRIMINATION INTO OUR NATION'S IMMIGRATION LAWS.

Our Constitution entrusts Congress with "broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S.

387, 394 (2012); *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress."). This is reflected explicitly in the Constitution's grant of power to Congress to "establish a uniform Rule of Naturalization," U.S. Const. art. I, § 8, cl. 4, which the Framers wrote to "leave a discretion to the Legislature . . . which will answer every purpose," 2 *The Records of the Federal Convention of 1787*, at 268 (Max Farrand ed., 1911).

Of course, Congress may choose to delegate substantial powers to the Executive Branch, *see Arizona*, 567 U.S. at 396; *Carlson v. Landon*, 342 U.S. 524, 544 (1952), but the Executive has no independent lawmaking power over the subject of immigration. "[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown*, 343 U.S. at 587; *id.* at 655 (Jackson, J., concurring) ("The Executive, except for recommendation and veto, has no legislative power."); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015) ("The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue.").

When the Framers wrote the Constitution, they gave the lawmaking power to Congress, recognizing that "the Prerogatives of the British Monarch" were not

"a proper guide in defining the Executive powers." 1 *Records of the Federal Convention*, *supra*, at 65.[2] By denying the Executive lawmaking power, the Framers sought "to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty." *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring); *see The Federalist No. 47*, at 269 (Madison) (Clinton Rossiter ed., rev. ed. 1999) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.").

Thus, "[t]he Constitution does not confer upon [the President] any power to enact laws or to suspend or repeal such as the Congress enacts." *United States v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915); *Kendall v. United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524, 613 (1838) (refusing to "cloth[e] the President with a power entirely to control the legislation of congress"). Rather, "[t]he President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellín v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown*, 343 U.S. at 585). The President cannot make an end-run around the "single, finely wrought," "step-by step, deliberate and

[2] From the sixteenth to the eighteenth centuries, British Kings had claimed, as a royal prerogative, the power to make law without the approval of Parliament as well as the power to suspend the execution of laws enacted by Parliament. *See* Robert J. Reinstein, *The Limits of Executive Power*, 59 Am. U. L. Rev. 259, 272-77, 279-81 (2009).

deliberative process," *INS v. Chadha*, 462 U.S. 919, 951, 959 (1983), the Framers prescribed for lawmaking. Yet, as demonstrated below, that is exactly what the President has done.

II. THE PROCLAMATION RUNS AFOUL OF THE IMMIGRATION AND NATIONALITY ACT.

In support of its claimed authority, the government principally relies on a single statutory provision. However, that provision does not give the President the breathtaking authority that the government claims.

Section 212(f) of the INA authorizes the President to "suspend the entry" of any class of aliens into the United States on the basis of the President's "find[ing]" that their entry "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). This provision—enacted to codify wartime emergency powers—gives the President the flexibility to address promptly admission questions that Congress has not addressed. It does not give the President the authority to supersede Congress's judgment when Congress has already considered an issue and addressed it. Nor does it give the President the equivalent of a line-item veto over the immigration laws enacted by Congress, permitting him to excise those parts of the INA he dislikes. That would "deal a severe blow to the Constitution's separation of powers," *Util. Air Regulatory Grp. v. EPA,* 134 S. Ct. 2427, 2446 (2014), and would "enhance[] the President's powers beyond what the Framers would have endorsed," *Clinton*, 524 U.S. at 451 (Kennedy, J., concurring).

A. The Proclamation Subverts a Carefully Crafted Legislative Scheme Designed To Prevent Potential Terrorists from Entering the United States.

Section 212(f) does not give President a blank check; rather, it must be understood against the backdrop of wartime emergency restrictions it codified. *See* Proclamation 2523, 6 Fed. Reg. 5821, 5822, ¶ 3 (Nov. 14, 1941) ("No alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General."); *see also* H.R. Conf. Rep. No. 100-475, at 165 (1987) (describing the President's authority under Section 212(f) as the authority "to deny admissions by proclamation or to deny entry to aliens *when the United States is at war or during the existence of a national emergency proclaimed by the President*"). In codifying those emergency powers, Congress gave the President an important, but limited, grant of authority, ensuring that he could act quickly in emergency situations—that is, when Congress had not yet had an opportunity to consider a particular issue or class of possible entrants to the country. S*ee Kent v. Dulles*, 357 U.S. 116, 128 (1958) (refusing to read congressional statute to give the Executive "unbridled discretion" and instead reading it narrowly "in light of prior administrative practice").

But Congress did not give the President the power to override the considered judgment of Congress—a form of executive lawmaking alien to the Constitution's system of separation of powers.

The President says Section 212(f) authorizes him to deny entry to millions of individuals on the ground that they may pose a terrorist threat. But Congress has already specified in Section 212(a) several terrorism-related grounds on which an individual may be denied a visa to enter the United States. 8 U.S.C. § 1182(a)(3)(B)(i). In painstaking detail, the statute declares inadmissible any foreign national who has "engaged in," "incited," or "endorse[d] . . . terrorist activity," or "is a member of a terrorist organization." *Id.* As an additional safeguard, the statute expressly authorizes "a consular officer, the Attorney General, or the Secretary of Homeland Security" to deny entry to any visa applicant he or she "knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity." *Id.* Further, a separate provision makes citizens of countries designated as "state sponsor[s] of terrorism"— including Iran, Syria, and Sudan—ineligible for nonimmigrant visas absent a determination by the Secretary of State and Attorney General that they "do[] not pose a threat to the safety or national security of the United States." 8 U.S.C. § 1735(a).

Congress recently revisited terrorism concerns when it passed the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, Pub.

L. No. 114-113, 129 Stat. 2989, Div. O, § 203 (codified at 8 U.S.C. § 1187(a)(12)). Under the Visa Waiver Program ("VWP"), the Department of Homeland Security may waive the B1/B2 visa requirement for aliens traveling from 38 approved countries, permitting stays of up to 90 days for business or tourism. *See* 8 U.S.C. § 1187. The 2015 Act gave the Homeland Security Secretary the authority to temporarily suspend any VWP country if it "fails to live up to its agreement to provide terrorism-related information." H.R. Rep. No. 114-369, at 3-4 (2015). Nationals from the suspended countries are not barred from traveling to the United States; they simply must obtain a visa to do so. Despite a documented risk of terrorist travel to the United States, Congress deliberately chose this solution as an alternative to "end[ing] this valuable program." *Combatting Terrorist Travel: Does the Visa Waiver Program Keep Our Nation Safe?*, *Hearing on H.R. 158 Before the Subcomm. On Border & Maritime Security of the H. Comm. on Homeland Security*, 114th Cong. 2 (2015) (Rep. Candice Miller). It concluded that the admission of persons from Muslim-majority nations, with proper vetting, is fully consistent with national interests. *See* 161 Cong. Rec. H9054 (Dec. 8, 2015).

To be sure, under the 2015 Act, nationals of VWP countries may no longer be admitted to the United States without a visa if they have traveled to a number of the countries identified in the Proclamation, or are dual-nationals of those countries, and are not subject to a specified exception. *See* § 203, 129 Stat. at 2989

(2015); Press Release, U.S. Dep't of Homeland Sec., *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016). But the 2015 law does not categorically bar the entry of such travelers. Instead, its tailored remedy reinforces Congress's determination that the proper response to the threat of terrorist travel is to require that certain entrants first obtain a visa. The President seeks here to override that judgment.

The government's categorical, indefinite bar on tens of millions of nationals, virtually all from Muslim-majority countries, based on the hypothesis that they might pose a terrorist threat, thus, upends Congress's "'comprehensive and reticulated statute.'" *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980)). The Proclamation writes discrimination into the INA, substituting an applicant's nationality alone for Congress's detailed requirements in evaluating the risk that a visa applicant may engage in terrorist activity in the United States. Further, it ignores that Section 212(a) already allows Executive Branch officials to make an individualized assessment that a noncitizen seeking to enter the United States is "likely to engage" in terrorist activity upon arriving in the country. 8 U.S.C. § 1182(a)(3)(B)(i). In light of these detailed and "specific criteria for determining

terrorism-related inadmissibility," *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring), the government's reliance on Section 212(f) to impose a blanket ban on entry is untenable.

B. The Proclamation Violates the INA's Categorical Prohibition on Nationality-Based Discrimination.

Section 212(f) also does not authorize the President to ignore Congress's categorical prohibition on nationality-based discrimination in the issuance of immigrant visas. The President cannot use Section 212(f) to make an end-run around the congressional mandate of equality in the issuance of immigrant visas in order to keep out Muslims. "The power of executing the laws . . . does not include a power to revise clear statutory terms[.]" *Util. Air Regulatory Grp.*, 134 S. Ct. at 2446.

The INA provides, in relevant part, that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). "Congress could hardly have chosen more explicit language," "unambiguously direct[ing] that no nationality-based discrimination shall occur." *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 473 (D.C. Cir. 1995) ("*LAVAS*"), *vacated on other grounds*, 519 U.S. 1 (1996).

The adoption of this provision was a sharp rebuke to what had come before: a "national quota system of immigration," *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 453 (S.D. Fla. 1980), according to which "the selection of immigrants was based upon race and place of birth," H.R. Rep. No. 89-745, at 8-10 (1965). As President Lyndon Johnson recognized in signing the law, the prior system "violated the basic principle of American democracy—the principle that values and rewards each man on the basis of his merit as a man." Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill (Oct. 3, 1965). Congress made the considered judgment that immigration of worthy individuals from all corners of the globe benefits the nation as a whole. *See, e.g.*, *Hearings Before the Subcomm. No. 1 of the H. Comm. on the Judiciary on H.R. 2580 to Amend the Immigration and Nationality Act, and for Other Purposes,* 89th Cong. 8-9 (1965) (Attorney General Katzenbach) (prior system "prevented or delayed" "brilliant and skilled residents of other countries . . . from coming to this country"). Thus, the 1965 ban on discrimination in immigrant visa issuance was designed to prohibit the Executive from practicing wholesale discrimination against people coming from certain countries—precisely what the Proclamation commands.

Reading Section 212(f) to allow the sort of discrimination that the Proclamation requires would render the later nondiscrimination provision a dead letter. *See LAVAS*, 45 F.3d at 473 ("The appellees' proffered statutory interpretation, leaving

it fully possessed of all its constitutional power to make nationality-based distinctions, would render 8 U.S.C. § 1152(a) a virtual nullity."). Significantly, Congress spoke explicitly in making exceptions to Section 1152's nondiscrimination rule. For example, 8 U.S.C. § 1152(a)(1)(A) applies "[e]xcept as specifically provided in . . . sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title." These exceptions permit certain preferences for, among others, immediate relatives of U.S. citizens in specified circumstances. *Id.* §§ 1151(b)(2)(A)(i), 1153. Similarly, Congress expressly carved out exceptions to the Visa Waiver Program, *see id.* § 1187(a)(12)(A), thereby requiring persons from certain countries to undergo more rigorous screening. Congress did not, however, create a similar exception for Section 212(f).

Section 212(f) has never been used to enact a categorical bar on entry by all aliens from a particular nation—much less millions of individuals like those covered by the Proclamation here. Rather, as the current Administration has recognized, Section 212(f) orders "arise from a foreign policy decision to keep certain elements in a given country from getting a visa." U.S. Dep't of State, *Presidential Proclamations*, https://perma.cc/M2RL-6775 (last visited Sept. 12, 2017). The power may not be used to supersede the nondiscrimination rule that Congress added to the INA in 1965—after Section 212(f) was enacted.

C. The Proclamation Lacks the Requisite Finding That Entry of Covered Nationals "Would Be Detrimental" to National Interests.

The Proclamation also fails to comply with Section 212(f) itself. The Proclamation does not establish that admitting individuals from the six covered countries and more than 50,000 refugees "would be detrimental to the interests of the United States," as Section 212(f) requires.

The Proclamation is predicated on a perceived *potential* threat—or, in other words, speculation that entry of the covered individuals *could be* detrimental to national interests. ER 115 (travel ban "prevent[s] the entry" of persons for "whom the United States government lacks sufficient information to assess the risks they pose to the United States"). But, under the immigration laws, the burden of proving an entitlement to a visa rests with the person seeking admission. 8 U.S.C. § 1361. Especially when viewed against the backdrop of the carefully drawn statutory provisions Congress designed to protect the country from foreign attacks, and the searching scrutiny required of sweeping assertions of presidential power under these circumstances, *see Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), this does not suffice to trigger the exclusion power granted by Section 212(f). The government has failed to substantiate its use of nationality as a proxy for risk. *Cf. Korematsu v. United States*, 323 U.S. 214, 235 (1944) (Murphy, J., dissenting) ("[T]he exclusion order necessarily must rely . . . upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and

espionage . . . . It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption.").

III. THE PROCLAMATION RUNS AFOUL OF THE ESTABLISHMENT CLAUSE.

A. The Text and History of the Religion Clauses Forbid Laws That Target a Disfavored Religious Minority for Discriminatory Treatment.

Our Constitution promises religious freedom to people of *all* religions and nationalities. The Religion Clauses "all speak with one voice": "Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) (citation omitted). The Constitution's Religion Clauses prohibit the government from writing into law discrimination against any one set of religious believers, reflecting that "no sect here is superior to another." 4 *Elliot's Debates* at 194. By commanding a course of religious neutrality, the Framers sought to free our nation "from those persecutions . . . with which other countries have been torn." *Id.*

The original Constitution prohibited all religious tests for federal office, providing that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. Const. art. VI, cl. 3. The Framers' "decision to ban religious tests was a dramatic departure from the prevailing practice in the states, eleven of which then banned non-Christians and at

least four of which banned non-Protestants from office." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1474 (1990). The Framers insisted that this kind of official discrimination against disfavored religious beliefs had no place in the Constitution.

In the North Carolina ratifying convention, James Iredell explained that the ban on religious tests "is calculated to secure universal religious liberty, by putting all sects on a level—the only way to prevent persecution." 4 *Elliot's Debates* at 196; *id.* at 208 ("No sect is preferred to another. Every man has the right to worship the Supreme Being in the manner he thinks proper."). These founding principles ensure religious liberty for all believers of any religion without exception. As Iredell observed, "it is objected that the people of America may, perhaps, choose representatives who have no religion at all, and that pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?" *Id.* at 194.

In the Massachusetts ratifying convention as well, supporters of the Constitution stressed that the United States was conceived as a "great and extensive empire," where "there is, and will be, a great variety of sentiments in religion among its inhabitants." 2 *Elliot's Debates* at 118-19. "[A]s all have an equal claim to the blessings of the government under which they live, and which they support, so

none should be excluded from them for being of any particular denomination in religion." *Id.* at 119. As Reverend Daniel Shute observed: "[W]ho shall be excluded from national trusts? Whatever answer bigotry may suggest, the dictates of candor and equity, I conceive, will be, *None*." *Id.* (emphasis in original).

Article VI's ban on religious tests, however, was not alone sufficient to ensure religious freedom to all. Antifederalists objected that "[t]he rights of conscience are not secured" and that "Congress may establish any religion." *See Notes on the Debates in the Pennsylvania Convention Taken by James Wilson*, *reprinted in Pennsylvania and the Federal Constitution*, *1787-1788*, at 785 (John Bach McMaster and Frederick Dawson Stone eds., 1888). "What security," they asked, "will there be, in case the government should have in their heads a predilection for any *one* sect in religion?" *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346, 399 (2002) (quoting "Z," Boston Indep. Chron. (Dec. 6, 1787)).

These objections convinced the American people to add the First Amendment to the Constitution, prohibiting the making of any "law respecting an establishment of religion" and guaranteeing the "free exercise thereof." U.S. Const. amend. I. The First Amendment "expresses our Nation's fundamental commitment to religious liberty": the Religion Clauses were "written by the descendents

of people who had come to this land precisely so that they could practice their religion freely. . . . [T]he Religion Clauses were designed to safeguard the freedom of conscience and belief that those immigrants had sought." *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 881 (2005) (O'Connor, J., concurring). The "central meaning of the Religion Clauses of the First Amendment" is that "all creeds must be tolerated and none favored." *Lee v. Weisman*, 505 U.S. 577, 590 (1992). This prohibits government from "classif[ying] citizens based on their religious views" and "singl[ing] out dissidents for opprobrium." *Galloway*, 134 S. Ct. at 1826.

As its Framers understood, the First Amendment ensures that "[t]he Religion . . . of every man must be left to the conviction and conscience of every man," James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 2 *The Writings of James Madison* 184 (G. Hunt ed., 1901), and that "opinion[s] in matters of religion . . . . shall in no wise diminish, enlarge, or affect [our] civil capacities," Thomas Jefferson, Virginia Act for Establishing Religious Freedom, ch. XXXIV (Oct. 1785), *in* 12 William Walter Hening, *The Statutes at Large, Being a Collection of All the Laws of Virginia* 84, 86 (1823). It guarantees that "[a]ll possess alike liberty of conscience . . . . It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. [H]appily the Government of the United States . . . gives to bigotry no sanction, to persecution no assistance." Letter from

George Washington to the Hebrew Congregation in Newport, R.I. (Aug. 18, 1790), https://founders.archives.gov/documents/Washington/05-06-02-0135.

The Framers wrote the First Amendment against the backdrop of the long history of colonial establishments of religion, which used the power of the state to disfavor certain religious beliefs and deny their adherents the right to freely practice their religion. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 183 (2012) ("Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church."). While not all of the colonies had religious establishments and those that did varied in important ways, the colonial religious establishments had this in common: Each used the machinery of government to discriminate against disfavored religious believers. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2115-30, 2159-69, 2177-81 (2003). "Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated." *Everson v. Bd. of Educ.*, 330 U.S. 1, 10 (1947).

During the debates over the First Amendment, Madison argued that, without the Establishment Clause, "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." 1 Annals of Cong. 758 (1789) (Joseph Gales ed., 1834). To prevent such abuses, the Framers withdrew "the machinery of the State to enforce a religious orthodoxy," recognizing that "[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Lee*, 505 U.S. at 592.

Consistent with this text and history, Supreme Court precedent confirms that the "clearest command of the Establishment Clause" is that "one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244; *Kiryas Joel*, 512 U.S. 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."); *id.* at 728-29 (Kennedy, J., concurring) ("[T]he Establishment Clause forbids the government to use religion as a line-drawing criterion."). These First Amendment principles apply in the immigration context no less than in other contexts.

B. The Constitution's Command of Religious Neutrality Squarely Applies to Immigration Regulations.

Our Constitution's Framers understood that immigration rules could be used to entrench a religious majority and disfavor a religious minority. Madison viewed

such religious establishments as an impermissible "Beacon on our Coast, warning" the "magnanimous sufferer" to "seek some other haven." Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 2 *The Writings of James Madison, supra,* at 188. The First Amendment denied the federal government the power to write this kind of religious discrimination into law.

As Madison knew, colonial establishments had often included immigration restrictions designed to keep out persons who possessed disfavored religious beliefs, who were often thought to represent a danger to the state. *See, e.g.*, McConnell, *Establishment and Disestablishment*, *supra*, at 2180 (observing that "Americans were convinced that Roman Catholics were under a kind of spiritual submission to Rome that made them incapable of exercising the independent thought necessary to be a good republican citizen"). Although these laws had generally been swept from the books by the time of the Founding, *see* McConnell, *Origins*, *supra*, at 1436-37, the bitter experience of living under a state-sponsored religious orthodoxy was still fresh in the Framers' minds.

Madison's home state of Virginia had long used its immigration laws to keep out disfavored religious believers. As early as 1609, the Virginia charter provided that "none be permitted to pass in any voyage . . . but such, as first shall have taken the oath of supremacy" to the Church of England and specifically noted that "we should be loath, that any person should be permitted to pass, that we suspected

to effect the superstitions of the church of Rome." Second Charter to the Treasurer and Company for Virginia, § XXIX (May 23, 1609), *in* 1 William Walter Hening, *The Statutes at Large, Being a Collection of All the Laws of Virginia* 80, 97-98 (1809). The oath Virginia required "included recognition of the king or queen as head of the Church, thus barring non-Anglicans, and specifically repudiated belief in the Catholic doctrines of papal authority and transubstantiation." McConnell, *Establishment and Disestablishment*, *supra*, at 2116. "So successful was this policy that until after the Revolution, there was no Catholic Church and there were few, if any, Catholic individuals in the Commonwealth of Virginia." *Id.* at 2117.

Other colonies, too, had religious restrictions on entry. In New England, Massachusetts Bay adopted an Act against Heresy in 1646 that provided that "no Master or Commander of any Ship . . . or other Vessel, shall henceforth bring . . . within this Jurisdiction, any known Quaker or Quakers, or any other blasphemous hereticks" on penalty of "one hundred pounds." Act of 1646: Heresie Error, *in Colonial Laws of Massachusetts* 155 (William H. Whitmore ed., 1889). Any such ship owner, if convicted, was required "to carry them backe to the place, whence he brought them." *Id.*

Further south, a number of colonies tried to keep out Catholics. In Maryland, a 1715 law sought to "prevent too great a number of Irish Papists being im-

ported into this province," by requiring "All Masters of Ships and Vessels, or others, importing Irish Servants into this Province" to pay a poll tax of 20 shillings "for every Irish Servant so imported." Act of 1715, ch. 36, § 7, *in* Thomas Bacon, *Laws of Maryland at Large* (1765). Georgia also imposed religious restrictions on Catholics. Georgia's 1732 Charter promised "all . . . persons, except Papists, shall have a free exercise of religion." 1 *The Colonial Records of the State of Georgia* 21 (Allen D. Candler ed., 1904). "Catholics were not even permitted to live in the colony." Joel A. Nichols, *Religious Liberty in the Thirteenth Colony: Church-State Relations in Colonial and Early National Georgia*, 80 N.Y.U. L. Rev. 1693, 1711 (2005). "[T]he prohibition on Catholics was generally effective, as the largest number reported in Georgia over the first twenty years was four, in 1747." *Id.* at 1749.

Madison called religious establishments that denied an "asylum to the persecuted" based on their religion "a signal of persecution." Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 2 *The Writings of James Madison, supra,* at 188. As Madison recognized, "whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yielded to the evidence which has convinced us." *Id.* at 186. By adding the First Amendment to the Constitution, the Framers denied the federal government the

power to draw lines based on religion—including in the immigration context. The "central meaning of the Religion Clauses of the First Amendment" is that "all creeds must be tolerated and none favored." *Lee*, 505 U.S. at 590. That principle prohibits a religious test for immigration.

C. The Proclamation Violates the Central Meaning of the First Amendment.

The Proclamation targets Muslims, just as President Trump's previous travel bans did. Virtually all the countries singled out by the Proclamation are majority-Muslim, and those that are not—North Korea and Venezuela—are entirely symbolic: only a paltry number of nationals seek entry from North Korea, and the Proclamation covers only a handful of government officials from Venezuela. The Proclamation thus creates a "danger of stigma and stirred animosities" toward Muslims, *see Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring), denying them the equal dignity the Constitution affords to all, regardless of religious belief.

It is irrelevant that the Proclamation does not mention Muslims by name. "Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993); *Kiryas Joel*, 512 U.S. at 699 ("[O]ur analysis does not end with the text of the statute at issue."). Context matters, *see McCreary Cty.*, 545 U.S. at 861-62; *Kiryas Joel*, 512 U.S. at 699, and

the evidence that the Proclamation singles out and stigmatizes Muslims is overwhelming. The Proclamation is shot through with animus against Muslims on account of their religion, and "purpose needs to be taken seriously under the Establishment Clause," *McCreary Cty.*, 545 U.S. at 874. Therefore this Court must take account of "the history of the government's actions," not "'turn a blind eye to the context in which [the] policy arose.'" *Id.* at 866 (citation omitted).

It also does not matter that the Proclamation does not apply to all Muslims. *See Kiryas Joel*, 512 U.S. at 705 ("Here the benefit flows only to a single sect [of a religion], but aiding this single, small religious group causes no less a constitutional problem than would follow from aiding a sect with more members or religion as a whole."). The Proclamation's terms, which apply almost exclusively to Muslim-majority nations, are based on religious hostility to Muslims.

There is no legitimate purpose—independent of religious animus—for the Proclamation's sweeping, gerrymandered prohibitions. There is no evidence to suggest that broadly excluding individuals from the targeted countries bears any rational relationship to protecting Americans from terrorist attacks. Significantly, not a single American has been killed as a result of terrorist attacks on U.S. soil carried out by individuals born in those countries since at least 1975. Alex Nowrasteh, *Guide to Trump's Executive Order To Limit Migration for "National Security" Reasons*, Cato Inst.: Cato at Liberty (Jan. 26, 2017),

https://www.cato.org/blog/guide-trumps-executive-order-limit-migration-national-security-reasons; *see id.* ("[T]he countries that Trump chose to temporarily ban are not serious terrorism risks."). Indeed, the government's own evidence demonstrates that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity." ER 85.

Even under a more limited form of judicial review, *see Fiallo v. Bell*, 430 U.S. 787 (1977), the Proclamation is unconstitutional. "Our deference in matters of policy cannot . . . become abdication in matters of law." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012). Respect for the powers of the President "can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed." *Id.* In immigration, as in other cases, when other branches of government transgress constitutional boundaries, "the judicial department is a constitutional check." 2 *Elliot's Debates* at 196. Because the Proclamation transgresses "important constitutional limitations," *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001), it must be invalidated.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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Senator of Massachusetts

Robert Menendez
Senator of New Jersey

Jeff Merkley
Senator of Oregon

Jack Reed
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Bernard Sanders
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Jeanne Shaheen
Senator of New Hampshire

Chris Van Hollen
Senator of Maryland

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Ron Wyden
Senator of Oregon

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I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 6,499 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amici curiae* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 14-point Times New Roman font.

Executed this 22nd day of November, 2017.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 22, 2017.

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/s/ Elizabeth B. Wydra
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