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

AMICUS BRIEF OF THE AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE IN SUPPORT OF APPELLEES STATE OF HAWAII

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/s/ Yolanda C. Rondon
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INTEREST OF AMICUS CURIAE[1]

The American-Arab Anti-Discrimination Committee (ADC) is a nonprofit, grassroots civil rights organization committed to defending the rights of people of Arab descent and promoting their rich cultural heritage. Founded in 1980 by U.S. Senator James Abourezk, ADC is non-sectarian and non- partisan. With members from all fifty states and chapters nationwide, ADC is the largest Arab- American grassroots organization in the United States. ADC protects Arab-American and immigrant communities against discrimination, racism, and stereotyping, and it vigorously advocates for immigrant rights and civil rights.

Proclamation 9645 imposes an indefinite travel ban on people from eight countries, six of which are majority-Muslim countries. Five of the countries identified in the Proclamation are nations with ethnic Arab majorities.[2] ADC has worked with thousands of individuals from around the world who have been directly and adversely by Proclamation 9645 and its predecessor travel bans.

By way of example, A.A. is a Yemeni citizen who trained as an engineer; his sister and brother-in-law are lawful permanent residents of the U.S. Unable to secure work due to ongoing armed conflict in Yemen, A.A. studied English. He

[1] ADC certifies that all parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus or its counsel made such a monetary contribution.

[2] Libya, Sudan, Somalia, Syria, and Yemen.

applied and was selected for a diversity visa interview. After his interview, a consular official informed A.A. that, due to a predecessor travel ban, see infra 6-8, A.A. must prove a bona fide, close familial relationship with a U.S. citizen or green card holder before receiving his visa. A.A. quickly provided this information, but the delay meant that all 50,000 diversity visas that could be issued in 2017 were already allotted before his application was processed. A.A. is currently in limbo; his family in the United States lives in fear for his safety and feel that they, too, are unwelcome in the U.S. because, like A.A., they are Muslim Yemeni nationals. If Proclamation 9645 is implemented, A.A. may remain perpetually in limbo.

Similarly, Q.A. is a Muslim Yemeni national whose daughter is a lawful permanent resident of the United States. He also "won" eligibility for a diversity visa in the lottery. The visa would have enabled him, his wife, and his four other children to enter the United States. Q.A. faced similar administrative delays associated with having to prove his bona fide connection to the United States; as a result, he could not get his visa processed before all of the 2017 diversity visas had already been issued, despite quickly providing information regarding his bona fide ties. Q.A.'s daughter remains in the United States without the familial, religious, and economic support of her parents and siblings. This is a small sample of the hardships ADC has had to help Arab-Americans (and their friends and family in

Arab-majority countries) navigate as a result of the Proclamation and its predecessor Executive Orders.

Moreover, the Proclamation was intended to have and has had the effect of branding Islam as a dangerous religion and making clear that Muslims are not fully welcome in the United States. Plainly, this adversely affects Muslim American Arabs. But it also adversely affects American Arabs who are *not* Muslim. Americans frequently conflate Arabic ethnicity with belief in Islam, despite the fact that most Muslims are not Arab. *See generally* Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1584 (2002); *see also President Trump's Speech to the Arab Islamic American Summit* (May 21, 2017), (describing as a single category "Arab, Muslim and Middle Eastern nations"). Accordingly, Arab-Americans regardless of faith suffer from the effects of a government-sanctioned message that Muslims are un-American.

ADC therefore submits this brief in support of the Appellees to urge the Court to affirm the District Court decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

The motive of the President matters in this Case. The Executive actions that preceded Proclamation 9645, Executive Orders 13,769 and 13,780, are key to the issues in this Case of whether the stated justification for the Proclamation is pretextual. Any reasonable person inquiring into pretext in this Case will conclude

that the Proclamation was the product of religious animus—specifically, hostility to Islam—and that the stated national security basis for the Proclamation is pretextual. On the same day that Executive Order 13,780 was set to expire, the President issues a Proclamation 9645 entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats."

Candidate Trump promised "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." *See* J.A. 135 (quoting President Trump's campaign "Statement on Preventing Muslim Immigration"). Candidate Trump explained his view in a nationally televised interview: "I think Islam hates us [and] * * * we can't allow people coming into the country who have this hatred."[3] Trump reiterated the same position in another interview: "[W]e're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.A. 305-306, 311.

President Trump signed the first Muslim ban that barred entry by people from seven majority-Muslim countries soon after his inauguration, enshrining the criteria for a permanent travel ban, without consulting any government national security experts. Exec. Order 13,769. Any ambiguity that the executive order was a

[3] *President Trump's Speech to the Arab Islamic American* Summit, *available at* https://www.whitehouse.gov/the-press- office/2017/05/21/president-trumps-speech-arab-islamic- american-summit.

Muslim ban was clarified by the order's provisions ensuring that non-Muslims from the affected countries would be given preferential treatment. *See* Executive Order 13,769 § 5. After Executive Order 13,769 was invalidated, President Trump made clear that Executive Order 13,780 was a revised Muslim ban. *See* J.A. 778-779. (President Trump reiterated his intent to "keep my campaign promises" and described new travel ban as "a watered down version of the first order."). After this Court (and others) found Executive Order 13,780 to likely be unlawful, the President enacted the Proclamation now under review.

Again the government claims through the Proclamation that it needs to bar entry by nationals of six majority-Muslim countries, this time indefinitely, for national security reasons. The government's position is unsupported because the government cannot plausibly show that individuals from the identified countries pose any sort of threat inherently based on their nationality. This thoroughly undermines the contention that the ban is motivated by national security concerns. The government instead urges the Court to look away, contending that, under INA, 8 U.S.C. § 1182(f), the President's exercise of his authority to suspend the entry of aliens is effectively unreviewable. *See* Pet. Br. 18-27. As an initial matter, that would mean a president need not disguise his motives, but could, for example, explicitly ban all Muslims from entering the United States on the ground that he believes that Islam "hates us" and Muslims are therefore presumptively dangerous.

But as the Court explained in *Sherbert* v. *Verner*, under the Free Exercise Clause the government may not "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities." 374 U.S. 398, 402 (1963). It may be unlikely that another Chief Executive would purposefully attack a particular religious group, but it is unsettling that the government's position would permit executive orders explicitly aimed at members of a particular faith.

Section 1182(f) does not provide discretion to discriminate on the basis of religion. Section 1182(f) allows the President to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants" whenever he "finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). The government erroneously reads "finds" to mean nothing more than that the President must *say* that the entry of certain aliens "would be detrimental to the interests of the United States." *Id.* But "finds" is more naturally understood to mean that the President must provide a genuine explanation of *why* such entry would be "detrimental." *Id.*

In addition to the "finding" requirement, Section 1182(f) separately contains a "proclamation" requirement ("[H]e may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as

immigrants or nonimmigrants * * * *."). 8 U.S.C. § 1182(f). The Proclamation may satisfy the proclamation requirement, but it does not satisfy the finding requirement. The government's reading treats the finding and proclamation requirements as if they were the same, impermissibly reading one or the other out of the statute. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983).

The District Court is likely to conclude that the President based Proclamation 9645, at least in part, on religious animus. Such a motive renders the Proclamation unlawful because, in addition to posing constitutional problems, it conflicts with Section 1182(f). Section 1182(f) must be construed in harmony with the Religious Freedom Restoration Act (RFRA). That Act, which applies to laws passed before and after its enactment, codifies the protections of the Free Exercise Clause and creates additional protections for the free exercise of religion. RFRA provides that the government may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it can show that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

This case involves a rare but sure-fire indicator of substantial burden. Laws, like the Proclamation, designed to single out and discriminate against members of a minority religion almost always serve their intended purpose, and then some.

Accordingly, the injunction should be upheld given the procedural posture here, that the District Court properly held that Appellees statutory and constitutional claims are reviewable and Appellees are likely to succeed on the merits of their showing that the proffered justifications for Proclamation 9645 are pretextual.

ARGUMENT

I. SECTION 1182(f) DOES NOT PERMIT THE PRESIDENT TO INTENTIONALLY DISCRIMINATE AGAINST MUSLIMS.

ADC agrees with Appellees that the Constitution precludes enforcement of Section 2 of Proclamation 9645 and the Proclamation is unlawful under the INA. The government argues that the President can use his Section 1182(f) powers to exclude *any* alien or class of aliens for *any* reason for *any* period of time. *See, e.g.*, Pet. Br. 28-29. The logical—and alarming—conclusion of that reasoning is that the President might simply assert that he has every right to find that Muslims' entry into the United States is detrimental to the interests of the United States simply because they are Muslim. Clear statutory limits on the President's Section 1182(f) authority forestall that troubling conclusion.

Under Section 1182(f), the President must make a finding that the entry of nationals from the eight designated countries is detrimental to the United States. The mere assertion or proclamation that the President makes on the face of the Proclamation does not suffice and cannot lawfully serve as the basis for Presidential action under Section 1182(f). Further, Congress limited the President's

authority under Section 1182(f) when it enacted RFRA. RFRA prohibits courts from simply taking at face value a proclamation that entry of a group of individuals would be detrimental to the United States based on a facially religiously neutral finding when there are very good reasons to believe the finding is pretext for purposeful discrimination against Muslims.

A. Proclamation 9645 Fails to Satisfy Section 1182(f)'s Finding Requirement.

The INA delegates to the President authority to control entry of aliens under certain circumstances but Congress did not give the President unlimited authority to suspend alien entry into the United States. Instead, it created a condition precedent: the President must "find" that those aliens' entry would be "detrimental to the interests of the United States." 8 U.S.C. § 1182(f).[4] The INA requires the President to "find" a particular fact: detriment to the United States. *See* Finding of Fact, Black's Law Dictionary (10th ed. 2014) (noting that "finding of fact" is often shortened to "finding").

In that context, "to find" means "[t]he result of a judicial examination or inquiry" or "[t]hat which is found or discovered." Finding, 1 Compact Edition of the Oxford English Dictionary 226 (1986). The requirements of "examination" or

[4] Because, as this Court has acknowledged previously, Section 1185(a)(1) provides coextensive authority, it is not separately analyzed here. *Hawaii v. Trump*, 859 F.3d 741, 770 (9th Cir. 2017).

"inquiry" distinguish "finding" from "deeming" or "declaring" something to be true. It may sometimes—even ordinarily—be the case that the face of an executive order or proclamation reflects the required consideration. But here, where the pretext inquiry shows that the President actually relied on his view that Muslims are dangerous because they hate the United States, and not the factual assertions spelled out in the Proclamation , additional evidence is required to evaluate the President's compliance with the INA.

The "finding" prerequisite requires something more than writing down at least one facially lawful reason for an action under Section 1182(f). Congress separately required the President to make a "proclamation" before suspending alien entries, and conditioned that requirement on satisfaction of the finding requirement. 8 U.S.C. § 1182(f). The Proclamation itself does not free the President from judicial review of his fact finding. The government's reading ignores Congress's decision to structure this delegation of authority with two distinct requirements—one conditioned on the other—and treats the finding and proclamation requirements as if they were the same, impermissibly reading a requirement out of the statute. *Russello*, 464 U.S. at 23. Thus, the plain text of the INA supports the conclusion that it is necessary and appropriate to look beyond the face of the Proclamation to consider pretext.

B. The Religious Freedom and Restoration Act Limits the President's Ability to Apply Section 1182(f) in a way that Substantially Burdens Appellees' Exercise of Religion.

RFRA limits the President's ability to apply Section 1182(f) in a way that substantially burdens Appellees' exercise of religion. Under RFRA, a federal government action that "substantially burden[s] a person's exercise of religion even if the burden results from a rule of general applicability" is valid only if it "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. The President's motive in adopting Section 2 is highly relevant to—if not determinative of—the issue of whether Proclamation 9645 passes muster under RFRA. Because both the Establishment Clause and RFRA limit the President's authority under the INA, the reason behind the President's adoption of the Proclamation is highly relevant to whether the President exceeded his authority under the INA.

Government action that privileges belief in one religion over another undoubtedly implicates the Establishment Clause. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) (courts have repeatedly held that government activity designed to "discriminate[] against some or all religious beliefs" leads to an impermissible entanglement between government and religion, thereby violating the Establishment Clause). As the Court explained in *Sherbert*,

"[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such." 374 U.S. at 402. The government may not "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities." *Id.*; *see also* 42 U.S.C. § 2000bb (incorporating the *Sherbert* standard into RFRA); *Burwell* v. *Hobby Lobby Stores, Inc*., 134 S. Ct. 2751, 2770 (2014) (explaining that the term "exercise of religion" within the meaning of RFRA involves religiously motivated speech and conduct).

This is because government action undertaken for religiously discriminatory reasons, almost without fail, will penalize belief in that religion. *See Lukumi*, 508 U.S. at 564; Brief of Scholars of Mormon History & Law as *Amici Curiae* in Supp. Of Neither Party (filed Aug. 17, 2017). Accordingly, *both* free exercise and anti-establishment jurisprudence "prevent the government from singling out specific religious sects for special benefits or burdens." Ronald Rotunda & John E. Nowak, 6 *Treatise on Constitutional Law-Substance & Procedure* § 21.1(a) (5th ed. 2017). *Sherbert* and its Free Exercise Clause progeny require courts to apply strict scrutiny to government action inspired by animus toward belief in a particular religion. Such government action is also subject to strict scrutiny under RFRA. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2770 (using Free Exercise jurisprudence to determine whether government action substantially burdens the exercise of religion

within the meaning of RFRA). In *Employment Division* v. *Smith*, 494 U.S. 872, 883-90 (1990), this Court substantially limited the application of *Sherbert*, holding that the Free Exercise Clause did not subject facially neutral laws of general applicability to strict scrutiny. Congress enacted RFRA in direct response to *Smith*, and applied statutory protections that mirrored the protections for free exercise set out in *Sherbert* and its progeny. 42 U.S.C. § 2000bb. [5]

To further advance the free exercise of religion, Congress applied RFRA to all previously-enacted federal statutes that could substantially burden religion without passing strict scrutiny. 42 U.S.C. § 2000bb-3 (RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993."). In other words, to the extent that any statute (before RFRA's passage) could be construed to impose a substantial burden on the exercise of religion in a manner that did not pass strict scrutiny, that construction must be altered in light of RFRA.

Importantly, RFRA does not contain an exception for the immigration or national security arenas; it "applies to *all* Federal law." *Id.* (emphasis added).

[5] Section 2000bb states: "The Congress finds that * * * in *Employment Division* v. *Smith*, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion[.] * * * The purposes of [RFRA] are--(1) to restore the compelling interest test as set forth in *Sherbert* v. *Verner*, and *Wisconsin* v. *Yoder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government." (internal citations omitted).

Consequently, "[s]eemingly reasonable regulations based upon speculation [and] exaggerated fears of thoughtless policies cannot stand," even in contexts where the political branches are due considerable deference. H.R. Rep. No. 103-88, at 8 (1993) (explaining that RFRA applies even to the military context, where executive authority is at its height); *accord* S. Rep. No. 103-111, at 8, 12 (1993). *Lukumi* and *Sherbert* show that government action based on animus toward believers in any particular faith so strongly suggests the imposition of a substantial burden that, where Proclamation 9645 was adopted to discriminate and/or imposes a substantial burden on them. Appellees are likely to make such a showing.

Appellees provide that their members "will remain in limbo as to whether they will ever be reunited" with family members who could not enter the U.S. due to the Proclamation. Appellees also provide that their current and prospective students will be impacted, and retention and recruitment of faculty as well as the stigmatization and impairment of Muslim Association of Hawaii members. Religious communities in the United States cannot welcome visitors, including religious workers, from designated countries. Non-citizens currently in the United States may be prevented from travelling abroad on religious trips, including pilgrimages or trips to attend religious ceremonies overseas, if they do not have the requisite travel documents or multiple-entry visas. ER 70-76, 379.

The government is also unlikely to show that Proclamation 9645 is narrowly

tailored to further a compelling government interest. *See* 42 U.S.C.§ 2000bb-1. The government has no compelling interest in discriminating against belief in a minority religion. The Proclamation is not narrowly tailored to meet a national security interest, instead, the Proclamation is both over- and under-inclusive with respect to national security. *See infra* Part II(B)(3). Therefore, Appellees are likely to show that the Proclamation exceed the limits on the President's suspension authority under Sections 1182(f) and 1185(a)—and consequently that the INA cannot be interpreted to provide the President with the authority to adopt the Proclamation— as motivated by religious animus.

II. THE PURPORTED JUSTIFICATIONS FOR THE PROCLAMATIONS ARE PRETEXTUAL.

As the courts have long recognized, discriminatory actions are often sheltered behind facially legal reasoning. Accordingly, case law has developed robust tools for determining whether a party's stated reason for acting is actually a pretext for an impermissible discriminatory motive, including in cases involving the free exercise of religion, jury selection, and employment. Here, where the President's extraordinary public statements reveal Proclamation 9645 true motivations and where RFRA narrows the deference ordinarily owed to the President in the immigration and national security arenas, those tools can aid the Court and the District Court in determining that the Proclamation results from animus toward Muslims.

A. Sources of Guidance for Detecting Pretext.

In a variety of contexts where motivations matter, courts routinely decide whether lawful, non-discriminatory reasons are authentic or merely pretext. Three areas of law—jury selection, employment discrimination, and free exercise of religion—provide particularly well-developed models for identifying pretext.

1. *Peremptory Strikes.*

When criminal defendants allege racial discrimination in prosecutors' use of peremptory strikes, courts evaluate prosecutors' proffered reasons for pretext as part of the *Batson* v. *Kentucky* three-step framework. 476 U.S. 79, 96 (1986). *First*, the defendant produces evidence that gives rise to an inference of discrimination. *Id.* at 97. *Second*, once the *prima facie* case is established, the government must come forward with a neutral non-discriminatory explanation for the strike. *Id.* at 97-98. *Third*, the court determines whether, in light of the prosecution's proffered reason, the defendant has nevertheless established purposeful discrimination. *Id.* at 98. *Batson*'s third step often turns on a pretext analysis. *See, e.g.*, *Miller-El* v. *Cockrell*, 537 U.S. 322, 339 (2003) (At *Batson* step three, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.") (quotations omitted).

2. *Employment Discrimination.*

Allegations brought under Title VII of the Civil Rights Act and other

employment discrimination statutes often include a pretext inquiry. For example, "single- motive" employment discrimination cases—those where the employee alleges that a single, prohibited motive caused the employer's adverse employment action—require the plaintiff to prove pretext in many cases. Applying the *McDonnell Douglas* framework, courts first analyze whether the plaintiff has pled a few basic prerequisites of discrimination. *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). If the plaintiff carries that burden, the burden of production then shifts to the defendant, who must provide evidence of a nondiscriminatory reason for the challenged action. If the defendant does so, then the plaintiff bears the burden of persuading the fact finder that the defendant's stated reason for the action is a pretext for discrimination. *See id.* at 802-04.[6] Because making out a *prima facie* case and producing a nondiscriminatory reason are both relatively light burdens, *McDonnell Douglas* cases often focus on a pretext inquiry. *See, e.g.*, *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 187-88 (1989), *abrogated on other statutory grounds* ("Although petitioner retains the ultimate burden of persuasion, our cases make clear that she must also have the opportunity to demonstrate that Appellee's proffered reasons for its decision were not its true reasons.").

[6] Mixed motive cases also "employ a burden-shifting framework…with different burdens that shift." *Shifting Burdens of Proof in Employment Discrimination Litigation*, 109 HARV. L. REV. 1579, 1582 (1996).

3. The Free Exercise Clause.

Courts have also evaluated pretext in the context of a Free Exercise Clause challenge to government action allegedly motivated by religious animus. In *Lukumi*, the Court held that "[f]acial neutrality" of government action "is not determinative" of whether it is designed to limit the free exercise of religion. 508 U.S. at 534. After noting that the text, history, and application of the challenged city ordinance suggested potential discrimination on the basis of religious belief, the Court engaged in an independent analysis of whether the ordinance was adopted for a religiously neutral purpose. *Id.*

B. Application of Factors Showing Pretext.

In ferreting out discrimination in these areas, a few categories of evidence are especially probative of pretext. Courts have been particularly alert to: (1) shifting rationales for a challenged action; (2) unexplained differences between the treatment of members of different groups; (3) a lack of fit between the stated reasons for an action and that action's results; and (4) an atmosphere of discrimination, based on past statements or actions. Looking to those forms of evidence in this case, the inevitable conclusion is that the rationale stated for Section 2 on the face of Proclamation 9645 was not the President's true motivation.[7]

[7] Analogous to *Batson*, *McDonnell Douglas*, or *Lukumi* the pretext factors are

1. Shifting Rationales.

When a party provides shifting rationales for the same action, those rationales are likely to be pretextual. *See, e.g.*, *Foster* v. *Chatman*, 136 S. Ct. 1737, 1751 (2016) ("As an initial matter, the prosecution's principal reasons for the strike shifted over time, suggesting that those reasons may be pretextual."); *Miller-El* v. *Dretke*, 545 U.S. 231, 245-46 (2005) (refusing to credit a prosecutor's explanation because when "defense counsel called him on his misstatement [as to one reason], he neither defended what he said nor withdrew the strike. Instead, he suddenly came up with * * * another reason for the strike."). Government officials' change in explanation for their actions—especially after the initial proffered explanation has been declared invalid—"reeks of afterthought," strongly suggesting that their stated reasons are not the true ones. *Id.* at 246.

The rapidly shifting rationales provided for the President's Proclamation fit this pattern. In January 2017, the President halted the entry of nationals from seven designated countries. When courts preliminarily ruled that the President enacted the Executive Order for impermissible reasons—*see Washington* v. *Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 02, 2017), *stay denied*, 847 F.3d 1151, 1156 (9th Cir. 2017)—the President "neither defended what he said nor

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easily satisfied here. Appellees have shown that Section 2 of the Proclamation, which targets six Muslim-majority countries, disproportionately impacts Muslims, and the government points to facially neutral reasoning in the Proclamation to attempt to justify its actions.

withdrew" the order; instead, he "suddenly came up with * * * another reason for" it. *Dretke*, 545 U.S. at 245-46.

Though they achieve very similar ends, Executive Order 13,769, Executive Order 13,780, and Proclamation 9645 offer entirely different rationales for their entry ban provisions. *See* Executive Order 13,769 §§ 1, 2; Executive Order 13,780 §§ 1(a), (f); Proc. 9645, 82 Fed. Reg. 45,161, Preamble (Sept. 27, 2017). In Executive Order 13,769 statements of purpose and policy focused on the risks posed by *individuals* from the countries subject to the ban. It mentioned conditions in those countries only to emphasize the supposed risks their nationals posed. *See* Executive Order 13,769 § 1. None of that reasoning appears in the Executive Order 13,780. Indeed, that document hardly discusses *individuals* at all. Instead, the Executive Order 13,780 focuses entirely on the selected countries' *governments.* Executive Order 13,780 § 1(d).

Proclamation 9645, similarly to the Executive Order 13,780, focuses on governments instead of individuals but alters the stated policy and purpose of the travel ban yet again. The Proclamation focuses on foreign government inadequacies in "identity-management and information-sharing capabilities, protocols, and practices" and the implications those inadequacies may have on "terrorism-related and public safety risks." Proc. Preamble. The Proclamation seems to iron out its policy and purpose to be more foreign relations centered,

rather than focused on perceived foreign threats. These constant shifts in policy and purpose "reek[] of afterthought," *Dretke*, 545 U.S. at 246, and "suggest[s]that those reasons may be pretextual," *Chatman*, 136 S. Ct. at 1751.

2. *Comparisons*.

Courts also use comparisons between individuals or groups subject to a challenged action and those not affected in order to assess whether a proffered non-discriminatory motive is pretextual. In the Free Exercise context, a strong inference of discriminatory motive arises when the burden of governmental action "in practical terms, falls on adherents [of a particular religion] but almost no others" or the challenged government action exempts non-religiously motivated conduct. *Lukumi*, 508 U.S. at 536-537. In employment discrimination cases, such comparisons are "especially relevant" to a finding of pretext. *See McDonnell Douglas*, 411 U.S. at 804. In the *Batson* context, "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Dretke*, 545 U.S. at 241; *see also Chatman*, 136 S. Ct. at 1750 (finding certain explanations "difficult to credit because the State willingly accepted white jurors with the same traits that supposedly rendered Garrett an unattractive juror").

Comparison evidence tends to demonstrate pretext for obvious reasons: if a

party claims to have a particular rationale for its actions, but then applies that rationale in a disparate manner based on race, gender, or religion, that strongly suggests that race, gender, or religion is the true basis for the party's actions. When "no explanation" is offered for that disparate application, the inference of discrimination becomes stronger still. *Cockrell*, 537 U.S. at 345. The stated rationale for Section 2 of the Proclamation—alleviating the risk that a foreign government's vetting procedures will fail to identify a dangerous individual—has quite clearly been applied disparately, in a way that, for the most part, is nearly impossible to explain without reference to religion.

The Proclamation provides three rationales for singling out its designated countries: each has significant shortcomings in "identity-management," each is inadequate in their "information-sharing capabilities, protocols, and practices," and each contains national security risk factors. Proc. Preamble. However, Iran, Libya, Sudan, Somalia, Syria, Chad and Yemen are not uniquely imbued with these characteristics. The Proclamation itself identifies as many as 47 countries that have identity-management and information-sharing shortfalls along with numerous national security risk factors. Proc. §1(e). And without much explanation, the government concludes that only eight of these countries will be subject to travel restrictions.

It becomes troubling that six of the Proclamation's eight designated

countries, that were pulled from a pool of 47, are clearly united by shared religious demographics. These six countries are all overwhelmingly Muslim. The Proclamation does not include *every* majority-Muslim country, but it includes *mostly* majority-Muslim countries, without explaining its exclusion of similarly situated non-Muslim countries. The government's "proffered reason for" banning entry of nationals from the designated countries "applies just as well to * * * otherwise-similar" non-Muslim countries. *Dretke*, 545 U.S. at 241. "[T]hat is evidence tending to prove purposeful discrimination." *Id.*

3. ***Lack of Fit Between Reasons and Results***.

The inference of discriminatory pretext becomes stronger when a party's stated goal could be accomplished just as effectively without a disparate impact. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975) (explaining that evidence that an employment policy's goal could be accomplished without an "undesirable racial effect" demonstrates pretext). Likewise, in the jury selection context, courts have often examined the "fit" between prosecutors' stated reason for striking jurors and the actual impact on the jury pool. *See, e.g.*, *Dretke*, 545 U.S. at 260. The utility of this proof is similar to that of comparison evidence: if a more efficient method exists to accomplish a stated goal, the natural question to ask is why someone would choose the less efficient method. When ignoring efficiency creates clear disparate impact on members of a particular class, pretext

for discrimination is found.

A blanket entry ban for all nationals of six countries with overwhelmingly Muslim populations is not an effective way to combat terrorism. A Department of Homeland Security draft report, prepared about two weeks before Executive Order 13,780 took effect, concluded that citizenship "is unlikely to be a reliable indicator of potential terrorist activity." J.A. 898. Moreover, the Department found that nationals of the countries listed in Executive Order 13,769— which, with the exception of Iraq, were the same in Executive Order 13,780 and Proclamation 9645—were "[r]arely [i]mplicated in U.S.-[b]ased [t]errorism." J.A. 1173. The Department examined 82 instances where individuals were inspired by foreign terrorist organizations to plan or attempt an attack in the United States. J.A. 1173. Of those 82 individuals, only six were nationals of the countries designated in Section 2 of Executive Order 13,780 and the Proclamation. J.A. 1173-1174. More than half were United States citizens. J.A. 1173. Among the foreign nationals, the most common countries of origin were Pakistan, Somalia, Bangladesh, Cuba, Ethiopia, Iraq, and Uzbekistan, only one of which is designated in the Proclamation. By the Proclamation's own standard for protecting the national security and public-safety of the United States, its choice of designated countries is a poor fit.

The Proclamation's efforts to explain why it singled out these particular countries are unconvincing. None of the governmental failings identified in the

Proclamation distinguish the six majority-Muslim designated countries from many others. Additionally, only very ambiguous, minimal government actions on the part of the other 39 countries identified as "at risk" or "non-compliant" in the Proclamation differentiate those 39 countries from the majority-Muslim designated countries. *See* Proc. §1(f). The point is not that Section 2 constitutes bad policy or relies on questionable national security judgments. Rather, this evidence makes it clear that Section 2's means have little to do with its stated ends. There is no "fit of fact and explanation." *Dretke*, 545 U.S. at 260. And when a party's stated explanation deviates so sharply from the clear facts, courts often draw the obvious inference that the stated explanation is not the true one. That inference is even stronger when, as here, a different, discriminatory explanation leads to a "much tighter fit of fact and explanation." *Id.* Although Section 2 does a poor job of fulfilling its stated goals, it makes significant strides toward fulfilling a campaign promise to curtail the entry of Muslims into the United States.

4. ***Atmosphere of Discrimination***.

An atmosphere of discrimination can also provide evidence of pretext. *See, e.g.*, *Patterson*, 491 U.S. at 188 ("[P]etitioner could seek to persuade the jury that Appellee had not offered the true reason for its promotion decision by presenting evidence of Appellee's past treatment of petitioner, including the instances of the racial harassment which she alleges and Appellee's failure to train her for an

accounting position"); *Lukumi*, 508 U.S. at 539 (looking to the timing and circumstances surrounding an ordinance's passage when evaluating its constitutionality). In *Batson*, the Court held that "historical evidence of racial discrimination" and a "culture * * * [that] in the past was suffused with bias" tend "to erode the credibility of the prosecution's assertion that race was not a motivating factor," especially when the prosecution uses the same tactics that had previously been shown to be racially motivated. *Cockrell*, 537 U.S. at 346-47.

Repeated statements of the President and his advisors evince just the sort of "culture * * * suffused with bias" that justifies a hard look at an alleged discriminator's stated reasons for action. *Id.* at 347. During President Trump presidential campaign, Trump called—on his website and in oral statements—explicitly for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." *See* J.A. 135. This statement provides strong evidence that religion "was on [President Trump's] mind when he considered" Section 2. *See Dretke*, 545 U.S. at 266.

As candidate Trump moved closer to securing his party's nomination for the presidency, he went further still, saying in a nationally televised interview, "I think Islam hates us [and] * * * we can't allow people coming into the country who have this hatred." *Id.* He reiterated the same position in another interview later that month: "[W]e're having problems with the Muslims, and we're having problems

with Muslims coming into the country." *Id.* In July of 2016 in response to Vice-President-elect Mike Pence, statements declaring a Muslim ban offensive and unconstitutional, Trump responded: "So you call it territories. OK? We're gonna do territories." J.A. 181.

After Election Day and inauguration, President Trump did not back down from these positions. Executive Order 13,769 applied to "territories," as President Trump had promised, but it echoed language about presumed hate and anti-American attitudes among Muslims that he had used in his original calls for a ban. Executive Order 13,679 § 1. In signing that Executive Order, President Trump said, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." J.A. 192. The clear implication, from the Executive Order's text and that statement, is that the Order furthered President Trump's longstanding promise to implement a "shutdown of Muslims entering the United States."

Executive Order 13,780 was signed against this backdrop, less than four weeks after the Ninth Circuit declined to stay a district court's injunction against Executive Order 13,769. *See Washington* v. *Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017) (denying stay on February 9, 2017). During that time, President Trump never disavowed his earlier anti- Muslim sentiments. To the contrary, President Trump reiterated his intent to "keep my campaign promises" despite this Court's

decision. Senior Policy Advisor to the President Stephen Miller, in discussing plans for a new Executive Order, explained that it would produce the "same basic policy outcome for the country," with "mostly minor technical differences." J.A. 756. Then-White House Press Secretary Sean Spicer concurred, saying, "The principles of the Executive Order remain the same." J.A. 756. And after Executive Order 13,780 was signed, President Trump described it in a major speech as "a watered down version of the first order." J.A. 779.

Taken together, statements made by President Trump and his staff before and after inauguration gave rise to the sort of atmosphere of discrimination that courts have long held " erode the credibility of" assertions that impermissible discrimination "was not a motivating factor." *Cockrell*, 537 U.S. at 346. Given President Trump's numerous, unequivocal statements that he was concerned with the threat of "hatred and danger" from Muslims, the stated reason for Proclamation 9645 can only be taken as a pretext for discrimination.

CONCLUSION

We respectfully request that the Court affirm the District Court decision and uphold the injunction as articulated by the District Court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This 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 uses a proportionally spaced typeface (Times New Roman) in 14-point. It was prepared using Microsoft Word. It complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 6,425 words, excluding the portions exempted by Fed. R. App. P.32(f), which is less than half of the 13,000 words allowed for principal briefs under Fed. R. App. P. 32(a)(7)(B)(i).

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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