No. 17-965

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners*,

v.

STATE OF HAWAII, ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE FORMER EXECUTIVE BRANCH OFFICIALS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici are former officials of the United States Department of Justice, the Department of Homeland Security, the Federal Bureau of Investigation, the Immigration and Naturalization Service, and the Department of Health and Human Services who recognize both the importance of executive power and the value of judicial review of official conduct. They submit this brief to make clear that the "presumption of regularity" has never been an obstacle to a court's consideration of evidence showing that government officials have acted with an improper purpose. Amici include the following individuals.[1]

Bo Cooper, former General Counsel of the Immigration and Naturalization Service.

David A. Martin, former General Counsel of the Immigration and Naturalization Service, former Principal Deputy General Counsel of the Department of Homeland Security, and former Acting General Counsel of the Department of Homeland Security.

Jonathan E. Meyer, former Deputy General Counsel of the Department of Homeland Security, and former Deputy Assistant Attorney General for the Office of Legal Policy.

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[1] In accordance with Rule 37.6, Amici certify that no counsel for any party authored this brief in whole or in part, and no person or entity other than named Amici made a monetary contribution for the preparation and submission of this brief. The parties consented to the filing of this brief.

David W. Ogden, former Deputy Attorney General, and former Assistant Attorney General for the Civil Division.

William B. Schultz, former General Counsel of the Department of Health and Human Services, and former Deputy Assistant Attorney General for the Civil Division.

Howard M. Shapiro, former General Counsel of the Federal Bureau of Investigation.

Elizabeth G. Taylor, former Principal Deputy Associate Attorney General.

Paul Virtue, former General Counsel of the Immigration and Naturalization Service, as well as former Executive Associate Commissioner and former Deputy General Counsel of that agency.

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

In an effort to shield the Executive from claims of a discriminatory intent in enacting the travel ban, the Government's brief cites the "presumption of regularity" to avoid judicial scrutiny. Gov. Br. 68. The presumption touted by the Government, however, does not insulate executive action from review and does not

alter the burden of the plaintiffs to show discriminatory intent.

The presumption of regularity is founded on the commonsense idea that courts should assume that government officials "have properly discharged their official duties." *United States v. Chem. Found., Inc.*, 272 U.S. 1, 15 (1926). The presumption began as a way of filling in minor evidentiary gaps, usually related to procedural or technical formalities. Historically, the same presumption of normality and regularity applied to private parties and corporate officers, as well as to government officials. For example, if a copy of a document with a corporate seal was filed, a court would presume it was an official corporate seal issued by an authorized party unless someone submitted evidence to the contrary. Today, consistent with its historical origins, the presumption serves as a "general working principle" that means courts will "insist on a meaningful evidentiary showing" before entertaining doubts about the integrity of official acts or documents. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004).

The Government, here, seeks to inflate this modest presumption into a high barrier thwarting meaningful judicial review. The Government argues that the presumption of regularity "foreclosed" the Fourth Circuit from "invalidating a presidential proclamation based on … comment[s] made" by the Executive "in connection" with the travel ban. Gov. Br. 68. But the presumption does not alter the standards of pleading or proof in a suit against the government, nor is it a source of deference or immunity from judicial re-

view. Indeed, as this Court has made clear, the presumption is little barrier to examining whether officials have acted with an improper purpose. The Government's argument here represents a major departure from both historical and modern applications of the presumption of regularity and should be squarely rejected.

ARGUMENT

I. The Presumption Of Regularity Was Historically A Modest Principle.

The historical foundation for the presumption of regularity does not support the aggressive application the Government advocates for. The most frequently cited case today regarding the presumption is *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 15 (1926). But the Court there—citing cases dating back to 1827—relied on a principle that was quite modest.

The presumption of regularity has humble origins. As with many legal principles, its roots lie with a Latin phrase: *omnia presumuntur rite et solemnitur esse acta, donec probetur in contrarium*. *Bank of U.S. v. Dandridge*, 25 U.S. 64, 70 (1827). It means: "All acts are presumed to be rightly done" until proven to the contrary. Herbert Broom, *A Selection of Legal Maxims* 578 (3d ed. 1852).

The presumption's original purpose was to fill minor gaps in proof relating to formalities or procedural technicalities, especially where circumstantial evidence supported the inference the Government proceeded properly. Under the presumption, "where

there is general evidence of facts having been legally and regularly done," a party need not prove circumstances which were "*strictly speaking*, essential to the validity of those acts, and by which they were probably accompanied in most instances." *United States v. Ross*, 92 U.S. 281, 285 (1875) (emphasis added). Courts applying this doctrine would, for example, "presume that a man acting in a public office has been rightly appointed; that entries found in public books have been made by the proper officer; that, upon proof of title, matters collateral to that title shall be deemed to have been done." *Dandridge*, 25 U.S. at 70. The presumption was not, however, a "substitute for proof of an independent and material fact." *Ross*, 92 U.S at 285.

Schell v. Fauché represents a quintessential presumption of regularity case. 138 U.S. 562 (1891). This Court ruled that documents protesting customs duties could be admitted into evidence even though the record did not demonstrate that they were properly served. *Id.* at 564-65. The Court, citing the presumption of regularity, explained that the protests had been subpoenaed from the appropriate government repository, and so it was "not unreasonable to infer that … the protests [were] served according to the custom of the office." *Id.* at 565.

It is that sort of procedural technicality that the presumption addressed. Notably, the doctrine is not based on any unique or special deference to the Executive Branch. In fact, this Court's first invocations of the doctrine involved judicial proceedings. In 1799, this Court stated that the proceedings of a circuit court "are entitled to … presumptions in favor of their

regularity." *Turner v. Bank of N. Am.*, 4 U.S. 8, 10 (1799). And in that case, the court *refused* to apply the presumption because no mere formality was at issue, but the existence of federal jurisdiction. Specifically, the record was silent regarding the citizenship of one of the parties. *Id.* at 9. Since diversity of citizenship could not be established, the Court ruled that federal jurisdiction did not exist (rather than presuming the lower court had properly found jurisdiction). *Id.* at 10.

A little over a decade later, the Court applied the presumption to the form of a "release" from a stay of an execution of judgment. *Fitzsimmons v. Ogden*, 11 U.S. 2, 11 (1812). The precise date of the release was not in the record. *Id.* So questions arose concerning whether the release was filed before the execution was issued. The Court explained that the gap in proof was not fatal: "[S]ince the execution could not legally issue without a regular release filed in the [c]ourt … it must be presumed … in favor of the regularity of the proceedings that the release was in due form, and bore date prior at least to the emanation of the execution." *Id.* (internal punctuation omitted).

The presumption of regularity was not grounded on giving any special deference to *government* actions, much less the Executive branch in particular. "It presume[d] that every man, in his *private* and official character, does his duty, until the contrary is proved." *Dandridge*, 25 U.S. at 69 (emphasis added); *see also* Broom, *A Selection of Legal Maxims* 579 ("The presumption … applies also to the acts of private individuals."). Over a hundred years ago, in *Cincinnati, New Orleans & Texas Pacific Railway Co. v. Rankin*, this Court applied the doctrine to private entities—in that

instance a railroad. 241 U.S. 319, 327 (1916). Citing the presumption of regularity, the Court explained that "[i]t cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law." *Id.*

It was these sorts of cases that this Court relied on in *Chemical Foundation*, 272 U.S. at 14-15—cases that underscore the modesty of the presumption. Take *United States v. Page* for example. 137 U.S. 673 (1891). That case involved a statute that required the record of certain court-martials to be "laid before the president of the United States for his confirmation" before the sentence could be carried out. *Id.* at 678. The Secretary of War declared that he followed those procedures. *Id.* at 680. The Court explained that when "the record discloses that the proceedings have been laid before the president for his orders," the resulting orders "are presumed to be his, and not those of the secretary." *Id.* The Court contrasted that situation with another case, where the record "failed to show the vital fact of the submission of the proceedings to the president." *Id.* In that circumstance, the "presumption could not supply that fact." *Id.* at 682.

Similarly, *United States v. Nix* involved a marshal's petition for reimbursement of his travel expenses. 189 U.S. 199 (1903). Resolving the case required determining the number of miles he had traveled transporting prisoners, deputies, and guards. The marshal had submitted his accounts to the Oklahoma district court, which approved them. *Id.* at 200 n.†. Because the accounts "had been allowed by the district judge, … the burden of showing

any error of fact in his account" fell on the opposing party. *Id.* at 205. The Court explained: "It would be an insupportable burden upon the officers of courts if, every time a question was made before the accounting officers of the Treasury of the correctness of their account, they were required to produce affirmative evidence of every item." *Id.* at 206.

The other cases *Chemical Foundation* cites are to the same effect:

- ***The Confiscation Cases***: The Court ruled that an information to seize property stating that the Attorney General had ordered the seizure "by virtue of the [relevant] act of Congress" sufficiently stated that the President had authorized the Attorney General's actions (as required by the statute). 87 U.S. 92, 108 (1873).

- ***Monongahela Bridge Co v. United States***: A company criminally refused to comply with the Secretary of War's order to alter a bridge so as to not obstruct the river it passed over. 216 U.S. 177, 186-87, 191 (1910). Because it was not relevant whether or not the bridge actually caused an obstruction, the Court assumed that the Secretary of War based his decision on the facts presented to him. *Id*. at 194-95.

- ***Dakota Cent. Tel. Co. v. South Dakota***: The Court concluded that arguments relating to the President's motives were not relevant because the alleged motives did not affect his authority to act. 250 U.S. 163, 184 (1919).

- ***Martin v. Mott***: The Court ruled that a government pleading to justify collecting a fine for refusing to report for militia service need only allege that the plaintiff was ordered to serve and did not need to allege that the necessary conditions for requiring military service were met. 25 U.S. 19, 32-33 (1827).

- ***Levinson v. United States***: The Court ruled that the government was bound by its sale of a Navy vessel even though it later realized it had received a higher bid from another potential buyer. 258 U.S. 198 (1922).

Citing these cases, the Court in *Chemical Foundation* applied the presumption of regularity in an unremarkable way. *Chemical Foundation* involved a State Department counselor's orders authorizing the government to seize "enemy-owned" intellectual property and sell it to the Chemical Foundation. 272 U.S. at 4, 6-7. The United States brought suit to set aside those sales alleging that the orders were fraudulently obtained. *Id.* at 4, 14. But there was no evidence of any fraud. *United States v. Chem. Found., Inc.*, 294 F. 300, 332 (D. Del. 1924) ("The charges of deception … have failed utterly."). Since both lower courts found that the United States had not established any fraud, this Court "accepted" the lower courts' determination. *Chem. Found.,* 272 U.S. at 14. This Court then *went on* to note that it would assume under the presumption of regularity that the counselor "properly discharged" his duties, citing the prior cases applying the presumption. *Id.* at 14-15.

The historical foundation of the presumption of regularity, including *Chemical Foundation*, evidences its modest role. Neither *Chemical Foundation* nor the cases it cites support the rule the Government advocates for here. The cases do not stand for the principle that Courts may not consider statements by government officials "made in connection" with official acts. Gov. Br. 68. Nor do any of those cases involve a law whose purpose is unconstitutionally discriminatory. Rather, the cases simply show that courts would assume procedural formalities have been satisfied, or at most, that courts would not assume misconduct occurred in the absence of any supporting evidence.

II. More Recent Cases Have Applied The Presumption As A Modest Working Principle.

A. The presumption does not alter the standards of pleading or proof.

While *Chemical Foundation* explained that courts should "presume that [government agents] have properly discharged their official duties" unless there is "*clear evidence* to the contrary," 272 U.S. at 14-15 (emphasis added), the presumption of regularity has never changed the standards of pleading or proof that apply in suits against government officials alleging an unconstitutional motive.

As for the standard of proof of what a plaintiff must show to establish a case at summary judgment and at trial, "where Congress has spoken, [this Court has] deferred to 'the traditional powers of Congress to prescribe rules of evidence and standards of proof in

the federal courts,' absent countervailing constitutional concerns." *Steadman v. S.E.C.*, 450 U.S. 91, 95 (1981) (quoting *Vance v. Terrazas*, 444 U.S. 252, 265 (1980)). Although courts are "at liberty to prescribe the standard" when Congress is silent, *id.,* the general rule is that "in a civil action … a preponderance of the evidence will establish the case," *S.E.C. v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 355 (1943); *see Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 (1983) ("In a typical civil suit for money damages, plaintiffs must prove their case by a preponderance of the evidence.").

The Government previously argued that the presumption requires courts to "resolve[] any uncertainty" in its favor and credit the President's stated rationale "absent the clearest showing to the contrary." Gov. Br. 77-78 (Nos. 16-1436, 16-1540). But as this Court explained in *Crawford-El v. Britton*, 523 U.S. 574 (1998), the preponderance of the evidence—not any "heightened standard"—is the appropriate burden of proof in a suit against government officials "based on a constitutional claim that requires proof of improper motive." *Id.* at 577. "[A]lthough evidence of improper motive … may be an essential component of the plaintiff's affirmative case," this Court saw "no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation." *Id.* at 589.

In so ruling in *Crawford-El*, this Court rejected an argument that the presumption of regularity somehow heightens the standard of proof. In *Crawford-El*, the Government argued that to succeed in a motive-based claim against an official asserting the right to

qualified immunity, the presumption of regularity required proof of improper motive by clear and convincing evidence. *See* Br. of the United States as Amicus Curiae Supporting Respondent, No. 96-827, 1997 WL 606738, at *21-22 (U.S. Oct. 1, 1997). This Court rejected that argument and instead unambiguously held that there was no heightened burden of proof. As *Crawford-El* makes plain, the presumption's "clear evidence" requirement, *Chemical Foundation*, 272 U.S. at 14, is wholly distinct from the "clear and convincing evidence" standard—or any other "heightened standard" of proof, *Crawford-El*, 523 U.S. at 594-95.[2]

Nor does the presumption of regularity alter the standard of pleading in a suit against government officials alleging an unconstitutional motive. This Court has repeatedly declined to impose heightened pleading standards beyond those set out in the Federal Rules of Civil Procedure. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 327 (2007) ("Congress, as creator of federal statutory claims, has power to prescribe what must be pleaded to state the claim, just as it has power to determine what must be

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[2] On this point, there has been some confusion in the lower courts. *See, e.g., In re Fosamax (Alendronate Sodium) Prods. Liab. Litig.*, 852 F.3d 268, 285 (3d Cir. 2017) (describing the presumption as a standard of proof); *Latif v. Obama*, 677 F.3d 1175, 1185 n.5 (D.C. Cir. 2012) (noting that courts applying the presumption "have required litigants to meet" a range of "standards" "[d]epending on the circumstances"). Although the Court has on occasions used the term "clear evidence" to mean "clear and convincing evidence," *Oriel v. Russell*, 278 U.S. 358, 362-63 (1929), it has never suggested that the presumption of regularity triggers a heightened standard of proof. This case is an opportunity to clarify any ambiguity.

proved to prevail on the merits."); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) ("Rule 9(b) … provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts.").

Notably, in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), where the plaintiff accused officials "at the highest level of the federal law enforcement hierarchy" of "arrest[ing] and detain[ing] thousands of Arab Muslim men" and subjecting them to "harsh conditions of confinement" "*solely on account of [their] religion, race, and/or national origin*," *id.* at 668-69 (emphasis added), this Court employed the same "plausibility" pleading standard that applies in general civil litigation, *see Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). If the presumption did any work in *Iqbal*, it was in the background, helping to inform what the Court deemed "plausible" under the factual circumstances presented. As the majority explained, the plaintiff's "conclusory" complaint failed to plausibly allege that the Attorney General and Director of the FBI had "purposefully" targeted him on the basis of his protected characteristics, given the more "obvious alternative explanation" that he was swept up by "a legitimate policy" aimed at individuals with a suspected link to the September 11 attacks. *Id.* at 680-82. In other words, the Court presumed that the defendants had "properly discharged their official duties," *Chemical Foundation*, 272 U.S. at 14-15, refusing to impute an improper motive to their actions on the basis of conclusory allegations.

B. The presumption is a working principle.

Elaborating on the "clear evidence" formulation set out in *Chemical Foundation*, more recent decisions of this Court cast the presumption as "a general working principle"—far from the source of special deference, elevated pleading standard, or heightened burden of proof sought by the Government. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) (citing *Chem. Found.*, 272 U.S. at 14-15). In operation, the presumption has meant only that this Court will "insist on a meaningful evidentiary showing" before entertaining doubts about the integrity of official acts. *Id.* at 175. Thus, "a totally unsupported suggestion" that government agents acted improperly will fail to "impugn the integrity" of government reports. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 179 (1991). Likewise, "in the absence of evidence to the contrary" this Court has refused to attribute a delay in agency action to official misconduct. *I.N.S. v. Miranda*, 459 U.S. 14, 18 (1982) (per curiam).[3]

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[3] This Court has also frequently noted that the presumption of regularity set out in *Chemical Foundation* extends to "prosecutorial decisions" such that "'in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Chem. Found.*, 272 U.S. at 14-15). The presumption should not, however, be confused with the requirements of specific claims against prosecutors, such as selective prosecution or retaliatory prosecution. *See id.* at 458 (holding that for claims of selective prosecution based on race, a defendant must "show that the Government declined to prosecute similarly situated suspects of other races"); *Hartman v. Moore*, 547 U.S. 250, 252 (2006) (holding that for claims "against criminal investigators for inducing prosecution in retaliation for

Lower courts have applied the presumption in a similarly limited manner. Because "[a]gency decisions are entitled to a presumption of regularity," the Eleventh Circuit has explained, it will decline to "ascribe some improper motive" to agency action "[a]bsent evidence in the record." *Nat'l Parks Conservation Assoc. v. U.S. Dep't of Interior*, 835 F.3d 1377, 1385-86 (11th Cir. 2016). So too, where challengers to an executive order of the President failed to "suggest[] any actual irregularity in the President's factfinding process or activity" the D.C. Circuit refused to entertain "an unwarranted assumption that the President was indifferent to the purposes and requirements of" his authority, "or acted deliberately in contravention of them." *Am. Fed. of Gov't Emps., AFL-CIO v. Reagan*, 870 F.2d 723, 728 (D.C. Cir. 1989); *see Latif v. Obama*, 677 F.3d 1175, 1186-87 (D.C. Cir. 2012) ("minor transcription errors" fail to "rebut[] the presumption of regularity" accorded an intelligence document).

C. The presumption is no obstacle to examining motive.

Though courts must "insist on a meaningful evidentiary showing" before entertaining doubts about the integrity of official acts, *Favish,* 541 U.S. at 175, "th[e] presumption is not to shield [government] action from a thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S.

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speech" plaintiffs must show an "absence of probable cause to support the underlying criminal charge").

402, 415 (1971). Particularly relevant here, the presumption is little barrier to examining whether government has acted with an improper purpose.

McCreary County v. ACLU, 545 U.S. 844 (2005), is instructive. In that case, civil liberties organizations challenged two courthouse displays of the Ten Commandments as violating the Establishment Clause. Reviewing the purpose behind the displays as an "objective observer," mindful of the "text, legislative history, and implementation" of the "official act," *id.* at 862, (quoting *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)), this Court determined that the "context in which [the] policy arose" revealed an unmistakable sectarian motivation, *id.* at 866 (quoting *Santa Fe*, 530 U.S. at 315). Although the dissent argued that looking at this history flouted "the presumption of regularity that always accompanies our review of official action," *id.* at 912, the majority took another view: that searching inquiry into "governmental purpose" is a "staple" of the law, and "a key element of a good deal of constitutional doctrine," *id.* at 861. And where this Court did afford deference to the "legislature's stated reasons," it was the *Lemon* test—not the presumption of regularity—that it cited as the source of deference. *Id.* at 864.

As *McCreary* makes clear, courts may begin from the premise that government agents have acted properly, yet that has never prevented them from "look[ing] behind the presumption to the actual facts." *See Bismullah v. Gates*, 501 F.3d 178, 186 (D.C. Cir. 2007), *vacated on other grounds*, 554 U.S. 913 (2008). If the contrary were true, as the Government seems

to suggest, then even a Jim Crow law designed specifically to disenfranchise Black voters, could escape constitutional scrutiny so long as it were neutral on its face. On this theory, courts would presume grandfather clauses, literacy tests, and requirements to count jelly beans were "regular." But this Court has long rejected the notion that the "discriminatory racial purpose" necessary to show a violation of the Equal Protection Clause "must be express or appear on the face of the statute." *Washington v. Davis*, 426 U.S. 229, 241 (1976).

Instead, this Court's cases describe "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" to determine whether government acted with "invidious discriminatory purpose." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) (detailing "[t]he impact of the official action," the "historical background" and "specific sequence of events leading up to the challenged decision," "[d]epartures from the normal procedural sequence," "statements" by officials, and government records as potential evidence of intent). As this Court recently put it, "all of the circumstances that bear upon the issue of racial animosity must be consulted" when discriminatory purpose is in question, and courts should not "blind [them]selves" to probative evidence of intent. *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016). The same is true of impermissible purposes under the Establishment Clause. *McCreary*, 545 U.S. 844.

Nor has the presumption prevented courts from considering a wide variety of evidence to determine whether it has been rebutted, including:

- Statements or admissions by the relevant officials, *see Hartman v. Moore*, 547 U.S. 250, 264 (2006);

- Sworn affidavits from witnesses, *see Kelly v. United States*, 826 F.2d 1049, 1053 (Fed. Cir. 1987);

- A pattern of conduct difficult to reconcile with legitimate purposes, *McDonough v. Anoka County*, 799 F.3d 931, 947-48 (8th Cir. 2015);

- Related acts of official corruption, *see Bracy v. Gramley*, 520 U.S. 899, 909 (1997);

- Contrary findings in government reports, *McDonough*, 799 F.3d at 948;

- And actions that "demonstrated undue bias towards particular private interests," *Nat. Res. Def. Council, Inc. v. S.E.C.*, 606 F.2d 1031, 1049 n.23 (D.C. Cir. 1979).

Several of these cases involved evidence analogous to that relied on by the Fourth Circuit. For example, the President's statements are similar to those considered in *McCreary* and *Hartman*. Likewise, as in *McDonough*, the context surrounding the travel ban orders reveals a pattern of conduct inconsistent with the Government's stated rationales.

D. The presumption is distinct from sources of deference and immunity.

This Court should reject the Government's effort to conflate the presumption, which is a working principle that applies in all cases and to all government conduct, with sources of deference and immunity.

The presumption is not a principle of deference to government defendants. As discussed, in its original form, the presumption clearly applied to private persons and corporate officers, as well as government officials. *See Dandridge*, 25 U.S. at 69; *Cincinnati, New Orleans & Tex. Pac. Ry. Co. v. Rankin*, 241 U.S. at 327. Today, it is simply a baseline presumption of normality accorded all government conduct, absent evidence to the contrary. It is not a special defense for government officials. Indeed, the presumption has in some contexts been invoked against government parties. *See Riggs Nat'l Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 295 F.3d 16 (D.C. Cir. 2002) (a private plaintiff allowed to invoke the presumption in regard to the accuracy of certain tax records).

The Government, for its part, concedes that the presumption "attaches to all federal officials' actions," but nevertheless suggests that the presumption is somehow magnified when combined with the "respect due to the head of a coordinate branch." Gov. Br. 68. But it cites no authority for applying the presumption differently where the President is concerned. Rather, "[e]very public officer is presumed to act in obedience to his duty, until the contrary is shown." *Martin*, 25 U.S. at 33. Accordingly, this Court has applied the presumption without variation to state judges, *Bracy*,

520 U.S. at 909, postal inspectors, *Hartman*, 547 U.S. at 263, and cabinet secretaries alike, *Overton Park*, 401 U.S. at 415. The D.C. Circuit, for its part, has applied the presumption in equal measure to an executive order of the President, *Am. Fed. of Gov't Emps.*, 870 F.2d at 728, and to Brazilian tax receipts, *Riggs Nat'l Corp.*, 295 F.3d at 20-21. Holding that the presumption should operate differently depending on the government official would introduce a new and unworkable complexity into that doctrine.

It would also needlessly blend the presumption of regularity with other rules that serve to heighten deference and grant immunity when appropriate. As this Court has recognized, "[t]he President's constitutional responsibilities and status … counsel[] judicial deference and restraint." *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982). One product of that recognition is the President's absolute immunity from damages liability based on official acts. *Id.* Another is the "narrow standard of review [that governs] decisions made by the Congress or the President in the area of immigration and naturalization." *Mathews v. Diaz*, 426 U.S. 67, 82 (1976). The Government's effort to conflate the presumption of regularity with the deference afforded to the President in the fields of immigration and national security is a transparent attempt to obtain more latitude than those carefully calibrated doctrines would otherwise afford. Whatever deference is appropriate in this case, its source is not the presumption of regularity.

CONCLUSION

The Court should reject the Government's attempts to expand the presumption of regularity beyond its historical underpinnings and modern application. The Court should apply the presumption as a modest working principle, and proceed to consider any evidence reasonably bearing on the President's decision to implement the travel ban.

Respectfully submitted,

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