No. 17-965

# In The Supreme Court of the United States

DONALD J. TRUMP, *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* CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF RESPONDENTS


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## INTEREST OF *AMICI CURIAE*[1]

This brief of *amici curiae* in support of Respondents is respectfully submitted by law professors with expertise in constitutional law. *Amici* submit this brief in order to present their view on the structural role of the Bill of Rights in our constitutional system, which contradicts the federal government's claim to virtually unlimited power over immigration free of constitutional constraints that restrict all other federal powers. In particular, the Establishment Clause uniquely forbids the federal government from favoring some religious sects over others. Proclamation No. 9645 ("the Proclamation") violates the Establishment Clause of the First Amendment and therefore cannot stand.

A list of *amici curiae* appears as Appendix A.[2]



## SUMMARY OF ARGUMENT

The Bill of Rights was added to the Constitution, not just to protect individual rights, but also to impose structural constraints on the federal government.

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[1] The parties' written consents to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

[2] The views expressed herein are those of the individual *amici* and not of any institutions or groups with which they are affiliated.

These constraints sharply curb the powers granted in the unamended Constitution, divesting the federal government of some of the authority it would otherwise have. Thus, Petitioners' claim of nearly unlimited authority over immigration that is immune from judicial review has it backwards. No federal power can override the Bill of Rights. To the contrary, the Bill of Rights limits federal power in every sphere, including immigration.

The Establishment Clause was originally understood as preventing federal regulation of religion in order to preserve state autonomy in this sphere. Prior to the enactment of the Fourteenth Amendment, a State could establish a state religion, favor some religions over others, or adopt a policy of nondiscrimination.

Whatever it opted to do, the Establishment Clause disqualified the federal government from interfering. The authority of the States in the domain of religion has now been curtailed by the Fourteenth Amendment and its application of the Bill of Rights to the States. But the constraints the Establishment Clause imposes on the federal government remain in their original form: The federal government can neither establish a national religion, nor engage in discrimination based on religious animus, nor interfere with what remains of state authority in the religious domain.

The Proclamation, motivated by bias against Muslims, violates the Establishment Clause by disfavoring adherents of a particular minority religion. And because the Establishment Clause is a general structural

limitation on the power of the federal government, the Proclamation cannot be enforced even against foreign nationals abroad.

The role of the Establishment Clause as a structural constraint on federal authority over immigration follows logically from the text, structure, and original meaning of the Bill of Rights. It is also consistent with this Court's precedents, properly understood. To the extent that the latter may nonetheless be read to give the federal government unwarranted authority to disregard the Bill of Rights, this Court should take the opportunity to clarify, limit, or overrule them.

The constitutional flaws of the Proclamation should lead this Court to rule in favor of the Respondents on the statutory issues in the case, in order to adhere to the canon against statutory constructions that raise constitutional problems.

## ARGUMENT

### I. The Bill of Rights limits federal power over immigration.

Petitioners contend that federal power over immigration is essentially unconstrained by the Bill of Rights. Immigration policy, they assert, is "exclusively entrusted to the political branches" and is "largely immune from judicial inquiry." Pet'rs' Br. at 18 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)).

Such claims are inconsistent with the role of the Bill of Rights as a structural limitation on federal power.

### A. The Bill of Rights consists largely of structural constraints that limit the power of the federal government in every realm, including immigration.

The text, history, and original meaning of the Bill of Rights indicate that most of its provisions – including the Establishment and Free Exercise Clauses of the First Amendment – are structural limitations on federal government power. Their applicability is not limited to government actions within the territory of the United States, or those that target American citizens. This conclusion is supported by the clear and unequivocal phrasing of the text, and by Founding-era practice.

#### 1. The text of the First Amendment does not limit its applicability based on either territory or citizenship.

The text of the First Amendment states, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Nothing there suggests that the Amendment is limited to government actions within the territory of the United States or those that target American citizens or legal permanent residents. Neither does it suggest that the force of the Amendment is somehow weaker when it comes

to government actions abroad. To the contrary, the text creates a categorical structural limitation on federal power. Regardless of the location or citizenship status of its objects, "Congress shall make no law" that transgresses the bounds of the Amendment.

The Constitution does reserve a few rights for citizens alone. Most notably, the Privileges and Immunities Clause of Article IV, Section 2, and the Privileges or Immunities Clause of the Fourteenth Amendment both protect the "privileges" and "immunities" of American citizens. U.S. Const. art. IV, § 2, cl. 1. But the fact that a few rights are explicitly reserved to citizens only serves to make clear that others are not. If there were an implicit assumption that all rights are reserved to citizens unless specifically indicated otherwise, there would be no need to explicitly indicate such a reservation with respect to any particular rights.

### 2. The original understanding of the Bill of Rights does not set territorial or citizenship status limitations on its applicability.

The Bill of Rights was added to the Constitution at the insistence of the Anti-Federalists because they feared the powers of the new federal government. *See*, *e.g.*, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* ch. 1 (1998) (describing the historical origins of the Bill of Rights). The Bill of Rights was thus originally understood as not only protecting certain individual rights, but also establishing a set of

structural limitations on federal power. *See id.* at chs. 1-6.

Moderate Anti-Federalists in the key States of New York and Virginia voted in favor of the Constitution on the expectation that the federal government's new powers would be constrained by a bill of rights. *See* Michael J. Zydney Mannheimer, *The Contingent Fourth Amendment*, 64 Emory L.J. 1229, 1278-81 (2015) It is because of this promise that we have the Constitution we know today. Any claim that the federal government has virtually unlimited power over immigration – and therefore can ignore the Bill of Rights when formulating immigration policy – has things backwards: The Bill of Rights limits federal authority over immigration, not the other way around.

This structural account of the Bill of Rights is consistent with Founding-era practice, which made no distinction between the way the Bill's restrictions on federal power applied within the United States and the way it constrained federal government actions abroad, including those targeting noncitizens.

In the early Republic, potential conflicts between the Bill of Rights and the exercise of federal power against noncitizens abroad mostly arose in the context of efforts to combat lawbreaking in international waters. Many involved enforcement of federal laws authorized by Congress's power to "define and punish Piracies and Felonies committed on the high Seas." U.S. Const. art. I, § 8, cl. 10. They included efforts to suppress piracy and the slave trade, and catch

violators of United States tariff and embargo policies. *See generally* Nathan S. Chapman, *Due Process Abroad*, 112 Nw. U.L. Rev. 377 (2017).

Both Congress and the executive consistently concluded that pirates could not be detained and punished without being afforded due process of law, as required by the Due Process Clause of the Fifth Amendment – including a trial in a regularly constituted federal court. *See id.* at 413. The same was true of the procedures for detaining and trying suspected slave traders and smugglers. *Id.* at 419. Such prominent jurists and statesmen as Supreme Court Justice James Iredell, Albert Gallatin, and John Quincy Adams argued that this was required by the Constitution. *See id.* at 382, 413.

Importantly, these policies made no distinction between suspected pirates, smugglers, and slave traders who were foreign nationals and those who were American citizens. As President John Adams's Attorney General Charles Lee instructed in 1798, suspected pirates were to be tried in ordinary federal courts, "according to the law of the United States, without respect to the nation which each individual may belong, whether he be British, French, American, or of any other nation." *Id.* at 427 (quoting Prize Ship and Crew – How to be Disposed of, 1 Op. Att'y Gen. 85, 86 (1798)).

If the Due Process Clause of the Fifth Amendment applies to Federal actions abroad, including those targeting noncitizens, the same goes for other parts of the Bill of Rights. And if federal power to punish crimes

"on the high Seas" is constrained by the Bill of Rights, that principle also applies to the power to regulate immigration. It would be strange indeed if captured pirates and smugglers were accorded greater protection under the Constitution than peaceful migrants.

### 3. The structural principle advanced here is consistent with the way the Bill of Rights constrains the exercise of other federal powers.

The claim that the federal government's "plenary power" over immigration gives it the authority to override the constraints of the Bill of Rights is flatly inconsistent with the way the Supreme Court has treated other federal powers, which are all subject to the Bill of Rights, regardless of how "plenary" they otherwise are. For example, Congress has long been understood to have plenary power to regulate interstate commerce. That authority is "plenary as to those objects" to which it extends. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824). Yet it does not follow that the federal government has the power to forbid the use of interstate commerce to disseminate ideas critical of the President, or that it can bar interstate trade carried on by Muslims or Jews.

Even the power over national defense – as fundamental and essential a federal power as any – is subject to the constraints of the Bill of Rights. *See*, *e.g.*, *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (ruling that this power is limited by the Free Speech

Clause of the First Amendment). As Justice Black wrote in the famous "Pentagon Papers" case:

> When the Constitution was adopted, many people strongly opposed it because the document contained no Bill of Rights to safeguard certain basic freedoms. . . . In response to an overwhelming public clamor, James Madison offered a series of amendments to satisfy citizens that these great liberties would remain safe and beyond the power of government to abridge. . . . [T]he Solicitor General argues . . . that the general powers of the Government adopted in the original Constitution should be interpreted to limit and restrict the specific and emphatic guarantees of the Bill of Rights adopted later. I can imagine no greater perversion of history.

*Id.* at 715-16 (Black, J., concurring).

If this principle restricts even Congress's and the President's specifically enumerated powers, such as the power to regulate interstate commerce and national defense powers, it should apply with at least equal force to federal authority over immigration. The latter is not enumerated in the Constitution, but has been merely assumed to exist by the Court because the power to "exclude aliens from its territory . . . is an incident of every independent nation" and therefore an "incident of sovereignty belonging to the government of the United States." *Chae Chan Ping v. United States*, 130 U.S. 581, 603, 609 (1889).

As Justice Scalia explained, "after the adoption of the Constitution there was some doubt about the power of the Federal Government to control immigration," and "with the fleeting exception of the Alien Act [of 1798], Congress did not enact any legislation regulating *immigration* for the better part of a century." *Arizona v. United States*, 567 U.S. 387, 421 (2012) (Scalia, J., concurring in part and dissenting in part). James Madison, Thomas Jefferson, and others argued that the Alien Friends Act was unconstitutional because the federal government lacked any general power to regulate immigration. *See* James Madison, *Virginia Resolutions of 1798* (1798) (stating that the Act "exercises a power nowhere delegated to the federal government"), *reprinted in* Jefferson Powell, *Languages of Power: A Source Book of Early American Constitutional History* 134 (1991); Thomas Jefferson, *Jefferson's Draft, The Kentucky Resolutions of 1798* (1798) ("ALIEN-friends are under the jurisdiction and protection of the laws of the state wherein they are; that no power over them has been delegated to the US"), *in* 30 The Papers of Thomas Jefferson 536 (2003). It would be perverse to allow the plenary power doctrine to give a merely implied – and historically contested – federal power over immigration higher status than the federal government's specifically enumerated powers.

Petitioners claim that "the exclusion of aliens abroad calls for especially deferential judicial review." Pet'rs' Br. at 61. But the political branches also have broad – indeed plenary – authority over interstate

commerce and many aspects of national defense. Yet it does not follow that the courts must engage only in "especially deferential . . . review" of federal government actions in these fields. Indeed, precisely because the government has such broad authority, it is especially important to ensure that power is not wielded in ways that are unconstitutional. The breadth of federal power under the unamended Constitution is the main reason that the Bill of Rights was enacted in the first place.

Petitioners also contend that the use of the plenary power doctrine to circumvent the Bill of Rights in the immigration field is proper because aliens seeking admission from abroad "have no constitutional rights at all regarding entry into the country." Pet'rs' Br. at 59. But the lack of a constitutional right to enter does not mean that the federal government can deny entry on any basis it wants. For example, Congress has the power to give or withhold Social Security benefits. *See Flemming v. Nestor*, 363 U.S. 603, 609-11 (1960). That does not mean it is free to discriminate on the basis of race or religion in doing so. *See id*. at 611. A law that excluded Muslims or Jews from receiving Social Security benefits would be unconstitutional. The same necessarily goes for a law or executive action that engages in similar discrimination with respect to potential immigrants.

### B. This Court's precedents belie the notion that immigration policy is "largely immune" from judicial review of claims that it violates the Bill of Rights.

This Court's precedents are consistent with the principle that the Bill of Rights imposes structural constraints on federal power over immigration. Indeed, these precedents show that claims that federal immigration policy violates a provision of the Bill of Rights have not been categorically barred by the Court. To the extent that any of the Court's precedents could be read as allowing Congress to ignore the Bill of Rights in the immigration context, it should take this opportunity to clarify, limit, or overrule those decisions.

For well over a century, this Court has recognized the obvious fact that federal power over immigration is constrained by the Constitution. *See Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (observing that federal power over immigration law "is subject to important constitutional limitations"); *INS v. Chadha*, 462 U.S. 919, 940-41 (1983) (noting that the federal government must choose "a constitutionally permissible means of implementing [its] power" over immigration); *Chae Chan Ping*, 130 U.S. at 604 (observing that federal power over immigration is "restricted . . . by the [C]onstitution itself").

Notwithstanding this established principle, Petitioners insist, based largely on *Kleindienst v. Mandel*, 408 U.S. 753 (1972), that immigration policy is virtually immune from judicial review, even when it

implicates the Bill of Rights. *See* Pet'rs' Br. at 58-64. Petitioners misread that case.

In *Mandel*, the Court addressed a First Amendment challenge to the Attorney General's decision not to grant a waiver to Mandel from his disqualification for a temporary visa pursuant to a federal statute that denied visas to anyone who advocated communism. 408 U.S. at 755-57. Importantly, though, the appellees in *Mandel* did *not* challenge the federal statute on First Amendment grounds. Instead, they conceded that Congress's exclusion of communists was consistent with the First Amendment. *Id.* at 767. They claimed merely that the First Amendment prohibited the Attorney General's exercise of executive discretion to refuse a waiver in Mandel's particular case.

The Court's statement that withholding judicial review was appropriate so long as the executive's reason for refusing a particular waiver was "facially legitimate and bona fide," *id.* at 770, was premised on the concession that the general exclusion of communists was consistent with the First Amendment. So long as that general exclusion is constitutional, and a specific decision implementing that general exclusion rests upon a "facially legitimate and bona fide" reason, the courts will not look behind that reason.

The present case is wholly different. Respondents here challenge the Proclamation itself, not just the manner in which it has been applied to a particular individual. Had the appellees in *Mandel* challenged

the statute head on, the Court could have decided the case based on ordinary First Amendment principles.

Petitioners argue that ordinary constitutional principles do not apply to the immigration context. Again, this misreads precedent. It is true that the Court said in *Demore v. Kim*, 538 U.S. 510, 521 (2003), that, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens" (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)). But aside from the obvious fact that, unlike citizens, noncitizens can be deported, *cf. Trop v. Dulles*, 356 U.S. 86, 92-93 (1958) (plurality opinion), this dictum does not imply a general power to override normal constitutional constraints in immigration cases.

The dictum appears to stem from *Harisiades*, 342 U.S. at 581-84, in which three aliens challenged deportation orders based on their prior membership in the Communist Party, which a federal statute made a ground for deportation. The Court rejected their First Amendment claims, but not because of any special deference or solicitude granted to Congress when it legislates in the immigration context. *Id.* at 591-92. Rather, the Court relied on then-conventional First Amendment principles, *id.* at 592 & n.18. *Dennis v. United States*, 341 U.S. 494, 516-17 (1951), decided just nine months earlier, held that Congress could, consistent with the First Amendment, criminalize membership in the Communist Party.

Thus *Harisiades* stands only for the simple notion that, if Congress could make membership in the Communist Party by American citizens a crime without violating the First Amendment, it could also make such membership grounds for deportation of an alien. *See* 342 U.S. at 592 & n.19 ("[T]he test applicable to the Communist Party has been stated too recently to make further discussion at this time profitable." (citing *Dennis*, 341 U.S. 494)). The federal government did not get any special deference merely because *Harisiades* was an immigration case.

Petitioners also rely heavily on cases in which an alien brought a procedural due process challenge to an order of exclusion. Typical is *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 207 (1953), in which an alien challenged the Attorney General's decision to exclude him without a hearing. The Court rejected the claim, explaining: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* at 212 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)). This dictum traces its lineage to *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), on which Petitioners also rely. There the Court wrote that, as to aliens seeking entry, "the decisions of executive or administrative officers, acting within powers expressly conferred by [C]ongress, are due process of law." *Id.* at 660.

But *Nishimura Ekiu* merely reflects an era in which the concept of procedural due process was thought to mean only that executive branch officials

must follow the applicable statutory and common law procedures of the jurisdiction in question. For example, in a roughly contemporaneous appeal in a state criminal case, the Court rejected the defendant's contention that his confession was coerced in violation of due process, writing that "if . . . the admission of th[e] testimony did not violate . . . the Constitution and laws of the state of Missouri, the record affords no basis for holding that he was not awarded due process of law." *Barrington v. Missouri*, 205 U.S. 483, 486-87 (1907).

The modern understanding of due process in both of these contexts is, of course, very different. *See Zadvydas*, 533 U.S. at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem [under] [t]he Fifth Amendment's Due Process Clause."); *Mincey v. Arizona*, 437 U.S. 385, 398-400 (1978) (holding that unwanted interrogation of hospital patient in "unbearable" pain in intensive care unit violates Due Process Clause of Fourteenth Amendment); *see also Boutilier v. INS*, 387 U.S. 118, 123-24 (1967) (rejecting due process void for vagueness challenge to immigration statute under the same standards used in other void for vagueness cases).

*Kerry v. Din*, 135 S. Ct. 2128 (2015), as explained in Justice Kennedy's decisive concurring opinion, is also a procedural due process case, in which the Court rejected a claim that the visa application of a foreign spouse of an American citizen was denied without sufficient reason for the denial. *Id.* at 2139-41 (Kennedy, J., concurring in the judgment). Justice Kennedy did not deny that due process required the government to

provide a reason. He simply determined that the State Department's citation of the applicable statutory provision barring from visa eligibility those who had engaged in "terrorist activities," coupled with the American spouse's concession that her husband had worked for the Taliban, provided a sufficient reason. *Id.*

A determination of what process is due regarding an individualized assessment of a visa application is worlds apart from the contention that a large swath of immigration policy is virtually exempt from the Establishment Clause. Like *Harisiades*, *Nishimura Ekiu* and its progeny, including *Din*, stand for the unremarkable proposition that constitutional claims in the immigration context are generally treated the same as in any other context. *See* Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 Geo. Immigr. L.J. 257, 258 (2000) (explaining that immigration cases have typically been "consistent with domestic constitutional law" as it existed when they were decided).

Importantly, this Court has never approved a distinction based on religion in the immigration context, or intimated that such a distinction is only subject to diminished judicial scrutiny. To the contrary, this issue simply has not arisen before, precisely because of widespread recognition that religion-based immigration restrictions would be anathema to the First Amendment. *See infra* Part II.A. Only two of this Court's immigration cases involve First Amendment challenges at all:

*Mandel*, in which the viewpoint-based distinction made by the immigration statute in question went unchallenged, and *Harisiades*, in which the Court subjected such a distinction to the same constitutional standards applied in domestic First Amendment cases at the time.

### C. To the extent that the Court's precedent does cast doubt on the applicability of the Bill of Rights to immigration cases, it should be limited or overruled.

To whatever extent the Court's precedents are inconsistent with the principle that the Bill of Rights constrains all powers granted to the federal government, they should be limited or overruled. The importance of the Bill of Rights as a check on abuses of federal power is such a fundamental element of our Constitution that this Court should not allow misguided or misunderstood precedent to negate it. This imperative is heightened by the painful reality that the plenary power doctrine has its origins, not in the ideals of the Founding, but in the widespread racial and ethnic prejudices of the same era that gave rise to Jim Crow segregation and *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. Rev. 1, 12-53 (1998) (describing the effects of racial prejudice on development of the plenary power doctrine, and its connections with domestic racial segregation). A key factor that this Court considers in deciding whether to

overrule precedent is whether it was "well reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009). A doctrine that is at odds with basic textual and structural principles of the Constitution and owes its origins in large part to racial prejudice surely is not.

Should the Court choose to apply the rule of *Mandel* to the present case, it can do so in a way that is compatible with the role of the Bill of Rights as a fundamental constraint on federal power. Petitioners rely on the passage in *Mandel* that indicates that "when the Executive exercises this power [to exclude an alien] on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the [plaintiffs'] First Amendment interests." 408 U.S. at 770. Under this approach, the government is entitled to heavy judicial deference only if it offers a justification for exclusion that is both "facially legitimate" and "bona fide."

The Court should make clear that a justification cannot be "facially legitimate" if it contravenes the Bill of Rights – for example, by targeting potential immigrants based on their speech or religion. The very nature of a legitimate government interest assumes that it does not involve attacking a constitutional right. *See*, *e.g.*, *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (holding that an attack on the constitutional right to equal protection of the laws by attempting to "harm a politically unpopular group" does not qualify as a legitimate state interest).

In order to be "bona fide," the interest in question must be offered in good faith, and cannot be a mere pretext for indirectly violating the Bill of Rights, as is the case here. *See Din*, 135 S. Ct. at 2141 (Kennedy J., concurring in the judgment) (noting that "an affirmative showing of bad faith" would vitiate the judicial deference that might otherwise be due under *Mandel*); *Int'l Refugee Assistance Project v. Trump* (*IRAP I*), 857 F.3d 554, 590 (4th Cir. 2017) (noting that "as the name suggests, the 'bona fide' requirement concerns whether the government issued the challenged action in good faith"), *vacated as moot, Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017). Should the Court conclude that *Mandel* applies to the present case, it can avoid overruling it, while still vindicating the importance of the Bill of Rights as a constraint on federal power of every kind.

### D. Because the Bill of Rights constrains federal power over immigration, it is permissible for courts to assess the President's statements as evidence of discriminatory motive.

Because the Bill of Rights constrains federal power over immigration, just as it does other government powers, courts can and should consider the President's many statements indicating that discrimination against Muslims was the true purpose of the Proclamation.

Laws and executive actions that discriminate on the basis of religion are subject to strict scrutiny, much like those that discriminate on the basis of race or ethnicity. *See*, *e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (reiterating this rule under the Free Exercise Clause). This Court has long held that a facially neutral law or regulation may be invalidated if its true purpose was to discriminate on the basis of a prohibited classification. *See*, *e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (striking down facially neutral ordinance that was used to discriminate against the Chinese).

In assessing whether an impermissible discriminatory motive is present, this Court's precedents require judges to make "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including "[t]he historical background of the decision" and "[t]he specific sequence of events leading up to the challenged decision." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977). The President's numerous statements indicating that the true purpose of his ostensibly territorially-based travel ban was to fulfill his campaign promise to impose a "Muslim ban" are undeniably key elements of "the historical background" of the Proclamation, and they are clearly part of the "specific sequence of events leading up" to it. *Id.*; *see also* Shawn E. Fields, *Is it Bad Law to Believe a Politician? Campaign Speech and Discriminatory Intent*, 52 U. Rich. L. Rev. 273, 294-315 (2018) (outlining reasons why it is appropriate and necessary for courts to consider

campaign statements in cases alleging discriminatory intent).

On at least a dozen separate occasions, President Trump equated his territorial travel ban policy with the Muslim ban he advocated during the campaign. For example, he noted that the second iteration of the travel ban was not a repudiation but actually an "expansion" of the initial ban that was deemed unconstitutional by every federal court that addressed the issue. *See* David Bier, *A Dozen Times Trump Equated his Travel Ban with a Muslim Ban*, Cato Inst.: Cato at Liberty (Aug. 14, 2017, 12:06 PM), https://www.cato.org/blog/dozen-times-trump-equated-travel-ban-muslim-ban; *see also IRAP I*, 857 F.3d at 575-77, J.A. 122-23, 169, 179, 399 (describing several of the President's statements to this effect in detail).

Campaign promises are an important indication of politicians' intentions. Despite the stereotype that candidates routinely break their commitments, empirical evidence suggests that presidents keep the vast majority of their campaign promises – generally two thirds or more. And it is likely they at least attempt to keep an even larger percentage. *See* Timothy Hill, *Trust Us: Politicians Keep Most of their Promises*, FiveThirtyEight (Apr. 21, 2016, 6:33 AM), https://fivethirtyeight.com/features/trust-us-politicians-keep-most-of-their-promises/ (summarizing relevant evidence); François Pétry & Benoît Collete, *Measuring How Political Parties Keep Their Promises* (presenting historical data on presidential promise-keeping), *in* Do They Walk Like They Talk?: Speech and Action in

Policy Processes 65 (Louis M. Imbeau ed., 2009). The President himself emphasized that he would issue the second Executive Order, after a prior one was struck down, in order to "keep [his] campaign promises," thereby demonstrating that those promises are indeed part of the "historical background" of this case. *See* J.A. 127-28. At the same time, he denigrated the second Executive Order as a "watered down" and "politically correct" version of his original order, concocted by the Department of Justice ("DOJ") to pass constitutional muster, and urged DOJ lawyers to return to the original version that had been struck down as based on anti-Muslim animus. J.A. 132-33. The present Proclamation was a direct outgrowth of two previous executive orders motivated by anti-Muslim bias.

To ignore campaign statements in such a context would be to close judicial eyes to obvious political realities. It would also set a dangerous precedent for future cases. If even the most egregious statements of discriminatory intent by decision-makers can be ignored if uttered during a campaign, future presidents and other policymakers would have a ready-made playbook for getting away with enacting a wide range of discriminatory policies. They could blatantly appeal to bigotry during the campaign, then moderate their rhetoric after the election and target racial, ethnic, or religious groups for discrimination by using facially neutral criteria that have a high correlation with the prohibited classification. For instance, they could target African-Americans by singling out people who live in majority-black neighborhoods, a strategy similar to the

"territorial" approach to targeting Muslims adopted by the Proclamation.

The President's statements are particularly relevant in a case like the present one, where the challenged government policy was the product of a single decision-maker, who made his intentions very obvious. In such a situation, courts do not face the difficulties inherent in assessing the purposes of multi-member legislative bodies, where different participants in the process may have supported the same policy for widely divergent reasons. *Cf.* Fields, *supra*, at 316 ("Unsurprisingly, it is more difficult to establish the underlying motives of ten county commissioners or one hundred senators than it is of one mayor, governor, or President.").

In the recent oral argument in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, Justice Kennedy suggested that "hostility to religion" on the part of one key member of a seven-person state commission could be a significant factor in rendering the resulting policy unconstitutional. Transcript of Oral Argument at 52, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, No. 16-111 (U.S. Dec. 5, 2017); *cf. Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909-10 (2016) (concluding that bias by one judge on a multi-judge appeals court requires vacatur even where his was not the decisive vote). The evidence of religious animus in the present case is far stronger. There is only one decision-maker, and he has made his motives clear on numerous occasions, not just in a single, possibly isolated, statement.

Evidence of impermissible motive does not by itself prove that the challenged government action must be ruled unconstitutional. The government can still vindicate its policy by demonstrating that it would have been enacted in the same form even in the absence of illicit motivations. *See Arlington Heights*, 429 U.S. at 270 n.21 ("Proof that the decision by the [government] was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the [government] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered."). But assessing evidence of motive is nonetheless a crucial part of the judicial role in cases like the present one, and the President's statements cannot be ignored in such an inquiry. In the present case, it is unlikely that the Petitioner can prove he would have issued the Proclamation even in the absence of religious animus, because the security rationales he offers are weak and do not meaningfully differentiate nations subject to the ban from those that are not. *See*, *e.g.*, David Bier, *Travel Ban is Based on Executive Whim, not Objective Criteria*, Cato Inst.: Cato at Liberty (Oct. 9, 2017, 2:07 PM), https://www.cato.org/blog/travel-ban-based-executive-whim-not-objective-criteria (explaining how the Proclamation fails to consistently apply its own supposed criteria for determining which nations should be covered).

* * *

First principles and precedent point in the same direction: Irrespective of the fact that the Proclamation operates in the immigration context, the Court may, and must, subject it to ordinary principles of constitutional law. Doing so would leave Congress and the President with broad power to regulate immigration on a wide range of grounds. They could, for example, discriminate among potential immigrants on the basis of job skills, educational attainment, criminal record, presence of family members in the United States, and so on. Just as Congress retains broad authority over interstate commerce and other matters within its Article I powers, the same is true in the field of immigration. What the federal government cannot do, however, is discriminate on bases that violate the Bill of Rights or other constitutional provisions.

## II. Under the Establishment Clause of the First Amendment, the proclamation is unconstitutional and void even as to foreign nationals abroad.

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Because this case involves a challenge to a federal executive proclamation, the First Amendment applies directly, unmediated by the Fourteenth Amendment.[3]

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[3] The Establishment Clause principles that limit Congressional action also apply to the executive. *Cf. Hein v. Freedom from*

But because most of the Establishment Clause jurisprudence over the past seventy years has addressed the Clause as incorporated against the States, the original understanding of the Clause as a constraint on uniquely federal power has often been ignored. That original understanding dictates that the federal government may neither establish a national religion, nor interfere with the primacy of the States in the field of religion.

The challenge in this case goes to the latter constraint. By using entry restrictions to target a particular religious minority, the Proclamation interferes with State primacy in the religious domain: It hampers the ability of the States to attract Muslim residents and thereby enhance the States' religious diversity. Because the Clause acts as a structural limitation on the power of the federal government, and not just a protection for individual rights, the Proclamation is void and cannot be applied to anyone, including foreign nationals abroad.

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*Religion Found., Inc.*, 551 U.S. 587, 593-95 (2007) (plurality opinion) (addressing Establishment Clause challenge to Executive Orders). If the First Amendment prohibits Congress from passing a statute, it surely must prohibit the President from taking the same action unilaterally by executive order. Petitioners have not argued to the contrary.

### A. The Proclamation violates the Establishment Clause because it interferes with State primacy over religion.

The original understanding of the First Amendment's Establishment Clause was that it was a federalism provision, preventing the federal government from establishing a national religion or interfering with the States' exclusive sovereignty in the religious sphere. The Proclamation, directed at limiting entry into the country by Muslims, conflicts with the latter constraint.

This Court's modern Establishment Clause jurisprudence began with *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 3 (1947), a challenge to a New Jersey statute. It was also in this case that the Court held that the Clause applies to the States via incorporation into the Fourteenth Amendment. *See id.* at 15. Since that time, the Court has not taken the opportunity to rule on the distinctive federalism strand of the Establishment Clause, which specifically disqualifies the federal government from regulating religion.

The Establishment Clause was originally understood, at least in part, as a federalism provision. Obviously, in 1791, it constrained only the federal government. That restriction on federal power was twofold. First, it prohibited the federal government from establishing a national religion or church. *See* Amar, *supra*, at 32. Second, it prevented the federal government "from interfering in the religious establishments of the states." Michael W. McConnell,

*Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2109 (2003).

While the first constraint is self-explanatory, the second requires some exploration of religious establishments and other arrangements by the States at the time of the adoption of the First Amendment. These arrangements ran the gamut from outright establishment of an official state church to an ecumenical embrace of all sects. On one end of the spectrum, Connecticut, Massachusetts, and New Hampshire essentially adopted a single Protestant sect – Congregationalism – as their state religion, though they did so indirectly, by delegating religious establishment to the local level through home rule provisions. *See* Amar, *supra*, at 32-33. South Carolina was somewhat more ecumenical, establishing Protestantism in general as its state religion by permitting taxation in support of all Protestant churches in the State. *See* Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* 52-58 (1994). Maryland and Georgia were more ecumenical still, by including Catholicism within their general establishment of Christianity as state religions. *See id*. at 54-56. Delaware, Pennsylvania, and Rhode Island had no official state religions and no state tax in support of any church, but still maintained "establishments" to the extent that they required religious tests to hold public office. *See Town of Greece v. Galloway*, 134 S. Ct. 1811, 1836 (2014) (Thomas, J., concurring in part and concurring in the judgment). And Virginia was furthest on the disestablishment

side of the spectrum, neither permitting state taxation in support of religion nor requiring religious tests for officeholders. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 310 (1963) (Stewart, J., dissenting). Thus, the States in 1791 took drastically different approaches to church-state relations.

The Establishment Clause was designed to entrench the principle that religion was under the control of the States, by forbidding interference by the federal government. "Each State was left free to go its own way and pursue its own policy with respect to religion." *Id.*; *see also* William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DePaul L. Rev. 1191, 1200 (1990) ("[T]here *was no consensus* on proper church/state relations. The only agreement was that the issue was properly left to the state and local governments." (footnote omitted)). Thus, the Establishment Clause disqualified the federal government from interfering in state policy toward religion. As Justice Story wrote: "[T]he whole power over the subject of religion is left exclusively to the State governments." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1879 (4th ed. 1873).

This authority, reserved to the States through the Establishment Clause, was subsequently limited by the Fourteenth Amendment, which incorporated the Bill of Rights against the States. This Court's cases, beginning with *Everson*, 330 U.S. at 15-16, make this clear. For example, States can no longer create an established church or favor one religious group over

others. *Cf.* Amar, *supra*, at 253-54 (discussing the impact of incorporation on states' religious policies).

Incorporation against the States is not relevant to the present litigation, however. Here, we deal purely with actions of the *federal* government. In such a context, the Establishment Clause applies in its original form, unaffected by the Fourteenth Amendment. Vis-à-vis the federal government, the Establishment Clause means in 2018 what it meant in 1791: The federal government may not assert authority over religion and church-state relations.

With these principles in mind, this is an easy case. Hawaii has made clear its commitment to maintain, enhance, and promote diversity. *See* J.A. 141 (discussing Hawaii's "commitment[] to . . . diversity embodied in the State's Constitution, laws, and policies"). Hawaii's commitment to diversity includes diversity of religion. Hawaii, of course, does not claim the authority to show favoritism toward Muslims, for such a policy would be unconstitutional. It simply seeks to make the State, including its agencies and schools, a place where adherents of all faiths, including Muslims, are tolerated and welcome. Such government policy towards religious diversity is a matter of church-state relations that was reserved to the States by the Establishment Clause, so long as it does not violate other parts of the Constitution. And it is part of the residual state authority over religious matters that survives incorporation.

The regulation of religious diversity through the attraction (or repulsion) of religiously diverse newcomers was a matter of church-state relations in 1791. States chose more ecumenical or more exclusionary approaches to religion based in part on the goal of either attracting or deterring religious dissenters as immigrants. In Connecticut and Virginia, debates over whether and to what extent churches should be supported by public tax money included discussions over whether such arrangements would "discourage[] new settlers." Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 182 (1986). A few States exhibited hostility to members of some religious sects, thereby discouraging their immigration to those States. New York did this by requiring an oath by newcomers that made it virtually impossible for Catholics to become citizens. Gerard V. Bradley, *Church-State Relationships in America* 54 (1987). Maryland required any new citizen to declare "his belief in the [C]hristian religion." *Laws of Maryland 1763-1784* Session of July-August 1779 ch. 6 (Alexander Contee Hanson ed., 1787), http://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000203/pdf/am203-212.pdf. Other States were far more welcoming of newcomers of different faiths. Pennsylvania adopted a policy of aid to all religions evenhandedly because lawmakers wanted to maintain their State as "a sectarian melting pot." Bradley, *supra*, at 48. Georgia's reputation for religious tolerance was driven in part by a desire to attract a wide variety of settlers of various minority faiths. *See* McConnell, *supra*, at 2129. Earlier in its history, South Carolina went

to "extreme lengths in order to secure religious liberty as bait for dissenting settlers." John Wesley Brinsfield, *Religion and Politics in Colonial South Carolina* 6 (1983).

State naturalization provisions were preempted by the Constitution, which made naturalization an exclusive federal power. *See* U.S. Const. art. I, § 8, cl. 4. But after adoption of the Establishment Clause, Congress was prohibited from enacting similar naturalization provisions that made distinctions based on religion. And the States maintained more general power over religious matters within their boundaries which could be, and was, used to attract or deter newcomers of different religious faiths. While policies designed to deter religious nonconformists from entering a state are now forbidden by the Fourteenth Amendment, those designed to attract religious minorities survive, to the extent that they do not adversely affect the constitutional rights of others and do not themselves discriminate on the basis of religion.

The Proclamation interferes with this state authority over religious matters and therefore violates the Establishment Clause. Imagine that the Proclamation explicitly barred Muslims from entering the country. This would infringe Hawaii's interests in seeking a religiously diverse populace for the simple and obvious reason that if Muslims could not enter the country, they also could not enter the State of Hawaii. Such an order would exclude alien adherents of an entire faith from joining the community of Hawaiians, hampering the State's goal of promoting religious diversity. The

same point applies even if, as in the present case, the federal government merely targets a subset of Muslims for exclusion.

The step from that case to this one is a short one. For the reasons discussed above, *see supra* Part I.D, and those demonstrated by Respondents and their other *amici*, the Proclamation was transparently motivated by anti-Muslim animus. On numerous occasions, both during and after the 2016 presidential campaign, the President characterized what would eventually become the Proclamation as an attempt to restrict entry by Muslims.

After previous iterations of the Proclamation were struck down by courts, the President could have taken steps to repudiate his earlier anti-Muslim animus, and make a clean break with policies intended to implement it. Instead, he doubled down. On August 17, 2017, about five weeks before signing the Proclamation, the President repeated the anti-Islamic fantasy about General John Pershing having supposedly killed "[r]adical Islamic" terrorists with bullets dipped in pigs blood. Katie Reilly, *President Trump Praises Fake Story About Shooting Muslims With Pig's Blood-Soaked Bullets*, Time.com, Aug. 17, 2017, http://time.com/4905420/donald-trump-pershing-pigs-blood-muslim-tweet/. On November 19, 2017, two months after the Proclamation was issued, the President tweeted three videos that he expressly described as depicting "Muslim[s]" engaged in acts of violence, including one he falsely described as depicting a "Muslim migrant." *Int'l Refugee Assistance Project v. Trump* (*IRAP II*), 883 F.3d 233,

267 (4th Cir. 2018), *petition for cert. filed*, 86 U.S.L.W. 3447 (U.S. Feb. 23, 2018) (No. 17-1194).

That the Proclamation, unlike the earlier executive orders, is permanent rather than temporary adds weight to the determination that it was spurred by animus. It cannot be defended on the grounds that it is just a temporary measure needed to improve vetting procedures.

Nor does the Proclamation's addition of two non-Muslim-majority countries to the list of nations change the situation. The restrictions on Venezuela affect only a very small group of government officials and their families. *Id.* at 300. And only a vanishingly small number of North Koreans seek entry to the country every year. *See* Peter Margulies, *The New Travel Ban: Undermining the Immigration and Nationality Act*, Lawfare (Sept. 25, 2017, 4:30 PM), https://www.lawfareblog.com/new-travel-ban-undermining-immigration-and-nationality-act ("Since North Korea does not allow its nationals to emigrate to the U.S. (or anywhere else), the number of North Koreans affected by the new ban is virtually nil.").

An entry ban motivated by animus against Muslims does not become any less so simply because it does not cover all the Muslims in the world, while including a few non-Muslims. Consider the case of a federal agency head who has repeatedly declared that he would refuse to hire any African-Americans. He cannot make his racially motivated hiring practices immune to constitutional challenge by instead refusing to hire

anyone who attended a Historically Black College or University ("HBCU") even though not all African-American job applicants attended such schools and a few HBCU alumni are actually white.

Petitioners' plea for a unique form of deference – that domestic Establishment Clause jurisprudence is too strict to apply to federal policy on immigration, *see* Pet'rs' Br. at 61-62, once again has it backwards. Federal policies call for at least as much scrutiny as those made by state and local governments. The Establishment Clause in fact applies with unique stringency to the federal government.

### B. The Proclamation is void and may not be applied to anyone, including foreign nationals.

Because the Establishment Clause is a structural provision that limits the power of the federal government, the Proclamation is null and void, and cannot be enforced against anyone, including aliens abroad. The Establishment Clause was designed to divest from the federal government "the whole power over the subject of religion." 2 Story, *supra*, § 1879. Like the Bill of Rights more generally, it is a structural constraint on federal power.

Petitioners' claim that "aliens outside the United States . . . have no constitutional rights at all regarding entry into the country," Pet'rs' Br. at 59, misses the point entirely. The question is not simply one of individual rights but also one of structural limitations on

power. The Establishment Clause, and the rest of the Bill of Rights, divest the federal government of certain powers. Thus, to ask whether aliens abroad have Establishment Clause rights is to ask the wrong question. "[A] law 'beyond the power of Congress,' for any reason, is 'no law at all.'" *Bond v. United States*, 564 U.S. 211, 227-28 (2011) (Ginsburg, J., concurring) (quoting *Nigro v. United States*, 276 U.S. 332, 341 (1928)). An executive Proclamation beyond the power of the President, likewise, is "no law at all." It cannot be enforced against anyone, anywhere.

Such was the understanding of the Bill of Rights at the time of the Founding. *See supra* Part I.A.2 The government must respect structural limitations on its power. If it does not, its actions are unconstitutional.

## III. The serious constitutional flaws of the proclamation should lead this court to rule in favor of the respondents on the statutory issues in the case, in order to adhere to the requirement of avoiding statutory interpretations that raise constitutional problems.

In addition to challenging the constitutionality of the Proclamation, Respondents also contend that it violates the Immigration and Nationality Act of 1965 ("INA"), and exceeds the authority granted by the 1952 INA. *See Hawaii v. Trump*, 878 F.3d 662, 683-97 (9th Cir. 2017) (holding that the Proclamation violates 8 U.S.C. § 1152(a)(1)(A) (2012), and exceeds the scope of authority granted to the President by 8 U.S.C. § 1182

(2012) and 8 U.S.C. § 1185 (2012)), *cert. granted*, 138 S. Ct. 423 (2018). *Amici* do not take a definitive position on the statutory issues in the case. But the longstanding canon against raising constitutional problems counsels in favor of interpreting the INA in favor of the Respondents, in order to avoid the serious constitutional flaws outlined in the present brief. This Court has a strong commitment to avoiding statutory constructions that raise "constitutional problems" of the type that would surely arise if the Petitioners' interpretation of the INA were to be upheld. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.*; *see also NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 504 (1979) (requiring a "clear expression of an affirmative intention of Congress" before a statutory interpretation that raises serious constitutional questions can be upheld).

Courts should avoid constitutionally problematic interpretations of statutes in any case where it is "fairly possible" to do so – even if "the most natural interpretation" of the law supports a different outcome. *NFIB v. Sebelius*, 567 U.S. 519, 563 (2012) (opinion of Roberts, C.J.). If there is any "fairly possible" way to interpret the INA to avoid delegating to the President the authority to issue a Proclamation that raises severe constitutional problems under the Establishment

Clause, the Court has a duty to adopt that reading, even if a different interpretation might otherwise be preferable. If the INA authorizes presidential actions that are likely to be unconstitutional, that provision of the statute would itself be unconstitutional, at least as applied here.

## CONCLUSION

For the reasons stated above, the judgments of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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## APPENDIX A
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