No. 17-1351

In the United States Court of Appeals
for the Fourth Circuit

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *ET AL.*,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *ET AL.*,
Defendants-Appellants.

On Appeal from the
United States District Court for the
District of Maryland, Southern Division

Brief *Amicus Curiae* of U.S. Justice Foundation, Citizens United, Citizens United Foundation, English First Foundation, English First, Public Advocate of the United States, Gun Owners Foundation, Gun Owners of America, Conservative Legal Defense and Education Fund, U.S. Border Control Foundation, and Policy Analysis Center in Support of Defendants-Appellants and Reversal

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March 31, 2017

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 17-1351 Caption: International Refugee Assistance Project v. Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

US Justice Fndn, Citizens United, CU Fndn, English First Fndn, English First, Public Advocate of the US,
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If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ William J. Olson Date: March 31, 2017

Counsel for: U.S. Justice Foundation, et al.

CERTIFICATE OF SERVICE

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I certify that on March 31, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ William J. Olson
(signature)

March 31, 2017
(date)

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae United States Justice Foundation, Citizens United, Citizens United Foundation, English First Foundation, English First, Public Advocate of the United States, Gun Owners Foundation, Gun Owners of America, Conservative Legal Defense and Education Fund, U.S. Border Control Foundation, and Policy Analysis Center are nonprofit organizations, exempt from federal income taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law. These *amici* submitted two briefs to the Ninth Circuit in Washington v. Trump (9th Cir. 17-35105), a lawsuit challenging President Trump's earlier immigration Executive Order 13,769 ("EO") (Jan. 27, 2017) — one in support of the government's motion for stay of the district court's preliminary injunction,[2] and the other in support of rehearing *en banc*.[3]

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[1] *Amici* requested and received the consent of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

[2] http://lawandfreedom.com/wordpress/wp-content/uploads/2017/02/Washington-v.-Trump-Amicus-Brief.pdf.

[3] http://lawandfreedom.com/wordpress/wp-content/uploads/2017/02/Washington-v.-Trump-Amicus-Brief-for-rehearing.pdf.

ARGUMENT

I. The District Court's Intrusion into the President's Discretion over Immigration Is Unjustified.

The district court's opinion, International Refugee Assistance Project v. Trump, (Mar. 16, 2017) (J.A. 770) (hereinafter "IRAP"), is cursory, lacking coherent constitutional analysis. It is incestuous, in that district court judges cite each other for entirely novel legal propositions, and then boldly forecast that their unprecedented rulings are likely to succeed on the merits.[4] It is also impetuous in rushing to judgment, jockeying to be among the first to prevent newly elected President Donald Trump from implementing the policy agenda he was elected to pursue.

The decision of District Judge Chuang opens a new chapter in American immigration law, as evidenced by the paucity of references to previous federal court immigration decisions, and his lack of reliance on the few immigration cases that he does cite. Apparently, Judge Chuang could not find any judicial precedent supporting the issuance of injunction directed against the President of the United States (or indeed any official in the Executive Branch) in light of the complete

[4] Judge Kozinski cited IRAP to demonstrate how reliance on the flawed Ninth Circuit panel decision on the first Executive Order "is spreading like kudzu through the federal courts." Washington v. Trump, 2017 U.S. App. LEXIS 4838, *19 (Mar. 17, 2017) (Kozinski, J., dissenting).

discretion vested in the President by 8 U.S.C. § 1182(f) — a statute that has been on the books since 1952, despite the numerous exercises of this Presidential power.[5]

To provide cover for its lack of legal authority to enjoin President Trump's Second Executive Order 13,780 ("SEO") (Mar. 6, 2017), the district court relied on one circuit court case and one district court case, both issued in the last few weeks, and both of which involved the easily distinguishable initial Trump Executive Order.

A. Washington v. Trump.

Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017), the case on which the court below placed principal reliance (citing it seven times), is especially troubling. From the moment the Ninth Circuit's decision denying a stay of a preliminary injunction against the Executive Order ("EO") was announced and circulated, it came under attack from across the ideological spectrum, including from those who "hold no brief" for President Trump. For example, in *The New Yorker,* CNN senior legal analyst Jeffrey Toobin, after quoting verbatim the statute upon which the contested EO in that case was based, observed: "What

[5] *See* USJF Legal Policy Paper identifying prior exercises of this presidential power (Feb. 12, 2016).

does the Ninth Circuit say about this provision? Nothing."[6] Toobin then went on to say:

> the President's exercise of his authority under this law must be consistent with the Constitution. But the words of the statute must be taken seriously as well.... **The Ninth Circuit should have engaged with this statutory text** and explored its relation to the commands of the Constitution. [*Id.* (emphasis added).]

Benjamin Wittes, editor-in-chief of Lawfare and a Senior Fellow in Governance Studies at The Brookings Institution, noted the same glaring failure, faulting the panel for "not bother[ing] even to cite ... the principal statutory basis for the executive order"[7]:

> That's a pretty big omission over 29 pages, including several pages devoted to determining the government's likelihood of success on the merits of the case.[8]

Giving virtually no attention to the relevant statutory text, the Ninth Circuit

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[6] J. Toobin, "The Vulnerabilities in the Ninth Circuit's Executive-Order Decision," *The New Yorker* (Feb. 10, 2017), http://www.newyorker.com/news/daily-comment/the-vulnerabilities-in-the-ninth-circuits-executive-order-decision.

[7] *See also* Professor Josh Blackman of the South Texas College of Law, "The Failure of the 9th Circuit to Discuss 8 U.S.C. 1182(f) Allowed It To Ignore Justice Jackson's Youngstown Framework," (Feb. 10, 2017), and "The Ninth Circuit's Contrived Comedy of Errors in Washington v. Trump: Part I," (Feb. 13, 2017).

[8] B. Wittes, "How to Read (and How Not to Read) Today's 9th Circuit Opinion," Lawfare (Feb. 9, 2017), https://lawfareblog.com/how-read-and-how-not-read-todays-9th-circuit-opinion.

panel's decision is deeply flawed. That remarkable oversight is, in and of itself, sufficient reason for this Court to seriously question the legitimacy of that decision, and the district court's reliance upon it.

Moreover, the stinging dissent issued by five Ninth Circuit judges to that Circuit's refusal to reconsider the panel decision *en banc* provides even further grounds for caution. *See* opinion of Judges Kozinski, Bybee, Callahan, Bea, and Ikuta, dissenting from denial of reconsideration *en banc*, Washington v. Trump, 2017 U.S. App. LEXIS 4838, *16. That lengthy dissent reveals the fact that the three-judge panel decision was based solely on due process, despite the long line of cases that have ruled that "the vast majority of foreigners covered by the executive order have **no** Due Process rights ... because they have never set foot on American soil" (*id*. at 1 (Kozinski, J., dissenting) (emphasis added)). This error too should give pause to those who would rely on that panel's flawed decision.

Even though the Ninth Circuit decision neither analyzed the Establishment Clause claim nor based any part of its decision on that Clause, the district court below cited incidental comments by the Ninth Circuit in a transparent attempt to appropriate whatever it could find, however cursory, to bolster its desired result. On three occasions, the district court sought solace in the appellate court's passing references to strengthen its baseless Establishment Clause ruling:

- IRAP at 5: "Although it did not reach the Establishment Clause claim, the Ninth Circuit noted that the asserted claim raised 'serious allegations' and presented 'significant constitutional questions.'" (citing Washington at 1168).

- IRAP at 29: "the Ninth Circuit [concluded] that an Establishment Clause claim against that Order raised 'serious allegations' and presented 'significant constitutional questions.' *Washington* ... at 1168."

- IRAP at 38: "*Washington* ... at 1167-68 (referencing standard Establishment Clause principles as applicable to the claim that the First Executive Order violated the Establishment Clause)."

In order to enjoin the SEO, Judge Chuang had to find a way around application of the Supreme Court's rule in Kleindienst v. Mandel, 408 U.S. 753 (1972), that:

> Congress has delegated conditional exercise of this [immigration] power to the Executive. We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the **courts will neither look behind the exercise of discretion, nor test it by balancing its justification against the First Amendment interests** of those who seek personal communication with the applicant. [Mandel at 770 (emphasis added).]

To do the heavily lifting required to circumvent a decision of the U.S. Supreme Court, the district court again relied on the Ninth Circuit's decision:

- IRAP at 37: "*Washington* ... at 1162 (holding that courts possess 'the authority to review executive action' on matters of immigration and national security for 'compliance with the Constitution')."

Of course, it is not entirely surprising that the Ninth Circuit failed to apply the rule in the Supreme Court's Mandel case. Just last year, Ninth Circuit Judge Ikuta

wrote:

> The Ninth Circuit has a knack for disregarding the Supreme Court. Sometimes it simply ignores the Supreme Court.... Other times it reads the decisions of the Supreme Court in such a peculiar manner that no "fair-minded jurist" could agree.... Occasionally it even thinks it is the Supreme Court. [United States v. Lee, 821 F.3d 1124, 1130 (9th Cir. 2016) (Ikuta, J., dissenting).]

B. Aziz v. Trump

Also heavily relied on by the district court below was Aziz v. Trump, U.S. Dist. LEXIS 20889 (E.D. Va. Feb. 13, 2017) decided by Judge Leonie M. Brinkema. Aziz was cited four times to support key elements of the district court opinion, despite the fact that Aziz considered a challenge to the earlier January EO.

Judge Chuang first asserted: "the Eastern District of Virginia found ... a likelihood of success on the merits of an Establishment Clause claim...." IRAP at 5. In support of that Establishment Clause claim, Judge Chuang cited Judge Brinkema's willingness to find what she called "direct evidence of animus"[9] (Aziz at *26).

- IRAP at 28-29: "These types of public statements [by President Trump and others] were relied upon by the Eastern District of Virginia in enjoining the First Executive Order based on a likelihood of success on an Establishment Clause claim, *Aziz* ... at *11..."

- IRAP at 29: "*See Aziz* ... at *4 (quoting from a July 17, 2016 interview [with] then-candidate Trump...."

[9] *See* discussion in Section III, *infra*.

The court's final citation to Aziz apparently was to the remarkable proposition that the mere "threat of an Establishment Clause violation [directly affecting only non-citizen, non-residents] in and of itself constitutes irreparable harm." Aziz at *27. *See* IRAP at 39 (finding irreparable harm to plaintiffs but no harm to government).

Since Judge Chuang issued his March 16, 2017 order, the same Virginia district court denied injunctive relief in Sarsour v. Trump, 2017 U.S. Dist. LEXIS 43596 (Mar. 24, 2017) in an opinion written by Judge Anthony J. Trenga. In evaluating the SEO, Judge Trenga found that "Discrimination based on religion cannot be inferred from the language EO-2" employs — "the Court sees no basis for the claim that EO-2's stated and referenced justifications are 'demonstrably false'...." *Id*. at *25. In concluding its analysis of the Establishment Clause claim the court stated that it:

> rejects the Defendants' position that since President Trump has offered a legitimate, rational, and non-discriminatory purpose stated in EO-2, this Court must confine its analysis of the constitutional validity of EO-2 to the four corners of the Order. [*Id*. at *30.]

The highly politicized, heavily criticized Washington and Aziz decisions, readily distinguishable as evaluating a different EO, provided Judge Chuang a shaky foundation indeed on which to ground his IRAP decision.

II. The Establishment Clause Does Not Apply to Plaintiffs' Religious Discrimination Claims.

According to the court below, three of the individual plaintiffs, lawful permanent residents of the United States, "have standing to assert the claim that the Second Executive Order ["SEO"] violates the Establishment Clause." IRAP at 16.

John Doe No. 1's claim is based upon the allegation that the SEO expresses "anti-Muslim views." *Id.* at 17. John Doe No. 3 characterizes the SEO as expressing "anti-Muslim attitudes." *Id.* And the Meteab plaintiff complains that the SEO, itself, embodies "official anti-Muslim sentiment." *Id.* Altogether, these three plaintiffs allege that the government's action "disfavor[s] their religion" and, as a consequence, directly and adversely affects family members who "are barred from entry into the United States as a result of the terms of the [SEO]." *Id.* at 18. All of these consequences allegedly have flowed from the SEO's violation of the First Amendment prohibition that "Congress shall make no law respecting an establishment of religion."

Establishment claims are based upon a claim that a person has been injured by a government benefit conferred on a favored religious group, such as the placement of a Ten Commandments monument on public property,[10] the erection

[10] *See, e.g.,* McCreary County v. A.C.L.U. of Ky., 545 U.S. 844 (2005).

of a creche scene during the Christmas season on county courthouse lawns,[11] teaching "creation" in a public school classroom,[12] praying to God before the beginning of a legislative session,[13] prayer and Bible reading as part of the public school curriculum,[14] conferring monetary benefits upon private religious schools,[15] conferring monetary benefits upon parents who send their children to private religious schools,[16] and providing tax breaks and other monetary benefits to support private counseling organizations with ties to certain religious denominations.[17]

Although the amended complaint acknowledges that the "clearest command" of the Establishment Clause is that the government cannot "**prefer**" one religion over

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[11] *See, e.g.,* County of Allegheny v. A.C.L.U., 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984).

[12] *See, e.g.,* Edwards v. Aguillard, 482 U.S. 578 (1987).

[13] *See, e.g.,* Marsh v. Chambers, 463 U.S. 783 (1983); Town of Greece v. Galloway, 134 S.Ct. 1811 (2014).

[14] *See, e.g.,* Wallace v. Jaffree, 472 U.S. 38 (1985) (prayer); Abington v. Schempp, 374 U.S. 203 (1963).

[15] *See, e.g.,* Everson v. Board of Education, 330 U.S. 1 (1947); Valley Forge Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464 (1982).

[16] *See, e.g.,* Mueller v. Allen, 463 U.S. 388 (1983).

[17] *See, e.g.,* Bowen v. Kendrick, 487 U.S. 589 (1988).

another (Compl. ¶ 9),[18] it completely and utterly fails to allege how the SEO prefers, or otherwise specially benefits, any religious act, event, or group. To be sure, the Complaint does allege that the President "has repeatedly made clear his intent to enact policies that exclude Muslims from entering the United States and favor Christians seeking to enter the United States" (¶ 44). *See also* Compl. ¶¶ 45-58. As for the specific policies underlying the two EO's themselves, the Complaint also alleges that the January EO "confirm[s] President Trump's intent to discriminate against Muslims [and] to give Christians priority" (¶ 60).

Finally, the Complaint alleges that the SEO was "motivated by the same anti-Muslim purpose that motivated the January 27 Order." ¶ 141. Thus, the first claim for relief, based upon the Establishment Clause, alleges a violation "by singling out Muslims for **disfavored** treatment," not Christians or any other religious entity or group for preferential treatment. Compl. ¶ 221 (emphasis added). As alleged, the cause of action sounds like a Free Exercise one — not an Establishment one. As the Supreme Court recently observed:

> [Establishment Clause] cases ... for the most part have addressed governmental efforts to **benefit** religion or particular religions, and so have dealt with a question different, ... in its formulation and emphasis, from [a claim based upon] an attempt to **disfavor** their religion because of the religious ceremonies it commands [where] the Free Exercise Clause is

[18] *See* Larson v. Valente, 456 U.S. 228, 244 (1982).

> dispositive.... [Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532 (1993) (emphasis added).

The two Religion Clauses, though related, are not interchangeable, as reflected in the different tests developed by the Supreme Court. *See* McGowan v. Maryland, 366 U.S. 420, 429-30 (1961). Establishment Clause claims are typically governed by a three part "Lemon test," under which courts must first inquire whether the statute or action benefitting a religious entity, or promoting a religious event, memorial, or display has a "secular legislative purpose." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). Second, if there is such a purpose, then courts must inquire whether the principal or primary effect of the government benefit either advances or inhibits religion. *Id.* Finally, courts must determine whether the benefitting action or statute fosters "an excessive government entanglement with religion." *Id.* at 613.

If the answer to each of the three questions is no, then the government benefit conferred upon the religious activity does not violate the First Amendment's prohibition against any law "respecting an establishment of religion." But if the answer to any one of these questions is yes, then the benefit conferred is an unconstitutional establishment of religion.

The three-part Lemon test was designed to fulfill the "commanding purpose" of the No Establishment Clause: to protect the people's right to freely choose

whether to financially support, or not support, religious organizations or causes. As the Supreme Court put it in Flast v. Cohen:

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to **favor** one religion over another or to **support** religion in general. James Madison ... observed in his famous Memorial and Remonstrance ... that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." [*Id.,* 392 U.S. 83, 103 (1968) (emphasis added).]

As a threshold matter in Establishment Clause cases, the law or activity must benefit a religious cause, or prefer one religious cause over another. On its face, there can be no dispute — the SEO does **not** confer any **benefit** on any religious person, entity, or practice. To be sure, the original EO might indirectly have preferred Christianity by "prioritiz[ing] refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." IRAP at 4. Even though this provision was removed in the SEO, the district court below ruled that the "removal of the preference for religious minorities in the refugee system, which was the only explicit reference to religion in the First Executive Order, does not cure the [SEO] of Establishment Clause concerns." *Id.* at 31. The court asserted that the change did not alter the first Executive Order's original religious

purpose, that is, to ban Muslims. *Id*. If the SEO was designed to "ban Muslims," how can it at the same time be a constitutionally forbidden establishment of religion when the very idea of an established religious faith and practice is one favored, not disfavored, by the Government?

The court below makes no effort to reconcile this obvious contradiction. Instead, the court embraces it, citing Ten Commandment display cases, like McCreary, as if the purpose of such displays on government property is to disfavor their religious supporters and for that reason such displays violate the Establishment Clause. How absurd. Not only should the court below have ruled that plaintiffs' Establishment Clause claim was not likely to succeed on the merits, it should have dismissed outright plaintiffs' evasive tactic of attempting to smuggle into its complaint a bogus Establishment Clause allegation to avoid the pitfalls had they grounded their claims of religious discrimination on the Free Exercise Clause.

In Complaint ¶ 221, plaintiffs alleged that the SEO "violates the Establishment Clause by singling out Muslims for disfavored treatment [for] the purpose and effect of inhibiting religion, and it is neither justified by, nor closely fitted to, any compelling governmental interest." In Lukumi Babalu, the Supreme Court stated that the Free Exercise Clause requires proof of a "compelling governmental

interest" and proof that it is "narrowly tailored," but only if the challenged law is not "neutral and of general applicability." *Id.* at 531. Fitting their religious freedom claim into this Free Exercise mold, the Complaint alleges that the SEO "single[s] out Muslims," and thus, must be "closely fitted" to "compelling governmental interest." ¶ 221. But plaintiffs label their claim as an Establishment Clause, not a Free Exercise one, even though the Supreme Court in Lukumi Babalu specifically stated that an Establishment Clause claim which addresses "governmental efforts to benefit religion" is governed by a "different formulation and emphasis." *Id.* Because the law at issue in Lukumi Babalu did not represent a government effort to benefit religion, but rather was an "attempt to disfavor" a religion, the Establishment Clause formulation was not applicable to the Lukumi Babalu plaintiff. Nor, as demonstrated above, does the three-part formulation underpinning an Establishment Claim apply here.

But even as a Free Exercise claim, Plaintiffs' allegations and evidence fall short. In Lukumi Babalu, the plaintiff demonstrated that the law not only discriminated against the religious views of the Church of the Lukumi Babalu Aye, but "targeted" the church's "religious exercises" of animal sacrifices. Finding no compelling interest protecting either public health or cruelty to animals justifying the city ordinance outlawing the church's sacrificial practices, the

Supreme Court ruled that the ordinance was an unconstitutional prohibition of the free exercise of religion.

Like the Lukumi Babalu plaintiff, the three Muslim plaintiffs have alleged that the SEO discriminates against their religious views.[19] However, unlike the Lukumi Babalu plaintiff, the three plaintiffs here have utterly failed to allege that the SEO burdens any exercise of their religious faith. *Id.* Indeed, one of the plaintiffs states that he is a nonpracticing Muslim (Decl. of John Doe No. 1). And all three complain about how they "feel," including family stress and separation, and travel inconveniences, but not one of them alleges that the SEO prohibits the exercise of even one religious practice, such as preventing a Muslim from traveling to Mecca. Yet, to prevail on a Free Exercise claim, it is incumbent upon the claimant to demonstrate affirmatively that the law prohibited him from "exercising" his religious faith. *See* Lukumi Babalu at 532. It is not enough for a Free Exercise claimants to allege "only economic injury." Rather, they must allege and prove "infringements of their own religious freedoms." McGowan at 429. In sum, the plaintiffs' claims of religious discrimination, whether based on the Establishment Clause or the Free Exercise Clause, are utterly without

[19] *See generally* Declarations of John Doe No. 1, John Doe No. 3, and Mohammed Meteab.

foundation and should be dismissed as having no likelihood of success on the merits.

III. The Court's Injunction Disregards the National Security Interests of the Nation because of Impure Motives.

The district court exhibited great creativity, but little humility, in rejecting the national security interests addressed by the SEO. Judge Chuang began his analysis by stating the general rule that:

> courts **should afford deference** to national security and foreign policy judgments of the Executive Branch.... The Court thus should not, and **will not, second-guess** the conclusion that national security interests would be served by the travel ban. [IRAP at 35 (emphasis added).]

However, just after promising not to "second guess" the President of the United States, the Court did just that.

As discussed in Section II, *supra*, the President's EO did not objectively establish, favor, or support any religion. For that reason, it was impossible for Judge Chuang to identify some impermissible assistance to religion for him to enjoin. Rather, he launched into a lengthy analysis of primary versus secondary purposes, finding "strong indications" that the national security purpose was "secondary" to a religious purpose. Then, by judicial fiat, Judge Chuang decided that, since he could only rule based on the "primary" purpose, the Executive Order must be enjoined. Yet, he admitted that the SEO advanced "national security

interests," and even so, based his decision entirely on his "second guessing" the motivation of the President. *Id.*

Judge Chuang then speculated about whether a secular or religious urge motivated the Executive Order. As the government argued in its brief, Judge Chuang surely is not "suggest[ing] that it is somehow improper for elected representatives to base their support for legislation in part on religious beliefs." Aplt. Br. at 50. Nevertheless, the judge did impute religious motives to the President and, on that basis, enjoined the Executive Order.

The Plaintiffs alleged an "anti-Muslim animus underlying the Second Executive Order" (IRAP at 11) and Judge Chuang shared the view that the President exhibited "animus towards Muslims" (IRAP at 29). Particularly in view of the Mandel decision which bars such an approach, this Court should consider the implications of allowing a district judge to ferret out or even impute motivations and, based on those perceived motivations, then fashion a corrective injunction to do right in the eyes of that judge. As the government argues, the courts should evaluate "the legitimacy of a law by what it says and does, and occasionally by the official context that surrounds it — not by what supposedly lies in the hearts of the drafters." Aplt. Br. at 2.

Where would such inquiries end? If the President of the United States were to determine that Judge Chuang was a partisan Democrat who was agitated by the undoing of the work of a prior Administration in which he served in a senior capacity, could it be said that the judge was motivated by his "animus" toward the current President and his policies? Should the President then treat this novel and constitutionally unsupportable injunction as being invalid and unenforceable? Should the prior statements and acts of Judge Chuang be evaluated to determine if his service in the Obama Administration as deputy general counsel of the Department of Homeland Security from 2009 to 2014 colored his decision about an EO undoing the immigration policies of the last Administration?[20] Can the judge's motives be discerned from the fact that, in that previous position, he reportedly "pursued policies that are diametrically opposed to those of President Trump [and] that many legal scholars and political commentators ... suggest that the impartiality of Judge Chuang's ... ruling 'might reasonably be questioned'"? *Id*. Was Harvard Law Professor Alan Dershowitz correct in saying "If Obama had issued the very same order with the same words it would be constitutional" and "this wasn't constitutional analysis. It was psychoanalysis"? *Id*.

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[20] M. Leahy, "Impartiality of Federal Judge Who Blocked Trump EO May Be In Question," Breitbart (Mar. 21, 2017), http://www.breitbart.com/big-government/2017/03/21/impartiality-of-federal-judge-who-blocked-trump-eo-may-be-in-question/.

Is the fact that Senator John McCain — no friend of the President — entered a statement in the Congressional Record to explain that he voted against Judge Chuang's confirmation because of "his involvement in the State Department's ... refus[al] to comply with a subpoena from the House Oversight and Government Reform Committee ... stonewalling attempts by Congress to uncover the truth surrounding the events in Benghazi on September 11, 2012" benchmark evidence of Judge Chuang's animus toward Republicans?[21]

As Chief Justice Burger explained in an important case about Presidential authority:

> the Judiciary always must be hesitant to probe into the elements of Presidential decisionmaking, just as other branches should be hesitant to probe into judicial decisionmaking. [Nixon v. Fitzgerald, 457 U.S. 731, 761 (1982) (Burger, C.J., concurring).]

The correct approach to a case such as this is to evaluate the Executive Order for what it is, rather than what one district court judge thought motivated it. As Justice Powell more specifically amplified in Nixon, "Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of them highly sensitive...." The consequences of this Court sanctioning the approach of Judge Chuang would "subject the President to trial on virtually every allegation that an action was unlawful, or was taken for a

[21] 160 Cong. Rec. S2590 (May 1, 2014).

forbidden purpose." *Id*. at 756. If Judge Chuang's approach here is sanctioned, there would be no stopping point: not only would motives be put on trial, but litigants would be enticed to find some "forbidden purpose" to challenge the legality of any official act. The search for motive transforms the judicial process from an objective legal search for legal principles to a psychological search to determine the state of the mind.

President Trump explained that the SEO's purpose was to "protect the American people from terrorist attacks by foreign nationals admitted to the United States," based on the best intelligence available to him. But Judge Chuang apparently knew better, enjoining the President based on the judge's belief that "no terrorist attacks have been committed on U.S. soil by nationals of the banned countries since September 11, 2001." In United States v. Masciandaro, 638 F.3d 458 (4th Cir. 2011), this Court refused to allow a law-abiding citizen to possess a firearm while asleep in his truck in the woods. Judge Niemeyer asserted: "This is serious business. **We do not wish to be even minutely responsible for some unspeakably tragic act** of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights." *Id.* at 475. The question now is whether the judges on this Court are willing to join Judge Chuang in assuming

full responsibility for overturning the President's attempt to prevent potential terrorists from entering the country.

IV. The President of the United States Is Not a Proper Party to this Case.

The district court had no power to enjoin the President, and thus President Trump never should have been named in his official capacity as a party to this litigation. *See* Brief for Appellants at 39-41. Can there by any doubt that President Trump was named as the lead defendant in the complaint, not because of any legal necessity, but for political effect? Yet, without raising a question, the district court permitted the case against the President to proceed to judgment, issuing an order that "Donald J. Trump, in his official capacity as President of the United States" is "ENJOINED from enforcing Section 2(c) of Executive Order 13,780."

As the Brief for Appellants notes, "courts generally 'ha[ve] no jurisdiction ... to enjoin the President in the performance of his official duties.'" *Id.* at 40 (quoting Franklin v. Massachusetts, 505 U.S. 788, 800-03 (1992)). That is putting it mildly. In Franklin, the Supreme Court struck down a district court's injunction against the president, noting that, while a district court clearly could enjoin a lower level federal official like a cabinet secretary[22] (note that, Secretaries Kelly and

[22] *See, e.g.,* Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952) (even though President Truman made the decision to seize the steel mills,

Tillerson and Director Coats also were named as defendants in this case), "the District Court's grant of injunctive relief against the President himself is extraordinary, and should have raised judicial eyebrows." *Id.* at 802. Writing in concurrence, Justice Scalia went even further, asserting that "[i]t is a commentary upon the level to which judicial understanding — indeed, even judicial awareness — of the doctrine of separation of powers has fallen, that the District Court entered this order against the President without blinking an eye." *Id.* at 826. Justice Scalia noted that, up until at least 1984, "'[n]o court has ever issued an injunction against the president himself or held him in contempt of court.'" *Id.* at 827. Unfortunately, that long tradition did not stop the district court in this case, which apparently issued its injunction "without blinking an eye."

Over a century before Franklin, the Supreme Court was asked to enjoin a President in Mississippi v. Johnson, 71 U.S. 475 (1866). There, the Supreme Court considered Mississippi's request "to enjoin President Andrew Johnson from enforcing the Reconstruction Acts." Franklin at 827. First, the Court distinguished between suits against the President seeking to have him perform a "mere ministerial duty [with] no room for the exercise of judgment," and cases

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Secretary Sawyer was enjoined from enforcing that decision); *see also* Marbury v. Madison, 5 U.S. 137 (1803) (even though President Jefferson made the decision not to deliver former President John Adams' appointments, it was Secretary of State James Madison who was party to the case).

which involve "the exercise of Executive discretion." Johnson at 499. Although leaving open the question of whether the president could be ordered to perform mere ministerial acts, the Court nevertheless was "fully satisfied that this court has no jurisdiction ... to enjoin the President in the performance of his official duties...." *Id.* at 501. Clearly, President Trump's issuance and enforcement of the SEO was an act in the performance of his official duties.[23]

As early as 1838, the High Court observed that "The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power." Kendall v. United States, 37 U.S. 524, 610 (1838). And, as it is with the President, so too it is with the other branches of government. Twenty-eight years later, in Johnson, the Supreme Court noted that the courts cannot "restrain the **enactment** of an unconstitutional law" by the legislative any more than **the Executive** "can be restrained in its action." Johnson at 500.[24]

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[23] *See* Marbury v. Madison at 170 ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.").

[24] *See also* Fitzgerald at 829 (Scalia, J., concurring); Newdow v. Bush, 391 F. Supp. 2d 95, 105 (D.D.C. 2005) ("The issuance of an injunction or a declaratory

In Nixon v. Fitzgerald — a civil suit for damages based on the President's official actions as president — the Supreme Court further explained the reasoning behind the president's absolute immunity. There, an Air Force employee was terminated soon after he provided congressional testimony unfavorable to the administration, and alleged that his termination constituted unlawful retaliation. *Id.* at 736. In finding that presidents have "absolute immunity from damages liability predicated on ... official acts," the Court noted that "'[t]he president cannot ... be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.'" *Id.* at 749.[25] In addition, the Court theorized that "'the President, personally, was not subject **to**

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judgment against the President draws the Court into serious separation-of-powers issues. In particular, there is long-standing legal authority that the courts cannot issue injunctions against the co-equal Executive and Legislative branches of our government."); Swan v. Clinton, 100 F.3d 973, 978 (D.C. Cir. 1996) (noting that a court may have authority to order the president to perform "purely 'ministerial' dut[ies]," but cautioning that even in such a case, "[t]he reasons why courts should be hesitant to grant such relief are painfully obvious; the President, like Congress, is a coequal branch of government, and for the President to be ordered to [do something], at best creates an unseemly appearance of constitutional tension and at worst risks a violation of the constitutional separation of powers.").

[25] Indeed, as the Court noted in Fitzgerald, "several delegates ... [a]t the Constitutional Convention expressed concern that subjecting the President even to impeachment would impair his capacity to perform his duties of office." *Id.* at 750 n.31.

any process whatever ... For [that] would ... put it in the power of a common justice to exercise any authority over him and stop the whole machine of government.'" *Id.* at 750 n.31 (emphasis added).

By permitting President Trump to be named a party to this litigation, the district court improperly allowed the President to be subject to the jurisdiction of a coequal branch of government, and thus theoretically subject even to "imprisonment for disobedience" should the President, for example, refuse to abide by the order and be found to be in contempt of court. *See id.*

The Court explained in Fitzgerald, "[t]he President occupies a unique position in the constitutional scheme." He is "the chief constitutional officer of the Executive Branch," and "it is the President who is charged constitutionally to 'take Care that the Laws be faithfully executed'" and to "conduct ... foreign affairs — a realm in which the Court has recognized that '[it] would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive....'" *Id.* at 750. The President's independence from the judiciary is "[t]he essential purpose of the separation of powers ... to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches." *Id*. at 760-61. The Constitution sets out only one oath — that to be

taken by the President of the United States — and no other federal official or member of the judicial branch is tasked with faithfully executing the laws. To subject the President to the injunctive power of the courts subverts his duty to execute the laws as the Constitution requires.

Here, the district court inserts the judiciary into the foreign affairs of this nation and, in doing so, has "produce[d] a needless head-on confrontation[] between [a] district judge[] and the Chief Executive." Franklin at 828 (Scalia, J., concurring). The district court apparently believed that, among the co-equal branches of our government, the United States District Court for the District of Maryland is "more equal than others."[26] In its injunction against the President — the only official elected by all the People, and removable only by impeachment for "Treason, Bribery, or other high Crimes and Misdemeanors"[27] — the district judge (unelected and holding its office only during a period of "good behaviour"[28]) ignored clear and unambiguous language from the Supreme Court chastising past courts that have attempted to do what this district court has done here.

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[26] *See* George Orwell, Animal Farm (Penguin Books: 1996) p. 135.

[27] Article II, Section 4.

[28] Article III, Section 1.

The lower court has shown itself to be both audacious in its belief as to the scope of its own authority,[29] and — at best — ignorant of the unique constitutional office of the President and of this nation's constitutional separation of powers. The district court's immigration injunction against the President of the United States is unprecedented, and vastly exceeded the district court's authority. The order subverts the President's constitutional and unilateral authority to "take Care that the Laws be faithfully executed," and it cannot stand.[30]

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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[29] The judiciary, of course, relies upon the executive branch to enforce its orders. "If the president refuse obedience, it is needless to observe that the court is without power to enforce its process." Johnson at 500-01.

[30] To be sure, this is not the first time a district court has attempted to enjoin a president. *See* Hedges v. Obama, 890 F. Supp. 2d 424 (S.D.N.Y. 2012) (injunction reversed on the merits in Hedges v. Obama, 724 F.3d 170 (2d Cir. 2013), and thus it was not necessary for the circuit court to reach the issue).

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IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* complies with the word count limitation set forth by Rule 29(d) because this brief contains 6,481 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. 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 this brief has been prepared in a proportionally spaced typeface using W ordPerfect version 18.0.0.200 in 14-point Times New Roman.

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Dated: March 31, 2017

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IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of United States Justice Foundation, *et al.*, in Support of Defendants-Appellants, was made, this 31st day of March 2017, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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