**Nos. 16-1436, 16-1540**

# In the Supreme Court of the United States

DONALD J. TRUMP, *ET AL.*, Petitioners,
*v.*
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *ET AL.*, Respondents.

DONALD J. TRUMP, *ET AL.*, Petitioners,
*v.*
STATE OF HAWAII, *ET AL.*, Respondents.

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS*

## BRIEF OF *AMICUS CURIAE* AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS AND URGING REVERSAL


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## *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS AND URGING REVERSAL OF THE DECISIONS BELOW AND VACATION OF THE PRELIMINARY INJUNCTIONS

In this brief, *amicus curiae*, the American Center for Law and Justice, addresses the President's broad discretion over immigration matters and demonstrates how the Executive Order does not violate the Establishment Clause (the second question presented). Counsel for the parties consent to the filing of this brief.[1]

## STATEMENT OF INTEREST

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. Counsel for the ACLJ have presented oral argument, represented parties, and submitted *amicus curiae* briefs before this Court and other courts around the country in cases involving the Establishment Clause and immigration law. *See, e.g., United States v. Texas*, 136 S. Ct. 2271 (2016); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *FEC v. Wis. Right to Life*, 551 U.S. 449 (2007); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v.*

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

*Mergens ex rel. Mergens*, 496 U.S. 226 (1990); *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017); *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017).

The ACLJ has actively defended, through advocacy and litigation, immigration-related policies that protect American citizens. This brief is supported by members of the ACLJ's Committee to Defend Our National Security from Terror, which represents more than 250,000 Americans who have stood in support of the President's Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States.

## SUMMARY OF THE ARGUMENT

The federal government's primary job is to keep this nation safe. The President's revised national security Executive Order ("EO")[2] is designed to do just that. The EO temporarily pauses entry into the United States of refugees and nationals from six unstable and/or terrorism-infested countries to allow time for needed improvements to the immigration and refugee screening processes.

Under the Constitution and federal statutes, the President has broad power to exclude aliens from this country for national security reasons. Courts

[2] Exec. Order No. 13,780 (Protecting the Nation from Foreign Terrorist Entry into the United States), 82 Fed. Reg. 13,209 (Mar. 9, 2017).

generally defer to the exercise of the President's power in this area, which is what the lower courts should have done here. The EO is a valid exercise of President Trump's authority that should not be disturbed.

Moreover, the mere suggestion of a possible religious or anti-religious motive, mined from past comments of a political candidate or his supporters uttered on the campaign trial as private citizens, is not enough to defeat the EO. Even under *Lemon*'s purpose prong, all that is needed to establish the constitutionality of a government action is that it have *a* secular purpose and was not motivated wholly by religious considerations. The EO clearly serves a genuine secular purpose—protecting our national security—and is not motivated by anti-religious considerations.

The decisions below should be reversed and the preliminary injunctions should be vacated to permit the EO to be enforced in full to protect our nation from foreign terrorists.

## ARGUMENT

### I. The Executive Order should be reviewed under the deferential standards applicable to the immigration policymaking and enforcement decisions of the political branches, which the Executive Order satisfies.

These cases involve the special context of an EO concerning the entry into the United States of refugees as well as nationals of six countries of particular concern, enacted pursuant to the President's constitutional and statutory authority.[3]

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[3] The six countries of concern are Iran, Libya, Somalia, Sudan, Syria, and Yemen primarily because they are terrorist breeding grounds. *E.g.*, Exec. Order No. 13,780, 82 Fed. Reg. 13,209, § 1 (findings supporting national security basis for EO); U.S. Dep't of State, *Country Reports on Terrorism 2015*, June 2016, www.state.gov/documents/organization/258249.pdf, at 11-12 (discussing terrorism in Somalia), 165-66 (describing Syria, Libya, and Yemen as primary theaters of terrorist activities), 299-302 (designating Iran, Sudan, and Syria as state sponsors of terrorism). Moreover, as noted in sociological literature, large numbers of incoming refugees, particularly those without adequate background verification, can pose the potential for a higher risk of terrorist activity to a welcoming nation. As one study explains, "[a] cross-national time-series data analysis of 154 countries from the years 1970-2007 shows evidence that countries with many refugees are more likely to experience both domestic and international terrorism." Seung-Whan Choi & Idean Salehyan, *No Good Deed Goes Unpunished: Refugees, Humanitarian Aid, and Terrorism*, 30 CONFLICT MGMT. & PEACE SCI. 53, 53 (2013) (abstract).

As discussed herein, when this Court has considered constitutional challenges to immigration-related actions of this sort, it has declined to subject those actions to the same level of scrutiny applied to non-immigration-related actions, choosing instead to take a considerably more deferential approach, which is what the lower courts should have done here.

### A. Judicial review of the immigration-related actions of the political branches is deferential.

This Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)). Indeed, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Moreover, the Constitution "is not a suicide pact," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963), and the President has broad national security powers that may be exercised through immigration restrictions. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952).

Not only do the decisions below undermine the President's national security authority, they also undercut the considered judgment of Congress (in bolstering the President's broad discretion) that

> [*w*]*henever the President finds* that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, *he may* by proclamation, and for such period *as he shall deem necessary*, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions *he may deem to be appropriate*.

8 U.S.C. § 1182(f) (2012) (emphasis added).

Where, as here, a President's action is authorized by Congress, "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Frankfurter, J., concurring)). The EO falls squarely within the President's constitutional and statutory authority and should be upheld in full. As this Court recently noted,

> [n]ational-security policy is the prerogative of the Congress and President. Judicial inquiry into the national-security realm raises concerns for the separation of powers in trenching on matters committed to other branches. . . . For these and other reasons, courts have shown deference to what the Executive Branch has determined . . . is essential to national security. Indeed, courts

> traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs unless Congress specifically has provided otherwise. Congress has not provided otherwise here.

*Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017) (citation and internal quotation marks omitted).

### B. The Executive Order is constitutional under this Court's deferential standards applicable to challenges to the political branches' immigration-related actions.

In *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), the Court rejected a First Amendment challenge to the Attorney General's decision to decline to grant a waiver that would have allowed a Belgian scholar to enter the country on a visa in order to speak to American professors and students. The Court held that "the power to exclude aliens is 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government.'" *Id.* at 765 (citations omitted). The Court concluded by stating that

> plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. In the case of an alien excludable under § 212 (a)(28), Congress has delegated conditional exercise of this 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 that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.

*Id.* at 769-70; *see also Kerry v. Din*, 135 S. Ct. 2128, 2139-41 (2015) (Kennedy, J., concurring) (the government's statement that a visa application was denied due to suspected involvement with terrorist activities "satisf[ied] *Mandel*'s 'facially legitimate and bona fide' standard").

Similarly, in *Fiallo*, this Court rejected a challenge to statutory provisions that granted preferred immigration status to most aliens who are the children or parents of United States citizens or lawful permanent residents, except for illegitimate children seeking that status by virtue of their biological fathers, and the fathers themselves. 430 U.S. at 788-90. The Court stated:

> At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens.

*Id.* at 792 (citation omitted). The Court noted that it had previously "resolved similar challenges to immigration legislation based on other constitutional rights of citizens, and has rejected the suggestion that more searching judicial scrutiny is required." *Id.* at 794. Additionally, the Court stated, "[w]e can see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*, a First Amendment case." *Id.* at 795. Furthermore, the Court emphasized that "it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision," *id.* at 799, and concluded that the plaintiffs raised "policy questions entrusted exclusively to the political branches of our Government." *Id.* at 798.

The legality of executive orders related to immigration does not turn on a judicial guessing game of what the President's subjective motives were at the time the order was issued. Instead, *Mandel*, *Fiallo*, and other cases dictate that courts should rarely look past the face of such orders. *See Washington v. Trump*, 853 F.3d 933, 939 n.6 (9th Cir. 2017) (Bybee, J., dissenting from denial of reconsideration en banc) (the panel's "unreasoned assumption that courts should simply plop Establishment Clause cases from the domestic context over to the foreign affairs context ignores the realities of our world").

The EO is closely tethered to well-established discretionary powers vested in the Executive Branch by the Constitution and statute. The EO *temporarily*

pauses entry into the United States of refugees under the United States Refugee Admissions Program as well as nationals of six unstable and/or terrorism-infested countries, which were designated as such by the prior administration, for the legitimate secular purpose of allowing time for needed improvements to the immigration and refugee screening processes.

The EO does *not* single out Muslims for disfavored treatment. The countless millions of non-American Muslims who live outside the six countries of particular concern are not restricted by the EO. Neither does it limit its application to Muslims in the six designated countries; instead, it applies to all citizens of the six enumerated countries irrespective of their faith. There is ample justification for the determination of multiple administrations that the six designated countries pose a particular risk to American national security. Respondents' objection to the EO is a policy dispute that should be resolved by the political branches, not by the federal courts.

The EO is similar in principle to the National Security Entry Exit Registration System ("NSEERS") implemented after the terrorist attacks of September 11, 2001, which was upheld by numerous federal courts. *Rajah v. Mukasey*, 544 F.3d 427, 438-39 (2d Cir. 2008) (citing cases). Under this system, the Attorney General imposed special requirements upon foreign nationals present in the United States who were from specified countries. The first group of countries designated by the Attorney General included Iran, Libya, Sudan and Syria, and a total of

twenty-four Muslim majority countries and North Korea were eventually designated. *Id.* at 433 n.3.

In one illustrative NSEERS case, the United States Court of Appeals for the Second Circuit rejected arguments that are strikingly similar to the arguments accepted by the lower courts here:

> There was a rational national security basis for the Program. The terrorist attacks on September 11, 2001 *were facilitated by the lax enforcement of immigration laws*. The Program was [rationally] designed to monitor more closely aliens from *certain countries selected on the basis of national security criteria*. . . .
>
> To be sure, the Program did select countries that were, with the exception of North Korea, predominantly Muslim. . . . However, one major threat of terrorist attacks comes from radical Islamic groups. The September 11 attacks were facilitated by violations of immigration laws by aliens from predominantly Muslim nations. The Program was clearly tailored to those facts. . . . The program did not target only Muslims: non-Muslims from the designated countries were subject to registration. There is therefore no basis for petitioners' claim.

*Id.* at 438-49 (emphasis added) (citation omitted). Similarly, the EO at issue here is constitutional.[4]

## II. The Executive Order is constitutional even under a traditional Establishment Clause analysis.

As noted previously, consideration of the EO must take into account the deferential nature of judicial review of immigration-related actions. Nevertheless, the EO is constitutional even under non-immigration-related Establishment Clause jurisprudence. The Fourth Circuit determined (wrongly) that the EO likely violates the Establishment Clause. Jt. App. at 236. The Ninth Circuit did not reach the issue. *Id.* at 1178.

Assuming the "purpose prong" of the *Lemon v. Kurtzman*, 403 U.S. 602(1971), test applies, the EO clearly satisfies it. The EO's predominant purpose is its stated objective, namely, protecting national

[4] In affirming parts of the preliminary injunction issued by the Hawaii trial court, the Ninth Circuit employed a novel reading of 8 U.S.C. § 1182(f) to conclude that the President exceeded his statutory authority by not making sufficient findings. Jt. App. at 1209. The Ninth Circuit's reading of Section 1182(f) is wrong because it directly contradicts the statute's unambiguous language providing the President with broad discretion to suspend or restrict entry of aliens into our country "whenever *he finds* that [their entry] would be detrimental to the interests of the United States." (emphasis added).

security, and, therefore, the government action here has a "secular legislative purpose." *Id.* at 612-13.[5]

The Fourth Circuit sidestepped the EO's obvious secular purposes by focusing on miscellaneous comments made by then-candidate Trump, or his advisors, which is flawed for at least four reasons.

First, this Court has stated that the primary purpose inquiry concerning statutes may include consideration of the "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history [and] the historical context of the statute . . . and the specific sequence of events leading to [its] passage." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) (citation and internal quotation marks omitted); *see also id.* (noting that the primary purpose inquiry is limited to consideration of "the 'text, legislative history, and implementation of the statute,' or comparable *official act*") (citation omitted and emphasis added).

The Fourth Circuit relied upon several quotes, made as long ago as 2015, by then-candidate Trump

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[5] The suggestion that the EO should be reviewed under *Lemon*'s purpose prong is particularly troubling given the flawed and inconsistent nature of the test. *See* Jay A. Sekulow & Erik M. Zimmerman, *Posting the Ten Commandments is a "Law Respecting an Establishment of Religion"?: How* McCreary County v. ACLU *Illustrates the Need to Reexamine the* Lemon *Test and Its Purpose Prong*, 23 T.M. COOLEY L. REV. 25 (2006) (discussing the irrational and inconsistent results produced by application of the *Lemon* test, especially the purpose prong).

and/or individuals holding some non-governmental position within his political campaign. Jt. App. at 219-22. Clearly, comments made, or actions taken, by a private citizen while a candidate for public office (or his or her advisors) *while on the campaign trail* are not "official" *government* acts, and do not constitute "*contemporaneous* legislative history." *McCreary Cnty.*, 545 U.S. at 862; *cf. Clinton v. Jones*, 520 U.S. 681, 686 (1997) (alleged misconduct occurring before Bill Clinton became President was not an "official" act).

Indeed, "one would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002). Thus, the Fourth Circuit failed to properly limit its inquiry to official acts or statements in conducting its Establishment Clause analysis. Presidential campaign rhetoric is inherently unofficial and unreliable and should not be considered. *See Washington v. Trump*, 858 F.3d 1168, 1173 (9th Cir. 2017) (Kozinski, J., dissenting from denial of reconsideration en banc) (explaining that, for Establishment Clause analysis, it "is folly" to consider a political candidate's campaign trail rhetoric, which is often contradictory or inflammatory).

Second, the Fourth Circuit's extensive reliance upon purported evidence of a subjective, personal anti-Muslim bias of the President and some of his advisors is improper because "what is relevant is the legislative purpose of *the statute*, not the possibly

religious motives of *the legislators* who enacted the law." *Bd. of Educ. v. Mergens ex rel. Mergens*, 496 U.S. 226, 249 (1990) (plurality opinion) (emphasis added). In short, the lower court engaged in the kind of "judicial psychoanalysis of a drafter's heart of hearts" that is foreclosed by this Court's precedent. *McCreary Cnty.*, 545 U.S. at 862.

The EO, on its face, serves secular purposes, and no amount of rehashing of miscellaneous campaign trail commentary can change that, especially when the content of the current EO is substantively different from the now-repealed previous executive order. In fact, a foray into the malleable arena of legislative history is not even a *requirement* in all Establishment Clause cases. *See Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (noting this Court's "reluctance to attribute unconstitutional motives to the [government] particularly when a plausible secular purpose . . . may be discerned from the face of the statute"); *see also Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring) (explaining that inquiry into the government's purpose should be "deferential and limited").

As Judge Niemeyer explained in his dissenting opinion in *International Refugee Assistance Project*, the majority's use of campaign statements to convert the facially neutral EO into an Establishment Clause violation was improper. The "Supreme Court has never applied the Establishment Clause to matters of national security and foreign affairs." Jt. App. at 349 (Niemeyer, J., dissenting). In the few cases in which the Court has invalidated government actions based

on a religious purpose, for example, *Edwards v. Aguillard*, 482 U.S. 578 (1987), "the Court found the government action inexplicable *but for* a religious purpose, and it looked to extrinsic evidence only to confirm its suspicion, prompted by the face of the action, that it had religious origins." Jt. App. at 350-51 (Niemeyer, J., dissenting). Those cases are manifestly distinguishable from the EO, which "is framed and enforced without reference to religion, and the government's proffered national security justifications . . . are consistent with the stated purposes of the [EO]." *Id.* at 351. "Conflicting extrinsic statements made prior to the [EO]'s enactment surely cannot supplant its facially legitimate national security purpose." *Id.*

Third, the mere suggestion of a possible religious or anti-religious motive, mined from past comments of a political candidate or his supporters, and intermixed with various secular purposes, is not enough to doom government action (along with all subsequent attempts to address the same subject matter). "[A]ll that *Lemon* requires" is that government action have "*a* secular purpose," not that its purpose be "*exclusively* secular," *Lynch v. Donnelly*, 465 U.S. 668, 681, 700 n.6 (1984) (citation omitted and emphasis added), and a policy is invalid under this test only if "the government acts with the ostensible and *predominant* purpose of advancing religion." *McCreary Cnty.*, 545 U.S. at 860 (emphasis added); *see also Van Orden v. Perry*, 545 U.S. 677, 703 (2005) (Breyer, J., concurring) (upholding government action that "serv[ed] a mixed but primarily nonreligious purpose"); *Bowen v. Kendrick*,

487 U.S. 589, 602 (1988) ("[A] court may invalidate a statute only if it is motivated *wholly* by an impermissible purpose.") (emphasis added).

The EO clearly serves secular purposes and, therefore, it satisfies *Lemon*'s purpose test. *See Sarsour v. Trump*, 2017 U.S. Dist. LEXIS 43596, at *24-34 (E.D. Va. 2017) (rejecting the claim that the EO violates the purpose prong of *Lemon* and noting that the EO is a facially lawful exercise of the President's authority and that the stated national security purpose of the EO is not a pretext for discrimination against Muslims).[6]

Lastly, under the Fourth Circuit's analysis, any hypothetical future immigration-related orders issued by the current President will be irredeemably tainted by the alleged subjective, predominantly anti-Muslim intent of the President and his surrogates,

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[6] Further evidence to dispel the notion that the EO is a cover for anti-Muslim discrimination is found in the May 3, 2017, testimony by then-FBI Director James Comey before the Senate Judiciary Committee on FBI Oversight. Comey testified that the FBI has over 2,000 "violent extremist investigations" and "about 300 of them [roughly 15%] are people who came to the United States as refugees." *Read the full testimony of FBI Director James Comey in which he discusses Clinton email investigation*, WASHINGTON POST (May 3, 2017) www.washingtonpost.com/news/post-politics/wp/2017/05/03/read-the-full-testimony-of-fbi-director-james-comey-in-which-he-discusses-clinton-email-investigation/?utm_term=.874b0288f409; *see also* Mark Krikorian, *Comey: 15 Percent of Terror Cases Came as Refugees*, NAT'L REVIEW (May 8, 2017, 4:50 PM), www.nationalreview.com/corner/447423/comey-terror-cases-refugees.

which runs contrary to this Court's admonition that the government's "past actions" do not "forever taint any effort . . . to deal with the subject matter." *McCreary Cnty.*, 545 U.S. at 874; *see also ACLU of N.J. ex rel. Lander v. Schundler*, 168 F.3d 92, 105 (3d Cir. 1999) (Alito, J.) ("The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked 'a secular legislative purpose,' or that it was 'intended to convey a message of endorsement or disapproval of religion.'") (citation omitted); *Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556, 564 (8th Cir. 2009) ("Another reason we reject the district court's *Lemon* analysis is that . . . [it] would preclude the District from *ever* creating a limited public forum in which religious materials may be distributed in a constitutionally neutral manner.").

The many substantive differences between the prior executive order and the existing EO constitute genuine changes in constitutionally significant conditions that cured any actual or perceived Establishment Clause deficiencies. *See Sarsour*, 2017 U.S. Dist. LEXIS 43596, at *33 ("[T]he substantive revisions reflected in [the EO] have reduced the probative value of the President's statements to the point that it is no longer likely that Plaintiffs can succeed on their claim that the predominant purpose of [the EO] is to discriminate against Muslims based on their religion and that [the EO] is a pretext or a sham for that purpose.").

The EO was narrowly crafted to address concerns raised during litigation over the prior executive order, with the secular goal of protecting national security. Addressing actual or perceived flaws in previous iterations of a law or policy, in order to bolster the likelihood that it will be upheld in litigation, is itself a valid secular purpose. *See, e.g., ACLU of Ky. v. Rowan Cnty.*, 513 F. Supp. 2d 889, 904 (E.D. Ky. 2007) (in Establishment Clause cases, changing a policy in "an attempt to avoid litigation . . . is an acceptable purpose").

Plain and simple, the EO does not violate the Establishment Clause. It should be enforced in full to protect our nation from foreign terrorists. As Judge Shedd properly noted in his dissenting opinion regarding the preliminary injunction upheld by the Fourth Circuit (words also applicable to the preliminary injunction upheld by the Ninth Circuit):

> the real losers in this case are the millions of individual Americans whose security is threatened on a daily basis by those who seek to do us harm. . . . [T]he security of our nation is indisputably lessened as a result of the injunction. Moreover, the President and his national security advisors (and perhaps future Presidents) will be seriously hampered in their ability to exercise their constitutional duty to protect this country.

Jt. App. at 366-67 (Shedd, J., dissenting).

## CONCLUSION

This Court should reverse the decisions below and vacate the preliminary injunctions.

Respectfully submitted,

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