ROBERT K. MATSUMOTO
[redacted]
Counsel for amicus curiae

JAY ALAN SEKULOW*
AMERICAN CENTER FOR LAW AND JUSTICE
[redacted]
* Not admitted in this jurisdiction

(See Next Page For Additional Counsel)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

STATE OF HAWAII and ISMAIL ELSHIKH, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	CASE NO. 1:17-cv-50-DKW-KJM [redacted]

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE SUPPORTING DEFENDANTS

Additional Counsel

STUART J. ROTH*
COLBY M. MAY*
ANDREW J. EKONOMOU*
JORDAN SEKULOW*
CRAIG L. PARSHALL*
MATTHEW R. CLARK*
BENJAMIN P. SISNEY*
AMERICAN CENTER FOR LAW AND JUSTICE
[redacted]

FRANCIS J. MANION*
GEOFFREY R. SURTEES*
AMERICAN CENTER FOR LAW AND JUSTICE
[redacted]

EDWARD L. WHITE III*
ERIK M. ZIMMERMAN*
AMERICAN CENTER FOR LAW AND JUSTICE
[redacted]

* Not admitted in this jurisdiction

Counsel for amicus curiae

Interest of *Amicus Curiae*

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* briefs before the Supreme Court of the United States and other courts around the country in cases concerning the First Amendment and immigration law. *See, e.g., FEC v. Wisc. Right to Life*, 551 U.S. 449 (2007); *McConnell v. FEC*, 540 U.S. 93 (2003); *United States v. Texas*, 136 S. Ct. 2271 (2016). The ACLJ has actively defended, through advocacy and litigation, immigration policies that protect American citizens.[1]

Argument

I. Supreme Court precedent dictates that the challenged Executive Order be reviewed under the deferential standards applicable to the immigration policymaking and enforcement decisions of the political branches, which the Order satisfies.

Plaintiffs have treated this case as if it were a run-of-the-mill Establishment Clause case. It is not. The cases they primarily rely upon, which green-lighted a detailed inquiry into the primary purpose and effect of the government's actions, involved factual contexts such as the public display of the Ten Commandments and laws concerning public education. In stark contrast, this case involves the

[1] No party to the case drafted any portion of this *amicus curiae* brief, and no one other than *amicus curiae*, its members, or its counsel paid for the preparation or submission of the brief.

special context of an executive order ("EO") concerning the entry into the United States of refugees and nationals of certain countries of particular concern, enacted pursuant to the President's constitutional and statutory authority. When the Supreme 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. The EO is valid under this standard.

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

"The Supreme 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.'" *Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)). 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 protecting national security is the government's first responsibility. The President has broad national security powers, which may be exercised through immigration restrictions. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588 (1952).

Plaintiffs' requested TRO would also undercut the considered judgment of Congress 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). 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, 2083-84 (2015) (citation omitted). The EO falls squarely within the President's constitutional and statutory authority.

B. The Order is constitutional under the Supreme Court's deferential standards applicable to constitutional 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 plaintiffs (American professors) contended that the denial deprived them of their First Amendment right to receive information from him. The Court noted that, although it had previously "referred to a First Amendment right to 'receive information and ideas,'" the

> [r]ecognition that First Amendment rights are implicated, however, is not dispositive of our inquiry here. In accord with ancient principles of the international law of nation-states . . . 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 764-66 (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*, the Court rejected a challenge to statutory provisions that granted preferred immigration status to most aliens who are the children or parents of U.S. 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. . . . [W]e observed recently that in the

> exercise of its broad power over immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens." . . .

Id. at 792 (citations 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. 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.[2] 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. The Court concluded that the plaintiffs raised "policy questions entrusted exclusively to the political branches of our Government. . . ." *Id.* at 798; *see also Washington v. Trump*, 2017 U.S. App. LEXIS 2369, at *15-16 (9th Cir. 2017) (courts "owe substantial deference to the immigration and national security policy determinations of the political branches" when deciding whether such policies are constitutional).

[2] A Ninth Circuit panel's statement that the *Mandel* standard does not apply to "exercises of policymaking authority at the highest levels of the political branches," *Washington*, 2017 U.S. App. LEXIS 2369, at *17-18, is undercut by *Fiallo*'s reliance upon *Mandel* in the context of a Congressional statute which, like the EO, is an "exercise[] of policymaking authority at the highest levels of the political branches."

In sum, 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; rather, *Mandel*, *Fiallo*, and other cases dictate that courts should rarely look past the face of such orders. The EO is valid under this standard. It 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 USRAP as well as nationals of six unstable and/or terrorism-infested countries of particular concern, 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; to the contrary, the countless millions of non-American Muslims who live outside of 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.

Although it is well-established that litigants and courts should not be second-guessing the wisdom of, or evidentiary support for, the political branches' decision-making concerning immigration, Plaintiffs repeatedly do just that, positing that an order that seeks to effectively fight terrorism should be crafted differently than the EO. Dkt. #65-1 at 43-44. There is, however, ample justification

for the determination of multiple administrations that the six designated countries pose a particular risk to American national security.[3] Plaintiffs' objection to the EO is a policy dispute that should be resolved by the political branches.

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 24 Muslim majority countries and North Korea were eventually designated. *Id.* at 433 n.3. In one illustrative case, the Second Circuit

[3] *See, e.g.*, U.S. Dep't of State, *Country Reports on Terrorism 2015*, June 2016, https://www.state.gov/documents/organization/258249.pdf, at pp. 11-12 (discussing terrorism in Somalia), pp. 165-66 (describing Syria, Libya, and Yemen as primary theaters of terrorist activities), pp. 299-302 (designating Iran, Sudan, and Syria as state sponsors of terrorism); Dep't of Homeland Security, *United States Begins Implementation of Changes to the Visa Waiver Program* (Jan. 21, 2016), https://preview.dhs.gov/news/2016/01/21/united-states-begins-implementation-changes-visa-waiver-program & *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016), https://preview.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program (explaining that most nationals of Visa Waiver Program countries who are also nationals of Iran, Sudan, or Syria, or who visited those countries or Libya, Somalia, or Yemen on or after March 1, 2011, are ineligible to be admitted to the U.S. under the Program).

rejected arguments that are strikingly similar to the arguments presented by Plaintiffs 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. . . . Muslims from non-specified countries were not subject to registration. Aliens from the designated countries who were qualified to be permanent residents in the United States were exempted whether or not they were Muslims. 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). Similarly, the EO at issue here is constitutional.[4]

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

Justice Breyer's controlling opinion in *Van Orden v. Perry*, 545 U.S. 677 (2005), observed that, "[w]here the Establishment Clause is at issue, tests designed to measure 'neutrality' alone are insufficient." *Id.* at 698-99 (Breyer, J.,

[4] The mere fact that the six countries of particular concern designated by the EO happen to have Muslim majority populations is not evidence of religious animus. Under this reasoning, the benefits that the government provides to military veterans would be rendered constitutionally suspect by the mere fact that approximately 85% of them happen to be male, even though there are many legitimate reasons for providing such benefits unrelated to any gender-based bias.

concurring); *cf. Trunk v. City of San Diego*, 629 F.3d 1099, 1106-07 (9th Cir. 2011) ("[W]e do not apply an absolute rule of neutrality because doing so would evince a hostility toward religion that the Establishment Clause forbids."). Justice Breyer stated that, in "difficult borderline cases . . . I see no test-related substitute for the exercise of legal judgment . . . [which] must reflect and remain faithful to the underlying purposes of the [Religion] Clauses. . . ." *Id.* at 700. In this case, "the exercise of legal judgment" must take into account the deferential nature of judicial review of immigration-related actions such as the EO. Nevertheless, the EO is constitutional even under non-immigration-related Establishment Clause jurisprudence.

The EO satisfies the "purpose prong" of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), which "asks whether the challenged government action has a secular purpose or was taken for 'the ostensible and predominant purpose of advancing religion.'" *Access Fund v. U.S. Dep't of Agric.*, 499 F.3d 1036, 1043 (9th Cir. 2007) (quoting *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005)). As discussed previously, the EO's predominant purpose is protecting national security.

Plaintiffs' Establishment Clause argument places enormous emphasis on the now-repealed prior executive order, while completely ignoring the significantly different substance of the EO that is actually at issue in this case. Dkt. #65-1 at 40-45. Plaintiffs act as if it had been *conclusively established* that the prior order

violated the Establishment Clause, but that order was only considered on an extremely expedited basis in the context of requests for a TRO or preliminary injunction, and no appellate court decided the Establishment Clause issue. Although a Virginia district court issued a preliminary injunction against the now-repealed order on Establishment Clause grounds, *Aziz v. Trump*, 2017 U.S. Dist. LEXIS 20889 (E.D. Va. 2017), a Massachusetts district court concluded that the same order did not discriminate against Muslims. *Louhghalam v. Trump*, 2017 U.S. Dist. LEXIS 15531, at *13-14 (D. Mass. 2017). Furthermore, when the Ninth Circuit denied the President's emergency motion to stay a TRO, it held that the President was not likely to succeed on his *due process* argument, *Washington*, 2017 U.S. App. LEXIS 2369, at *22-29, and merely noted in passing that the Establishment Clause claims "raise serious allegations and present significant constitutional questions" while "reserv[ing] consideration of these claims." *Id.* at *31. As such, the disputed validity of the now-repealed order provides an incredibly thin reed upon which Plaintiffs have rested their Establishment Clause argument.

Additionally, even if the prior order was inconsistent with the Establishment Clause, the Supreme Court has held 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 Ky. v. Rowan Cnty.*, 513 F. Supp. 2d 889, 897 (E.D.

Ky. 2007) (holding that, under *McCreary County*, a government actor that purportedly had "an overtly religious purpose in the past, may 'get it right' at some point in the future, based on 'genuine changes in constitutionally significant conditions'"); *ACLU 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.'") (citations omitted); *Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556 (8th Cir. 2009) ("Another reason we reject the district court's *Lemon* analysis is that its emphasis on past practice and the views of individual Board members would preclude the District from ever creating a limited public forum in which religious materials may be distributed in a constitutionally neutral manner. . . . [S]chool officials must remain free to experiment in good faith with new policies.").

The Ninth Circuit illustrated this point in *Kong v. Scully* when it upheld statutory amendments that permitted Medicare and Medicaid payments for the nonmedical care of individuals who reject medical services for religious reasons. 341 F.3d at 1134. The only existing entities that qualified for such payments were Christian Science sanatoria that promoted spiritual healing. A previous provision that expressly applied only to Christian Scientists had been struck down in an

earlier case. *Id.* at 1137. Nevertheless, the Ninth Circuit upheld the modified provisions. *Id.* at 1140-41.

Similarly, the fact that enforcement of the now-repealed order—which was substantively different from the present EO in numerous ways—was preliminarily enjoined on an expedited basis does not support Plaintiffs' position here. Contrary to *McCreary County*'s admonition, Plaintiffs posit that the existing EO (and presumably any hypothetical future immigration-related orders issued by the current President) are irredeemably tainted by the alleged subjective, predominantly anti-Muslim intent of the President and his surrogates. Dkt. #65-1 at 40-45. Here, however, the many substantive differences between the prior order and the existing EO constitute "genuine changes in constitutionally significant conditions" that cured any actual or perceived Establishment Clause deficiencies. *See McCreary Cnty.*, 545 U.S. at 874.

Moreover, Plaintiffs' attempt to sidestep the EO's obvious secular purposes by focusing on miscellaneous comments made by then-candidate Trump, or one of his advisors, is flawed for at least three reasons. First, Plaintiffs have misapplied precedent that states 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.*, 545 U.S. at 862; *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). 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." *See id.* 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).

Second, Plaintiffs posit that there have been no "genuine changes in constitutionally significant conditions" that would justify upholding the EO because the President "has pointed to . . . no evidence that *his motives* have changed." Dkt. #65-1 at 44 (emphasis added). This analysis is flawed 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*, 496 U.S. 226, 249 (1990) (plurality op.) (emphasis added). Plaintiffs ask this Court to engage in the kind of "judicial psychoanalysis of a drafter's heart of hearts" that is foreclosed by Supreme Court 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. A foray into the

malleable arena of legislative history is not a *requirement* in all Establishment Clause cases; to the contrary, courts "must defer to [the government's] stated reasons if a 'plausible secular purpose . . . may be discerned from the face of the statute,'" which is the case here. *Trunk*, 629 F.3d at 1108 (quoting *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983)); *see also Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring) (inquiry into the government's purpose should be "deferential and limited").

One illustration of Plaintiffs' flawed attempt to concoct a predominantly religious purpose for the EO is their suggestion that a presidential policy advisor's statement that the EO "is designed to accomplish 'the same basic policy outcome for the country' as the first [order], while merely correcting 'a lot of very technical issues that were brought up by the court" constitutes evidence that the existing EO is really a wolf in sheep's clothing. Dkt. #65-1 at 42. Rather than being some sort of smoking gun, however, this comment merely suggests that the existing EO was narrowly crafted to address concerns raised during litigation over the prior order, with the secular goal of protecting national security in mind. 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., Rowan Cnty.*, 513 F. Supp. 2d at 904 (in Establishment Clause cases, changing a policy in "an attempt to avoid litigation . . . is an acceptable purpose").

Finally, 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," and a policy is invalid under this test only if it "was motivated *wholly* by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680-81 & n.6 (1984) (emphasis added); *see also Van Orden*, 545 U.S. at 703 (Breyer, J.) (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."). The EO clearly serves secular purposes and, therefore, it satisfies *Lemon*'s purpose test.

Conclusion

Plaintiffs' suggestion that adopting their flawed Establishment Clause analysis would be "perfectly consistent with the deference owed to the Executive in the national security and immigration context" is simply untenable in light of Supreme Court jurisprudence. Dkt. #65-1 at 45. The EO falls well within the President's broad discretion, provided by constitutional and statutory authority. Plaintiffs' motion should be denied.

Dated: March 13, 2017.

Respectfully submitted,

/s/ Robert K. Matsumoto
ROBERT K. MATSUMOTO
[redacted]

JAY ALAN SEKULOW*
STUART J. ROTH*
COLBY M. MAY*
ANDREW J. EKONOMOU*
JORDAN SEKULOW*
CRAIG L. PARSHALL*
MATTHEW R. CLARK*
BENJAMIN P. SISNEY*
AMERICAN CENTER FOR LAW AND JUSTICE
[redacted]

FRANCIS J. MANION*
GEOFFREY R. SURTEES*
AMERICAN CENTER FOR LAW AND JUSTICE
[redacted]

EDWARD L. WHITE III*
ERIK M. ZIMMERMAN*
AMERICAN CENTER FOR LAW AND JUSTICE
[redacted]

* Not admitted in this jurisdiction

Counsel for amicus curiae