

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

)
) Case No. 2:17-cv-00141-JLR
)
) AMERICAN CENTER FOR LAW &
) JUSTICE'S *AMICUS CURIAE* BRIEF
) OPPOSING EMERGENCY MOTION TO
) ENFORCE PRELIMINARY INJUNCTION
) (DKT. #119)
)
)
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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); *Washington v. Trump*, 2017 U.S. App. LEXIS 2369 (9th Cir. 2017). 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.

This case involves the 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, and Plaintiffs’ emergency motion should be denied.

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.

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’ position would also undercut the considered judgment of Congress that [w]henver 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 existing 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[ies] *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

1 lawful permanent residents, except for illegitimate children seeking that status by virtue of
2 their biological fathers, and the fathers themselves. 430 U.S. at 788-90. The Court stated:

3 At the outset, it is important to underscore the limited scope of judicial inquiry into
4 immigration legislation. This Court has repeatedly emphasized that “over no conceivable
5 subject is the legislative power of Congress more complete than it is over” the admission
6 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.” . . .

7 *Id.* at 792 (citations omitted).

8 The Court noted that it had previously “resolved similar challenges to immigration
9 legislation based on other constitutional rights of citizens, and has rejected the suggestion
10 that more searching judicial scrutiny is required.” *Id.* at 794. The Court stated, “[w]e can see
11 no reason to review the broad congressional policy choice at issue here under a more
12 exacting standard than was applied in *Kleindienst v. Mandel*, a First Amendment case.” *Id.* at
13 795.² The Court emphasized that “it is not the judicial role in cases of this sort to probe and
14 test the justifications for the legislative decision.” *Id.* at 799. The Court concluded that the
15 plaintiffs raised “policy questions entrusted exclusively to the political branches of our
16 Government. . . .” *Id.* at 798; *see also Washington*, 2017 U.S. App. LEXIS 2369, at *15-16
17 (courts “owe substantial deference to the immigration and national security policy
18 determinations of the political branches” when deciding whether such policies are
19 constitutional).
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24 ² The Ninth Circuit panel’s statement that the *Mandel* standard does not apply to “exercises
25 of policymaking authority at the highest levels of the political branches,” *Washington*, 2017
26 U.S. App. LEXIS 2369, at *17-18, is undercut by *Fiallo*’s reliance upon *Mandel* in the
27 context of a Congressional statute which, like the EO, was an “exercise[] of policymaking
28 authority at the highest levels of the political branches.”

1 In sum, the legality of executive orders related to immigration does not, as Plaintiffs'
 2 suggest, turn on a judicial guessing game of what the President's subjective motives were at
 3 the time; rather, *Mandel*, *Fiallo*, and other cases dictate that courts should rarely look past the
 4 face of such orders. The EO is valid under this standard. It is closely tethered to well-
 5 established discretionary powers vested in the Executive Branch by the Constitution and
 6 statute. The EO *temporarily* pauses entry into the United States of refugees under the
 7 USRAP as well as nationals of six unstable and/or terrorism-infested countries of particular
 8 concern, which were designated as such by the prior administration, for the legitimate secular
 9 purpose of allowing time for needed improvements to the immigration and refugee screening
 10 processes. The EO does *not* single out Muslims for disfavored treatment; to the contrary, the
 11 countless millions of non-American Muslims who live outside of the six countries of
 12 particular concern are not restricted by the EO. Neither does it limit its application to
 13 Muslims in the six designated countries; instead, it applies to all citizens of the six
 14 enumerated countries irrespective of their faith.

17 Although it is well-established that litigants and courts should not be second-guessing
 18 the wisdom of, or evidentiary support for, the political branches' decision-making concerning
 19 immigration, Plaintiffs do just that. Dkt. #119 at 9 & n.5. There is, however, ample
 20 justification for the determination of multiple administrations that the six designated
 21 countries pose a particular risk to American national security.³ Plaintiffs' objection to the
 22 existing EO is a policy dispute that should be resolved by the political branches.

25 ³ See, e.g., U.S. Dep't of State, *Country Reports on Terrorism 2015*, June 2016,
 26 <https://www.state.gov/documents/organization/258249.pdf>, at pp. 11-12 (discussing terrorism
 27 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);

(Continued...)

1 The EO is similar in principle to the National Security Entry Exit Registration System
 2 (“NSEERS”) implemented after the terrorist attacks of September 11, 2001, which was
 3 upheld by numerous federal courts. *Rajah v. Mukasey*, 544 F.3d 427, 438-39 (2d Cir. 2008)
 4 (citing cases). Under this system, the Attorney General imposed special requirements upon
 5 foreign nationals present in the United States who were from specified countries. The first
 6 group of countries designated by the Attorney General included Iran, Libya, Sudan and Syria,
 7 and a total of 24 Muslim majority countries and North Korea were eventually designated. *Id.*
 8 at 433 n.3. In one illustrative case, the Second Circuit rejected arguments that are strikingly
 9 similar to the arguments presented by Plaintiffs here:

11 There was a rational national security basis for the Program. The terrorist attacks on
 12 September 11, 2001 *were facilitated by the lax enforcement of immigration laws. . . .*
 13 The Program was [rationally] designed to monitor more closely aliens from *certain*
countries selected on the basis of national security criteria. . . .

14 To be sure, the Program did select countries that were, with the exception of North
 15 Korea, predominantly Muslim. . . . However, one major threat of terrorist attacks comes
 16 from radical Islamic groups. The September 11 attacks were facilitated by violations of
 17 immigration laws by aliens from predominantly Muslim nations. The Program was
 18 clearly tailored to those facts. . . . Muslims from non-specified countries were not subject
 19 to registration. Aliens from the designated countries who were qualified to be permanent
 20 residents in the United States were exempted whether or not they were Muslims. The
 21 program did not target only Muslims: non-Muslims from the designated countries were
 22 subject to registration. There is therefore no basis for petitioners’ claim.

23 (...Continued)

24 Dep’t of Homeland Security, *United States Begins Implementation of Changes to the Visa*
 25 *Waiver Program* (Jan. 21, 2016), [https://preview.dhs.gov/news/2016/01/21/united-states-](https://preview.dhs.gov/news/2016/01/21/united-states-begins-implementation-changes-visa-waiver-program)
 26 *begins-implementation-changes-visa-waiver-program & DHS Announces Further Travel*
 27 *Restrictions for the Visa Waiver Program* (Feb. 18, 2016),
 28 [https://preview.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-](https://preview.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program)
 29 *waiver-program* (explaining that most nationals of Visa Waiver Program countries who are
 30 also nationals of Iran, Sudan, or Syria, or who visited those countries or Libya, Somalia, or
 31 Yemen on or after March 1, 2011, are ineligible to be admitted to the U.S. under the
 32 Program).

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

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

4 Justice Breyer's controlling opinion in *Van Orden v. Perry*, 545 U.S. 677 (2005),
 5 observed that, "[w]here the Establishment Clause is at issue, tests designed to measure
 6 'neutrality' alone are insufficient." *Id.* at 698-99 (Breyer, J., concurring); *cf. Trunk v. City of*
 7 *San Diego*, 629 F.3d 1099, 1106-07 (9th Cir. 2011) ("[W]e do not apply an absolute rule of
 8 neutrality because doing so would evince a hostility toward religion that the Establishment
 9 Clause forbids."). Justice Breyer stated that, in "difficult borderline cases . . . I see no test-
 10 related substitute for the exercise of legal judgment . . . [which] must reflect and remain
 11 faithful to the underlying purposes of the [Religion] Clauses. . . ." *Id.* at 700. In this case,
 12 "the exercise of legal judgment" must take into account the deferential nature of judicial
 13 review of immigration-related actions such as the EO. Nevertheless, the existing EO is
 14 constitutional even under non-immigration-related Establishment Clause jurisprudence.

16 The EO satisfies the "purpose prong" of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13
 17 (1971), which "asks whether the challenged government action has a secular purpose or was
 18 taken for 'the ostensible and predominant purpose of advancing religion.'" *Access Fund v.*
 19 *U.S. Dep't of Agric.*, 499 F.3d 1036, 1043 (9th Cir. 2007) (quoting *McCreary Cnty. v. ACLU*,
 20 545 U.S. 844, 860 (2005)). As discussed previously, the EO's predominant purpose is
 21 protecting national security.
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24 ⁴ The mere fact that the six countries of particular concern designated by the EO happen to
 25 have Muslim majority populations is not evidence of religious animus. Under this reasoning,
 26 the benefits that the government provides to military veterans would be rendered
 27 constitutionally suspect by the mere fact that approximately 85% of them happen to be male,
 28 even though there are many legitimate reasons for providing such benefits unrelated to any
 gender-based bias.

1 Plaintiffs place enormous emphasis on the now-repealed prior executive order, while
2 downplaying the significantly different substance of the EO that is still in existence. *See* Dkt.
3 #119. Plaintiffs act as if it had been *conclusively established* that the prior order violated the
4 Establishment Clause, but that order was only considered on an extremely expedited basis in
5 the context of requests for a TRO or preliminary injunction, and no appellate court decided
6 the Establishment Clause issue. *Compare Aziz v. Trump*, 2017 U.S. Dist. LEXIS 20889 (E.D.
7 Va. 2017) (issuing a preliminary injunction against the now-repealed order on Establishment
8 Clause grounds) with *Louhghalam v. Trump*, 2017 U.S. Dist. LEXIS 15531, at *13-14 (D.
9 Mass. 2017) (concluding that the same order did not discriminate against Muslims).
10 Furthermore, it is a stretch for Plaintiffs to claim that the Ninth Circuit “found that states’
11 Establishment Clause and equal protection claims based on improper religious intent are
12 quite strong.” Dkt. #119 at 9. Rather, when the Ninth Circuit denied the President’s
13 emergency motion to stay the TRO issued in this case, it held that the President was not
14 likely to succeed on his *due process* argument, *Washington*, 2017 U.S. App. LEXIS 2369, at
15 *22-29, and merely noted *in passing* that the Establishment Clause claims “raise serious
16 allegations and present significant constitutional questions” while “reserv[ing] consideration
17 of these claims.” *Id.* at *31. As such, in light of the unique, exceedingly expedited nature of
18 review of the now-repealed order, the disputed validity of that order provides a thin reed
19 upon which Plaintiffs have rested their Establishment Clause argument.

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23 Additionally, even if the prior order was inconsistent with the Establishment Clause,
24 the Supreme Court has held that the government’s “past actions” do not “forever taint any
25 effort . . . to deal with the subject matter.” *McCreary Cnty.*, 545 U.S. at 874; *see also ACLU*
26 *of Ky. v. Rowan Cnty.*, 513 F. Supp. 2d 889, 897 (E.D. Ky. 2007) (holding that, under
27 *McCreary County*, a government actor that purportedly had “an overtly religious purpose in
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1 the past, may ‘get it right’ at some point in the future, based on ‘genuine changes in
2 constitutionally significant conditions”); *ACLU v. Schundler*, 168 F.3d 92, 105 (3d Cir.
3 1999) (Alito, J.) (“The mere fact that Jersey City’s first display was held to violate the
4 Establishment Clause is plainly insufficient to show that the second display lacked ‘a secular
5 legislative purpose,’ or that it was ‘intended to convey a message of endorsement or
6 disapproval of religion.”) (citations omitted); *Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556
7 (8th Cir. 2009) (“Another reason we reject the district court’s *Lemon* analysis is that its
8 emphasis on past practice and the views of individual Board members would preclude the
9 District from ever creating a limited public forum in which religious materials may be
10 distributed in a constitutionally neutral manner. . . . [S]chool officials must remain free to
11 experiment in good faith with new policies.”).

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13 The Ninth Circuit illustrated this point in *Kong v. Scully* when it upheld statutory
14 amendments that permitted Medicare and Medicaid payments for the nonmedical care of
15 individuals who reject medical services for religious reasons. 341 F.3d at 1134. The only
16 existing entities that qualified for such payments were Christian Science sanatoria that
17 promoted spiritual healing. A previous provision that expressly applied only to Christian
18 Scientists had been struck down in an earlier case. *Id.* at 1137. Nevertheless, the Ninth
19 Circuit upheld the modified provisions. *Id.* at 1140-41.

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21 Similarly, the fact that enforcement of the now-repealed order—which was
22 substantively different from the present EO in numerous ways—was preliminarily enjoined
23 on an expedited basis does not support Plaintiffs’ position here. Contrary to *McCreary*
24 *County*’s admonition, Plaintiffs suggest that the existing EO (and presumably any
25 hypothetical future immigration-related orders issued by the current President) are
26 irredeemably tainted by the alleged subjective, predominantly anti-Muslim intent of the
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1 President and his surrogates. *See* Dkt. #119 at 3, 9. Here, however, the many substantive
2 differences between the prior order and the existing EO constitute “genuine changes in
3 constitutionally significant conditions” that cured any actual or perceived Establishment
4 Clause deficiencies. *See McCreary Cnty.*, 545 U.S. at 874. Indeed, Attorney General Bob
5 Ferguson (Plaintiffs’ counsel) acknowledged as much by calling the current EO “an
6 important victory for Washington families, businesses and universities — and the rule of
7 law” because “[n]umerous key provisions . . . are eliminated or restricted in the revised
8 order,” such as “bans on Green Card holders, visa holders and dual citizens, an indefinite ban
9 on Syrian refugees, and explicit preferences based on religion,” which “substantially reduces
10 the scope of the [original] travel ban.”⁵

12 Moreover, Plaintiffs’ attempt to sidestep the EO’s obvious secular purposes by
13 focusing on miscellaneous comments made by then-candidate Trump, or one of his advisors,
14 is flawed for at least three reasons. First, Plaintiffs have misapplied precedent that states that
15 the primary purpose inquiry concerning statutes may include consideration of the “plain
16 meaning of the statute’s words, enlightened by their context and the contemporaneous
17 legislative history [and] the historical context of the statute . . . and the specific sequence of
18 events leading to [its] passage.” *McCreary Cnty.*, 545 U.S. at 862; *see also id.* (noting that
19 the primary purpose inquiry is limited to consideration of “the ‘text, legislative history, and
20 implementation of the statute,’ or comparable official act”) (citation omitted). Clearly,
21 comments made, or actions taken, by a private citizen while a candidate for public office (or
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25 ⁵ Washington State, Office of Attorney General, *News Releases: AG Ferguson’s lawsuit*
26 *forces President to capitulate on travel ban*, Mar. 6, 2017,
27 <http://www.atg.wa.gov/news/news-releases/ag-fergusons-lawsuit-forces-president-capitulate-travel-ban>.

1 his or her advisors) *while on the campaign trail* are not “official” government acts, and do
2 not constitute “*contemporaneous* legislative history.” *See id.* Indeed, “one would be naive not
3 to recognize that campaign promises are—by long democratic tradition—the least binding
4 form of human commitment.” *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002).

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6 Second, Plaintiffs’ suggestion that the existing EO is inherently suspect based upon
7 allegations that Defendants’ personal, subjective motivations remain unchanged, Dkt. #119 at
8 9, is misplaced because “what is relevant is the legislative purpose of *the statute*, not the
9 possibly religious motives of *the legislators* who enacted the law.” *Bd. of Educ. v. Mergens*,
10 496 U.S. 226, 249 (1990) (plurality op.) (emphasis added). Plaintiffs invite this Court to
11 engage in precisely the kind of “judicial psychoanalysis of a drafter’s heart of hearts” that is
12 foreclosed by Supreme Court precedent. *McCreary Cnty.*, 545 U.S. at 862.

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14 The EO, on its face, serves secular purposes, and no amount of rehashing of
15 miscellaneous campaign trail commentary can change that. A foray into the malleable arena
16 of legislative history is not a *requirement* in all Establishment Clause cases; to the contrary,
17 courts “must defer to [the government’s] stated reasons if a ‘plausible secular purpose . . .
18 may be discerned from the face of the statute,’” which is the case here. *Trunk*, 629 F.3d at
19 1108 (quoting *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983)); *see also Wallace v. Jaffree*,
20 472 U.S. 38, 74 (1985) (O’Connor, J., concurring) (inquiry into the government’s purpose
21 should be “deferential and limited”).

22
23 One illustration of Plaintiffs’ flawed attempt to concoct a predominantly religious
24 purpose for the EO is their suggestion that a presidential policy advisor’s statement that the
25 EO is designed to accomplish “the same basic policy outcome” as the first order, while
26 merely correcting some “very technical issues,” constitutes evidence that the existing EO is
27 really a wolf in sheep’s clothing. Dkt. #119 at 3, 9. Rather than being some sort of smoking
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1 gun, however, this comment merely suggests that the existing EO was narrowly crafted to
2 address concerns raised during litigation over the prior order, with the secular goal of
3 protecting national security in mind. Addressing actual or perceived flaws in previous
4 iterations of a policy, in order to bolster the likelihood that it will be upheld in litigation, is
5 itself a valid secular purpose. *See, e.g., Rowan Cnty.*, 513 F. Supp. 2d at 904 (in
6 Establishment Clause cases, changing a policy in “an attempt to avoid litigation . . . is an
7 acceptable purpose”).

8
9 Finally, the mere suggestion of a possible religious or anti-religious motive, mined
10 from past comments of a political candidate or his supporters, and intermixed with various
11 secular purposes, is not enough to doom government action (along with all subsequent
12 attempts to address the same subject matter). “[A]ll that *Lemon* requires” is that government
13 action have “a secular purpose,” not that its purpose be “*exclusively* secular,” and a policy is
14 invalid under this test only if it “was motivated *wholly* by religious considerations.” *Lynch v.*
15 *Donnelly*, 465 U.S. 668, 680-81 & n.6 (1984) (emphasis added); *see also Van Orden*, 545
16 U.S. at 703 (Breyer, J.) (upholding government action that “serv[ed] a mixed but primarily
17 nonreligious purpose”); *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) (“[A] court may
18 invalidate a statute only if it is motivated wholly by an impermissible purpose.”). The EO
19 clearly serves secular purposes and, therefore, it satisfies *Lemon*’s purpose test.
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22 Conclusion

23 The EO falls well within the President’s broad discretion, provided by constitutional
24 and statutory authority. Plaintiffs’ emergency motion should be denied.
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1 Dated: March 14, 2017.

Respectfully submitted,

2
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Certificate of Service

I hereby certify that on March 14, 2017, I caused a true and correct copy of the foregoing *amicus curiae* brief to be electronically filed with this Court's CM/ECF system, which will send notification of such filing to all attorneys of record in this action.

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