Nos. 16-1436 and 16A1190

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *ET AL.*,
Petitioners-Applicants,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT,
ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, U.S. Justice Foundation, English First, English First Foundation, Policy Analysis Center, Gun Owners Foundation, Gun Owners of America, Inc., and Conservative Legal Defense and Education Fund in Support of Application for Stay and Petition for Certiorari

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June 12, 2017

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Motion for Leave to File Brief *Amicus Curiae*

Amici curiae Citizens United, Citizens United Foundation, U.S. Justice Foundation, English First, English First Foundation, Policy Analysis Center, Gun Owners Foundation, Gun Owners of America, Inc., and Conservative Legal Defense and Education Fund respectfully move for leave to file the attached *amicus* brief in support of Petitioners-Applicants' application for stay pending disposition of the petition for certiorari and in support of their petition for writ of certiorari. This motion and brief are being filed before court ordered deadline of 3:00 pm, June 12, 2017, to respond to the application and petition.

Petitioners have filed a blanket consent to the filing of *amicus* briefs in support of the petition for certiorari, and have consented to the filing of the *amicus* brief in support of the application. Counsel for respondents state that "in light of the timing of your anticipated filing, we take no position on your

request."

Although this Court's Rules do not expressly provide for *amicus* briefs in support of or in opposition to an application for stay, this Court previously has allowed them. *See, e.g.*, Leal Garcia v. Texas, 564 U.S. 940, 943, n.* (2011).

Amici have a deep interest in protecting our nation's borders and enforcing our nation's immigration laws. Furthermore, *amici* believe they have special insight into the laws surrounding the President's Executive Order at issue, and they have filed an *amicus* brief in this case before the Fourth Circuit, as well as three *amicus* briefs in the Ninth Circuit in Washington v. Trump and Hawaii v. Trump.

Therefore, *amici* respectfully request leave to file an *amicus* brief in support of the application for stay of the district court's injunction and in support of the petition for certiorari.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*[1]

Citizens United, English First, and Gun Owners of America, Inc. are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation, United States Justice Foundation, English First Foundation, Gun Owners Foundation, Policy Analysis Center, and Conservative Legal Defense and Education Fund are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). These organizations were established, *inter alia*, for purposes related to participation in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. These *amici* filed an *amicus* brief in this case in the Fourth Circuit as well as three *amicus* briefs in the Ninth Circuit in Washington v. Trump and in Hawaii v. Trump.

STATEMENT

The courts below freely admitted that the President has given "'facially neutral'" reasons for his Second Executive Order ("SEO") of March 6, 2017. *See*

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Due to the Court's June 2 order to file a response by June 12, *amici* did not have time to provide the 10-day notice required of Rule 37.2, but notified counsel for the parties shortly thereafter.

IRAP v. Trump, 2017 U.S. App. LEXIS 9109, *60 ("IRAP"). In fact, the President explained in great detail the basis for his order. He identified the threat to national security posed by the unrestricted immigration of certain foreign nationals, linking that threat to his chosen course of action, and explaining precisely how his actions are designed to respond to that threat. *See* SEO Section 1; *see also* Petition for Certiorari ("Pet. Cert.") at 8-9. Not only has the President explained the need for the SEO, but so too have executive branch officials such as Secretary of Homeland Security Kelly[2] and Secretary of State Tillerson.[3] The SEO is not only facially neutral, but demonstratively required to minimize a very real threat to Americans.

SUMMARY OF ARGUMENT

The district and circuit courts dismiss all stated reasoning supporting the SEO. Instead, they reach behind President Trump's statements made as the nation's Chief Executive, to statements made by candidate Trump on the campaign trail while a private citizen. Then, with the interpretive flexibility of pagan bone throwers, the judges tease out from among numerous ambiguous and conflicting statements the

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[2] "Statement by Secretary of Homeland Security John Kelly on President's Executive Order Signed Today," Department of Homeland Security (Mar. 6, 2017).

[3] "Remarks on the President's Executive Order Signed Today," U.S. Department of State (Mar. 6, 2017).

"evidence" that fits the "bad faith" predicate they believe necessary to enjoin the SEO.

Judicial second guessing was made possible only because the court misapplied the Establishment Clause to an alleged disfavoring of a religion, and then seized upon a repudiated Establishment Clause test which allegedly authorizes the court to search for impermissible motives applicable only in cases in which the government has favored a religion. Acting as if they were jurors determining *mens rea* in a criminal case — but without the benefit of a trial, sworn testimony, and rules of evidence — the judges pronounced the President of the United States guilty of "intolerance, animus, and discrimination."

In reaching their conclusion, the courts below rejected what President Trump said in his Executive Order and during his presidency, relying instead upon what candidate Trump said in the past. Additionally, these courts reject (i) what this country's highest ranking national security officials have recommended; (ii) what Congress has done (Pet. Cert. at 2); (iii) what past administrations have concluded (IRAP at *182); and (iv) the policies that the People themselves voted for.[4] The injunction entered here is not based on any established constitutional rule; it is an act of judicial lawlessness.

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[4] A. Giaritelli, "Poll: 49 percent support Trump's immigration ban, 41 percent oppose," *Washington Examiner* (Jan. 31, 2017).

ARGUMENT

I. THE INJUNCTION REQUIRES ADMISSION OF POTENTIAL RADICAL ISLAMIC TERRORISTS INTO THE UNITED STATES.

The district court's injunction, as modified by the Fourth Circuit sitting *en banc*, orders that President Trump and the executive branch employees who work for him **may not** enforce SEO Section 2(c).[5] Section 2(c) of the SEO bans nationals from six terror-prone countries from entering into the United States for a period of 90 days. The practical effect of the district court's order is to direct that the nationals of countries that Congress has found to be state sponsors of terrorism **must be admitted** into this country in an **unsafe manner, without proper vetting**. Also, the injunction undermines the stated purpose of SEO Section 2(c) to permit the Secretary of Homeland Security to have the time and resources to develop **vetting procedures** with which to **safely admit** persons from the six named countries into the United States. *See* SEO Section 2(a).

It is highly likely that this injunction will result in the entry into the country of persons from countries unable or unwilling to provide sufficient information for proper screening. Syria, for example, is known for its porous border with Turkey through which ISIS

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[5] IRAP v. Trump, 17-361, U.S.D.C. Md., ECF #150, Mar. 16, 2017, p. 2.

fighters enter at will to fight in the country's civil war.[6] With a severe lack of infrastructure (and even functioning government) in many areas of the country, it would seem impossible to obtain any assurances that a "refugee" from Syria is not instead a member of ISIS who entered from another country. Thus, the national serious threat is real. Yet the courts below would choose to keep the borders open, disregarding of "[t]he Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence" — primarily because of statements by candidate Trump on the campaign trail.

In Judge Kozinski's dissent from a denial of stay of the Washington injunction in the Ninth Circuit, he stated, "[e]ven if a politician's past statements were utterly clear and consistent, using them to yield a specific constitutional violation would suggest an absurd result — namely, that the policies of an elected official can be forever held hostage by the unguarded declarations of a candidate." Washington v. Trump, 2017 U.S. App. LEXIS 4838, *21 (9th Cir. Mar. 17, 2017) (Kozinski, J., dissenting from the denial of reconsideration *en banc*). He makes an excellent point as to the sweeping and dangerous rationale underlying the injunction. Consider President Trump's authorization of a missile strike against a Syrian

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[6] *See* N. Bertrand, "'Relax, they are our friends': One quote shows why Turkey's ISIS problem is only going to get worse" (Apr. 14, 2016), Business Insider, http://www.businessinsider.com/turkey-isis-syria-border-problem-2016-4.

military airbase in April 2017.[7] Applying the logic of the courts below, could not the same or other plaintiffs bring suit based on the Establishment Clause and obtain a nationwide (or worldwide) injunction against further military action against Syria? No doubt, someone would be found to have hurt feelings, because their family members living in Syria could be harmed by U.S. military action. Could plaintiffs not claim that President Trump's motives were tainted when he ordered a cruise missile strike on the pretext of the use of chemical weapons on civilians, when his true motive was that he just hates Muslims? Could not the district and circuit court opinions, taken to their logical conclusion, be used to prohibit the President from acting as Commander in Chief of the nation's armed forces? Indeed, the SEO establishes a foundation for a comprehensive review of federal immigration policy with respect to foreign nations and foreign persons. For that reason, it constitutes every bit as much an act in pursuit of national security as a strike on military targets abroad.

What the courts below have done is nothing less than a judicial takeover of a large portion of the constitutional powers of the Executive Branch, wresting away control of foreign and domestic policymaking from the People's elected officials. The injunction binds President Trump's senior officials to the status quo. Allegedly tainted by discrimination,

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[7] B. Starr and J. Diamond, "Trump launches military strike against Syria" CNN News, Apr. 7, 2017, http://www.cnn.com/2017/04/06/politics/donald-trump-syria-military/index.html.

many of the President's powers to implement his own policies have been put into the receivership of federal judges, much like some government school districts were in the 1970s and 80s.[8] There is no natural termination point to this type of judicial interference.[9]

Indeed, Judge Traxler (concurring below) would rule that, so long as Donald Trump is president, every policy change affecting Muslims will require judicial approval:

> [t]he answer to the rhetorical question of whether the President will be able to 'free himself from the stigma' of his own self-inflicted statements ... lies in determining whether the Executive Order complies with the rule of law. **That requires us to consider, in each instance**, how the character, temporality, and nature of the President's repeated, public embrace of an **invidiously discriminatory** policy offensive to the Constitution bear on a challenged policy. [IRAP at *116 n.1 (emphasis added).]

Under the Traxler rule, he and his *en banc* colleagues have unleashed district courts to exercise power without responsibility, and viewing the world

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[8] *See* J.A. Rabkin, "Captive of the Court: A Federal Agency in Receivership," *The American* (May 26, 1984) http://www.aei.org/publication/captive-of-the-court-a-federal-agency-in-receivership/.

[9] *See* Pet. Cert. at 21-22.

through rose-colored glasses, ignore the potential danger of radical Islamic extremists, like here, on the ground that "no terrorist acts have been committed on U.S. soil by nationalists of the banned countries since September 11, 2001." Such judicial naivete would thus be substituted for the expertise and knowledge of officers of the executive department — including access to the latest intelligence — such as would be denied them by the Hawaii district court's broad order enjoining the Trump administration's efforts even to develop an effective vetting process for foreign nationals from the six countries. *See* Hawaii v. Trump, 2017 U.S. Dist. LEXIS 47042, *23 (D. Haw. Mar. 29, 2017).

II. THE COURTS BELOW ENGAGED IN AN ACT OF JUDICIAL WILL, DISREGARDING THE CONSTITUTIONAL AND STATUTORY BASIS OF THE PRESIDENT'S SEO.

A. The President Has Inherent As Well As Statutory Power to Protect the Nation's Borders.

Neither the opinion of the district court nor the court of appeals demonstrated any real understanding of the President's solemn responsibility, and robust authority, to control the nation's borders. Rather, both opinions reflect hostility to border controls, giving no deference whatsoever to the judgment of the President on this vital matter of national security. The courts below showed no willingness to honor the promise made by Alexander Hamilton to ratifying conventions that the judiciary would be the "least dangerous to the

political rights of the constitution; because it will be least in a capacity to annoy or injure them." Federalist No. 78, G. Carey & J. McClellan, The Federalist (Liberty Fund: 2001) at 402. Defying that prediction, the judges below have undermined and usurped the constitutional powers of the President, while giving the erroneous impression that they are mandated to do so by that same Constitution.

The district court began its analysis by stating: "The formulation of immigration policies is entrusted exclusively to Congress...." 2017 U.S. Dist. LEXIS 37645 at *28. Although it may be true that Article 1, Section 8 of the U.S. Constitution gives Congress the power to establish a "uniform rule of naturalization," there is no similar enumerated power granting Congress authority to regulate immigration. Neither does Article 2 of the Constitution confer upon the President any express authority over immigration. Thus, the source of the power to control the nation's borders is not textual, but rather inherent in any nation's sovereignty. *See* E. de Vattel, The Law of Nations, bk. II, ch. VII, § 94, p. 309 (B. Kapossy & R. Whatmore, eds. 2008). The "power to exclude from the sovereign's territory people who have no right to be there" is, as Justice Scalia observed, "the defining characteristic of sovereignty." Arizona v. United States, 132 S. Ct. 2492, 2511 (2012) (Scalia, J. dissenting). That inherent power to exclude aliens is shared by the President and the Congress.

The district court below stated that "Congress delegated **some** of its power [over immigration] to the President in ... 8 U.S.C. § 1182(f)...." 2017 U.S. Dist.

LEXIS 37645 at *28 (emphasis added). Unlike the district court in Washington,[10] at least the district court below quoted the central statute on which the SEO relies:

> **Whenever** 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. [Emphasis added.]

Although both courts below found ways to undermine section 1182(f) through allegations of animus and "bad faith," the statute could not be more clear. Congress conveyed to the President of the United States all of its power to ban the admission of aliens. Thus, the President's constitutional authority is at its zenith.[11]

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[10] The district court's embarrassing "oversight," in wholly ignoring the operative statute, led to that court being roundly criticized by even liberal legal commentators for its rush to an anti-Trump judgment. *See, e.g.*, J. Toobin, "The Vulnerabilities in the Ninth Circuit's Executive-Order Decision," *The New Yorker* (Feb. 10, 2017).

[11] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these

B. The Courts Below Have Demonstrated Both Political Hostility and Animus Toward the President.

In one of the most important challenges to presidential authority ever brought, Chief Justice Burger explained:

> 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) (emphasis added).]

Yet the Fourth Circuit did exactly what the Chief Justice warned against, belittling the SEO's use of "vague words of national security," and melodramatically characterizing the President's action as one that "drips with religious intolerance, animus, and discrimination."[12] IRAP at *20.

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circumstances ... may he be said ... to personify the federal sovereignty.").

[12] Islam is not only a religion — it also is a political system. *See* J. Tayler, "Ayaan Hirsi Ali Explains How To Combat Political Islam," *Quillette* (Mar. 31, 2017). Consider how the Fourth Circuit opinion would constrain President Trump from responding to the threat of immigration from a Muslim country where the 109 verses of the Quran which call Muslims to war against nonbelievers to achieve Islamic rule are generally believed. *See* "What Does Islam Teach about Violence," http://www.thereligionofpeace.com/pages/quran/violence.aspx.

The correct approach to a case such as this is to evaluate the Executive Order for what it does, rather than what one district court judge and even a majority of judges on a court of appeals 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 taken here by the Fourth Circuit, indeed, would "subject the President to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose." *Id*. at 756. If the Fourth Circuit's approach here is sanctioned, there would be no stopping point: not only would motives be put on trial, but litigants would also 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.

The 2016 presidential election was waged in part, as a battle between open-border internationalists aligned with Secretary Hillary Clinton who embrace even illegal immigration, and nationalists who aligned with President Donald Trump, who promised to enforce our borders. It is not the role of judges to operate "behind enemy lines" as a left-behind army tasked with impugning the President and impeding his agenda. Yet, for example, in a concurrence, one of the circuit court judges, Judge James A. Wynn, remarkably concluded that the President's statutory authority to ban entry to "'all aliens or any class of

aliens'" conferred no authority "to deny entry on the basis of nationality and religion." IRAP at *107, 117. Judge Wynn then demonstrated his personal animus to the President through intemperate language, such as "religious animus" and "invidiously discriminatory." *Id*. at *116.

C. The Decisions of the Courts Below Open the Judiciary to What Chief Justice Burger Termed a "Probe into Judicial Decisionmaking."

There is an old saying that "what is good for the goose is good for the gander." If the Fourth Circuit is correct — that evidence of animus voids a decision of the political branches — then, as Justice Burger warned, would that not invite a "probe into judicial decisionmaking" by the political branches? Nixon at 761. Indeed, the President of the United States, as a coordinate branch of the federal government, would seem to have the same duty as to the court to examine the motives of the judges ruling on cases involving his authority before determining whether to give deference to a judicial ruling. Indeed, when judges twist the Constitution and statutes of the nation so as to give effect to their political will, the judicial branch acts like a political branch of government, and ceases to have any legitimacy to order another co-equal branch of government to do anything.[13]

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[13] Should the Court believe that the central issue in the case is the credibility of President Trump, that is a matter on which Justice Ginsburg has already publicly expressed her views, rendering her ineligible to participate in this Court's review. *See*

For example, if the President were to determine that District Judge Chuang enjoining the SEO in Maryland was agitated by the undoing of the work of a prior administration in which he served in a senior capacity, could he conclude that the judge was motivated by his "animus" toward the current President and his policies? Should his prior statements and acts be evaluated to determine if his service 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?[14] Can the judge's motives be discerned from the fact that, in his 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*. Should the President then treat this novel and constitutionally unsupportable injunction as being invalid and unenforceable?[15]

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28 U.S.C. § 455 and J. Biskupic, CNN, "Justice Ruth Bader Ginsburg calls Trump a 'faker,' he says she should resign" (July 13, 2016).

[14] M. Leahy, "Impartiality of Federal Judge Who Blocked Trump EO May Be In Question," Breitbart (Mar. 21, 2017).

[15] No challenges to similar Executive Orders issued by prior presidents have been successful. *See* "A Legal Analysis of New Proposals to Limit Immigration from Muslim Countries into the United States," USJF Legal Policy Paper at 2-4 (Feb. 12, 2016).

Indeed, counsel for respondents conceded his challenge was grounded in "never-Trumpism" in oral argument before the Fourth Circuit:

> Judge Niemeyer: "If a different candidate had won the election and then issued this order, I gather you wouldn't have any problem with that?"
>
> * * *
>
> Counsel for Respondents Omar Jadwat: "Yes, your honor, I think in that case, it could be constitutional."[16]

III. THE FOURTH CIRCUIT ERRONEOUSLY FOUND THAT PRESIDENT TRUMP'S SEO VIOLATED THE ESTABLISHMENT CLAUSE.

The Fourth Circuit clearly explained the narrow scope of its decision, stating:

> the preliminary injunction issued by the district court may be justified **if and only if** Plaintiffs can satisfy the requirements for a preliminary injunction based on their **Establishment Clause claim**. [IRAP at *44 (emphasis added).]

Indeed, the Fourth Circuit ruled that it was the invocation of the Establishment Clause which allowed the court to avoid the application of Kleindienst v.

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[16] "ACLU Lawyer Says Travel Ban 'Could Be Constitutional' if Enacted by Hillary Clinton," NTK Network (May 8, 2017).

Mandel, 408 U.S. 753 (1972), explaining that case as "contemplat[ing] the application of **settled** Establishment Clause doctrine in this case." IRAP at *60 (emphasis added). In truth, there is nothing whatsoever "settled" about the application of the Establishment Clause to this case.

To its credit, the Fourth Circuit carefully sorted through the standing claims before determining that only one had the legal standing to trigger the court's constitutional authority to an Establishment Clause claim — John Doe #1. *Id.* at *55-56. However, not once did the circuit court, or the district court before it, pause to address whether the complaint was properly grounded in the Establishment Clause. The Fourth Circuit's conclusion that constitutional text, which prohibits the "Establishment of religion," applies to an act supposedly disfavoring some adherents of a particular religion, results in a constitutional error of enormous significance, at variance with innumerable decisions of this Court, requiring review. *See* Supreme Court Rule 10(c). Through this misapplication of the constitutional text, the courts below have contrived a constitutional conflict designed to empower unelected federal judges to overturn a decision of the President and open the nation's borders to foreigners who cannot be properly vetted before admission. In reality, the Fourth Circuit decision is a judicial hijacking of the election of the President who was doing exactly what the People elected him to do.

A. The Establishment Clause Does Not Apply to This Case.

Neither the litigants nor the courts below made the threshold inquiry whether the Establishment Clause even applies to this case — simply assuming that the plaintiffs' claims that the President's allegedly "anti-Muslim" views and attitudes violated the constitutional ban on laws with respect to the establishment of religion. However, in Church of Lukumi Babalu Aye v. City of Hialeah, this Court ruled that in cases involving claims of a government "attempt to **disfavor** [one's] religion[,] the **Free Exercise Clause** is **dispositive.**" *Id.,* 508 U.S. 520, 532 (1993) (emphasis added).[17] In contrast, this Court observed, "**Establishment Clause** cases ... for the most part[18] have addressed governmental efforts to **benefit** religion or particular religions." *Id.* (emphasis added).

Free Exercise cases require proof that the government action "prohibits" one's "exercise" of one's religious faith. *See id.* at 532. It would not be enough for a Free Exercise claimant to allege and prove "only

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[17] The Lukumi Babalu Court also stated that "the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." However, of the six Supreme Court cases cited in support, none involved a challenge like that brought here, based on the disfavoring of religion. *See id.* at 532.

[18] Even if this Court has occasionally employed loose language implying that the Establishment Clause might be invoked in a case involving government action disparaging a religion, the Court's "for the most part" qualifier does not allow courts to disregard the presumptive rule that government attempts to disfavor religion or religious practice are not governed by the Establishment Clause, but rather by the Free Exercise Clause.

economic injury"; one must allege and prove "infringement of their own religious freedoms." *See* McGowan v. Maryland, 366 U.S. 420, 429 (1961). Thus, as applied to the Lukumi Babalu plaintiffs, they were able to sustain a Free Exercise claim because the law targeted the church's "religious exercises" of animal sacrifices. *Id*. at 542. Here John Doe #1 failed completely to allege that the EO prohibits him from exercising his religious faith, such as traveling to Mecca or fasting during Ramadan, only alleging a litany of burdens on his lifestyle and feelings:

- SEO bars his wife's entry, forcing him to choose between his career and his wife
- SEO has created significant fear, anxiety, and insecurity for him and his wife
- SEO has caused him to fear for his personal safety in this country, wondering whether he should return to Iran. [IRAP at *48.]

In a Free Exercise case, such allegations about how the SEO sent a message that foreign-born Muslims like he are second-class citizens — political outsiders — would be of no avail.

Knowing that any Free Exercise claim would almost certainly fail, John Doe #1 and his co-plaintiffs seized the Establishment Clause as a weapon of convenience. And the court of appeals adopted the plaintiff's constitutional premise that the "Establishment Clause's command [is] not to disfavor a particular religion." *Id*. at *53. Indeed, the court of appeals asserted that "one of the core objectives of modern Establishment Clause jurisprudence has been

to prevent the State from sending a message to non-adherents of a particular religion 'that they are *outsiders*, not full members of the political community.'" *Id*. at *47. In reaching this conclusion, the court relied upon two cases, neither of which involved challenges to government action that allegedly **disfavored** one religion over another. Nor did either involve facts from which a "reasonable observer" could infer that the government action conferring a benefit upon a preferred religion denigrates the citizenship status of one who is not in the preferred class. *Id*. at *53 n.9. In Moss v. Spartanburg Sch. Dist. Seven, 683 F.3d 599 (4th Cir. 2012), a Jewish daughter and father who received a letter describing public school policy of awarding academic credit for private, Christian religious instruction suffered injury in part because they were made to "feel like 'outsiders' in their own community." *Id*. at 607. The court of appeals acknowledged that the quotation was taken from this Court's very different decision in McCreary County v. ACLU of Ky., 545 U.S. 844, 860 (2005) (emphasis added), where the Ten Commandments display "show[ed] a purpose to **favor** religion," and, hence, sent a message to non-adherents of a religious doctrine that they were not full members of the political community.[19]

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[19] Although the court of appeals cited two appellate Establishment Clause cases in which plaintiffs prevailed on allegations of "disfavored" treatment, they were not cited to support the proposition that the Establishment Clause provided a remedy for such treatment. *See* Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012), and Catholic League for Religious & Civil Rights v. City & County of San Francisco, 624 F.3d 1041 (9th Cir. 2010). IRAP at *54 n.10. Apparently the question here was not raised,

The distinction between a government act favoring religion, as contrasted with disfavoring religion, is not a semantic one, but stems from the fact that the two religion clauses in the First Amendment are designed to protect two different rights. As Joseph Story explained, the Establishment Clause addresses the "limits to which the government may rightfully go in **fostering and encouraging** religion." *Id.,* 2 J. Story, Commentaries on the Constitution, Section 1872, at 628 (Little, Brown: 5th ed. 1891) (emphasis added). On the other hand, the Free Exercise Clause addresses the limits to which the government may rightfully go in "**excluding**" individual religious beliefs and practices. *Id.* at 629 (emphasis added). Although the two rights are interrelated, Story opined that "the duty of supporting religion, especially the Christian religion, is **very different** from the right to force the consciences of other men or to punish them for worshiping God in the manner which they believe their accountability to him requires." *Id.* Section 1876, at 631 (emphasis added).

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much less answered, and those cases should not govern the Establishment Clause challenge to the President's SEO. Similarly, in its discussion of standing, IRAP at *53, the court of appeals referenced Mellen v. Bunting, 327 F.3d 355 (4th Cir. 2003) to support the notion that a violation could be based on the "endorsement or disapproval" of religion, but that was pure *dicta*, as the case involved daily supper prayer at a government school. In it, the Fourth Circuit cited further *dicta* from Wallace v. Jaffree, 374 U.S. 38 (1985) which involved only the claim of support for religion from a moment of silence in government schools. *Dicta* built upon *dicta* is a weak foundation for the expansion of a constitutional principle.

As demonstrated above, despite the protestations of the court of appeals below that the SEO "in context drips with religious intolerance, animus, and discrimination," John Doe #1 could never have asserted a colorable Free Exercise claim. As for his Establishment claim, he has not even attempted to show how the President's actions allegedly "disfavoring" Islam amount to an Establishment Clause claim, such as preferring one religion over another. Further, the court of appeals engaged in no discussion on why this case constitutes an exception to the general rule that the Establishment Clause is triggered by government action benefitting, not disfavoring, religion. Not only is the answer to that question important in principle but, as a practical matter, it shifts the focus away from the lack of impairment of personal religious faith and practices of the individual plaintiffs, and opens the door to a judicial inquiry into motive and purpose under the Lemon v. Kurtzman 403 U.S. 602, 612 (1971), test which was never designed to test the constitutionality of a government action that disfavors a particular religion.

B. The Fourth Circuit Erroneously Assumed that the Lemon Test Applies.

The court of appeals nonchalantly presumed that "the test outlined in *Lemon v. Kurtzman* ..., governs the constitutional inquiry" (IRAP at *59), applying the three-part Lemon test, as if it is settled doctrine, and concluding that the SEO does not have a "secular purpose." The court of appeals creates the distinct impression that since 1971, when Lemon was first

decided, the three-part test generated by the Supreme Court has been smooth sailing. However, for decades, justices on both sides of the aisle have expressed dismay over the state of Establishment Clause jurisprudence. In 2002, Justice Souter, dissenting in Zelman v. Simmons-Harris, lamented that this Court's Establishment Clause jurisprudence had reached "doctrinal bankruptcy." *Id.*, 536 U.S. 639, 688 (2002) (Souter, J., dissenting). Seven years earlier, concurring Justice Thomas found it in "hopeless disarray." Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring). Two years before that, Justice Scalia, joining a chorus of academic critics colorfully describing the High Court's Establishment Clause precedents as a "geometry of crooked lines and wavering shapes." Lamb's Chapel v. Center Morisches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring). Long before retiring from this Court, Justice Stevens bemoaned the fact that its Establishment Clause precedents have imposed "the sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in Lemon ...." Committee for Public Educ. and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting). Indeed, as Justice Sandra Day O'Connor observed, "this action once again illustrates certain difficulties inherent in the Court's use of the test articulated in Lemon." Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 483 U.S. 327, 346 (1987) (O'Connor, J., concurring). And, as Justice Rehnquist, before he became Chief Justice, lamented: "the Lemon test has caused this Court to fracture into unworkable plurality opinions [] ...

depending upon how each of the three factors applies to a certain state action." Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting). Lastly, in Van Orden v. Perry, 545 U.S. 677 (2005), Chief Justice Rehnquist writing for a plurality of four justices found the Lemon test "not useful" in assessing the constitutionality of a Ten Commandments display on the Texas State Capitol grounds and explaining that "[m]any of our recent cases simply have not applied the Lemon test." *Id.* at 685-86 (citations omitted).

In contrast with these cautionary words, the court of appeals automatically subjected the SOE to analysis under the Lemon test, notwithstanding "the nature of Lemon's application varies so severely from context to context that ... it can hardly be considered a uniform test." *See* K. Ravishankar, "The Establishment Clause's Hydra: The Lemon Test in the Circuit Courts," 41 UNIV. DAYTON L. REV. 261, 263 (2016). Indeed, the Establishment Clause cases run the gambit from legislative prayer to school prayer, to religious symbols, and to State funding of Religion in Schools. *Id.* at 264-273. Of special note is the status of legislative prayer after Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

In 1983, this Court ruled that the opening of legislative sessions of Congress with prayer was not forbidden by the Establishment Clause. Marsh v. Chambers, 463 U.S. 783 (1983). Long considered to be an exception "to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to 'any of the formal

"tests" that have traditionally structured' this inquiry," Town of Greece ruled that:

> *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted "by reference to historical practices and understandings." [*Id.* at 845-46.]

Under Town of Greece's restatement of Marsh, then the Establishment Clause text as historically understood would govern, not conformity to some judicially-devised test. As Justice Alito put it, if there was an inconsistency between any Establishment Clause test in any court opinion "and the historic practice of legislative prayer, the inconsistency calls into question the validity of the test, not the historic practice." *Id.* at 862 (Alito, J., concurring). Apparently all nine justices in Town of Greece agreed that "Marsh – not the Lemon test – controlled in legislative prayer cases." *See* Ravishankar at 266. In contrast, so confident of his analysis and so committed to the Lemon formula, Justice Brennan wrote that he had "no doubt that, if any group of law students were asked to apply the principles of Lemon to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional." Marsh at 800-01 (Brennan, J., dissenting).

Today's judges should know that — after Town of Greece, and before pronouncing judgment in an Establishment Clause case — they must first address

the threshold question of whether the Lemon test governs. This is especially true in cases like this one in which there is no Establishment Clause precedent involving the exercise of the highly deferential powers of the President and Congress in matters involving the nation's foreign affairs, beginning with the original role that religion played in America's relationship with the various Indian tribes. *See* R. Cord, Separation of Church and State at 57-79 (Lambeth Press, N.Y. 1982). The Lemon test has never been applied to a case involving entry into the United States from foreign countries. It was error for the court of appeals below to presume the applicability of that much-maligned test.

CONCLUSION

For the foregoing reasons, the Application for Stay should be granted and the Petition for a Writ of Certiorari should be granted.

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