No. 17-965

In the Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Petitioners,

v.

STATE OF HAWAII, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici are constitutional law scholars. They submit this brief to identify a distinct legal principle compelling the conclusion that the President's travel ban proclamation is unconstitutional: the long-settled prohibition on governmental acts based on animus toward a particular religious group. A full list of *Amici* is attached as an appendix to this brief.[1]

SUMMARY OF ARGUMENT

I. In its decision affirming a preliminary injunction against Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017), the Fourth Circuit relied on *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844 (2005), and the secular purpose prong of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), to hold that the Proclamation is invalid because a "reasonable observer" would conclude that it rests on "anti-Muslim bias." *IRAP* v. *Trump* ("*IRAP II*"), 883 F.3d 233, 267 (4th Cir. 2018). That ruling was correct.

But the Fourth Circuit also held that the Proclamation must be invalidated under a distinct legal principle: the prohibition on official action based on animus toward any particular religious group. *See, e.g.*, *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1822 (2014); *id.* at 1831 (Alito, J., concurring); *Bd. of Educ.*

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amici* and their counsel—contributed money intended to fund preparing or submitting the brief. Petitioners have filed a blanket letter of consent. Respondents have consented to the filing of this brief.

of Kiryas Joel Vill. Sch. Dist. v. *Grumet*, 512 U.S. 687, 722, 728 (1994) (Kennedy, J., concurring in the judgment); *Larson* v. *Valente*, 456 U.S. 228, 244 (1982); *see also Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993); *Romer* v. *Evans*, 517 U.S. 620, 632-35 (1996). This rule has been recognized as fundamental under the Establishment Clause. And it is directly applicable here. *See IRAP II*, 883 F.3d at 256-57 ("Examining official statements from President Trump and other executive branch officials . . . we conclude that the Proclamation is unconstitutionally tainted with animus toward Islam.").

Indeed, while the Fourth Circuit focused mainly on *Lemon*'s secular purpose prong, the facts that it considered even more clearly demonstrate anti-Muslim animus under familiar means of discerning improper motive. *See, e.g.*, *Town of Greece*, 134 S. Ct. at 1824-26; *Locke* v. *Davey*, 540 U.S. 712, 724-25 (2004); *Lukumi*, 508 U.S. at 534-36; *see also, e.g.*, *United States* v. *Windsor*, 133 S. Ct. 2675, 2693-94 (2013); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985) . As the Fourth Circuit observed, "Plaintiffs offer undisputed evidence that the President of the United States has openly and often expressed his desire to ban those of Islamic faith from entering the United States." *IRAP II*, 883 F.3d at 269.

II.A. The extraordinary record in this case confirms that President Trump's motive in issuing the Proclamation was anti-Muslim animus. During the campaign, Mr. Trump repeatedly promised voters that he would ban Muslims from entering the United States. When his "Statement on Preventing Muslim

Immigration" was criticized on constitutional grounds, Mr. Trump switched his rhetoric and began referring to "territory." Upon taking office, President Trump promptly made good on his animus-laden promise by issuing a sweeping executive order ("EO-1") that lacked any discernible connection to a recognized security threat. While not *explicitly* denominated a "Muslim Ban," EO-1 was widely seen as fulfilling that campaign promise. Dispelling any doubt, President Trump and his advisors made numerous statements confirming that EO-1 was intended to serve as his long-promised "Muslim Ban." *See* J.A. 228-29, 377-79.

After EO-1 was enjoined, President Trump issued a second executive order ("EO-2") similar to the first. At that time, the President's campaign website still called for a "total and complete shutdown of Muslims entering the United States." J.A. 400. When asked about the basis for EO-2, the President's senior advisors assured the public that it involved the same "basic policies" and "policy outcome" as EO-1, and addressed only "technical issues." J.A. 127, 401. The President, in turn, warned that he resented this "watered down Travel Ban." J.A. 132. The President later added that he preferred a "larger" and "more specific" travel ban, but knew that would not be "politically correct." J.A. 133. Then, as now, the President had only ever identified a single class as meriting a "larger" and "more specific" ban: Muslims.

Like EO-1, EO-2 was designed to exclude and demean Muslims. On that basis, multiple courts enjoined it in whole or in part. Nonetheless, they allowed the review process required by EO-2 to proceed. During that review, the President made a

series of statements about the policy he preferred. *See* J.A. 133. Consistent with his unequivocal and unchanged position on prohibiting Muslims from entering the country, the President then issued the Proclamation, which tracks EO-2 in all material respects. Although the Proclamation seeks to obfuscate its targeting of Muslims by adding North Korea and Venezuela, its actual effect on entry from those nations is marginal. *See* J.A. 355-56. Moreover, "the criteria allegedly used in the review . . . lie at odds with the list of countries actually included in the Proclamation." *IRAP II*, 883 F.3d at 269.

On November 29, 2017, the President again confirmed that his underlying "travel ban" policy and his choice to make anti-Muslim statements are closely linked. That day, he retweeted (and thus endorsed) three anti-Muslim hate videos produced by a foreign extremist group: (1) "Muslim destroys a Statue of Virgin Mary!"; (2) "Islamist mob pushes teenage boy off roof and beats him to death!"; and (3) "Muslim migrant beats up Dutch boy on crutches!" *See IRAP II*, 883 F.3d at 267. When asked why the President had done so, Deputy Press Secretary Raj Shah noted that "the president has been talking about these security issues for years now" and has "addressed these issues with the travel order that he issued earlier this year . . . ." *Id*.

An extensive public record thus establishes that in issuing the Proclamation—and its predecessors—President Trump was adhering to his animus-laden campaign promise, rather than acting for any constitutionally legitimate reason.

II.B. The President's lawyers cannot deny that the Proclamation is invalid if it was issued to harm Muslims. So, instead, they invoke the inter-agency review process required by EO-2 to support their claim that the Proclamation rests only on "neutral criteria." Br. 71. There are two basic flaws in this argument.

First, the Proclamation was issued by the President, who alone holds "the executive Power," U.S. Const. art. II, § 1. And here, the President has repeatedly rejected, criticized, and departed from the various policy rationales presented to the courts by his unelected subordinates. *See, e.g.*, *IRAP II*, 883 F.3d at 264-65. It would disrespect the Office of the Presidency—and destroy lines of political and electoral accountability—for this Court to treat the President as insignificant in the issuance of his own Proclamation. His statements about its purpose must be considered authoritative. As the Court has explained, "The people do not vote for the 'Officers of the United States.' They instead look to the President to guide the 'assistants or deputies . . . subject to his superintendence.'" *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477, 497-98 (2010) (citations omitted).

In the Establishment Clause context, it is particularly appropriate to hold the President accountable for his statements when he has used them to shape public understanding of his policy. By virtue of the President's anti-Muslim remarks, millions of people comprehend that the Proclamation targets Muslims for stigma and exclusion. *See Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 315 (2000) ("We refuse to turn a blind eye to the context in which this policy arose."). If the President's words mean nothing for

constitutional purposes—even as they mean everything to those affected by his Proclamation—then the rule of law will suffer. It would be anomalous for this Court to ignore presidential statements broadcast to the world, while embracing litigation-oriented rationales offered by the President's advisors.

This Court's decision will reverberate throughout American life. It will teach the people of this nation—and migrants worldwide—about the meaning of the Constitution. And as a result of the President's harmful statements, any decision by this Court that upholds the Proclamation will send a message that the Constitution allows the President to ban people because he disapproves of their faith.

Second, the question here is not whether the inter-agency review process cured lingering animus from EO-1 and EO-2. Put differently, this case is not about whether the Proclamation is tainted by past illicit intentions that are now extinguished. Rather, the ultimate question is whether the Proclamation—and the "travel ban" policy that it implements—would exist *at all* in the absence of continuing anti-Muslim animus. *See McCreary*, 545 U.S. at 872-73.

The Proclamation cannot be understood in isolation. The President has repeatedly promised to ban Muslims from entering the United States. Since taking office, he has never disavowed that promise. Instead, he has tacitly reaffirmed it, while grudgingly switching to a ban based on territories. The President has also made many openly anti-Muslim statements, and has linked these "politically incorrect" remarks to his calls for a ban that is simultaneously "larger" and "more specific." J.A. 133. The rationales contained in the Proclamation

itself appear nowhere in these statements. The only common thread in the President's remarks about his travel ban—from EO-1 to the Proclamation—is a pejorative view of Muslims and a desire to keep a large number of them out.

Accordingly, the adequacy and neutrality of the inter-agency review process are beside the point, although there is ample reason to doubt both. That review did not precede the travel ban. Rather, it occurred *after* the essential policy determination had already been made. And it functioned primarily to legitimize a presidential command that was born of animus, persists in animus, and seeks to make animus the law of the land. No matter how many officials affix their names to it, the Proclamation rests on a rotten foundation. And rather than seek to cure that animus, the President has only continued to espouse it in public statements. Because no version of the "travel ban" would exist in the absence of improper motives, it is irrelevant that multiple agencies participated in drafting the latest instrument implementing it.

III. Even if this Court were to conclude that national security concerns played some role in the Proclamation's enactment, that still would not save it. Animus may co-exist with legitimate motives. Where the government acts on the basis of mixed motives, courts do not hesitate to invalidate official acts when animus was an *essential* or *primary* motive—as it most certainly was here. *See Windsor*, 133 S. Ct. at 2693; *Lukumi*, 508 U.S. at 535; *Larson*, 456 U.S. at 248.

The importance of that principle is confirmed by reference to original understanding. This country was founded to welcome people of all faiths and to reject religious intolerance. In 1785, James Madison warned against any law departing "from that generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens." James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 9 (1785). He added:

> Instead of holding forth an Asylum to the persecuted, [the Bill] is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance . . . .

Id.

The bill against which Madison remonstrated has been consigned to the dustbin of history. But the underlying evils against which Madison warned are still with us. This case does not present them in disguise. No, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). President Trump has repeatedly espoused the animus that motivated his promises—and his subsequent acts—to ban a large number of Muslims from entering the United States. As a result of his statements, a decision by this Court upholding the Proclamation would deliver a powerful blow to popular faith in the

First Amendment as a shield against official religious prejudice. Respectfully, for freedom to endure, the Proclamation must be enjoined.

ARGUMENT

I. THE CONSTITUTION PROHIBITS GOVERNMENTAL ACTION BASED ON ANIMUS TOWARD RELIGIONS

As Justice Kennedy has explained, "[i]n our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." *Lukumi*, 508 U.S. at 532. This prohibition against governmental action motivated by animus toward a religious group is so fundamental that it has been expressed not only in Establishment Clause doctrine, but also in cases arising under the Free Exercise and Equal Protection Clauses.

Together, these precedents teach that the anti-animus rule rests upon an abiding commitment to equal treatment and religious freedom. Indeed, "the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion [] all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring).

A. The Establishment Clause

The Establishment Clause ensures that government shall not establish any religious orthodoxy, or favor or disfavor one religion over another. *See Larson*, 456 U.S.

at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). This rule is "inextricably connected with the continuing vitality of the Free Exercise Clause." *Id.* at 245. Religious freedom "can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Id*. As Justice Goldberg explained, the Religion Clauses recognize that "[t]he fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

This Court has thus held time and again that the Establishment Clause forbids official acts based on animus toward any particular religious group. That principle transcends many of the familiar divisions in Establishment Clause jurisprudence, and has been embraced by strict separationists, proponents of the endorsement test, those who believe that the Clause targets coercion, and jurists who see a very broad role for religion in public life. *See, e.g.*, *Locke*, 540 U.S. at 725 (Rehnquist, C.J.) (upholding a scholarship program against constitutional attack because "we find neither in the history or text of [the state law], nor in the operation of the [program], anything that suggests animus toward religion"); *Kiryas Joel*, 512 U.S. at 703 (holding courts must safeguard "a principle at the heart of the Establishment Clause, that government should not prefer one religion to another,

or religion to irreligion"); *id.* at 714 (O'Connor, J., concurring) ("[T]he government generally may not treat people differently based on the God or gods they worship, or do not worship."); *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984) (holding the Establishment Clause "forbids hostility toward any [religion]"); *Epperson* v. *Arkansas*, 393 U.S. 97, 106 (1968) (holding that "[t]he State may not adopt programs or practices . . . which 'aid or oppose' any religion"). There is a judicial consensus that government may not act on the basis of animus toward disfavored religious groups.

The Court recently reaffirmed the rule against governmental animus toward religion in *Town of Greece*, which upheld a town's practice of holding a prayer program at the start of monthly board meetings. 134 S. Ct. 1811 (2014). A crucial issue in *Town of Greece* was whether the town had established Christianity by adopting a rotational policy that led to mostly Christian prayers. The Court upheld the town's policy, concluding that some sectarian prayer is consistent with the nation's historical traditions, and that the town's prayer program did not result in religious coercion. *See id.* at 1819-25.

However, the Court's opinion contained a critical limitation:

> If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That

> circumstance would present a different case than the one presently before the Court.

Id. at 1823. The Court thus made clear that the town could not "signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished." *Id.* at 1826. Practices serving to "denigrate, proselytize, or betray an impermissible government purpose" would violate the Constitution and demean adherents of disfavored faiths. *Id.* at 1824; *accord Kiryas Joel*, 512 U.S. at 722 (Kennedy, J., concurring) (stating religious accommodations would violate the Establishment Clause if they "discriminate against other religions").

In a concurrence in *Town of Greece*, Justice Alito echoed the majority's warning against official acts based on animus. He noted that the town's lack of non-Christian prayer leaders "was at worst careless"—adding, "I would view this case very differently if the omission of these synagogues were intentional." 134 S. Ct. at 1831. Similarly, Justice Breyer emphasized the absence of evidence suggesting discriminatory intent. *See id.* at 1840 (Breyer, J., dissenting) ("The plaintiffs do not argue that the town intentionally discriminated against non-Christians when choosing whom to invite[.]").

As *Town of Greece* showed, and as many other precedents confirm, the Establishment Clause's prohibition against animus enjoys wide support among jurists of all methodological persuasions. This rule is also supported by historical evidence concerning the original understanding of the First Amendment. "A large proportion of the early settlers of this country came here from Europe to escape [religious

persecution]." *Everson* v. *Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 8 (1947). By the time the Bill of Rights was ratified, "the American states had already experienced 150 years of a higher degree of religious diversity than had existed anywhere else in the world." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421 (1990).

The Framers thus understood that their task was to design a "government for a pluralistic nation—a country in which people of different faiths had to live together." Jon Meacham, *American Gospel: God, the Founding Fathers, and the Making of a Nation* 101 (2006). As George Washington wrote, "the government of the United States . . . gives to [religious] bigotry no sanction, to persecution no assistance." Letter from George Washington to the Jews (Aug. 18, 1790), in *The Separation of Church and State: Writings on a Fundamental Freedom by America's Founders* 110 (Forrest Church ed., 2004). Thomas Jefferson, in turn, saw the Establishment Clause as "proof that [the people] meant to comprehend, within the mantle of [the law's] protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo and infidel of every denomination." Thomas Jefferson, *Writings* 40 (Merrill D. Peterson ed., Library of Am. 1984).

Governmental acts based on animus toward a disfavored religious group are thus at war with the Establishment Clause, as a matter of principle, precedent, and history. This anti-animus rule follows directly from the Clause's purpose of protecting religious freedom for those sects not favored by the political majority: just as the government cannot coerce

(or endorse) religious belief or practice, neither can it take action based on a desire to harm or suppress any faith. Given the centrality of religion in many people's lives, courts look with the utmost suspicion upon official acts based on hostility to any particular religion. *See Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2607 (2015) ("The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.").

This does not mean that government is unable to recognize the importance of religion—including majority religions—in our nation. Far from it: the anti-animus rule is perfectly consistent with broad views of religion's permissible role in public life. Rather, the Establishment Clause forbids officials from exercising governmental power on the basis of a desire to suppress, harm, or denigrate any particular religious sect or denomination. This limit, though narrow, is vital to religious liberty. *See Am. Commc'ns Ass'n, C.I.O.* v. *Douds*, 339 U.S. 382, 448 (1950) (Black, J., dissenting) ("Centuries of experience testify that laws aimed at one . . . religious group . . . generate hatreds and prejudices which rapidly spread beyond control.").

B. The Free Exercise Clause

The Free Exercise and Establishment Clauses speak as one against laws designed to oppress disfavored faiths. This reflects "the common purpose of the Religion Clauses," which is "'to secure religious liberty.'" *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 313 (2000) (quoting *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962)). Indeed, it was "historical instances of religious persecution and intolerance that gave concern

to those who drafted the Free Exercise Clause." *Bowen* v. *Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.).

This principle received its fullest elaboration in *Lukumi*, where the Court struck down a facially neutral local ordinance on the ground that it was based on animosity toward Santeria religious practices. *See* 508 U.S. at 542. The Court explained that "[t]he Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Id.* at 547. Thus, "Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Id.*

Governmental acts based on religious animosity are wholly forbidden by the Free Exercise Clause. *Id*. That is true even if officials "did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom." *Id.* at 524.

Furthermore, in discerning animus, "[f]acial neutrality is not determinative" because the "Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination." *Id.* at 534. Rather, when government effectively classifies on religious lines, courts guard against "impermissible attempt[s] to target [religious people] and their religious practices." *Id.* at 535.

Under *Lukumi*, evidence of improper purpose may come from the text and structure of an order, the order's real-world effect, or the degree to which the order is tailored to achieve legitimate ends. *See id.* at 533-38. Courts also assess "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.* at 540 (opinion of Kennedy, J.).

Thus, if the full circumstances of an official act disclose that it was based on animus toward a religious group, that act must be invalidated.

C. The Equal Protection Clause

Precisely because the rule against anti-religious animus is grounded in the principle of equal treatment for all faiths, Justice Kennedy has explained that application of that rule should be informed by insights from equal protection doctrine. *See Lukumi*, 508 U.S. at 540 (opinion of Kennedy, J.) ("In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases.").

The Equal Protection Clause is instructive in the Establishment Clause context in at least three respects. First, on many occasions, this Court has equated religion and race as bases of discrimination inimical to our constitutional order. *See, e.g.*, *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303-04 (1976). That principle has been invoked in a wide array of circumstances: "Just as the government may not

segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial." *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment); *see also Shaw* v. *Reno*, 509 U.S. 630, 648 (1993).

Second, equal protection jurisprudence offers a nuanced account of what constitutes impermissible animus. In many cases, the Court has invalidated acts on animus grounds without any finding that particular individuals were subjectively motivated by bigotry. *See, e.g.*, *Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 634. Rather, as Justice Kennedy has explained: "Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring); *accord Lukumi*, 508 U.S. at 524 (recognizing the possibility that officials "did not understand" or "failed to perceive" their animus toward Santeria).

Thus, the Court has remained sensitive to the subtle dangers posed by "unconscious prejudices and disguised animus," as well as the social harms of "covert and illicit stereotyping." *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522 (2015). "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

Finally, equal protection cases shed additional light on how to recognize animus. Several objective factors are often considered relevant: the text of an act; its novelty in our constitutional tradition; the full context leading up to and following enactment; the act's real-world effects; and the degree of fit between an act's stated purpose and its actual structure. *See Windsor*, 133 S. Ct. at 2693-95; *Romer*, 517 U.S. at 634-35; *Cleburne*, 473 U.S. at 448; *Village of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-67 (1977); *United States Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 536-38 (1973). Religion Clause precedents, including those addressing official acts based on animus toward specific religious denominations, consider the same factors. *See Kiryas Joel*, 512 U.S. at 698-705; *Lukumi*, 508 U.S. at 534-36; *Edwards* v. *Aguillard*, 482 U.S. 578, 594-95 (1987); *see also Town of Greece*, 134 S. Ct. at 1824-26 (describing when a pattern of prayers would impermissibly function to "denigrate" or "betray an impermissible government purpose").

The link between the Religion Clauses and the Equal Protection Clause thus promotes a more refined application of the Establishment Clause's ban on governmental animus toward religion.

II. THE PROCLAMATION VIOLATES THE CONSTITUTION BECAUSE IT IS BASED ON ANIMUS AGAINST MUSLIMS

"For centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom." *Town of Greece*, 134 S. Ct. at 1841 (Kagan, J., dissenting). But here, the President issued the Proclamation in defiance of that tradition. Even acknowledging that he is entitled to deference on matters of immigration and national security, it is hard to imagine a clearer instance of official action motivated by animus toward a religion. As Judge Harris has observed, this unusual case features "a governmental decisionmaker using his own direct communications with the public to broadcast—repeatedly, and throughout the course of [the] litigation—an anti-Muslim purpose tied specifically to the challenged action." *IRAP II*, 883 F.3d at 352 (Harris, J., concurring).

A. The Evidence of Animus Is Overwhelming

In its decision addressing the Proclamation, the Fourth Circuit relied on statements by the President concerning his view of Muslims and his desire to ban them from the United States. This evidence included "President Trump's disparaging comments and tweets regarding Muslims; his repeated proposals to ban Muslims from entering the United States; his subsequent explanation that he would effectuate this 'Muslim' ban by targeting 'territories' instead of Muslims directly; the issuance of EO-1 and EO-2, addressed only to majority-Muslim nations; and finally the issuance of the Proclamation, which not only closely

tracks EO-1 and EO-2, but which President Trump and his advisors described as having the same goal as EO-1 and EO-2." *Id*. at 264.

While the Fourth Circuit discussed these facts in relation to *Lemon*'s reasonable observer test, the same evidence also reveals animus: President Trump's Proclamation and the oft-repeated campaign promise it fulfilled were based on a desire to exclude Muslims from this nation. While the Proclamation does not exclude *all* Muslims, and does not single out Muslims by name, the clear and widely-noted goal of the Proclamation is to ban a large number of Muslims from the United States in satisfaction of President Trump's promise to do just that.

Indeed, as explained above, this kind of evidence—the text of an order, its novelty, its real-world effects, the context of its enactment, statements made by decisionmakers, and the degree of fit between an order's stated purpose and actual structure—is the standard fare of courts engaged in animus analysis. *See Town of Greece*, 134 S. Ct. 1824-26; *Locke*, 540 U.S. at 725; *Lukumi*, 508 U.S. at 534-36; *see also, e.g.*, *Windsor*, 133 S. Ct. at 2693-95; *Romer*, 517 U.S. at 634-35; *Cleburne*, 473 U.S. at 448. And as the Fourth Circuit properly held, the immigration and national security contexts of this litigation do not require that the Court close its eyes to the facts. *See IRAP II*, 883 F.3d at 267-69.[2]

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[2] To be sure, the Court in *Kleindienst* v. *Mandel* deferred to a decision to exclude aliens based on "a facially legitimate and bona fide reason." 408 U.S. 753, 770 (1972). But here the President's improper anti-Muslim motive means that the Proclamation was not "bona fide" under *Mandel*. *See id.*

Evaluated through the lens of animus doctrine, the factual record in this case permits only a single conclusion: that the Proclamation and its underlying "travel ban" policy were designed with an anti-Muslim purpose. This conclusion follows from a remarkably consistent series of statements made by the President and his senior advisors starting shortly after the election and continuing to the present:

(1) More than a month after the election, President Trump was asked whether he would revisit his intention to ban Muslims. He replied: "You know my plans all along, and I've been proven to be right." J.A. 123.

(2) Upon signing EO-1, President Trump read its oblique title—"Protecting The Nation From Foreign Terrorist Entry Into The United States"—and said, "We all know what that means." J.A. 124.

(3) On January 28, 2017, Rudy Giuliani stated, "When [President Trump] first announced it, he said 'Muslim ban.' He called me up, he said, 'Put a commission together, show me the right way to do it legally.'" J.A. 125.

(4) When EO-2 was enjoined, the President said he would rather "go all the way, which is what [he] wanted to do in the first place." J.A. 131.

(5) Throughout this period—and until the eve of the Fourth Circuit's oral argument on EO-2—President Trump's regularly-updated campaign website included his call for a "total and complete shutdown of Muslims entering the United States." J.A. 130-131.

(6) On June 5, 2017, the President tweeted: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!" He continued: "The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to the [Supreme Court]" J.A. 132-133.

(7) On September 25, 2017, the President stated that the "travel ban . . . should be far larger, tougher, and more specific," but "stupidly that would not be politically correct." J.A. 133.

(8) When the Proclamation became public, the President told reporters, "The travel ban: The tougher, the better." J.A. 136.

These statements reveal President Trump's consistent and animus-laden motives concerning the "travel ban" policy, leading up to and including the Proclamation. They also confirm that the President has never publicly expressed any change of heart regarding the ultimate basis for imposing a "tougher," "larger," and "politically incorrect" ban on entry.

These public statements, moreover, must be considered in the context of President Trump's other comments about Muslims. *See, e.g.*, *Santa Fe*, 530 U.S. at 315-316. And those remarks dispel any conceivable doubt that the travel ban policy is born of animus.

It is helpful to begin with Mr. Trump's remarks shortly before being sworn into office. *See McCreary*, 545 U.S. at 866 ("The world is not made brand new every morning."). In that period, he stated that "Islam hates us," J.A. 399; called for excluding Muslims

because "we're having problems with the Muslims, and we're having problems with Muslims coming into the country," J.A. 121; explained that he would seek to evade scrutiny of the proposed "Muslim Ban" by formulating it in terms of nationality, rather than religion, J.A. 399; and refused to deny that he proposed "to create a Muslim registry or ban Muslim immigration into the United States," J.A. 123.

These statements continued after Inauguration Day 2017. For example, on March 16, 2017—the day that EO-2 was due to go into effect—President Trump sweepingly asserted that "the assimilation [of Muslims in the U.S.] has been very, very hard." Chris Cillizza, *Donald Trump's Explanation of His Wire-Tapping Tweets Will Shock and Amaze You*, Wash. Post (March 16, 2017). Five months later, invoking a false story about General John Pershing, he implied in a tweet that "Radical Islamic" terrorists should be executed with bullets dipped in pig's blood. *IRAP II*, 883 F.3d at 267. Notably, the President has not suggested committing such atrocities against terrorists of any of other faith.

More recently, on November 29, 2017, President Trump retweeted three anti-Muslim videos produced by Britain First—a group whose mission is to oppose "all alien and destructive politic[al] or religious doctrines, including . . . Islam." *Id*. These incendiary videos depicted purported Muslims attacking people and brazenly smashing Christian religious statues. When questioned by reporters, Deputy Press Secretary Raj Shah drew a straight line from President Trump's discriminatory campaign statements to his latest Proclamation: "The President has been talking about

these security issues for years now, from the campaign trail to the White House," and "the President has addressed these issues with the travel order that he issued earlier this year and the companion proclamation." *Id*.[3]

The Government raises a variety of objections to considering these statements. *See* Br. 64-71. But this Court has never suggested that statements by the President—including those made pre-inauguration—are uniquely irrelevant to motive analysis. To the contrary, it is well-established that courts must consider "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Lukumi*, 508 U.S. at 540 (opinion of Kennedy, J.) (citation omitted).

These considerations reflect simple common sense: it "taxes the credulity of the credulous" to assert that the President's own statements shed no light on the purpose of his order. *Maryland* v. *King*, 133 S. Ct. 1958, 1980 (2013) (Scalia, J., dissenting). That is particularly true here, as the connection in time, subject, scope, and substance between the President's statements and each iteration of his travel ban is extraordinarily clear. And so, too, is the President's pattern of using coded rhetoric to convey a desire to

[3] This statement exemplifies the oddity of arguments against any consideration of President Trump's campaign statements. Since taking office, he and his advisors have repeatedly and explicitly incorporated them by reference to explain the travel ban policy.

ban entry by Muslims—*e.g.*, targeting "territories" and favoring a "politically incorrect" policy.

There is no reason to fear that the free speech rights of candidates, or politicians, would be chilled by consideration of President Trump's public remarks. The First Amendment protects speech, but it does not allow candidates or politicians to evade accountability if their words reveal that an unconstitutional purpose motivated their official actions. To the contrary, courts regularly rely on statements by governmental actors to discern improper intent. *See McCreary*, 545 U.S. at 869; *Edwards*, 482 U.S. at 583; *see also* Richard Primus, *Motive Matters in Assessing the Travel Ban*, Take Care (March 20, 2017) ("If the Administration doesn't want its orders to be struck down, it shouldn't act on the basis of discriminatory motives.").[4]

It is therefore necessary and appropriate to consider President Trump's statements about the travel ban in assessing whether the latest iteration of that policy complies with the Constitution. And those statements make clear that the Proclamation, like its predecessors, rests primarily on forbidden animus.

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[4] If anything, the Government's argument is especially weak compared to similar objections in analogous cases. Usually, this Court seeks to discern the motives of a multi-member body, such as a legislature, and faces hard questions about identifying group motive. Here, in contrast, the Court need only consider the motives of a single man who has made dozens of statements directly explaining his actions.

B. The Review Process Did Not Rid the Proclamation of Animus or Render the President's Statements Irrelevant

If President Trump's public statements reflect the true basis for the Proclamation, there can be no doubt about its invalidity. The Government therefore seeks to reframe the analysis, insisting that any animus in EO-2 was cured by the inter-agency review process preceding the Proclamation. *See* Br. 65-66. But this argument suffers from two separate flaws.

First, faced with strong evidence of animus in a policy issued personally by the President, it is no solution to respond that the chief executive's unelected subordinates acted with pure intentions. That line of reasoning threatens to destroy political accountability. *See Free Enterprise Fund*, 561 U.S. at 497-98. As Judge Wynn has explained, "Voters would be confused as to whether the Proclamation advances the President's promise to ban entry of Muslims, as the President has proclaimed, or is intended to prevent entry of aliens from countries that fail to maintain or share adequate information regarding their nationals, as the Government and the Proclamation claims. Voters, therefore, would not know which policy to hold the President accountable for at the polls." *IRAP II*, 883 F.3d at 347 (Wynn, J., concurring).

It would be particularly imprudent to separate the Proclamation from its author when the President is directly responsible for the global perception that his travel ban exists to subordinate Muslims. In Establishment Clause cases, this Court has refused "to pretend that we do not recognize what [everyone] understands clearly." *See Santa Fe*, 530 U.S. at 315.

Here, the President originated the idea of a Muslim Ban; he campaigned on an animus-laden promise to implement it; he openly explained his strategy for disguising that ban through an order just like the Proclamation; he made numerous public statements linking the travel ban to anti-Muslim animus; and he persisted in seeking this policy despite the absence of any credible need for it. He should not now be permitted to hide behind an administrative review process, or to claim that his own words are irrelevant.

Second, the Government errs in asking whether any animus that tainted EO-2 has been cured by the internal review process. *See* Br. 66. The question here is not whether the Proclamation must fall because animus motivated the creation of EO-1 and EO-2. Rather, it is whether the "travel ban" policy that the Proclamation implements would exist *at all* without continuing anti-Muslim animus. At the very least, a governmental action that would not have occurred in the absence of improper intent is unconstitutional. *See, e.g.*, *McCreary*, 545 U.S. at 873-74; *see also Hunter* v. *Underwood*, 471 U.S. 222, 232 (1985) (holding that a statute is undoubtedly invalid when it would not have been enacted "but-for" discriminatory intent). Here, the only question that needs answering is this: was the Proclamation itself motivated by animus?

The answer to that question is "yes." From EO-1 through the present day, President Trump has issued an unbroken series of public statements expressing his desire to impose a single policy: *the travel ban*. While the President has denounced certain versions of his own ban as too weak—or too politically correct—he has never suggested that they resulted from distinct

motivations. To the contrary, he has been strikingly consistent in connecting his preference for a travel ban to whichever version of that policy exists at the time of his remarks. Much like EO-1 and EO-2, the Proclamation thus exists only to implement the travel ban policy. And as shown above, that policy itself was born of anti-Muslim animus and remains mired in it.

It is of little moment that the Proclamation was crafted through an inter-agency process that identified other potential reasons for such a policy. That review would never have occurred if the President had not already decided to create a travel ban—and to do so for improper, discriminatory reasons. Because this policy is shot through with animus, and would not exist but for animus, it cannot survive constitutional review.

III. THE PROCLAMATION IS INVALID EVEN IF ANIMUS WAS NOT ITS SOLE MOTIVE

Given the exceptional record in this case, it is reasonable to conclude that the Proclamation and its underlying travel ban policy were motivated *solely* by anti-Muslim animus (or by a decision to follow through on anti-Muslim campaign promises). Viewed that way, the Proclamation—whose scope and structure do not match even its own professed security purposes—is analogous to the amendment invalidated in *Romer* v. *Evans*: "Its sheer breadth is so discontinuous with the reasons offered for it that the [Proclamation] seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." 517 U.S. at 632.

In the alternative, it might be concluded that the animus documented by the Fourth Circuit co-exists

with other motives. That is often true in cases evoking the animus principle. Thus, in *Lukumi*, the Court recognized that the subject did implicate "multiple concerns unrelated to religious animosity." 508 U.S. at 535. But those concerns were so "remote" from the ordinance under review that they could not save it. *Id.* So, too, in *Windsor*, where the Court acknowledged other legislative purposes, but nevertheless concluded that the Defense of Marriage Act's "principal effect" and "principal purpose" were to "impose inequality, not for other reasons like governmental efficiency." 133 S. Ct. at 2694. And again in *Larson*, where Minnesota had a valid interest in "protecting its citizens from abusive practices in the solicitation of funds for charity," but where that interest could not explain the State's *de facto* denominational line-drawing. 456 U.S. at 248.

In short, where the government acts on the basis of mixed motives—as it often does—courts do not hesitate to invalidate official action when animus was a *primary* or *essential* motive. *Cf. McCreary*, 535 U.S. at 865. And here, for reasons well stated by the Fourth Circuit, that conclusion is inevitable: both with respect to the existence of a travel ban in general, and with respect to the Proclamation's peculiar structure.

Perhaps the most instructive precedent on this point is *Korematsu* v. *United States*, 323 U.S. 214 (1944). There, too, an order built on animus was presented to courts as required by national security concerns, which judges were forcefully urged to take at face value. There, too, the President acted on the basis of various motives, some of them legitimate and others—the decisive ones—emphatically not so. And there, too, evidence about the true motivations of the

Executive Branch undercut the Government's factual argument to the Judiciary—though whereas that evidence remained buried in 1944, here the President has stated his motives explicitly. *See* Leah Litman and Ian Samuel, *No Peeking?: Korematsu and Judicial Credulity*, TAKE CARE (Mar. 22, 2017).

In *Korematsu*, the Supreme Court acceded to a presidential demand for boundless deference, over a dissent that refused to uphold bigotry. *See* 323 U.S. at 233 (Murphy, J., dissenting) ("Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."). The mere facade of a national security justification, even if actually in the mix of presidential motives, should not have saved an order that rested ultimately on prejudice. As *Korematsu* teaches, when otherwise-valid motives are mixed with animus, the legitimate justification is itself corrupted. *See Powers* v. *Ohio*, 499 U.S. 400, 416 (1991). For good reason, *Korematsu* is now seen as a warning against reflexive deference to the President—even in cases involving sensitive subjects. *See Hassan* v. *City of N.Y.*, 804 F.3d 277, 307 (3d Cir. 2015) ("[T]he past should not preface yet again bending our constitutional principles merely because an interest in national security is invoked." (citing *Korematsu*, 323 U.S. at 223)).

This case tests the lesson of *Korematsu* in our own time. Through his statements, the President has demonstrated to the American people—and to a global audience—that the Proclamation exists to stigmatize and denigrate Muslims. That understanding is now widely shared, unlike the security rationales that the President's lawyers have emphasized in their court

filings. If this Court were to uphold the President's travel ban, it would teach an entire generation that principles of religious liberty do not prohibit the President from exercising his vast powers on the basis of a desire to harm a religious minority. That is wrong as a matter of constitutional law, and it would be a disastrous message to send at this moment in history.

Respectfully, the Court should not abide a Proclamation universally—and correctly—understood to flow from the President's anti-Muslim animus.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that this Court should affirm the judgment below.

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Respectfully submitted,

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