No. 17-965

IN THE
# Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *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 *Amicus Curiae* of Citizens United, Citizens United Foundation, Conservative Legal Defense and Education Fund, Public Advocate of the United States, Gun Owners Foundation, Gun Owners of America, Inc., English First, English First Foundation, Policy Analysis Center, and Restoring Liberty Action Committee in Support of Petitioners

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## INTEREST OF THE *AMICI CURIAE*[1]

Citizens United, Public Advocate of the United States, Gun Owners of America, Inc., and English First are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation, Conservative Legal Defense and Education Fund, Gun Owners Foundation, English First Foundation, and Policy Analysis Center are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). Restoring Liberty Action Committee is an educational organization. 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 seven previous *amicus* briefs in this and related cases in the Fourth and Ninth Circuits, and in this Court:

- Washington v. Trump, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.,* Ninth Circuit (Feb. 6, 2017);
- Washington v. Trump, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, Ninth Circuit (Feb. 16, 2017);

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; 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.

- IRAP v. Trump, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, Fourth Circuit (Mar. 31, 2017);
- Hawaii v. Trump, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, Ninth Circuit (Apr. 21, 2017); and
- Trump v. IRAP, Brief *Amicus Curiae* of Citizens United, *et al.*, U.S. Supreme Court (June 12, 2017).
- Trump v. IRAP, Brief *Amicus Curiae* of Citizens United, *et al.*, U.S. Supreme Court (August 17, 2017).
- Hawaii v. Trump, Brief *Amicus Curiae* of Citizens United, *et al.*, Ninth Circuit (November 22, 2017).

## STATEMENT OF THE CASE

On February 1, 2017, newly inaugurated President Trump issued an Executive Order designed to implement a pause in the immigration policies of President Obama, as he sought to staff a new Administration fashioning new and improved immigration policies and practices as he had promised the American people while on the campaign trail. That Executive Order triggered much litigation primarily in the Ninth and Fourth Circuits.

### A. President Trump's First Two Executive Orders.

The First Executive Order (No. 13,769 (Feb. 1, 2017)) immediately became the subject of litigation around the country. It was replaced by the Second

Executive Order (Executive Order No. 13,780 (Mar. 9, 2017)), which imposed a temporary suspension ("a brief period of 90 days") of immigration from seven specifically named countries, for a specific purpose: to review "existing screening and vetting procedures were under review." *Id*., Sec. 1(b)(ii). In enjoining enforcement, both Maryland and Hawaii district court judges actually went so far as to enjoin the President himself — an almost unprecedented act. The Fourth Circuit and the Ninth Circuit removed the injunctions against the President, but upheld injunctions as to other defendants, the Fourth limiting it to Section 2(c) of the Second Executive Order,[2] and the Ninth limiting it to both Sections 2 and 6.[3] This Court granted certiorari to review the decisions of both circuits, but after the expiration of the Second Executive Order ordered the lower courts to vacate the injunctions and dismiss those cases as moot . *See* Trump v. Hawaii, 138 S.Ct. 377 (Oct. 24, 2017).

### B. Presidential Proclamation 9645

On September 24, 2017, the President issued his third presidential directive: Proclamation 9645. The Ninth Circuit affirmed a nationwide injunction imposed by the District Court in Hawaii, on statutory grounds, without reaching the Establishment Clause claim. Hawaii v. Trump, 878 F.3d 662, 702 (9th Cir. 2017). The Government filed a petition for certiorari

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[2] Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 572 (4th Cir. 2017) ("IRAP").

[3] Hawaii v. Trump, 859 F.3d 741, 755 (9th Cir. 2017).

and Respondents urged this Court to add the Establishment Clause question because the alleged Establishment Clause violation "would be sufficient by itself to justify the affirmance of the preliminary injunction." Brief in Opposition at 34. On January 19, 2018, this Court granted certiorari to review the decision of the Ninth Circuit and directed the parties to address the Establishment Clause question.

On February 15, 2018, the Fourth Circuit upheld the Maryland District Court's nationwide injunction as before, on the ground that it violated the Establishment Clause. *See* Int'l Refugee Assistance Project v. Trump, 2018 U.S. App. LEXIS 3513, *61 (4th Cir. 2018). On February 23, 2018, the Maryland plaintiffs also filed a petition for certiorari (No. 17-1194), seeking review of one question decided against it in the Fourth Circuit, and requesting consolidation with the Ninth Circuit case. This *amicus* brief addresses, as has the Government, the Establishment Clause claim as it was decided by the Fourth Circuit. Brief for Petitioners ("Pet. Br.") at 17, 58.

## SUMMARY OF ARGUMENT

The Establishment Clause claim rests entirely upon the mistaken assumption that, because the Proclamation disfavors the Muslim religion, it is an unconstitutional law respecting an establishment of a religion. This claim is erroneous both as a matter of logic and of history. Logically, to establish is to favor, not disfavor, something. Historically, this Court has consistently recognized that the Establishment Clause was designed to prohibit laws that "prefer" one religion

over another, not laws that disfavor a religion as alleged here. Thus, reliance on the Lemon test – a test developed in Establishment Clause cases to appraise the constitutionality of a law designed to benefit religion – is totally misplaced here. Or "has no place here."

The Fourth Circuit plaintiffs were never able to demonstrate they suffered judicially cognizable harm. The injuries alleged were expressed in terms of feelings and expectations. Efforts to show injury to plaintiffs, through assertions that some third parties discriminated against Muslims, or that the "facially-legitimate" Proclamation itself was offensive, were unavailing. To the extent that there was any other type of injury alleged, it was to foreign nationals who have no protectable First Amendment rights. Therefore, the Court should never have reached the issues of supposed bias and animus by a coordinate branch of government. Candidate Trump repeatedly expressed his plan to limit entry into the country from certain majority-Muslim countries and, based on that, the American people voted him into office. A court that imputes animus to the President also levels that charge against the American people who elected him, and the judiciary has no role to second-guess the results of an election. Despite denying it did so, the Fourth Circuit conducted precisely what this Court has prohibited — a "judicial psychoanalysis of a drafter's heart of hearts."

The Hawaii and Maryland District Court injunctions, as upheld by the Ninth and Fourth Circuits, were not limited to granting relief to the

parties before the court, but purported to bind the Trump Administration worldwide from implementing its travel restrictions. The extraordinary nature of the remedy was given little attention by the courts below, as illustrated by Judge Watson's observation "[n]ationwide relief seems appropriate in light of the likelihood of success" on the merits. The courts below relied on the 2015 injunction against President Obama's DAPA program entered in Texas, et al. v. United States, but they failed to recognize, or at least failed to point out, that case was inapposite, as it involved a violation of the Administrative Procedure Act which authorized courts to "set aside" illegal agency action.

The Ninth Circuit appeared to justify the scope of its injunction based on the need to allow "lesbian, gay, bisexual, transgender, and queer ("LGBTQ") individuals "to safely bring their partners home to them," even though this claim was never before the Court. And the case cited by the Ninth Circuit as authority for a nationwide injunction involved a class action, also not involved in this case. The injunctions entered below violate this Court's rule in United States v. Mendoza, designed to provide this Court with the benefit of multiple, different circuit court decisions. Lastly, these injunctions exceeded the judicial power of the United States, going beyond resolving disputes into making and implementing laws and rules for the nation.

## ARGUMENT

### I. THE CLAIM THAT THE PRESIDENTIAL PROCLAMATION VIOLATES THE ESTABLISHMENT CLAUSE IS BOGUS.

In its opening brief, the Government erroneously assumes that the Establishment Clause claim tendered in this case is genuine, but that it fails on its merits — either because the Presidential Proclamation (i) "rests on a 'facially legitimate and bona fide reason'" in compliance with this Court's ruling in Kleindienst v. Mandel, 408 U.S. 753 (1972); or (ii) has an "'official objective' [that] is religion-neutral" in compliance with McCreary County v. ACLU of Ky., 545 U.S. 844, 862 (2005). Pet. Br. at 16, 58-71. In fact, however, the Establishment Clause challenge to the Proclamation fails without resort to the merits, because it rests upon a claim that the Proclamation "disfavors" the Muslim religion, whereas the Establishment Clause condemns only laws that "prefer" some religion over another. *See* Larson v. Valente, 456 U.S. 228, 244-46 (1982). As this Court has explained in Larson:

> Since [1947] this Court has adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can "pass laws which **aid** one religion" or that "**prefer** one religion over another." [*Id.*. at 246 (emphasis added).]

Because the Establishment Clause claim here, both on its face and as a matter of fact, rests on alleged "animus" toward the Muslim faith, not on a preference

for any religion, the claim is not a genuine Establishment Clause claim, and thus, fails to constitute a claim upon which relief can be granted under F.R.Civ.P. Rule 12(b)(6).

### A. The Establishment Claim Rests Entirely Upon the Ground that the Proclamation Disfavors the Muslim Religion.

As Petitioners make clear in their brief, the Establishment Clause objection to the Proclamation was based on the allegation that it was "infused with religious animus ... 'denigrat[ing]'" the Muslim religion. Pet. Br. at 17, 28, 65-66. As the Petitioners further explained, it was on the basis of this allegation that the Fourth Circuit rendered its decision that "EO-2 was the product of religious animus, and then contend[ing] that the Proclamation failed to 'cure the "taint."'" Pet. Br. at 65-66. Indeed, the Fourth Circuit went to great lengths to establish that the Proclamation violated the Establishment Clause solely on the ground that the Proclamation and its predecessor executive orders "disfavored the Muslim faith." IRAP v. Trump, 2018 U.S.App. LEXIS 3513, *17-18, *28-29, *32-33 (4th Cir. 2018). *See also id.* at *33, *37. So convinced by its evidentiary survey, the Fourth Circuit concluded that "the Proclamation's invocation of national security is a pretext for an anti-Muslim religious purpose":

> Plaintiffs here do not just plausibly allege with particularity that the Proclamation's purpose is driven by anti-Muslim bias, they offer undisputed evidence of such bias: the words of

> the President. This evidence includes President Trump's disparaging comments and tweets regarding Muslims; his repeated proposals to ban Muslims from entering the United States.... [*Id.* at *48-49.]

Completely absent from the Fourth Circuit opinion is any evidence that the Proclamation purposes to favor a religion. To be sure, the Fourth Circuit did note that the President had previously stated that "EO-1 would give preference to Christian refugees" (*id.* at *18), but it never ruled that the purpose of the Proclamation was to "prefer" Christianity over Islam. *See id.* at *53-54. Rather, the Fourth Circuit found only that, as a matter of fact, "EO-1 ... provided exemptions for Christians," negating "any asserted evidence indicating a genuine national security purpose," but rather to reinforce the claim that EO-1's overarching "*purpose* was to discriminate against Muslims," not to prefer Christians. Indeed, whatever preference that EO-1 may have given to "Christian refugees," that provision was entirely removed from subsequent iterations of the travel ban, including the Proclamation. To the contrary, after "[e]xamining official statements from President Trump and other executive branch officials, along with the Proclamation itself," the Fourth Circuit "conclud[ed] that the Proclamation is unconstitutionally tainted with animus toward Islam." *Id.* at *33. If so tainted, it taxes one's credulity how the Proclamation can be a law respecting an establishment of religion, when that very Proclamation is touted as one that disfavors a religion. This is Alice in Wonderland logic, unsupported either by the plain meaning of the words

"establishment" and "disfavor," or by the historical context of the Establishment Clause.

### B. The Establishment Clause Does Not Apply to Laws that Disfavor Religion.

The Fourth Circuit opinion, as it is written, is inconsistent. On the one hand, it has stated that the plaintiffs have "claimed that the Proclamation violated the Establishment Clause's prohibition on disfavoring religion...." *Id.* at *29. On the other hand, it has stated that the "Plaintiffs here have alleged that the Proclamation violates the Establishment Clause, which bars government action that establishes **or** disfavors religion." *Id.* at *36 (emphasis added). *See also id.* at *37. In its first statement, the Fourth Circuit appears to have embraced the novel notion that the word "establishment" comprehends "disfavor." However, in its second statement, the Fourth Circuit makes clear that it understands those two words have distinctly different meanings. According to Webster, "disfavor" means "the state or fact of not being favored or in favor."[4] In contrast, Webster defines "establish": "to assist, nurture so that stability and continuance are assured." *Id.* at 778. Thus, establishment means an "act of bringing into existence, creating, founding, originating or setting up so that certain continuance is assured." *Id.* In contrast "disfavor" means "the condition of being deprived of favor or under displeasure; or absence of loss of that which favors one's standing or cause." *Id.* at 649. Thus, synonyms

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[4] N. Webster, Third International Dictionary 649 (1982).

for disfavor are "disadvantage" or "dislike" (*id.*), whereas "establish" calls to mind words like "appoint," "entitle," or "ordain." *Id.* at 778. Rather than the two words having compatible meanings, they are quite the opposite. The ordinary meaning of the phrase[5] — "no law respecting an establishment of religion" — would preclude only those laws conferring favor on a religion, not laws that would disfavor.

The distinction between a government act favoring religion, as contrasted with disfavoring religion, is not just a semantic one, but also stems from the fact that the two religion clauses in the First Amendment were designed to protect two quite different rights. As Joseph Story has 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). 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. 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.* at Section 1876. This reading of the Establishment Clause is compatible with the history of the two

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[5] "The ordinary-meaning rule is the most fundamental semantic rule of interpretation." A. Scalia & B. Garner, Reading Law at 69 (West: 2012).

religion guarantees as they appear in the First Amendment.

A quarter century ago, this essential distinction between Establishment and Free Exercise claims was marked by this Court. In Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993), the Court observed that, in cases involving claims of a government "attempt to **disfavor** [one's] religion[,] the Free Exercise Clause is **dispositive.**" *Id.* at 532 (emphasis added). In contrast, the Court further noticed that "Establishment Clause cases ... for the most part[6] have addressed governmental efforts to **benefit** religion or particular religions." *Id.* (emphasis added). In the eyes of this Court, then, there are two kinds of religion cases — Establishment and Free Exercise — each of which "deal[s] with a question different ... in its formulation and emphasis." *Id.*

In Free Exercise cases, discriminatory actions taken against a religion require proof that the action "prohibits" one's "exercise" of one's religious faith. *See id.* at 532. *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 exercise" of animal sacrifices. *Id.* at 542. Such is not

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[6] Even if 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.

the case here. No one is contending that any one is prohibited from exercise of their religious faith by the President's Proclamation. Instead, the claim is phrased as an Establishment one, asserting that the Proclamation "send[s] a message to **non-adherents** of a particular religion that they are *outsiders*, not full members of the political community." *See* IRAP at 36 (italics original, bold added). To sustain such a claim, a court must first discern whether the law or activity in question is one that is conferring a benefit upon a favored religious group, and on account of this favor, unconstitutionally causes "feelings of marginalization and exclusion" in **non-adherents** of the preferred religious faith. *Id.* at 43.

### C. The Establishment Clause Claim Here Should Not Be Appraised by the Lemon Test.

Having assumed that the Establishment Clause applies even to laws that do not prefer or in some other way benefit religion, the Fourth Circuit assumed that this Court's three-part test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971) would apply. Slip Op. at 44. The Fourth Circuit is mistaken — on two counts.

First, as already established, there is no finding that the Proclamation preferred any religious denomination over another, such as in Larson v. Valente, 456 U.S. 228, 244 (1982); nor was there any effort expended upon an inquiry whether one could infer from the alleged anti-Muslim rhetoric that the real purpose was to benefit any competing religious

faith. *See, e.g.,* Epperson v. Arkansas, 393 U.S. 97 (1968). The Lemon test, however, has been tailored to sort out those laws that permissibly benefit religion from those that do not, requiring proof of: (i) a "secular purpose," (ii) a primary effect that neither advances not inhibits religion, and (iii) no "foster[ing] [of] 'an excessive government entanglement with religion." *Id.* at 612-13. Each prong of the test makes sense only if the Establishment Clause challenge is limited to claims that one has been injured by a government benefit conferred on a favored religious group, such as the placement of a Ten Commandments monument on public property,[7] the erection of a creche scene during the Christmas season on the county courthouse lawns,[8] teaching "creation" in a public school classroom,[9] prayer and Bible reading as part of the public school curriculum,[10] conferring monetary benefits upon private religious schools,[11] conferring monetary benefits upon parents who send their children to private religious schools,[12] or providing tax

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[7] *See, e.g.,* McCreary County v. ACLU of Ky., 545 U.S. 844 (2005).

[8] *See, e.g.,* County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984).

[9] *See, e.g.,* Edwards v. Aguillard, 482 U.S. 578 (1987).

[10] *See, e.g.,* Wallace v. Jaffree, 472 U.S. 38 (1985); Abington v. Schempp, 374 U.S. 203 (1963).

[11] *See, e.g.,* Everson v. Board of Education, 330 U.S. 1 (1947); Valley Forge Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464 (1982).

[12] *See, e.g.,* Mueller v. Allen, 463 U.S. 388 (1983).

breaks and other monetary benefits to support private counseling organizations with ties to certain religious denominations.[13]

Second, and in any event, federal court judges are ill-advised to grant preliminary injunctive relief in Establishment Clause cases based on the application of the Lemon test. Such preliminary relief is available only when one is likely to succeed on the merits, and it is not obvious that the Court would even apply the Lemon test, much less render a decision favorable to plaintiffs on the merits. *See* K. Ravishankar, "The Establishment Clause Hydra: The Lemon Test in the Circuit Courts," 41 U. DAYTON L. REV. 262 (2006). Indeed, for years, the Court's Establishment Clause jurisprudence has been severely criticized by former members of this Court. *See, e.g.,* Zelman v. Simmons-Harris, 536 U.S. 639, 688 (2002) (Souter, J., dissenting) (Establishment Clause jurisprudence has reached "doctrinal bankruptcy"); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring) ("Establishment Clause [cases constitute a] geometry of crooked lines and wavering shapes"); Committee for Public Educ. and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) ("the 'blurred, indistinct, and variable barrier' described in *Lemon*.").

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[13] *See, e.g.,* Bowen v. Kendrick, 487 U.S. 589 (1988).

## II. THE MATTER BEFORE THIS COURT DOES NOT RISE TO THE LEVEL OF AN ARTICLE III CASE OR CONTROVERSY.

During his campaign for the presidency, then-candidate Trump repeatedly invoked the term "radical Islamic terrorism."[14] This rhetoric distinguished him from President Obama, who for years had been widely criticized because of his steadfast refusal to use the words "Islamic" and "terrorism" in the same sentence.[15] President Trump apparently believed it was little more than common sense to describe a significant portion of the world's terrorism in relation to the religion openly espoused by the persons committing it. President Obama, however, appeared to believe that linking Islam to terrorism would paint with too broad a brush, tying an entire religion to the views of a subset of its most extreme and violent adherents. At its essence, this rhetorical conflict constituted a political dispute between two competing positions embraced by different segments of the American public.

Whether or not Fourth Circuit Chief Judge Gregory and his Fourth Circuit colleagues who joined his opinion approve, on November 8, 2016, the American people voted for the very immigration

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[14] P. Holley, "'Radical Islamic terrorism': Three words that separate Trump from most of Washington," *The Washington Post* (Mar. 1, 2017)

[15] D. Diaz, "Obama: Why I won't say 'Islamic terrorism,'" CNN (Sept. 29, 2016)

policies that President Trump has been attempting to carry out with EO-1, EO-2, and the September Proclamation. Indeed, President Trump's statements that the Chief Judge Gregory finds so "disparaging," "disturbing," and "raw[]" (IRAP at *52, *55, *57) were widely known by the American public prior to its choosing to elect President Trump. Therefore, the Court's imputation of religious animus to President Trump based on statements he made on the campaign trail inescapably imputes those same motivations to the American public who voted for the President's policies. This is dangerous ground for the judiciary to stand, as it is fundamental to our nation that it is the people who are sovereign.

The political dispute reflected in this case is quintessentially the sort of matter in which judges should have absolutely no role, aside from their role as an individual citizen in casting an election ballot.[16] Unfortunately, many federal judges appear to think differently. But it is not the role of federal judges to operate 'behind enemy lines' as a left-behind army, tasked with impugning the President and impeding his agenda.

### A. It Is Not the Role of Article III Courts to Redress Hurt Feelings.

As the Fourth Circuit's *en banc* opinion makes clear, the suit before it was based not on the First Amendment rights of foreign nationals — as they have

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[16] *See* Judge Niemeyer's dissent, IRAP at *325-26.

none (*see* Kleindienst v. Mandel, 408 U.S. 753, 762 (1972), *see also* IRAP at *339 (Judge Agee, dissenting)) — but on the rights of American citizens and persons. Yet, as the Fourth Circuit admits, the plain language of "[t]he Proclamation only applies to foreign nationals who are outside the United States...." IRAP at *26. One is left to wonder, then, how an American's rights can be violated by a policy that, by its terms, has nothing to do with him. In order to reach that conclusion, the Fourth Circuit was forced to engage in a series of mental and emotional leaps, relying on a series of precedents that in no way stand for the principles that the Fourth Circuit claimed.

First, the Fourth Circuit attempts to bridge the gap between persons explicitly targeted by the Proclamation and persons allegedly affected, with its conclusion that the U.S. plaintiffs in this case "have sufficiently alleged **personal contact** with unconstitutional religious animus." IRAP at *34 (emphasis added). That is so, the court claims, because "Establishment Clause injury-in-fact 'may be shown in various ways'...." *Id*. at *36. The court then relies on a series of cases where Establishment Clause standing was found — while not bothering to mention that all of those cases dealt with laws or policies that applied within the United States to United States persons. *See id.* at *36-37; *see also* Pet. Br. at 61-62. The court cites not one authority for the proposition that policies directed only at those with no ties to this country can injure domestic persons sufficiently to create Article III standing.

Second, apparently recognizing the thinness of its argument, the Fourth Circuit cites itself for the proposition that "Establishment Clause injuries are often 'spiritual and value-laden, rather than tangible and economic.'" IRAP at *36 (citing Moss v. Spartanburg County School District Seven, 683 F.3d 599, 607 (4th Cir. 2012)). But even if that were so, the injuries the court alleges here do not even meet its own test. The court claims that the plaintiffs are "suffering '[f]eelings of marginalization and exclusion,'" and "are experiencing prolonged separation from close family members who have been rendered categorically ineligible for visas." IRAP at *38. Indeed, plaintiffs' case in the Fourth Circuit rises and falls on feelings — giving a list of eight examples of how various plaintiffs below "**feel**," "**feels**," or "**felt**."[17] IRAP at *39-40.

Even pretending that hurt feelings can establish standing, the Fourth Circuit is utterly unable to tie the alleged "injuries-in-fact" offered by the plaintiffs to the alleged anti-Muslim "evidence" it marshals against President Trump. It appears that most of the hurt "feelings" to which the Fourth Circuit refers were not

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[17] As these *amici* noted in an earlier *amicus* brief in this case: "Dr. Elshikh does not have standing just because President Trump has made him sad." As *amici* explained: "Being personally offended by government action has never been sufficient to confer standing for a federal judge to second guess the President of the United States — at least before 2017 challenges to President Trump's two Executive Orders. Although this country may now have entered an era where people often believe that they can go to court any time their feelings have been hurt, the lawyers and the district court should have known better." Hawaii v. Trump, Brief *Amicus Curiae* of USJF (Apr. 21, 2017) at 17-18.

caused by President Trump's alleged anti-Muslim statements directly, but rather because various plaintiffs "'heard anti-Islamic comments more frequently,' and he or someone he knows experiences Islamophobia '[a]lmost every week,'" or because "a man ... said that I make this country worse," or because another plaintiff "gets 'more suspicious looks from more people'...." IRAP at *39-40. Apparently in the Fourth Circuit, standing to challenge an executive action can be established by an odd look from a stranger. *See* IRAP at *343 (Agee, J., dissenting). Additionally, even when the Fourth Circuit tries to tie President Trump to the plaintiffs' injuries, it is not President Trump's alleged anti-Muslim statements that are the cause of the injuries, but rather the travel ban itself. The lower court blames "the ban," "the travel restrictions," "the first travel ban," "the Proclamation," and "this new Proclamation" — a Proclamation the court assumed was "facially legitimate." IRAP at *39-40, 47.

Finally, the Fourth Circuit makes one last attempt to shore up its opinion by citing a 1982 opinion of this Court. The Fourth Circuit alleges that hurt feelings "are personal, particularized injuries cognizable under Article III because they are suffered '*as a consequence* of the alleged constitutional error.'" IRAP at *40-41 (citing Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 485 (1982). In reality, Valley Forge says much more — in fact, it says just the opposite.

> Although respondents claim that the Constitution has been violated, they claim

> nothing else. They **fail to identify** any personal injury suffered by them *as a consequence* of the alleged constitutional error, **other than** the **psychological consequence** presumably produced by observation of conduct with which one disagrees. [Valley Forge at 485 (emphasis added).]

The Fourth Circuit's machinations are unavailing — there simply is no law for the sort of standing the lower court "found" (manufactured) in this case. It is entirely unclear how EO1, EO2, or the Proclamation now under review make any of the plaintiffs feel like they are "'outsiders, not full members of the political community'" (IRAP at *36), when the President's actions explicitly apply only to foreigners who quite literally — and certainly legally — are "outsiders, not full members of the political community." *See* IRAP at *339-40 (Judge Agee, dissenting).

### B. It Is Not the Role of Courts to Inquire into Motivations of a Coordinate Branch.

Following its creation of standing out of whole cloth, the Fourth Circuit begins its Establishment Clause analysis by noting that "[t]he Proclamation's stated purpose is 'to protect [U.S.] citizens from terrorism....'" IRAP at *47. However, the Court apparently is not entirely sure that national security is a valid governmental interest: "**[a]ssuming without deciding** that the proffered purpose of the Proclamation is 'facially legitimate'...." *Id.* (emphasis added). Rather, the court "'look[s] behind' the Government's proffered justification for its action," and

concludes that "the Proclamation's invocation of national security is a pretext for an anti-Muslim religious purpose." *Id.* at *48.

The Fourth Circuit fabricates President Trump's alleged "pretext" out of bits of "evidence" about foreign Muslims which, the court argues, leads to the "'commonsense conclusion'" that the President's actions were taken because of his "'religious animosity'" towards U.S. Muslims. *See* IRAP at *48, *49, *51, *60. The government's opening brief on the merits in this case correctly criticizes the Fourth Circuit for relying on "extrinsic material" rather than the actual text and context of the Proclamation. Pet. Br. at 17. The government notes that this Court's precedents do not "permit courts to 'look behind' the Proclamation's stated rationale and search for pretext." Pet. Br. at 61. Even so, the Fourth Circuit's "peek behind" the Proclamation does not reveal the animus that the court claims.

On first glance, much of the court's "evidence" is nothing more than its perception of President Trump's attitude, rather than actual "evidence." But, even the so-called "evidence" on which the court relies is misleading, at best. Early in its opinion, the court claims that "President Trump stated in an interview with the Christian Broadcasting Network that EO-1 would give **preference** to Christian refugees." IRAP at *18 (emphasis added). To be sure, that correctly reflects the spin put on President Trump's statement by the interviewers, but what he actually said was far different. In reality, what President Trump said was that the disparity between Muslim and Christian

refugees was "very, very unfair" and "we are going to help them."[18] A promise to stop discrimination against one group of persons hardly rises to the level of an intent to "prioritize" them, or to correspondingly discriminate against others.

The Fourth Circuit also uses as "evidence" of the President's alleged animus the fact that he often has made statements expressing his desire to ban Muslim immigration from certain countries. IRAP at *19, *49, *52 n.15. The court apparently believes such statements provide an open and shut case — that a statement intending to crack down on Muslim immigration is *per se* discrimination on the basis of religion. *See* IRAP at *56. Nothing could be further from the truth. In making this assumption, the Fourth Circuit confuses President Trump's "purpose" with his "motivation." Noting that this Court has permitted courts to "'look behind' the Government's proffered justification" (IRAP at *48), the Fourth Circuit claims to do just that by looking at evidence that it believes is unambiguous — such as President Trump's statements that use the word "Muslim." But rather than the court looking behind the Proclamation at President Trump's statements, the court looks behind those statements at a meaning the court

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[18] D. Brody, "Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees," CBN News (Jan. 27, 2017) https://www1.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees.

imputes to them.[19] Indeed, while many of President Trump's statements may be clear, the motivation behind them is not unambiguous. For example, the President has said "that he wanted a 'Muslim ban'...." IRAP at *19. The Fourth Circuit believes this statement is capable of only one interpretation — President Trump must hate Muslims. But the President never actually said "I want a Muslim ban because I hate Muslims" — not even close. It is the Fourth Circuit which imparts this unstated meaning to the President's words, by engaging in precisely what this Court has prohibited — a "judicial psychoanalysis of a drafter's heart of hearts." McCreary, 545 U.S. at 862; *see* Pet. Br. at 17, 64.

As President Trump has repeatedly stated, his intent is to exclude terrorists from the United States. President Trump clearly believes that the majority of the terrorist threats that this nation faces come from countries with Muslim populations, that this form of terrorism is inextricably linked to the religion of those who perpetrate it, and that excluding persons from certain majority-Muslim countries is the best way to exclude terrorists from their midst.[20] While some may disagree with some of those suppositions, they do not constitute animus.

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[19] As Judge Niemeyer notes in his dissent, the majority's conclusion of animus came from "the **unstated** objective of expressing anti-Muslim animus." IRAP at *323 (emphasis added).

[20] Judge Niemeyer concludes that "[u]nless corrected, the district court's approach will become a sword for plaintiffs to challenge any facially neutral government action, particularly an action affecting regions dominated by a single religion." IRAP at *325.

### C. Article III Courts Do Not Have a Free Wheeling Mandate to "Do Justice."

In a speech to a bar association last year, Fourth Circuit Chief Judge Gregory explained his belief that the core of the Constitution was the phrase "establish justice"[21] contained in its Preamble — even though we do not know what that is all the time. And, he explained that a judge has "the power to make void any act that is contrary to the manifest tenor of the Constitution.... It's not the height of our dedication to the rule of law, but it's the depth of our determination to do justice...." *Id.* Reducing the Constitution to two words — "do justice" — gives judges a fair bit of latitude to strike down whatever they may believe is against the "manifest tenor" of the Constitution, as different judges may interpret that standardless phrase.[22] In overruling the President's Proclamation that was authorized by statute, Judge Gregory apparently concluded that "the Rule of Law falls short." *Id.* Departing from the historic role of the Courts to "say what the law is,"[23] the Fourth Circuit determined to do what the judges felt that justice required.

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[21] *See* North Carolina Bar Association Annual Meeting (2017) https://www.youtube.com/watch?v=0wsjrKFU-bc at 10:20.

[22] Judge Niemeyer, writing in dissent, similarly faults the majority for creating a "new rule that [] will enable a court to justify its decision to strike down any executive action with which it disagrees." IRAP at *319.

[23] Marbury v. Madison, 5 U.S. 137, 177 (1803).

## III. THE DISTRICT COURT'S INJUNCTION, AS MODIFIED BY THE NINTH CIRCUIT, IS CONSTITUTIONALLY INFIRM, EXCEEDING THE JUDICIAL POWER OF THE FEDERAL COURTS.

### A. The District Court's Global Injunction Granted Relief to Persons Not Parties to the Litigation.

This Court granted certiorari to determine "[w]hether the global injunction is impermissibly overbroad." Petition for Certiorari at (1). In this case, the overbreadth problem is not primarily an issue of the injunction's geographic scope, but rather whether the district court had authority to grant relief to an enormous class of persons who are not parties to the litigation.

The five plaintiffs in this suit were identified as the "State of Hawai'i ..., Ismail Elshikh, Ph.D., John Doe 1, John Doe 2, and the Muslim Association of Hawaii, Inc." Hawai'i[24] v. Trump, 265 F.Supp.3d 1140, 1145 (D. Haw. 2017). Although all of the individual plaintiffs were residents of Hawaii and the claims of all parties related to that state directly, these five plaintiffs sought "a nationwide" injunction, as if they had brought a class action on behalf of all Muslims nationwide. Yet district court judge Derrick K.

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[24] Note that the district court used what it appeared to believe to be a culturally sensitive name for the State of Hawaii, federal law notwithstanding.

Watson obligingly responded, "the Court orders exactly that." *Id*. at 1148.

Actually, Judge Watson went even further than requested, as the injunction he ordered could more accurately be described as breathtakingly "global" in scope, just short of galactic:

> Defendant[s] ... are enjoined fully from enforcing or implementing Sections 2(a), (b), (c), (e), (g), and (h) of the Proclamation issued on September 24, 2017 ... **across the Nation**. Enforcement of these provisions **in all places, including the United States**, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court. [*Id*. at 1160-61.]

Although Judge Watson could have issued an injunction properly tailored to remedy the harm allegedly suffered by the named plaintiffs, he chose to bring a complete stop to the President's Proclamation of September 24, 2017, despite the fact that it was plainly designed to protect United States "'citizens from terrorist attacks and other public safety threats,' by preventing 'foreign nationals who may ... pose a safety threat ... from entering the United States'" (*id.* at 1146-47, citing Proclamation). This injunction had the effect of barring the new President of the United States from implementing the immigration policies on which he had campaigned, and on which he was

elected President of the United States by the American people.[25]

### B. The District Court Global Injunction Was Unauthorized by Law.

Judge Watson's only discussion of the scope of his injunction was one paragraph:

> Nationwide relief is appropriate in light of the likelihood of success on Plaintiffs' INA claims. *See* Washington [v. Trump], 847 F.3d at 1166-67 (citing Texas [v. United States], 809 F.3d at 187-88); *see also* Hawaii [v. Trump], 859 F.3d at 788 (finding no abuse of discretion in enjoining on a nationwide basis Sections 2(c) and 6 of EO-2, "which in all applications would violate provisions of the INA"). [*Id.* at 1160.]

The extent of the consideration given to, and justification for, the worldwide scope of Judge Watson's injunction was limited to two Ninth Circuit decisions issued in similar litigation earlier that year, supported by a decision issued by the Fifth Circuit — Texas, *et al.* v. United States, 809 F.3d 134 (5th Cir. 2015). The Fifth Circuit upheld a nationwide injunction in a multi-state challenge to President

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[25] It also prevented the new President from changing the policies of the former President of the United States — who happened to have been Judge Watson's classmate at Harvard Law School, and who had appointed Judge Watson to the federal bench in 2013. See A. Burns, "From a Placid Judge, a Cutting Rejection of Trump's Travel Ban," *New York Times* (Mar. 16, 2017).

Obama's implementation of DAPA — the Deferred Action for Parents of Americans and Lawful Permanent Residents. However, Judge Watson failed to point out that the district court injunction in the Texas case was based on a finding of a violation of the Administrative Procedure Act ("APA"), and its directive to federal courts that a:

> reviewing court shall ... hold unlawful and **set aside** agency action ... found to be — (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ... [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. [5 U.S.C. § 706(2) (emphasis added).]

The APA grant of authority to "set aside" empowers a federal district court to "vacate" agency action that violates APA and, once that occurs, the agency has no authority to act otherwise anywhere in the nation. At bottom, that statute does not authorize nationwide injunctions, but rather authorizes federal courts to vacate illegal agency action. In contrast, there was no reliance on an APA violation or other comparable congressional authority undergirding Judge Watson's global injunction in Hawaii.

### C. The Ninth Circuit's Modification of Judge Watson's Injunction Cured Nothing.

On appeal, the Government argued that the injunction was overbroad, for a variety of reasons. Hawaii v. Trump, 878 F.3d 662, 701 (9th Cir. 2017). Reviewing the scope of the preliminary injunction only

for an abuse of discretion, the Ninth Circuit agreed that:

> a **nationwide injunction** was necessary to give Plaintiffs a **full expression** of their rights. [*Id*. at 701 (emphasis added).]

The Court never explained why the injunction could not have been narrowed and still provide full relief to the named plaintiffs, nor did it make clear what it meant by "full expression." It may be a reference to a "politically correct" comment that appears never to have been raised by the parties, but gratuitously added by the appellate court:

> The Proclamation also risks denying lesbian, gay, bisexual, transgender, and queer ("LGBTQ") individuals in the United States the opportunity to reunite with their partners from the affected nations.... The public interest is not served by denying LGBTQ persons in the United States the ability to safely bring their partners home to them. [*Id*. at 701.]

The Ninth Circuit purported to modify the district court injunction, commenting that "a nationwide injunction is permissible [while] a worldwide injunction as to all nationals of the affected countries extends too broadly." *Id*. at 701. By omitting protection for foreign nationals who have no "credible claim of a bona fide relationship with a person or entity in the United States" (*id*. at 702), the Ninth Circuit purported to "narrow the scope of the

preliminary injunction" but it in no way converted a worldwide injunction into a nationwide injunction.

### D. The Ninth Circuit's Injunction Does Not Arise from a Class Action.

The Ninth Circuit cited two cases as authority for a nationwide injunction: Bresgal v. Brock, 843 F.2d 1163 (9th Cir. 1987), and Texas, *et al.* v. United States, *supra*. The Ninth Circuit followed the lead of the district court in ignoring entirely the APA issue ruled upon in the Texas case, discussed *supra*. As for Bresgal, the Ninth Circuit stated:

> [A]n injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit — even if it is not a class action — *if such breadth is necessary to give prevailing parties the relief to which they are entitled*. [Hawaii at 701, citing Bresgal at 1170.]

However, omitted from the Ninth Circuit's quotation from Bresgal was the sentence immediately preceding the excerpt quoted:

> Where relief can be structured on an individual basis, it must be **narrowly tailored to remedy the specific harm** shown. Id. at 727. On the other hand ... [Bresgal at 1170 (emphasis added).]

The only Supreme Court authority cited by the Ninth Circuit to support its reliance on Bresgal was

Califano v. Yamasaki, 442 U.S. 682 (1979) — but that case does not stand for the proposition for which it was cited. To be sure, Yamasaki does contain one sentence (bolded below) that some may claim supports the authority of district courts to issue nationwide or even worldwide injunctions. But it must be remembered that Yamasaki was a case involving a class action under Rule 23 — with the procedural protections afforded by that Rule — a very different situation from the case under review, which was not brought as a class action:

> Nothing in Rule 23, however, limits the geographical scope of a class action that is brought in conformity with that Rule. Since the class here was certified in accordance with Rule 23 (b)(2), the limitations on class size associated with Rule 23 (b)(3) actions do not apply directly. Nor is a nationwide class inconsistent with principles of equity jurisprudence, since **the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class**. Dayton Board, 433 U.S., at 414-420. If a class action is otherwise proper, and if jurisdiction lies over the claims of the members of the class, the fact that the class is nationwide in scope does not necessarily mean that the relief afforded the plaintiffs will be more burdensome than necessary to redress the complaining parties. [Yamasaki at 702 (emphasis added).]

Although the Ninth Circuit also relied on another of its own decisions, Zepeda v. INS, 753 F.2d 719 (9th Cir. 1983), that decision undermines the case for nationwide injunctive relief, making it even clearer that such relief is insupportable:

> We must vacate and remand, however, because the scope of the injunction is too broad. On remand, **the injunction must be limited to apply only to the individual plaintiffs** unless the district judge certifies a class of plaintiffs.... A federal court may issue an injunction if it has personal jurisdiction over the parties and subject matter jurisdiction over the claim; **it may not attempt to determine the rights of persons not before the court**. [*Id.* at 727 (citations omitted) (emphasis added).]

### E. The Nationwide Injunction Violates United States v. Mendoza.

The Brief for Petitioners relies on United States v. Mendoza, 464 U.S. 154 (1984), but space did not permit it to do more than state the nub of its holding — "rejecting application of nonmutual issue preclusion against the government." Pet. Br. at 75 (citing pages 160 and 162 of that decision).

In Mendoza, the Supreme Court reviewed a decision of the Ninth Circuit which had affirmed a district court judgment that the United States was precluded from asserting a defense against an alien, because that defense had been previously considered

and rejected in earlier litigation that did not involve the same alien. This Court determined that the United States was not restricted by collateral estoppel from raising the defense to the suit by Mendoza, who had not been involved in the earlier litigation. This Court asserted several reasons for its decision, including that applying "nonmutual offensive collateral estoppel" would, in the eyes of this Court, impede the development of competing views on complex legal issues by freezing in place the first final decision rendered on a particular legal issue. Mendoza at 158. Justice Rehnquist explained:

> We have long recognized that "the Government is not in a position identical to that of a private litigant" ... both because of the geographic breadth of Government litigation and also, most importantly, because of the nature of the issues the Government litigates.... A rule allowing nonmutual collateral estoppel against the Government in such cases would substantially thwart the development of important questions of law by **freezing the first final decision** rendered on a particular legal issue. Allowing only one final adjudication would **deprive this Court of the benefit it receives from permitting several courts of appeals** to explore a difficult question before this Court grants certiorari. [Mendoza at 159-60 (citations omitted) (emphasis added).][26]

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[26] In his Mendoza decision, Justice Rehnquist cited Califano v. Yamasaki, *supra*, signaling that he understood Mendoza to be

By extending its injunction nationwide, the Ninth Circuit deprived this court of the benefit of multiple, different appellate court decisions.

### F. The Nationwide Injunction Below Exceeded the Judicial Power of the United States.

Article III, Section 2 provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity [and] to Controversies to which the United States shall be a Party..." Madison's Notes taken at the Constitutional Convention indicate that the power of the judiciary was "limited to cases of a Judiciary Nature,"[27] not a political nature. *See* Marbury v. Madison, 5 U.S. 137, 163-67 (1803). This Court has long recognized that judicial power is "'the power of a court to decide and pronounce a judgment and carry it into effect **between persons and parties who bring a case** before it for decision.'" Muskrat v. United States, 219 U.S. 346, 356 (1911) (emphasis added). "[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006). Cases and controversies are disputes between litigants, and it is the very nature of the judicial power to resolve disputes between parties, rather than to make laws of

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comparable with that decision rendered just five years before.

[27] J. Madison, The Debates in the Federal Convention of 1787, Aug. 27, 1787.

general applicability, which has the attributes of the exercise of a legislative power vested in Congress, or perhaps a power delegated to the Executive, but certainly not a judicial power.

The injunction approved by the Ninth Circuit was not limited to a resolution between the parties as it should have been. Injunctions, under Rule 65 of the Federal Rules of Civil Procedure, affect "the parties; the parties' officers, agents, servants, employees, and attorneys; and other persons who are in active concert or participation" with them if they have received "actual notice" of the injunction. The injunction below exceeded the scope of Rule 65, granting relief to nonparties who had no involvement whatsoever in the litigation. And, it impaired the ability of the President to carry out the important responsibilities entrusted to him by the Constitution and the laws of the land. As this Court has stated: "'injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.'" Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994). Injunctions which compel government action with respect to nonparties violate this principle.

It could be said that nationwide injunctions issued by courts in class action litigation give relief to nonparties, but that relief is given pursuant to numerous protections afforded by federal law and the Federal Rules of Civil Procedure. It could be said that striking down a regulation issued by an unelected bureaucrat for failure to abide by the Administrative Procedure Act has a similar effect to a nationwide injunction, but at least the Court there acts pursuant

to an express congressional authorization. *See* Section III.B., *supra*. Neither situation is comparable to or provides authority for the type of injunctions issued below, which do not resolve cases and controversies between litigants, but rather allow judges to usurp the powers of the President of the United States.

Allowing the lower federal courts to enjoy such free-wheeling authority to trump the political decisions of the President provides a compelling incentive to forum shop and find that one district court judge, situated in a friendly circuit, who most assuredly would agree with the policy position of the plaintiff.

And, lastly, if such federal court injunctions are seen by a President of the United States as a political act designed to impede the exercise of his lawful authority to protect the nation, it certainly would bring closer the day that this or another president will simply refuse to give effect to a court order, based on the sound principles discussed *infra*. A presidential decision to choose to lawfully protect the nation rather than to obey an unlawful court order might well lead to the unraveling of the insupportable claim of the Supreme Court to supremacy first embraced in Cooper v. Aaron, 358 U.S. 1 (1958), and re-establish the historic rule that each branch of government has its own independent duty to follow the Constitution, as each perceives that duty. During the Founding Era, and well into the history of our country, "[t]he decisions ... of courts [were] held in the highest regard," but as Blackstone warned, they were not "law" themselves, but only "evidence" of law, "[s]o that *the law*, and the *opinion of the judge* are not always

convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law." I Blackstone's *Commentaries* at 71 (emphasis original). Lastly, it is instructive to review the words of Alexander Hamilton in Federalist 78, concluding that the judiciary has "neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." Courts should never be entirely certain that their orders will be followed, unless they are persuasive exercises of judgment, and not acts of political will.

## CONCLUSION

For the foregoing reasons, the decisions of the Ninth and Fourth Circuits should be reversed.

Respectfully submitted,

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