

No. 17-15589

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STATE OF HAWAI'I and ISMAIL ELSHIKH,

Plaintiffs-Appellees,

vs.

DONALD TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

Civil Action No. 1:17-cv-00050-
DKW-KJM

The Honorable Derrick K. Watson

**BRIEF OF EPISCOPAL BISHOPS AS *AMICI CURIAE*
IN SUPPORT OF APPELLEES AND AFFIRMANCE OF THE
DISTRICT COURT OF HAWAI'I**

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are the Rt. Rev. Gladstone B. Adams III, Bishop Provisional of the Episcopal Church of South Carolina; the Rt. Rev. Laura J. Ahrens, Bishop Suffragan of the Episcopal Church of Connecticut; the Rt. Rev. Marc Handley Andrus, Bishop of the Diocese of California; the Rt. Rev. Patrick Bell, Bishop of the Diocese of Eastern Oregon; the Rt. Rev. Barry L. Beisner, Bishop of the Diocese of Northern California; the Rt. Rev. Ian T. Douglas, Bishop Diocesan of the Episcopal Church of Connecticut; the Rt. Rev. Dan Edwards, Bishop of the Diocese of Nevada; the Rt. Rev. Thomas Ely, Bishop of the Diocese of Vermont; the Rt. Rev. Mary Gray-Reeves, Bishop of the Diocese of El Camino Real; the Rt. Rev. Scott Hayashi, Bishop of the Diocese of Utah; the Rt. Rev. Mark Lattime, Bishop of the Diocese of Alaska; the Rt. Rev. Dorsey W.M. McConnell, Bishop of the Diocese of Pittsburgh; the Rt. Rev. Robert O’Neill, Bishop of the Diocese of Colorado; the Rt. Rev. Rayford Ray, Bishop of the Diocese of Northern Michigan; the Rt. Rev. David Rice, Bishop of the Diocese of San Joaquin; and the Rt. Rev. Gregory Rickel, Bishop of the Diocese of Olympia (also known as the Episcopal Church of Western Washington) (collectively, the “Bishops”).

The Episcopal Church is organized into 111 geographic dioceses, which

include more than 7,000 congregations. Each Bishop, whose authority in their diocese is both sacramental and constitutional within the Episcopal Church, governs the diocese, together with local representative bodies.

Among the central tenets of the Episcopal Church (the “Church”) are to welcome and assist strangers, especially those who are poor, sick, and most in need of help, to provide a safe haven for those seeking freedom from oppression, and to uphold the dignity of every human being. To that end, the Church has an active global missionary program and a refugee resettlement program here in the United States, together known as the Episcopal Migration Ministries (“EMM”). Since 1988, EMM and its network of affiliate partners have aided and welcomed more than 50,000 refugees into the United States. In 2016, EMM helped more than 5,700 refugees from 35 countries build new lives, in peace and security, in 30 communities across the United States. EMM collaborates with local partner agencies in 27 Episcopal dioceses and 23 states to welcome those fleeing persecution. Helping these families is one of the ways in which Episcopalians honor their baptismal covenant with God.

The Bishops earnestly believe the President’s recently revised executive order impedes the ability of Episcopalians to practice their faith and keep their baptismal covenant with God. This executive order has slammed the door on people who have suffered some of the greatest atrocities in recent times, and it

does this solely on the basis of their religion. From its earliest inception, America has been a safe haven for victims of religious oppression, in part because religious tolerance is a value enshrined in our Constitution through the Establishment Clause. The President's original executive order and his recently-revised order directly contradict those values, and in doing so undermine America's longstanding and special status as a place of refuge for the world's most vulnerable populations. Both as leaders in the Episcopal Church and as members of the broader faith community, the Bishops have a deep interest in preserving this country's special status as a safe haven for refugees and in protecting the fundamental principle of religious tolerance.

II. ARGUMENT

From the beginning of his presidential campaign, President Donald J. Trump called for a "total and complete shutdown of Muslims entering the United States."¹ One week after he took office, the President made good on his threat by issuing an executive order banning everyone but religious

¹ Donald J. Trump, *Statement on Preventing Muslim Immigration* (December 7, 2015), www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration.

minorities from seven majority-Muslim countries.² In the weeks that followed, the President and his senior advisors confirmed that this was his long-promised “Muslim ban.”³ When it became clear that the Original Executive Order would not pass constitutional muster, the President and his senior advisors revised its text, removed Iraq from the list, and issued the document as a Revised Executive Order.⁴ The President and his senior advisors have made clear in fundraising e-mails⁵ and statements to the press⁶ that the Revised Executive

² See Protecting the Nation from Foreign Terrorist Entry Into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (“Original Executive Order”).

³ E.g., *Full Transcript: President Donald Trump’s News Conference*, CNN (Feb. 16, 2017), <http://www.cnn.com/2017/02/16/politics/donald-trump-news-conference-transcript>; Rebecca Shabad, *Donald Trump says he’s expanding his Muslim ban*, CBS (July 24, 2016), <http://www.cbsnews.com/news/donald-trump-says-hes-expanding-muslim-ban>; Katie Reilly, *Donald Trump on Proposed Muslim Ban: ‘You Know My Plans’*, Time (Dec. 21, 2016), <http://time.com/4611229/donald-trump-berlin-attack> (last accessed Mar. 13, 2017); Amy B. Wang, *Trump asked for a ‘Muslim ban,’ Giuliani says — and ordered a commission to do it ‘legally’*, The Washington Post (Jan. 29, 2017), <http://wpo.st/xzuY2> (last accessed Mar. 13, 2017).

⁴ See Protecting the Nation from Foreign Terrorist Entry Into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13210-11 (Mar. 6, 2017) (“Revised Executive Order”).

⁵ M. Zapotosky, D. Nakamura, & A. Hauslohner, *Revised Executive Order Bans Travelers from Six Muslim-Majority Countries from Getting New Visas*, Washington Post (Mar. 6, 2017), www.washingtonpost.com/world/national-security/new-executive-order-bans-travelers-from-six-muslim-majority-countries-applying-for-visas/2017/03/06/3012a42a-0277-11e7-ad5b-d22680e18d10_story.html?utm_term=.1f6730369a62.

Order has the same intent as the Original Executive Order—the implementation of the President’s desired “total and complete shutdown of Muslims entering the United States.”⁷

Other *amici curiae*, including Americans United for Separation of Church and State, the Southern Poverty Law Center, and the Interfaith Coalition, have thoughtfully explained how the Original Executive Order and the Revised Executive Order (together, the “Executive Orders”) violate the Establishment Clause. The Bishops join in those arguments, and submit the following historical background and context for the Court’s benefit.

A. The Establishment Clause Enshrines America’s Longstanding Role as a Safe Haven for Refugees Fleeing Religious Oppression.

The Founders adopted the Establishment Clause in part to enshrine America’s role as a safe haven for victims of religious oppression and to guard against precisely the sectarian partisanship that underlies the Executive Orders at issue here. This effort arose out of the Founders’ own experiences with the rise of sectarianism in the British Colonies. From its earliest conception, the New World had been a haven for those fleeing oppression in the Old World. “A large proportion of the early settlers of this country came here from Europe

⁶ *Press Briefing by Secretary Sean Spicer, No. 18*, The White House (Mar. 7, 2017), www.whitehouse.gov/the-press-office/2017/03/07/press-briefing-press-secretary-sean-spicer-372017-18.

⁷ Trump, *supra* note 1.

to escape the bondage of laws which compelled them to support and attend government favored churches.”⁸ They came here to avoid “turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy.”⁹ But as life in the Colonies developed, the formerly persecuted became persecutors—often repeating “many of the old world practices and persecutions” they escaped.¹⁰

It is an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies.¹¹

Accordingly, Virginia’s early code of laws imposed fines, whippings, or months in the gallows for failure to attend church twice daily.¹² The early Jews arriving in Maryland from Brazil were denied citizenship, the right to worship, and the right to operate public businesses.¹³ In Puritan New England, religious minorities were punished with whippings, ear croppings, and even hangings.¹⁴

⁸ *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8 (1947).

⁹ *Id.* at 8-9.

¹⁰ *Id.* at 10.

¹¹ *Engel v. Vitale*, 370 U.S. 421, 427 (1962).

¹² Patricia U. Bonomi, *Under the Cope of Heaven: Religion, Society, and Politics in Colonial America* 36 (2003).

¹³ *Id.* at 43.

¹⁴ *Id.* at 44.

“These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. . . . It was these feelings which found expression in the First Amendment.”¹⁵ The movement towards the Establishment Clause began in earnest in 1785 with a proposal to renew Virginia’s tax levy for the support of the established Church of England.¹⁶ In opposition to the proposal, James Madison wrote his famous *Memorial and Remonstrance*, in which he argued that renewing the levy for support of the Church was “a dangerous abuse of power”¹⁷

Among Madison’s arguments is one that applies squarely to the Executive Orders at issue here. Madison cautioned that renewing the religious tax would be “a departure 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.”¹⁸ He specifically warned that victims of oppression abroad would look elsewhere for refuge if America fell into the trap of establishing a national religion and penalizing those who do not adhere to it:

¹⁵ *Everson*, 330 U.S. at 11.

¹⁶ See *id.*

¹⁷ James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785).

¹⁸ *Id.* at ¶ 9.

What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an Asylum to the persecuted, it 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. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthropy [sic] in their due extent, may offer a more certain repose from his Troubles.¹⁹

Madison's warnings proved extremely effective. Not only was the bill defeated, but the Virginia "Assembly enacted the famous 'Virginia Bill for Religious Liberty' originally written by Thomas Jefferson."²⁰ Madison's work and ideas spread beyond Virginia, and several other colonies considered similar legislation at the time.²¹ In *Reynolds v. United States*,²² the Supreme Court recognized that this movement led to the inclusion of the Establishment Clause in the First Amendment. As noted above, a fundamental argument in favor of the Establishment Clause was that religious discrimination is an anathema to the United States' special role as a beacon of hope and refuge for the oppressed.

¹⁹ *Id.* (emphasis added).

²⁰ *Everson*, 330 U.S. at 12.

²¹ *See Engel*, 370 U.S. at 428-29 (citing, *inter alia*, Sanford Hoadley Cobb, The Rise of Religious Liberty in America 74-115 (1902)).

²² 98 U.S. 145, 164 (1878).

B. Both Executive Orders Undermine America’s Role as a Safe Haven for Refugees Fleeing Oppression and Impede the Efforts of Religious Organizations to Render Aid.

Beyond violating the letter of the Establishment Clause, the Executive Orders have caused the very harms James Madison identified in his *Memorial and Remonstrance*. They have shaken the world’s faith in America as a home for people suffering religious, ethnic, political, and other strife. The day after the President signed the Original Executive Order, the UN Refugee Agency issued a statement recognizing that the United States’ resettlement program “is one of the most important in the world” and expressing “hope that the U.S. will continue its strong leadership role and long tradition of protecting those who are fleeing conflict and persecution.”²³ A few days later, the United Nations Secretary General declared that the United States had lost its standing as a leader in refugee resettlement, but he had “hope that the U.S. [would] be able to re-establish its very solid refugee protection in resettlement”²⁴ Lawmakers in Indonesia, home to the world’s largest Muslim population, decried the Original Executive Order as an act that will “diminish the U.S.

²³ *Joint IOM-UNHCR Statement on President Trump’s Refugee Order* (Jan. 28, 2017), www.unhcr.org/en-us/news/press/2017/1/588bc4e34/joint-iom-unhcr-statement-president-trumps-refugee-order.html.

²⁴ S. Sengupta, *U.N. Leader Says Trump Visa Bans ‘Violate Our Basic Principles,’* N.Y. Times (Feb. 1, 2017), www.nytimes.com/2017/02/01/world/trump-immigration-ban-un.html.

standing [sic] as a beacon for democracy.”²⁵ German Chancellor Angela Merkel likewise remarked that banning travel based on nationality and blocking refugee admissions are “against the core idea of international aid for refugees and international cooperation.”²⁶ The world views the Executive Orders as America retreating from its traditional role as the leading safe haven for immigrants and refugees.

The Revised Executive Order also undermines the efforts of religious organizations in the United States, including the Episcopal Church, to render aid to those fleeing war and oppression. For many Americans, this type of refugee-assistance work is an expression of their faith and one of the ways in which they keep their covenant with God. Through EMM, the Episcopal Church and its members provide a multitude of services to refugees, including coordinating the arrival of refugees to the United States, housing assistance, job training, providing for basic household needs, advocacy, language tutoring, business training and microenterprise loans, and a savings program to help refugees purchase homes, vehicles, education, or businesses. When the

²⁵ T. Salim, *RI Regrets Trump’s Muslim Ban*, The Jakarta Post (Jan. 30, 2017), www.thejakartapost.com/news/2017/01/30/ri-regrets-trump-s-muslim-ban.html.

²⁶ A. Ansari, N. Robertson, and A. Dewan, *World leaders react to Trump’s travel ban*, CNN (Jan. 30, 2017), www.cnn.com/2017/01/30/politics/trump-travel-ban-world-reaction/.

President signed his Original Executive Order on January 27, 2016, EMM had invested substantial resources in preparing to welcome hundreds of refugee families—including families from Syria, Iraq, and Somalia—into communities across the county. As a result of the Church’s efforts, these refugee families already had domestic arrangements supporting their arrival in the United States and were approved for travel. Yet, these families had their dreams dashed when they had to abruptly cancel their travel plans following the Original Executive Order.

Since then, EMM’s work (and the work of other similarly situated religious organizations) has been completely disrupted. The chaos surrounding the implementation of the Executive Orders has also required EMM to expend additional, unplanned-for resources. EMM staff have worked around-the-clock to address the immediate needs of these families in crisis, and to respond to questions and concerns from their families and loved ones already in the United States who had been planning for the arrival of these already-approved refugees. In addition, many of EMM’s resources devoted to these refugee families over the past months have now been wasted.

The Revised Executive Order further exacerbates the harm to EMM and the many people it serves. A few of the refugees EMM was expecting arrived between the time the Original Executive Order was halted by court orders and

the effective date of the Revised Executive Order. But hundreds of the families EMM was expecting from the countries listed in the Executive Orders (and other countries) have not arrived, and these families will not be able to complete their trips if the Revised Executive Order goes into effect.

Both Executive Orders have caused and continue to cause significant additional harm to the very vulnerable people that EMM serves. These refugees are fleeing persecution in their countries of origin, and because of the President's Executive Orders, they now face persecution in the safe haven they had been promised in the United States. The dramatic reduction in the overall number of refugees allowed will not only rob families of hope and a future, but will also cost some of them their lives. It has and will continue to debilitate the vital mission of EMM and other established religious organizations like it, and it will deprive Americans of the opportunity to practice their faith through service to others in need.

III. CONCLUSION

The words inscribed on the base of the Statue of Liberty invite the world to give America its tired, its poor, its huddled masses yearning to breathe free. This idea—that victims of oppression around the world will find refuge on our shores—is enshrined in the Establishment Clause and is given life in part by religious organizations like the Episcopal Church, who actively work to

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellees state that they are unaware of any related cases pending in this Court.

RESPECTFULLY SUBMITTED this 19th day of April, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on the 19th day of April, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 19th day of April, 2017.

HILLIS CLARK MARTIN & PETERSON P.S.

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