No. 17-15589

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAII, ET AL.,
Plaintiffs/Appellees

v.

DONALD J. TRUMP, ET AL.,
Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR HAWAII
THE HONORABLE DERRICK KAHALA WATSON, DISTRICT JUDGE
CASE NO. 1:17-CV-00050-DKW-KSC

AMICI CURIAE BRIEF OF SCHOLARS OF AMERICAN RELIGIOUS HISTORY & LAW IN SUPPORT OF NEITHER PARTY

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INTERESTS OF AMICI CURIAE

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Although some amici are themselves Mormon, amici do not speak for the Mormon Church itself or for other members of the faith. Rather, amici write because they have specialized knowledge of the federal government's sustained 19th-century legal campaign against Mormons, which included efforts to restrict Mormon immigration. As this brief explains, this history illustrates the dangers of discriminating against

religious groups and labeling their members as "outsiders, not full members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

STATEMENT OF COMPLIANCE WITH RULE 29

This brief is submitted pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure. All current parties have consented to the filing of this brief.

No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amici curiae and their counsel contributed money to fund the preparation or submission of this brief.

INTRODUCTION

On March 6, 2017, the President issued Executive Order 13,780, "Protecting The Nation From Foreign Terrorist Entry Into The United States" ("Executive Order" or "Order"). That Order singles out individuals from six predominately-Muslim countries—Iran, Libya, Somalia, Sudan, Syria, and Yemen—and suspends their entry into the United States for at least 90 days. *See* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

Amici do not take a position on whether the Executive Order violates the Establishment Clause or is otherwise unlawful. But amici do seek to provide this Court with a perspective on the federal government's treatment of another religious minority, members of The Church of Jesus Christ of Latter-day Saints. Responding to public hostility against Mormons—hostility that was in some cases tied to Islamophobia and anti-Orientalism—the federal government targeted Mormons for disfavored treatment in the 19th century. Most relevant here, the government pursued several measures to restrict Mormon immigration. As a result of these government actions in the last half of the 19th century, Mormons were treated as "not full members of the

political community" until well into the 20th century, and continue to face the residual effects of the government's policies more than a century later.

As explained in this brief, the Mormon experience provides a striking example of the harms of treating a particular religious minority as dangerous and foreign. If the Executive Order does target Muslims for disfavored treatment, then the history of the federal government's mistreatment of Mormons suggests it could take decades—if not longer—to undo the damage that such official action would do to the body politic and to the place of Muslims in American society.

This case presents an opportunity to give the Executive Order the sort of frank scrutiny that did not exist in the 19th century. This Court should ensure that history does not repeat itself by taking a hard look at the government's purported justifications for the Executive Order, and the "evidence of purpose beyond the face of the challenged law." *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017).

ARGUMENT

I. THE HISTORY OF RELIGIOUS DISCRIMINATION AGAINST MORMON IMMIGRANTS DEMONSTRATES THE NEED FOR VIGILANT JUDICIAL REVIEW OF GOVERNMENT ACTIONS BASED ON FEAR OF RELIGIOUS MINORITIES

An understanding of Mormon history in the 19th century illustrates the pernicious consequences of governmental discrimination against religious minorities—and the need for exacting judicial review of government actions that target or disproportionately affect particular religious groups.

As explained below, throughout the 19th century Americans frequently treated Mormons as dangerous outsiders because of their religious faith. Latter-day Saints suffered mob violence countenanced by state officials, legal attacks by the federal government, and a crusade of discrimination waged against Mormon immigrants because of their religion. This history demonstrates the ease with which exaggerated fears of religious minorities regarded as different and dangerous by some Americans can be translated into government policies that treat them as "outsiders, not full members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

A. Mormons Were the Objects of Widespread Religious Hostility in the 19th Century

The Mormon Church was founded in 1830. In 1833 and again in 1838, hostile mobs in Missouri drove the Mormons from their homes. One group in Missouri wrote an open letter to other citizens stating, "We . . . shall expect your co-operation and assistance in expelling the fanatics, who are mostly aliens by birth, and aliens in principle from the country."[2] When the local Mormons organized to defend themselves from attacks, the leaders of the other side luridly insisted:

> They are the aggressors—they have been guilty of high treason; they have violated the laws and shed the blood of our citizens; and we think this one of the cases of emergency in which the people ought to take the execution of justice in their own hands.[3]

Others called the Mormons a "'banditti of Canadian refugees,'"[4] referring presumably to the presence of Canadian converts to the new faith who had immigrated to the United States. Ultimately, the

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[2] DOCUMENTS CONTAINING THE CORRESPONDENCE, ORDERS, & C. IN RELATION TO THE DISTURBANCES WITH THE MORMONS; AND THE EVIDENCE GIVEN BEFORE THE HON. AUSTIN A. KING 40 (1841).

[3] *Id.*

[4] RICHARD LYMAN BUSHMAN, JOSEPH SMITH: ROUGH STONE ROLLING 364 (2005).

governor of Missouri issued an order declaring "'[t]he Mormons must be treated as enemies, and must be exterminated or driven from the State.'"[5]

The Mormons relocated in Illinois, but in 1844 an Illinois mob murdered Church founder Joseph Smith, and the Mormons were eventually driven out of Illinois as well. In 1847, after years of violence and religious persecution in the eastern states, the Mormons fled to the area of the Great Basin that would eventually become the state of Utah.

In 1852, the Mormon Church publicly announced the practice of polygamy as part of its religion. While only a minority of 19th-century Mormons practiced polygamy, the teaching deeply offended many outside the Church, and set off years of additional political conflict. After several decades of legal wrangling, the Mormon Church publicly abandoned polygamy in 1890. But as shown above, hostility to Mormonism predated the Church's embrace of polygamy. And as explained later in this brief, in large part because of government policy, this hostility continued long after the Latter-day Saints abandoned the practice.

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[5] *Id.* at 365.

Some of the public hostility arose from the Mormons' extensive and successful overseas proselytizing program, which resulted in an influx of Mormon immigrants. Throughout the 19th century, Mormons pursued a successful missionary effort in Europe, especially Scandinavia and the British Isles, resulting in thousands of Latter-day Saint converts. These Mormons sought to immigrate to Utah in order to join their co-religionists and seek a better life in the United States.

The infusion of immigrants into the Mormon population, however, heightened the distrust and animosity of many Americans. Speaking of Utah, for example, one pastor and public lecturer identified Latter-day Saint immigrants with European urine and excrement:

> Then consider the heterogeneous character of the population swarming to this great western hive, from the dark lanes, and crowded factories, and filthy collieries of the old world, – sewerage and drainings of European population.[6]

A widely-read celebrity pastor insisted that "'[u]nless we destroy Mormonism, Mormonism will destroy us'" and calling, if necessary, for

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[6] BENJAMIN MORGAN PALMER, MORMONISM: A LECTURE DELIVERED BEFORE THE MERCANTILE LIBRARY ASSOCIATION OF CHARLESTON, S.C. 32 (1853).

the use of "'howitzer and bombshell and bullets and cannon-ball'" against the Latter-day Saints.[7]

As the 19th century progressed, the public discussion of Mormonism became increasingly race-based. Nineteenth-century racial theorists, for example, suggested that Mormonism had given rise to a "physiologically distinct race."[8]

Anti-Mormonism also assimilated various other ethnic and religious prejudices. For example, Mormons were frequently compared to the Hindus of India, and labeled as a barbaric people who could be legitimately coerced in ways that were unacceptable for "real"

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[7] W. PAUL REEVE, RELIGION OF A DIFFERENT COLOR: RACE AND THE MORMON STRUGGLE FOR WHITENESS 216 (2015) (discussing Talmadge's background and his widely-published speeches on Chinese immigrants and Mormons).

[8] Nathan B. Oman, *Natural Law and the Rhetoric of Empire: Reynolds v. United States, Polygamy, and Imperialism*, 88 WASH. U. L. REV. 661, 681 (2011); *see also* REEVE, *supra* note 7, at 14-15 (chronicling the idea of a "New Race" supposedly created by Mormonism); J. SPENCER FLUHMAN, "A PECULIAR PEOPLE": ANTI-MORMONISM AND THE MAKING OF RELIGION IN NINETEENTH-CENTURY AMERICA 111-117 (2012) (noting that "in the church's first decades anti-Mormon antagonists routinely invoked racial epithets as knee-jerk insults" and showing how 19th-century racial ideologies were used to present Mormons as dangerous aliens).

Americans. The Speaker of the House of Representatives and Vice President in the Grant Administration, Schuyler Colfax, argued that American policy toward the Mormons should be modeled on the imperialism of the British Raj.[9]

Islamophobia was also used to attack Mormons, who were compared to the supposedly violent and lustful Turks and Arabs; the Church's founder, Joseph Smith, was derisively referred to as the "'American Mohamet.'"[10] In popular books, Mormonism was identified with "'the deepest debauchery, superstition and despotism known to Paganism, Mohammedanism or Medieval Papacy.'"[11]

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[9] Oman, *supra* note 8, at 684-685 (discussing Colfax's speeches on Mormonism). Oman notes:

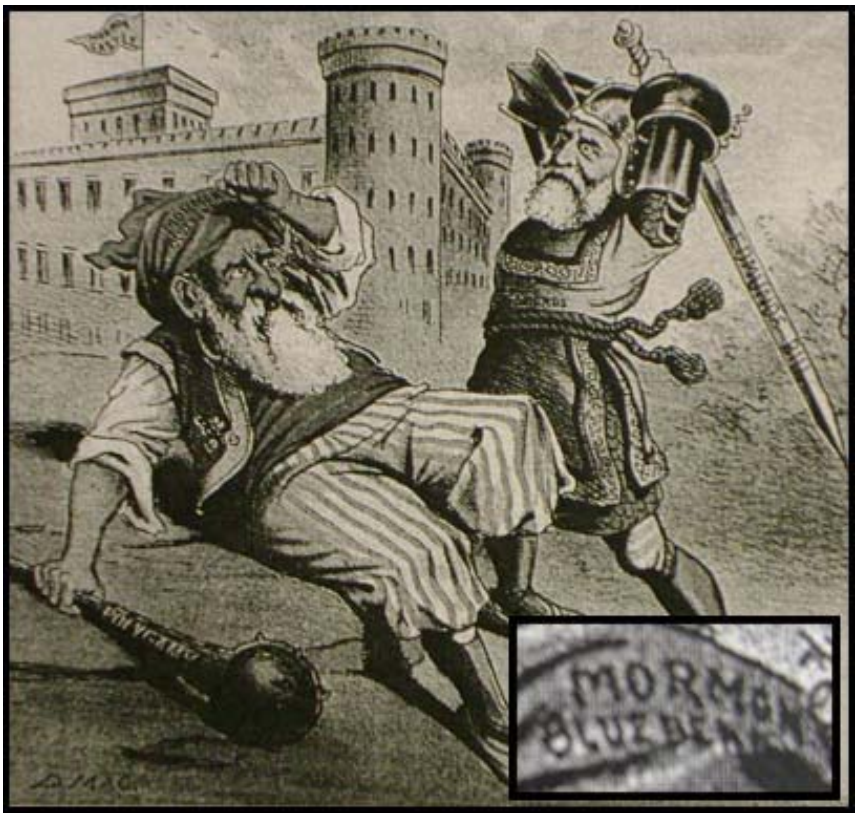
> [T]he creation of a Mormon race had legal implications. Their status as a degenerate people justified imperial control, hence the common equation of federal rule in Utah with the British Empire in India.

Id. (footnote omitted).

[10] *See* REEVE, *supra* note 7, at 221.

[11] PATRICK Q. MASON, THE MORMON MENACE: VIOLENCE AND ANTI-MORMONISM IN THE POSTBELLUM SOUTH 103 (2011).

The 1889 cartoon, shown below, makes explicit the undercurrent of anti-Islamic animus in attacks on Mormonism. The cartoon shows the anti-Mormon Senator George F. Edmunds of Vermont as a crusading Christian knight striking a prostrate "Mormon bluebeard" dressed as a Turk. In the same vein, critics of Mormonism remarked on the Latter-day Saints' "dangerously" sympathetic attitude toward Muslims.[12]



[12] *See* FLUHMAN, *supra* note 8, at 109 (recounting the speech of Representative Joseph Morrill, who said "'It is natural that the Mormons should sympathize more with Turks than with Christians.'"). Mormons do, indeed, have a long tradition of sympathy toward Muslims—perhaps due to a shared legacy of disenfranchisement and

B. Nineteenth-Century Immigration Restrictions Targeted Mormons Because of Religious Animus

This popular religious animus against Mormons was increasingly translated into law as the 19th century progressed. Although the most familiar example is likely Congress's 1862 criminalization of bigamy in the territories, legal action against the Mormons included far more than simply the suppression of plural marriage:

- Congress dissolved the Mormon Church as a legal entity and confiscated its assets, Edmunds-Tucker Act of 1886, Pub. L. No. 49-397, ch. 397, § 17, 24 Stat. 635, 638 (1887) (disincorporating the Church and creating procedures for the confiscation of its property);

- Mormons were systematically excluded from service on juries, Edmunds Act of 1882, Pub. L. No. 47-47, ch. 47, § 5, 22 Stat. 30, 31 (1882) (excluding jurors who merely believed in polygamy);

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discrimination. In 1841, the Mormon city of Nauvoo enacted an ordinance stating that "Catholics, Presbyterians, Methodists, Baptists, Latter-day Saints, Quakers, Episcopals, Universalists, Unitarians, Mohammedans [Muslims], and all other religious sects and denominations whatever, shall have free toleration, and equal privileges in this city." As one scholar has observed, "[t]he only non-Christian religion specifically mentioned in the code was 'Mohammedans,' which was a striking inclusion . . . . At Nauvoo the city council signaled a welcoming attitude toward 'Mohammedans' should they desire to settle among the Latter-day Saints. It was an unlikely scenario simply because there were so few Muslims in Illinois [where Nauvoo is located] and elsewhere in the United States." REEVE, *supra* note 7, at 221.

- Congress revoked Mormon women's territorial right to vote, commanding that "it shall not be lawful for any female to vote at any election hereafter held in the Territory of Utah for any public purpose whatever, and no such vote shall be received or counted or given effect," Edmunds-Tucker Act of 1887, Pub. L. No. 49-397, ch. 397, § 20, 24 Stat. 635, 639 (1887);

- Mormon children of newly contracted polygamous marriages were disinherited, *id.* at § 11 (repealing territorial laws allowing "illegitimate" children to inherit);

- Idaho deprived all Mormons of the right to vote, *Davis v. Beason*, 133 U.S. 333 (1890) (upholding an Idaho statute requiring that voters swear an oath that they did not believe in the doctrine of "celestial marriage"), abrogated by *Romer v. Evans*, 517 U.S. 620 (1996).

Most relevant to this case, animus against the Mormons led federal officials and lawmakers to attack Mormon immigration. In 1879, the Secretary of State sent a circular letter to all American diplomatic offices, calling on them to pressure European governments to prohibit Mormon emigration from their countries. The letter denounced Mormon converts as coming from among the "ignorant classes"[13] and

[13] William Evarts, *Circular No. 10, Sent to the Diplomatic Officers of the United States* (August 9, 1879) *in* U.S. DEP'T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 11 (1880).

insisted that Mormon missionary efforts were a "criminal enterprise."[14] It called on European governments to make sure that the United States did not become "a resort or refuge for . . . crowds of misguided men and women."[15] The *London Times* ridiculed the letter, and the governments of Denmark, Norway and Sweden (then a combined kingdom) declined to take action.[16]

In addition to trying to prevent Mormon emigration from other countries, the government also took action at ports of entry to turn away Mormon converts. At New York City, for example, Mormons from England were detained and sent back to the United Kingdom.[17] The government claimed legal authority under an 1882 statute limiting entry by indigent immigrants, but the officials' interpretation of the law was so strained that the Mormons detained under it were able to obtain habeas relief in New York state court.[18]

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[14] *Id.* at 12.

[15] *Id.*

[16] *See* William Mulder, *Immigration and the "Mormon Question": An International Episode*, 9 W. POL. SCI. Q. 416, 423-424 (1956).

[17] *See id.* at 427.

[18] *See id.*

One federal immigration official in New York repeatedly insisted that Mormon immigrants were "'foreign paupers, idiots, convicts and persons likely to become a public charge.'"[19] The charge of pauperism, however, had little factual basis. As one historian noted of the efforts to ban Mormon immigrants, "[it] was too evident that there were no Mormons in almshouses."[20]

Federal officials often reacted to public clamor in the press to detain and return Mormon immigrants. In 1888, for example, responding to public claims that a recently arrived immigrant ship was packed with nubile young woman for the imagined harems of Utah, federal officials moved in. As it turned out, the company of Mormons was evenly divided between men and women, consisting mainly of families. One of the women detained was reported in the press as "'guilty of being 53 years of age and having with her two innocent grandchildren.'"[21] On other occasions, federal officials detained Latter-

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[19] Fred E. Woods, *Norfolk and the Mormon Folk: Latter-day Saint Immigration Through Old Dominion (1887-90)*, 1 MORMON HIST. STUD. 73, 75 (2000).

[20] *See* Mulder, *supra* note 16, at 428.

[21] *See id*.

day Saint immigrants and then assisted Protestant missionaries in trying to persuade them to abandon Mormonism.[22]

The federal government's efforts to cut off Mormon immigration came at a transitional moment in the history of U.S. immigration law. For most of the 19th century, federal law placed no restrictions on migration. It was only in 1875, with the passage of the Page Act, that the federal government sought to substantially limit immigration. *See* Page Act of 1875, Sess. II, ch. 141, 18 Stat. 477 (1875); *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972) (stating that "[u]ntil 1875 alien migration to the United States was unrestricted").[23] During this period, however, concerns about Mormon immigration from Europe were coupled with rising concerns on the Pacific coast about immigration from China. Indeed, these supposedly dual threats to American

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[22] *See* Woods, *supra* note 19, at 85-86.

[23] *But see also* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993) (recounting the various ways that state law restricted immigration prior to 1875).

civilization were often linked in public rhetoric as examples of dangerous "oriental" outsiders.[24]

In 1882, the same Congress that passed the anti-Mormon Edmunds Act also passed the Chinese Exclusion Act. *See* Chinese Exclusion Act of 1882, Pub. L. No. 47-126, ch. 126, § 1, 22 Stat. 58, 58-59 (1882). In these debates over the exclusion of Chinese immigrants, the example of the Mormons was invoked.[25]

During this same period, Congress also moved to attack Mormon immigration. To facilitate immigration, the Church had created a financing mechanism for Latter-day Saints, who could borrow money to pay for their passage, which was then repaid from their income once they were settled in the United States. This corporation was known as the Perpetual Emigrating Fund. In 1887, Congress disincorporated the fund, and the United States confiscated its assets. *See* Edmunds-Tucker Act of 1886, Pub. L. No. 49-397, ch. 397, § 15, 24 Stat. 635, 637

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[24] *See also* REEVE, *supra* note 7, at 215-220 (recounting public discussions of Chinese and Mormon immigration).

[25] *See* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 657-661 (2005) (discussing the linkages between anti-Mormonism and anti-Chinese sentiment).

(1887). The law went on to command that the Utah territorial legislature was not to "create, organize, or in any manner recognize any such corporation or association, or to pass any law for the purpose of or operating to accomplish the bringing of persons into the said Territory for any purpose whatsoever." *Id.*

C. The Effects of the Federal Government's Targeting of Mormons Lingered for Decades

Even after the Mormons publicly abandoned polygamy in 1890—the ostensible goal behind the federal government's hostility—the effects of the message of exclusion sent by the federal government's targeting of Mormonism and Mormon immigrants remained.

In 1898, the U.S. House of Representatives excluded one of Utah's duly elected Congressmen because he had engaged in (but been pardoned for) polygamy.[26] Five years later, the U.S. Senate embarked on a massive investigation of the Latter-day Saints when Utah sent another Mormon, Reed Smoot, to represent the state as its U.S.

[26] The Congressman was Brigham H. Roberts, who had been pardoned for violation of federal anti-bigamy laws by President Grover Cleveland, along with other Mormon polygamists married prior to 1890.

Senator.[27] During the resulting investigation, the media "references were overwhelming (three to one) to Mormonism as a danger to the American political system and way of life."[28] The Senate investigative committee ultimately produced thousands of pages devoted to the question of whether Mormons could be permitted to fully participate in the nation's political life. The committee voted to exclude Smoot, although the full Senate rejected its suggestion and seated Smoot in 1907. Even so, the message that non-Mormons were "insiders, favored members of the political community," *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring), while Mormons were "outsiders, not full members of the political community," *id.*, persisted.

A comprehensive scholarly study of Mormons in the media shows the nadir of treatment of Latter-day Saints came in the 1880s,

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[27] *See generally* KATHLEEN FLAKE, THE POLITICS OF AMERICAN RELIGIOUS IDENTITY: THE SEATING OF SENATOR REED SMOOT, MORMON APOSTLE (2004) (recounting the prolonged controversy over the election of Reed Smoot and the efforts to keep Mormons from full membership in the American political community).

[28] JAN SHIPPS, *From Satyr to Saint: American Perceptions of the Mormons, 1860-1960*, *in* SOJOURNER IN THE PROMISED LAND: FORTY YEARS AMONG THE MORMONS 51, 71 (2000).

corresponding to the peak of the federal government's anti-Mormon crusade.[29] But it took until well into the 20th century for the message sent by the government to dissipate. Decades after Mormons abandoned polygamy, media coverage of Latter-day Saints continued to be dominated by the suggestion that they were "'un-American'" and bad citizens because they were mere "'human units [who] move[d] instantly and unquestionably at [the] command'" of a religious "'hierarch.'"[30] Indeed, echoes of the government's policy of exclusion in the 1880s continued to reverberate in the opening years of the 21st century. In 2007, one in four Americans continued to tell pollsters that they would be less likely to vote for a candidate solely because she was Mormon.[31] Of religions in America at the time, only Islam garnered greater suspicion.[32]

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[29] *See* SHIPPS, *supra* note 28, at 63 (charting the negative treatment of Latter-day Saints based on a comprehensive database of media coverage of Mormonism).

[30] *Id.* at 67.

[31] *See* Scott Keeter & Gregory Smith, *Public Opinion About Mormons*, PEW RESEARCH CENTER (Dec. 4, 2007), http://www.pewresearch.org/2007/12/04/public-opinion-about-mormons.

[32] *See Public Expresses Mixed Views of Islam, Mormonism*, PEW RESEARCH CENTER (Sept. 25, 2006), http://www.pewforum.org/2007/09/26/public-expresses-mixed-views-of-islam-mormonism/.

The Mormon experience illustrates the harms that result from the government targeting a particular religion. The federal government's actions against Mormons occurred at a time when First Amendment jurisprudence was in its infancy and the law blessed government actions that today would be blatantly unconstitutional. *See, e.g.*, *Davis v. Beason*, 133 U.S. 333 (upholding an Idaho statue depriving all Mormons of the right to vote on the basis of belief), abrogated by *Romer*, 517 U.S. 620. Fortunately, this attitude toward religious minorities has been replaced in our law. *See Romer*, 517 U.S. at 634 ("To the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law. To the extent it held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome." (citations omitted)). However, this history shows the negative and long-lasting effects of government action aimed at religious minorities.

II. THE FIRST AMENDMENT REQUIRES COURTS TO TAKE A HARD LOOK AT THE GOVERNMENT'S JUSTIFICATIONS AND MOTIVATIONS FOR ACTIONS THAT DISPARATELY AFFECT A RELIGIOUS GROUP

The Mormon historical experience underscores the necessity for rigorous judicial scrutiny of allegedly discriminatory government action, and for careful consideration of the purposes behind even facially neutral orders.

The Supreme Court has made clear that "'the First Amendment mandates government neutrality'" with respect to religion. *McCreary Cnty., Kentucky v. Am. Civil Liberties Union of Kentucky*, 545 U.S. 844, 861 (2005). Justice O'Connor rightly observed that neutrality is essential to ensure that governments do not "mak[e] adherence to a religion relevant in any way to a person's standing in the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). Favoring one religion over another impermissibly "sends the ancillary message to . . . nonadherents that 'they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)).

To determine whether the government's Executive Order impermissibly signals to Muslims that they are "outsiders," and whether the Order's territory-based approach was pretextual rather than truly neutral, the district court considered what it described as "significant and unrebutted evidence of religious animus driving the promulgation of the Executive Order and its related predecessor." D. Haw. No. 17-cv-00050, Dkt. 219 at 33. This evidence is thoroughly cataloged in the district court's opinion and the parties' briefs, but included such facts as then-candidate Trump's press release "'calling for a total and complete shutdown of Muslims entering the United States.'"[33] *Id*. at 35.

[33] The day after candidate Trump issued this press release, the Mormon Church took the rare step of issuing a statement in response, pointing to the words of Church founder Joseph Smith, who said, "I am bold to declare before Heaven that I am just as ready to die in defending the rights of a Presbyterian, a Baptist, or a good man of any denomination; for the same principle which would trample upon the rights of the Latter-day Saints would trample upon the rights of the Roman Catholics, or of any other denomination who may be unpopular and too weak to defend themselves." *See* The Church of Jesus Christ of Latter-day Saints, *Church Points to Joseph Smith's Statements on Religious Freedom, Pluralism*, MORMON NEWSROOM (Dec. 8, 2015), http://www.mormonnewsroom.org/article/church-statement-religious-freedom-pluralism.

As the Supreme Court has explained, "facial neutrality" cannot shield "[o]fficial action that targets religious conduct for distinctive treatment." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). Moreover, a court must not "turn a blind eye to the context in which [a] policy" arises—after all, reasonable observers will themselves rely on contextual clues to assess whether a government action endorses or disparages religion. *McCreary Cnty.*, 545 U.S. 844, 866 (citation and quotation marks omitted); *see also Washington v. Trump*, 847 F.3d at 1167-68 (citing *Church of the Lukumi Babalu Aye*, 508 U.S. at 534). Accordingly, courts must closely examine the "readily discoverable fact[s]" leading to the government action, including the "historical context" and the "sequence of events." *McCreary Cnty.*, 545 U.S. at 862.

The Mormon experience illustrates why it is important for courts to examine supposedly-legitimate reasons for singling out religious minorities. In the 19th century, American government officials relied on religious identity as a proxy for determining the risk of lawlessness and danger posed by Mormon immigrants and refugees. Federal officials insisted that Mormon immigrants must be detained and

returned because they would likely violate anti-bigamy laws. Yet contrary to the claims made by government officials, American Mormon missionary efforts abroad were not aimed at beguiling young women to immigrate to Mormon harems in Utah. These fantasies bore little if any relationship to the realities of the overwhelming majority of Mormon families who wished to enter the United States to escape persecution in their home countries and to unite with their co-religionists in the Utah territory. As the detention of a 53-year-old grandmother illustrates, striking at Mormons in general on the basis of lurid stereotypes was a poor method of identifying those planning to break the law.

It is easy to understand how such a religious test, no matter how constitutionally odious, would be a tempting proxy for assessing the risks of would-be immigrants, especially when such a religious test coincides with or is in reaction to popular passions. This is precisely why the courts have an obligation to look beyond the government's purported justifications to determine whether they are pretextual.

Accordingly, amici urge this Court to recognize that the First Amendment requires courts to take a hard look at the entire context of

government action that appears to have a disparate impact on religious minorities. At the same time, amici do not take a position on what specific "contextual" evidence the district court should have considered, or whether this Court should affirm the district court's conclusions of fact that the government's national security justifications were pretextual.

CONCLUSION

The Supreme Court has long held that the judiciary has a special role in scrutinizing government action motivated by "prejudice against discrete and insular minorities." *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Amici respectfully urge the Court to subject the Executive Order to close scrutiny for a religious animus to prevent harms of the kind committed against the Mormon community in the past.

Respectfully submitted,

Date: April 20 2017

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CERTIFICATION OF COMPLIANCE

Counsel for Amici Curiae Scholars of American Religious History and Law certifies:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,888 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS-Word in 14-point Century Schoolbook font type.

Date: April 20, 2017

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9th Circuit Case Number(s) 17-15589

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