No. 17-15589

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAII AND ISMAIL ELSHIKH
Plaintiffs-Appellees,
v.

DONALD J. TRUMP, President of the United States, *et al.*,
Defendants-Appellants.

On Appeal from Entry of Preliminary Injunction
District Court for the District of Hawaii
Case No. 1:17-CV-50-DKW-KSC, Hon. Derrick K. Watson

BRIEF OF *AMICUS CURIAE*, THE AMERICAN CENTER FOR LAW AND JUSTICE, IN SUPPORT OF DEFENDANTS-APPELLANTS' POSITION ON APPEAL AND URGING THAT THE PRELIMINARY INJUNCTION BE VACATED. BRIEF FILED WITH THE CONSENT OF THE PARTIES.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(A), the *amicus curiae*, the American Center for Law and Justice, makes the following disclosures: it is a non-profit organization that has no parent corporation and no publicly held corporation owns any portion of it.

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CERTIFICATION PURSUANT TO FED. R. APP. P. 29(A)(4)(E)

Pursuant to Fed. R. App. P. 29(a)(4)(E), the American Center for Law and Justice affirms that no counsel for a party authored this brief in whole or in part and that no person other than the *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. Counsel for the ACLJ have presented oral argument, represented parties, and submitted *amicus* briefs before the Supreme Court of the United States, this Court, and other courts around the country in cases concerning the First Amendment and immigration law. *See, e.g., FEC v. Wisc. Right to Life*, 551 U.S. 449 (2007); *McConnell v. FEC*, 540 U.S. 93 (2003); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), and *Int'l Refugee Assistance Project v. Trump*, No. 17-1351 (4th Cir. 2017). The ACLJ has actively defended, through advocacy and litigation, immigration policies that protect American citizens. This brief is supported by members of the ACLJ's Committee to Defend Our National Security from Terror, which represents more than 205,000 Americans who have stood in support of the President's Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States.

The ACLJ submits this *amicus curiae* brief to support Defendants-Appellants' position on appeal and to urge this Court to vacate the preliminary injunction. Counsel for Plaintiffs (Attorney Neal Katyal) and Counsel for Defendants (Attorney Sharon Swingle) consented to the filing of this *amicus curiae* brief on behalf of their clients via electronic mail received by the undersigned on March 31, 2017. This brief is timely filed in accordance with this Court's briefing schedule. CTA Dkt. # 14.

ARGUMENT

I. Supreme Court precedent dictates that the challenged Executive Order be reviewed under the deferential standards applicable to the immigration policymaking and enforcement decisions of the political branches, which the Executive Order satisfies.

The district court erred in treating this case as if it were a run-of-the-mill Establishment Clause case.[1] It is not. This case involves the special context of an executive order ("EO") concerning the entry into the United States of refugees and nationals of six countries of particular concern, enacted pursuant to the President's constitutional and statutory authority. As discussed herein, when the Supreme Court has considered constitutional challenges to immigration-related actions of this sort, it has declined to subject those actions to the same level of scrutiny

[1] In converting the TRO into a preliminary injunction, the district court adopted and incorporated the findings and conclusions of the TRO into the preliminary injunction. ER at 7.

applied to non-immigration-related actions, choosing instead to take a considerably more deferential approach. *See also Washington v. Trump*, 2017 U.S. App. LEXIS 4838, at *29 n.6 (9th Cir. 2017) (Bybee, J., dissenting from the denial of reconsideration en banc) (the panel's "unreasoned assumption that courts should simply plop Establishment Clause cases from the domestic context over to the foreign affairs context ignores the realities of our world"). The EO is valid under this standard.

A. Judicial review of the immigration-related actions of the political branches is deferential.

"The Supreme Court has 'long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)). Indeed, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Moreover, the Constitution "is not a suicide pact," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963), and protecting national security is the government's first responsibility. The President has broad national security powers, which may be exercised through immigration restrictions. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952).

The preliminary injunction also undercuts the considered judgment of Congress that

> [w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f). Where, as here, a President's action is authorized by Congress, "'his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.'" *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015) (citation omitted). The EO falls squarely within the President's constitutional and statutory authority.

B. The Executive Order is constitutional under the Supreme Court's deferential standards applicable to constitutional challenges to the political branches' immigration-related actions.

In *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), the Court rejected a First Amendment challenge to the Attorney General's decision to decline to grant a waiver that would have allowed a Belgian scholar to enter the country on a visa in order to speak to American professors and students. The plaintiffs (American professors) contended that the denial deprived them of their First Amendment right to receive information from him. The Court noted that, although it had previously "referred to a First Amendment right to 'receive information and ideas,'" *id.* at 762-63, the

> [r]ecognition that First Amendment rights are implicated, however, is not dispositive of our inquiry here. In accord with ancient principles of the international law of nation-states, . . . the power to exclude aliens is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers--a power to be exercised exclusively by the political branches of government."

Id. at 765-66 (citations omitted). The Court concluded by stating that

> plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. In the case of an alien excludable under § 212 (a)(28), Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.

Id. at 769-70; *see also Kerry v. Din*, 135 S. Ct. 2128, 2139-41 (2015) (Kennedy, J., concurring) (the government's statement that a visa application was denied due to suspected involvement with terrorist activities "satisf[ied] *Mandel*'s 'facially legitimate and bona fide' standard.").

Similarly, in *Fiallo*, the Court rejected a challenge to statutory provisions that granted preferred immigration status to most aliens who are the children or parents of United States citizens or lawful permanent residents, except for illegitimate children seeking that status by virtue of their biological fathers, and the fathers themselves. 430 U.S. at 788-90. The Court stated:

> At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. . . . [W]e observed recently that in the

> exercise of its broad power over immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens."

Id. at 792 (citations omitted).

The Court noted that it had previously "resolved similar challenges to immigration legislation based on other constitutional rights of citizens, and has rejected the suggestion that more searching judicial scrutiny is required." *Id.* at 794. The Court stated, "[w]e can see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*, a First Amendment case." *Id.* at 795.[2] The Court emphasized that "it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision." *Id.* at 799. The Court concluded that the plaintiffs raised "policy questions entrusted exclusively to the political branches of our Government. . . ." *Id.* at 798; *see also Washington*, 847 F.3d at 1161 (courts "owe substantial deference to the immigration and national security policy

[2] Although a panel of this Court recently concluded that the *Mandel* standard does not apply to "exercises of policymaking authority at the highest levels of the political branches," *Washington*, 847 F.3d at 1162, this conclusion is undercut by *Fiallo*'s reliance upon *Mandel* in the context of a Congressional statute which, like the EO, is an "exercise[] of policymaking authority at the highest levels of the political branches." *See Washington*, 2017 U.S. App. LEXIS 4838, at *31 (Bybee, J.) ("The appropriate test for judging executive and congressional action affecting aliens who are outside our borders and seeking admission is set forth in *Kleindienst v. Mandel*, 408 U.S. 753 (1972).").

determinations of the political branches" when deciding whether such policies are constitutional).

In sum, the legality of executive orders related to immigration does not turn on a judicial guessing game of what the President's subjective motives were at the time; rather, *Mandel*, *Fiallo*, and other cases dictate that courts should rarely look past the face of such orders. The EO is valid under this standard. It is closely tethered to well-established discretionary powers vested in the Executive Branch by the Constitution and statute. The EO *temporarily* pauses entry into the United States of refugees under the United States Refugee Admissions Program ("USRAP") as well as nationals of six unstable and/or terrorism-infested countries of particular concern, which were designated as such by the prior administration, for the legitimate secular purpose of allowing time for needed improvements to the immigration and refugee screening processes.

The EO does *not* single out Muslims for disfavored treatment. The district court correctly noted that the EO "does not facially discriminate for or against any particular religion, or for or against religion versus non-religion. There is no express reference, for instance, to any religion nor does the Executive Order—unlike its predecessor—contain any term or phrase that can be reasonably characterized as having a religious origin or connotation." ER at 54. The countless millions of non-American Muslims who live outside of the six countries of

particular concern are not restricted by the EO. Neither does it limit its application to Muslims in the six designated countries; instead, it applies to all citizens of the six enumerated countries irrespective of their faith.

Although it is well-established that litigants and courts should not be second-guessing the wisdom of, or evidentiary support for, the political branches' decision-making concerning immigration, the court cited with approval Plaintiffs' assertion that the EO's stated national security reasons are pretextual. ER at 60-61. There is, however, ample justification for the determination of multiple administrations that the six designated countries pose a particular risk to American national security.[3] Plaintiffs' objection to the EO is a policy dispute that should be resolved by the political branches.

[3] *See, e.g.*, U.S. Dep't of State, *Country Reports on Terrorism 2015*, June 2016, https://www.state.gov/documents/organization/258249.pdf, at pp. 11-12 (discussing terrorism in Somalia), pp. 165-66 (describing Syria, Libya, and Yemen as primary theaters of terrorist activities), pp. 299-302 (designating Iran, Sudan, and Syria as state sponsors of terrorism); Dep't of Homeland Security, *United States Begins Implementation of Changes to the Visa Waiver Program* (Jan. 21, 2016), https://preview.dhs.gov/news/2016/01/21/united-states-begins-implementation-changes-visa-waiver-program & *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016), https://preview.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program (explaining that most nationals of Visa Waiver Program countries who are also nationals of Iran, Sudan, or Syria, or who visited those countries or Libya, Somalia, or Yemen on or after March 1, 2011, are ineligible to be admitted to the U.S. under the Program).

The EO is similar in principle to the National Security Entry Exit Registration System ("NSEERS") implemented after the terrorist attacks of September 11, 2001, which was upheld by numerous federal courts. *Rajah v. Mukasey*, 544 F.3d 427, 438-39 (2d Cir. 2008) (citing cases). Under this system, the Attorney General imposed special requirements upon foreign nationals present in the United States who were from specified countries. The first group of countries designated by the Attorney General included Iran, Libya, Sudan and Syria, and a total of twenty-four Muslim majority countries and North Korea were eventually designated. *Id.* at 433 n.3. In one illustrative case, the Second Circuit rejected arguments that are strikingly similar to the arguments accepted by the district court here:

> There was a rational national security basis for the Program. The terrorist attacks on September 11, 2001 *were facilitated by the lax enforcement of immigration laws*. . . . The Program was [rationally] designed to monitor more closely aliens from *certain countries selected on the basis of national security criteria*. . . .
>
> To be sure, the Program did select countries that were, with the exception of North Korea, predominantly Muslim. . . . However, one major threat of terrorist attacks comes from radical Islamic groups. The September 11 attacks were facilitated by violations of immigration laws by aliens from predominantly Muslim nations. The Program was clearly tailored to those facts. . . . Muslims from non-specified countries were not subject to registration. Aliens from the designated countries who were qualified to be permanent residents in the United States were exempted whether or not they were Muslims. The program did not target only Muslims: non-Muslims from the designated countries were subject to registration. There is therefore no basis for petitioners' claim.

Id. at 438-49 (emphasis added). Similarly, the EO at issue here is constitutional.[4]

II. The Executive Order is constitutional even under a traditional Establishment Clause analysis.

Justice Breyer's controlling opinion in *Van Orden v. Perry*, 545 U.S. 677 (2005), observed that, "[w]here the Establishment Clause is at issue, tests designed to measure 'neutrality' alone are insufficient." *Id.* at 699 (Breyer, J., concurring); *cf. Trunk v. City of San Diego*, 629 F.3d 1099, 1106-07 (9th Cir. 2011) ("[W]e do not apply an absolute rule of neutrality because doing so would evince a hostility toward religion that the Establishment Clause forbids."). Justice Breyer stated that, in "difficult borderline cases . . . I see no test-related substitute for the exercise of legal judgment . . . [which] must reflect and remain faithful to the underlying purposes of the [Religion] Clauses." *Van Orden*, 545 U.S. at 700. In this case, "the exercise of legal judgment" must take into account the deferential nature of judicial review of immigration-related actions such as the EO. Nevertheless, the EO is

[4] Contrary to the district court's suggestion, ER at 54-55, the mere fact that the six countries of particular concern designated by the EO happen to have Muslim majority populations is not evidence of religious animus. Under this reasoning, the benefits that the government provides to military veterans would be rendered constitutionally suspect by the mere fact that approximately 85% of them happen to be male, even though there are many legitimate reasons for providing such benefits unrelated to any gender-based bias.

constitutional even under non-immigration-related Establishment Clause jurisprudence.[5]

The EO satisfies the "purpose prong" of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), which "asks whether the challenged government action has a secular purpose or was taken for 'the ostensible and predominant purpose of advancing religion.'" *Access Fund v. U.S. Dep't of Agric.*, 499 F.3d 1036, 1043 (9th Cir. 2007) (quoting *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005)). As discussed previously, the EO's predominant purpose is protecting national security.

The district court's decision to sidestep the EO's obvious secular purposes by focusing on miscellaneous comments made by then-candidate Trump, or his advisors, is flawed for at least four reasons.

First, the Supreme Court has stated that the primary purpose inquiry concerning statutes may include consideration of the "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history [and] the historical context of the statute . . . and the specific sequence of events leading to [its] passage." *McCreary County v. ACLU*, 545 U.S. 844, 862

[5] In contrast to the district court here, a district court in the Eastern District of Virginia recently denied a motion for a preliminary injunction, which included an Establishment Clause claim, brought against the current executive order and rejected many of the same arguments brought by Plaintiffs in the instant action. *Sarsour v. Trump*, 2017 U.S. Dist. LEXIS 43596 (E.D. Va. 2017).

(2005); *see also id.* (noting that the primary purpose inquiry is limited to consideration of "the 'text, legislative history, and implementation of the statute,' or comparable official act") (citation omitted).

The district court relied upon several quotes, made as long ago as 2015, by then-candidate Trump and/or individuals holding some non-governmental position within his political campaign. ER at 57-59. Clearly, comments made, or actions taken, by a private citizen while a candidate for public office (or his or her advisors) *while on the campaign trail* are not "official" *government* acts, and do not constitute "*contemporaneous* legislative history." *See McCreary County*, 545 U.S. at 862. Indeed, "one would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002).

No doubt, the district court stumbled in its Establishment Clause analysis by treating campaign statements made by private citizens as the equivalent of "official" government acts. Establishment Clause analysis should be restricted to conduct that constitutes a "comparable official act." *See McCreary County*, 545 U.S. at 862. Presidential campaign rhetoric is inherently unofficial and unreliable and should not be considered. *See Washington*, 2017 U.S. App. LEXIS 4838 at *19-21 (Kozinski, J., dissenting from denial of reconsideration en banc) (explaining that, for Establishment Clause analysis, it "is folly" to consider a

political candidate's campaign trail rhetoric, which is often contradictory or inflammatory).

The phrase "official acts," when applied to a sitting President, is a judicial term of art that has a fixed meaning, denoting *only* conduct that occurs after he or she assumes the Presidency. The Supreme Court has held in another context that actions of a candidate that occur *before* he assumes the office of President constitute, by definition, "unofficial," rather than "official," conduct.

In *Clinton v. Jones*, 520 U.S. 681 (1997), the Supreme Court considered the judicially-created doctrine of Presidential immunity, a doctrine that only applies to cases involving "official" conduct of a President. A unanimous Court held that, because all but one of the four counts in a civil damages suit against President Bill Clinton alleged misconduct occurring *before* he became President, as to that alleged conduct, it was "perfectly clear" that it was "unofficial" in nature. *Id.* at 686. Referring to the fourth and last count, which alleged that Mr. Clinton, *while President* and through his agents, had defamed the complainant, the Court contrasted that count with the others by noting:

> With the exception of the last charge, which arguably may involve conduct within the outer perimeter of the President's official responsibilities, it is perfectly clear that the alleged misconduct of petitioner was *unrelated to any of his official duties* as President of the United States and, indeed, occurred *before he was elected* to that office.

Id. (emphasis added) (footnote omitted); *see also Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014) (differentiating between government officials and private citizens for purposes of offering prayers during an official proceeding). Thus, the district court failed to properly limit its inquiry to official acts or statements in conducting its Establishment Clause analysis. *See Washington*, 2017 U.S. App. LEXIS 4838, at *21 (Kozinski, J.) ("Limiting the evidentiary universe to activities undertaken while crafting an official policy makes for a manageable, sensible inquiry," rather than considering "anything a politician or his staff may have said, so long as a lawyer can argue with a straight face that it signals an unsavory motive.").

Second, the district court's extensive reliance upon purported evidence of a subjective, personal anti-Muslim bias of the President and some of his advisors is improper because "what is relevant is the legislative purpose of *the statute*, not the possibly religious motives of *the legislators* who enacted the law." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) (plurality opinion) (emphasis added). In short, the district court engaged in the kind of "judicial psychoanalysis of a drafter's heart of hearts" that is foreclosed by Supreme Court precedent. *McCreary County*, 545 U.S. at 862.

The EO, on its face, serves secular purposes, and no amount of rehashing of miscellaneous campaign trail commentary can change that, especially when the

content of the current EO is substantively different from the now-repealed executive order. A foray into the malleable arena of legislative history is not a *requirement* in all Establishment Clause cases; to the contrary, courts "must defer to [the government's] stated reasons if a 'plausible secular purpose . . . may be discerned from the face of the statute,'" which is the case here. *Trunk*, 629 F.3d at 1108 (quoting *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983)); *see also Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring) (explaining that inquiry into the government's purpose should be "deferential and limited").

One illustration of the problematic nature of attempting to utilize legislative history to override a policy's facial neutrality is Plaintiffs' suggestion, cited with approval by the district court, that a presidential policy advisor's statement that the current EO is designed to accomplish "the same basic policy outcome" as the now-repealed executive order, while merely correcting technical issues brought up by this Court, constitutes evidence that the existing EO is really a wolf in sheep's clothing. ER at 36, 59. Rather than being some sort of smoking gun, this comment merely suggests that the existing EO was narrowly crafted to address concerns raised during litigation over the prior order, with the secular goal of protecting national security in mind. The district court recognized that the EO "represents a response to [this Court's] decision in *Washington v. Trump*." ER at 3, 32. Addressing actual or perceived flaws in previous iterations of a law or policy, in

order to bolster the likelihood that it will be upheld in litigation, is itself a valid secular purpose. *See, e.g., ACLU of Ky. v. Rowan County*, 513 F. Supp. 2d 889, 904 (E.D. Ky. 2007) (in Establishment Clause cases, changing a policy in "an attempt to avoid litigation . . . is an acceptable purpose").

Third, the mere suggestion of a possible religious or anti-religious motive, mined from past comments of a political candidate or his supporters, and intermixed with various secular purposes, is not enough to doom government action (along with all subsequent attempts to address the same subject matter). "[A]ll that *Lemon* requires" is that government action have "*a* secular purpose," not that its purpose be "*exclusively* secular," and a policy is invalid under this test only if it "was motivated *wholly* by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680-81 & n.6 (1984) (emphasis added); *see also Van Orden*, 545 U.S. at 703 (Breyer, J., concurring) (upholding government action that "serv[ed] a mixed but primarily nonreligious purpose"); *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) ("[A] court may invalidate a statute only if it is motivated wholly by an impermissible purpose."). The EO clearly serves secular purposes and, therefore, it satisfies *Lemon*'s purpose test. *See Sarsour*, 2017 U.S. Dist. LEXIS 43596, at *24-34 (rejecting the claim that the current executive order [which is at issue in the instant appeal] violates the purpose prong of *Lemon* and noting that the executive order is a facially lawful exercise of the President's authority and that the stated

national security purpose of the executive order is not a pretext for discrimination against Muslims).

Fourth, and final, the district court's improper emphasis on the alleged subjective, predominantly anti-Muslim intent of the President and his surrogates led it to conclude that the current EO is unconstitutionally tainted. ER at 17-18. This conclusion runs contrary to *McCreary County*'s admonition that the government's "past actions" do not "forever taint any effort . . . to deal with the subject matter." *McCreary County*, 545 U.S. at 874. The district court's conclusion is erroneous because the many substantive differences between the now-repealed executive order and the existing EO constitute "genuine changes in constitutionally significant conditions" that cured any actual or perceived Establishment Clause deficiencies. *See, e.g., ACLU v. Schundler*, 168 F.3d 92, 105 (3d Cir. 1999) (Alito, J.) ("The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked 'a secular legislative purpose,' or that it was 'intended to convey a message of endorsement or disapproval of religion.'") (citations omitted); *Sarsour*, 2017 U.S. Dist. LEXIS 43596, at *33 ("[T]he substantive revisions reflected in EO-2 [the executive order at issue in the instant appeal] have reduced the probative value of the President's statements to the point that it is no longer likely that Plaintiffs can succeed on their claim that the predominant purpose of EO-2 is to discriminate

against Muslims based on their religion and that EO-2 is a pretext or a sham for that purpose.").

CONCLUSION

The preliminary injunction is untenable in light of Supreme Court jurisprudence. The EO falls well within the President's broad discretion, provided by constitutional and statutory authority. This Court should vacate the preliminary injunction.

Dated: April 21, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit on April 21, 2017, using CM/ECF, which will send notification of such filing to counsel of record.

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☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

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Signature of Attorney or Unrepresented Litigant: /s/ Edward L. White III

Date: 4/21/2017

("s/" plus typed name is acceptable for electronically-filed documents)