No. 17-15589

In the
United States Court of Appeals for the Ninth Circuit

STATE OF HAWAII, ISMAIL ELSHIKH,
Plaintiffs-Appellees,
v.
DONALD J. TRUMP,
President of the United States, *et al*.
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawaii

Brief *Amicus Curiae* of U.S. Justice Foundation, Citizens United, Citizens United Foundation, English First Foundation, English First, Public Advocate of the United States, Gun Owners Foundation, Gun Owners of America, Conservative Legal Defense and Education Fund, U.S. Border Control Foundation, and Policy Analysis Center in Support of Defendants-Appellants and Reversal

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DISCLOSURE STATEMENT

The *amici curiae* herein, U.S. Justice Foundation, Citizens United, Citizens United Foundation, English First Foundation, English First, Public Advocate of the United States, Gun Owners Foundation, Gun Owners of America, Conservative Legal Defense and Education Fund, U.S. Border Control Foundation, and Policy Analysis Center, through their undersigned counsel, submit this Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1, 29(c).

All of these *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them. The *amici curiae* are represented herein by Herbert W. Titus, who is counsel of record, Robert J. Olson, William J. Olson, and Jeremiah L. Morgan of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, Virginia 22180-5615. *Amicus* United States Justice Foundation also is represented herein by Joseph W. Miller, 932 D Street, Suite 2, Ramona, California 92065. *Amici* Citizens United and Citizens United Foundation are also represented herein by Michael Boos, 1006 Pennsylvania Avenue SE, Washington, D.C. 20003.

s/Herbert W. Titus
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MISCELLANEOUS

INTEREST OF *AMICI CURIAE*[1]

Amici United States Justice Foundation, Citizens United, Citizens United Foundation, English First Foundation, English First, Public Advocate of the United States, Gun Owners Foundation, Gun Owners of America, Conservative Legal Defense and Education Fund, U.S. Border Control Foundation, and Policy Analysis Center are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code ("IRC"). Each entity is dedicated, *inter alia*, to the correct construction, interpretation, and application of law. Their interest also includes protecting our nation's borders, enforcement of immigration laws, separation of powers, and related issues.

Many of these *amici* have worked on these issues for many years, including the following during the last year: (i) a Legal Analysis of presidential candidate Trump's proposals to limit immigration from certain countries (Feb.

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[1] *Amici* requested and received the consents of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

12, 2016); (ii) an *amicus* brief to the U.S. Supreme Court in support of a 26-State challenge to presidential executive actions that were clearly outside statutory authority (Apr. 4, 2016); (iii) Comments to the Department of State regarding the proposed number of refugees for 2017 (May 19, 2016); (iv) a Legal Policy Paper analyzing the constitutional authority for States to enter into an interstate compact regarding immigration (Sept. 2, 2016); (v) Comments to the U.S. Citizenship & Immigration Service regarding amendments to the Registration for Classification as Refugee form (Nov. 17, 2016); (vi) an *amicus* brief to the Ninth Circuit in support of a motion to stay a Temporary Restraining Order, which prohibited enforcement of a recent Executive Order temporarily suspending entry of certain immigrants and refugees into the United States (Feb. 6, 2017); (vii) an *amicus* brief in the Ninth Circuit in support of rehearing *en banc* in the above case (Feb. 16, 2017); and (viii) an *amicus* brief in the Fourth Circuit in further support of President Trump's effort to secure our borders against entry by those coming from select countries where their background cannot be checked (Mar. 31, 2017).

ARGUMENT

I. Did the 1801 Barbary Conflict Constitute an Unconstitutional "Establishment of Religion"?

Imagine for a moment that a U.S. District Court had been asked to consider an Establishment Clause challenge to President Thomas Jefferson's military action against the Barbary Pirates in 1801. After the United States refused to pay tribute for the passage of its merchant ships through the region, that conflict pitted the United States against four North African provinces of the Islamic Ottoman Empire.

Imagine that a plaintiff of Islamic faith, residing in the United States, had been "deeply saddened" (*See* Hawaii v. Trump, 2017 U.S. Dist. LEXIS 36935, *27) ("Order") by the President's action against Islamic foreign powers, and brought an Establishment Clause claim, seeking to enjoin President Jefferson from prosecuting the conflict, claiming that the President's actions had created a "perception that the Government has established a disfavored religion." *See id.* at *10-11. No doubt, the Islamist plaintiff would have claimed that President Jefferson, by taking military action against nations with "overwhelmingly Muslim populations" was "singling out … predominantly Muslim countries" and "caus[ing] harm by stigmatizing" those from such countries. *See id.* at *11, 33.

To justify his action to a very modern federal judge, President Jefferson likely would have asserted that the Barbary conflict has nothing to do with Islam as a religion. He would have claimed that "it's not the Muslim [conflict]. But it's countries that have tremendous terror." *See id.* at *11. Democrat/ Republican Jefferson would have pointed out that the conflict "applies to … countries that Congress and the prior [Federalist Adams] Administration determined posed special risks…" *See id.* at *32. He would have cited commentators like Politifact to demonstrate that "religion was not a significant factor in the Barbary wars."[2]

In response, the district court's analysis would likely have begun by admitting that "[i]t is undisputed that the [Barbary conflict] does not facially discriminate for or against any particular religion…." *See id.* at *32. But that would not be the end of the inquiry — not by a long shot. The district court would have then explained that, even though the Barbary conflict was initiated for a "'facially legitimate and bona fide reason,'" the court must look behind the

[2] *See* L. Jacobson, "In Barbary wars, did U.S. declare 'war on Islam'?" *Politifact* (Feb. 11, 2015) http://www.politifact.com/ truth-o-meter/ statements/2015/feb/11/chain-email/barbary-wars-did-us-declare-war-islam/

stated purposes, because "[i]t is a discriminatory purpose that matters…." *See id.* at *33-34.

No doubt, the court would have looked to the "historical background of the decision and statements by decisionmakers…." *See id.* at *34. And, no doubt, the court would have found "significant and unrebutted evidence of religious animus driving the [prosecution] of the [Barbary conflict]." *See id.* at *35. Indeed, the court would have found that the **true** motivation underlying the prosecution of the Barbary conflict was to be found in a 1786 letter to Secretary of Foreign Affairs John Jay co-authored by President Jefferson and John Adams when both were serving as American Commissioners. That letter[3] summarized their unfruitful attempts to negotiate peace with the Barbary states:

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[3] Probing further, the court would have found the true animus underlying U.S. Policy could be found in what Jefferson and Adams read. Adams' personal copy of the Koran contained a preface which stated of Islam that "Thou wilt wonder that such absurdities have infected the best part of the world, and wilt avouch, that the knowledge of what is contained in this book, will render that law contemptible …" The Koran, Commonly Called the Alcoran of Mahomet, by the Sieur de Ryer, Oct. 1806, First American Edition, p. iv, https://archive.org/details/korancommonlycal00john. Similarly, Jefferson's copy of the Koran noted that: "It is certainly one of the most convincing proofs that Mohammedism was no other than a human invention, that it owed its progress and establishment almost entirely to the sword." G. Sale, The Koran, Commonly Called the Alcoran of Mahomet, London, 1734, Sec. II, pp. 49-50, https://archive.org/details/Sale1734Koran.

> We took the liberty to make some inquiries concerning the **Grounds of their pretentions to make war upon Nations who had done them no Injury**, and observed that we considered all mankind as our friends who had done us no wrong, nor had given us any provocation.
>
> The Ambassador answered us that it **was founded on the Laws of their Prophet**, that **it was written in their Koran**, **that all nations who should not have acknowledged their authority were sinners, that it was their right and duty to make war upon them wherever they could be found**, and to make **slaves** of all they could take as **Prisoners**, and that every Musselman who should be slain in battle was sure to go to Paradise. [Letter of American Commissioners to John Jay, March 28, 1786 (emphasis added).[4]]

Would not such prior statements have been sufficient for the district court below to conclude that "the stated secular purpose of the [Barbary conflict was], at the very least, 'secondary to a religious objective' of [going to war with] Muslims"? *See* Order at *39. Would not the court likely have concluded that "[t]hese plainly-worded statements … betray the [conflict's] stated secular purpose," (*see id.*) and then have decided that the Barbary conflict was fought not to defend a fledgling nation from piracy, but to establish Islam as a "disfavored religion" (*id.* at *11) and therefore must be enjoined as an unconstitutional establishment of religion?

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[4] *See* https://founders.archives.gov/documents/Jefferson/01-09-02-0315.

The conflict between the United States and significant elements of Islam is not new. Nevertheless, the district court in Hawaii utterly failed to even consider the possibility that the United States could be facing an external threat from Islam, which for centuries has been as much a political ideology as a religion.[5] How the nation responds to such external threats is vested exclusively in the President of the United States by the U.S. Constitution. No federal judge has the authority to usurp the President's authority to preserve, protect, and defend the country against such external threats, whether they come from nation states, terrorists, secularists, sects, or political/religious ideologies.

II. The District Court's Ruling on Standing Cannot Stand.

In concluding that both Hawaii and Dr. Elshikh have standing, the district court has all but ignored the most basic principles undergirding this important limitation on the power of federal courts. Simply because a person contests the

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[5] Harvard's Kennedy School senior fellow Ayaan Hirsi Ali writes: "Islam implies a constitutional order fundamentally incompatible with the US Constitution and with the 'constitution of liberty' that is the foundation of the American way of life.... The ultimate goal of dawa is to destroy the political institutions of a free society and replace them with the rule of sharia law." (As quoted in J. Tayler, "Ayaan Hirsi Ali Explains How To Combat Political Islam," *Quillette* (Mar. 31, 2017), http://quillette.com/2017/03/31/ayaan-hirsi-ali-explains-how-to-combat-political-islam2/.)

legality of an action, or even has suffered some injury, does not mean he automatically has standing to bring suit in federal court.

In this case, the injuries alleged (especially by Elshikh) are better described as emotional or political rather than legal. However, a plaintiff in federal court must not only allege an injury-in-fact, but also an injury-at-law. Simply disagreeing with the direction the country is headed or a particular decision made by a President does not confer legal standing. And just because one's mother-in-law temporarily cannot come from another country to visit does not constitute a legal injury.

Moreover, the plaintiffs in this case in large part are seeking to litigate injuries to third parties — alleging that they are being affected by what is happening to someone else. Dr. Elshikh asserts injuries to his mother-in-law, his wife and children, members of his Mosque, and other Muslim residents of Hawaii. Elshikh Decl. ¶¶ 3, 4, 6-8. Hawaii attempts to litigate alleged injuries to the University of Hawaii, which in turn are based vicariously on alleged injuries to the University's students and faculty. Dickson Decl. #1 ¶¶ 9-12. Yet as the Supreme Court has held, a "federal court's jurisdiction … can be invoked **only** when the plaintiff **himself** has suffered 'some threatened or actual injury

resulting from the putatively illegal action.…'" Warth v. Seldin, 422 U.S. 490, 499 (1975) (emphasis added).

A. Hawaii's Claim of Standing Rests on Shaky Factual and Legal Allegations That Crumble When Exposed to Analysis.

As a preliminary matter, the district court cited only a single authority for its novel proposition that Hawaii has standing to challenge the Second Executive Order ("SEO"). To be sure, the court lists the leading cases, including Mass. v. EPA, Friends of the Earth, and Lujan,[6] but only in its preliminary discussion of **what standing is**. In its actual analysis of **why Hawaii has standing**, however, the only case the court cited is this Court's recent opinion in Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017). Order at *21. Indeed, it would seem as if this Court's Washington decision is the **only precedent supporting** Hawaii's standing here.

1. Potential Students Are Not a Finite Commodity.

The district court accepted certain factual allegations made by Hawaii as sufficient to support Hawaii's standing to sue. First, the court ruled that, since the SEO temporarily bars certain potential future students from entry into the

[6] Mass. v. EPA, 549 U.S. 497 (2007); Friends of the Earth v. Laidlaw, 528 U.S. 167 (2000); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

United States, "the University [of Hawaii] will not be able to collect the tuition that those [potential future] students would have paid." *Id.* at *20. That is a *non sequitur*. The fact that a university cannot collect tuition from Student A is no injury if the university can just as easily replace him with Student B. The University has not alleged or proven that it has an open admissions policy, or that the pool of potential students is a finite commodity, or that it regularly admits all applicants from the covered countries, or that it could not easily fill any open slots simply by substituting other students.

2. The University Alleges a Generalized Grievance.

Second, the district court echoed Hawaii's vague claims that certain professors and students at the University might theoretically be "'dissuad[ed] … from continuing their scholarship,'" presumably because their families might not be able to join them in the United States. *Id.* at *20-21. It is not clear how this alleged harm would be any different for a University student or faculty member from any other foreign person from the affected countries living anywhere in the United States. The alleged harm of not being able to have one's family members visit would apply equally to a fast-food worker in Nebraska as it would for a student in Hawaii. That claim constitutes a supposedly aggrieved class only

somewhat more limited than all taxpayers, and is a generalized grievance, not a "particularized" harm. *See* Warth at 499 ("when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction."). *See also* Jewel v. NSA, 673 F.3d 902, 908 (9th Cir. 2011).

3. The University's Persian Language Program Will Be Just Fine.

Moreover, the district court adopts the University's claims that denying entry to individuals from the six countries covered by the SEO will cause "non-monetary losses," such as "damag[ing] … the collaborative exchange of ideas among people of different religions and national backgrounds," and "grind[ing] to a halt certain academic programs, including the University's Persian Language and Culture program." That's quite an assertion! Persian is spoken primarily in three countries: Iran, Afghanistan, and Tajikistan. There are estimated to be about 54 million Persian speakers worldwide,[7] and a minority — slightly over 40 percent — are located in Iran.[8] The rest are located in countries not affected by the SEO. The University has neither alleged nor demonstrated that, if Iranian

[7] *See* http://www.vistawide.com/languages/top_30_languages.htm.

[8] *See* http://www.lmp.ucla.edu/Profile.aspx?LangID=63&menu=004.

Persian speakers are temporarily prohibited from joining the University's faculty, the University could not replace them with Persian faculty members from elsewhere in the world — including Persian speaking academics already in the United States.

Similarly, the University has not alleged precisely how its long-term student or faculty diversity would be harmed by the SEO's temporary 90 or 120-day moratorium on immigration from certain foreign countries. This Court may not assume that which is neither alleged nor proven. There is every reason to believe that the University's Persian program would be just fine for the few months the suspension would be in effect.

In a similar vein, it is worth noting that the SEO was slated to go into effect on March 16, 2017, and the provisions challenged here were to last between 90 and 120 days, meaning they would have expired by mid-July 2017, this while the University's spring 2017 semester began in January, and its fall 2017 semester does not begin until mid-August.[9] The University has not shown specifically how the SEO would have an adverse effect on events occurring well after its expiration.

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[9] *See* http://www.hawaii.edu/academics/calendar/.

4. The University Provides No Country-Specific Figures.

The district court was unfazed by the failure of the University to allege that a single foreign individual at the University actually has a single family member outside the United States who does not have a visa and thus might be precluded from entry in the future. As the Brief for Appellants ("Gov't. Br.") points out, the SEO contains potential case-by-case waivers for situations precisely such as this, and the University has not alleged that any person has even considered applying for such a waiver — much less actually applied for one — much less been denied. This is hardly a concrete or particularized injury of the kind that is necessary to confer legal standing.

Most importantly, though, the University neither alleges nor proves that it has either faculty or students from each of the six countries covered by the SEO. As for students, the University simply alleges generally that it has "approximately 27 graduate students from the seven countries" (Dickson Decl. 1 ¶ 9), failing to identify how many (if any) are from each country. And the University alleges that it only has "permanent resident faculty from the same seven affected countries, namely Iran, Iraq and Sudan." *Id.* at ¶ 10. The University's second declaration discusses only "Iran and Sudan," since Iraq is no

longer covered by the SEO. Dickson Decl. 2 ¶ 7. Neither declaration says anything about having faculty from Libya, Syria, Somalia, or Yemen. Finally, as for the University's "at least thirty faculty members with valid visas who are from the seven countries," the University again fails to reveal from which countries they came. Dickson Decl. 1 ¶ 11. In spite of this lack of specificity, the district court's injunction bars the application of the SEO to all six countries — including to countries where the University of Hawaii has not alleged it has either faculty or students.

In its zeal to enjoin the President of the United States, the district court never bothers to connect the harms alleged by the University to the specific countries named in the injunction. For example, the University's Persian programs clearly are not harmed by a temporary ban on immigration from Somalia, where virtually no one speaks Persian. So, even if the University had standing to challenge the SEO as to Iran, that does not mean it has standing to challenge the SEO as to Somalia. And since the University has not specifically alleged that it has either faculty or students from Libya, Syria, Somalia, or Yemen, it cannot possibly have standing to challenge the SEO as it applies to

those countries. Simply put, the district court's injunction paints with far too broad a brush, well beyond the allegations or evidence.

B. Dr. Elshikh Does Not Have Standing Just Because President Trump Has Made Him Sad.

First of all, it should raise judicial eyebrows when anyone asserts that he is upset because his mother-in-law **cannot** come to visit. Be that as it may, Dr. Elshikh's claims of standing do not hold water for numerous reasons. Most importantly, as the government notes, Elshikh is attempting to assert the rights of third parties, rather than his own. Gov't. Br. at 28. But there is more.

1. The Injury to Dr. Elshikh's Mother-In-Law is Speculative.

First, it is unclear why Dr. Elshikh (who is from Egypt), challenging the SEO to have his mother-in-law (who is from Syria) visit, has standing to challenge the SEO as applied to Iran, Somalia, Sudan, Yemen, or Libya. The ban on immigrants from those countries could not possibly impose concrete harm on Dr. Elshikh or his mother-in-law's travel plans.

Next, Dr. Elshikh explains that, after President Trump's first Executive Order, he "called the National Visa Center to inquire" as to his mother-in-law's application, at which point he was told it was "on hold." Elshikh Decl. ¶ 4. Later, however, the government informed him that the application was "now in

fact proceeding to the next stage of the process…." *Id.* Thus, the last concrete fact that Dr. Elshikh knows about his mother-in-law's visa application is that it is in process. After the SEO, however, Dr. Elshikh apparently did not bother to inquire as to the status of the application, and therefore the only allegation or evidence about the application's current status is his own speculative conjecture. *See Id.*

2. Dr. Elshikh Alleges Injury to Third Parties, Not Himself.

But even accepting as fact Dr. Elshikh's suspicion that his mother-in-law's visa application temporarily has been put on hold, Dr. Elshikh's declaration is devoted to alleging that other people are being harmed — not that Dr. Elshikh personally is being harmed. Indeed, he claims that his "older children" are "deeply affected" and "deeply saddened" by the SEO, that his "mother-in-law has been looking forward to visiting," that the SEO "has directly impacted my family," that this result is "devastating to me, my wife and children [and also] to my mother-in-law," that "[m]any members of my Mosque are upset [and] fearful," and that he "personally know[s]" of others affected by the SEO. Elshikh Decl. ¶¶ 3, 5-8. None of these claims rise to the level of Article III standing — hurt feelings of others do not receive constitutional protection. *See*

Warth at 499 ("the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.").

3. Being Sad Does Not Confer Article III Standing.

At bottom, the only personal harm that Dr. Elshikh alleges is that President Trump has made him "deeply sad[]." Elshikh Decl. ¶ 1. Yet as the government notes in its brief, even a "'stigmatizing injury'" standing to support a First Amendment claim is only conferred upon a person actually stigmatized. *See* Gov't. Br. at 26.

In modern parlance, a "snowflake" is known as a young adult who is "more prone to taking offence and less resilient than previous generations, or as being too emotionally vulnerable to cope with views that challenge their own."[10] 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

[10] *See* https://en.wikipedia.org/wiki/Generation_Snowflake

believe that they can go to court any time their feelings have been hurt, the lawyers and the district court should have known better.

III. The Establishment Clause Does Not Apply Here.

In their original complaint, Plaintiffs alleged that the President's First Executive Order ("FEO") violated the Establishment Clause by "officially preferring one religion over another." Compl. ¶ 84. In support of this charge, plaintiffs alleged that various sections of the FEO "as well as Defendants' statements … and their actions to implement it, are intended to [and] have the effect of disfavoring Islam and favoring Christianity." *Id.* ¶¶ 85-86.

In their Second Amended Complaint, Plaintiffs repeat their general allegation that the Establishment Clause prohibits "**preferring** one religion over another," yet they now allege only that Sections 2 and 6 of the SEO "**disfavor** Islam." *Id.* ¶¶ 107-09. Completely absent from the Second Amendment Complaint is any charge that the SEO actually **prefers** Christianity or any other religion.

Thus, the Establishment Clause claim now before this Court is based **solely** upon the factual and legal assumption that the SEO has, by **disfavoring** Islam, unconstitutionally **established** an unnamed and unidentified religion.

Quoting Larson v. Valente, 456 U.S. 228, 244 (1982), the district court began its discussion of Plaintiffs' Establishment Clause claim, restating that "'[t]he clearest command of the Establishment Clause is that one religious denomination cannot be **officially preferred** over another.'" 2017 U.S. Dist. LEXIS 36935, *31 (emphasis added). The court then claimed that the question before it was: "[W]hether the [SEO] runs afoul of **that** [Establishment] command," namely, whether the SEO "officially **preferred** … one religious denomination" over another. *Id.* (emphasis added).

Yet in answering that simple question, the court mindlessly assumed that, because the SEO allegedly "discriminated" against the Muslim faith, the SEO preferred a religion, without identifying what that preferred faith was. In lockstep with the Plaintiffs' Second Amended Complaint, the district court decided that, because the SEO allegedly "disfavored" Muslims, it had somehow "established a disfavored religion." *See* Order at *10-11. *See also* Compl. ¶ 4. This is Alice in Wonderland logic — that, by disfavoring the Muslim faith, the SEO magically "preferred" another faith in violation of the Establishment Clause. That is not only illogical, but also unhistorical. As Joseph Story observed in his Commentaries on the Constitution, the Establishment Clause was

designed to limit the degree to which the federal government could favor religion, not disfavor it, limiting how far the "government may rightfully go in fostering and encouraging religion."[11]

Undeterred by either logic or history, the district court assumed that the Establishment Clause command against religious preference was implicated by the allegation that the SEO's "purpose [is] to **disfavor** a particular religion." Order at *31.

In support of its finding of religious preference, the district court found that the SEO was so permeated by "anti-Muslim animus" that it was self-evident the Establishment Clause was violated — but without there being any evidence of preferential treatment of a competing religious purpose or denomination. *See* Order at *31, 33-36. To be sure, the district court did attempt to enlist the Larson case on the plaintiffs' behalf, contending that the Establishment Clause was triggered by "apply[ing] regulations only to minority religions," but there is no doubt that the Larson ruling was based upon the fact that the law "grants denominational preferences of the sort consistently and firmly deprecated in our precedents." 456 U.S. at 246.

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[11] 2 J. Story, Commentaries on the Constitution, § 1872, 628 (5th ed.: 1891).

Indeed, Establishment claims are based upon a claim that a person has been injured by a government benefit conferred on another favored religious group, such as the placement of a Ten Commandments monument on public property,[12] the erection of a creche scene during the Christmas season on the county courthouse lawns,[13] teaching of "creation" in a public school classroom,[14] praying to God before the beginning of a legislative session,[15] prayer and Bible reading as part of the public school curriculum,[16] conferring monetary benefits upon private religious schools,[17] conferring monetary benefits upon parents who send their children to private religious schools,[18] or providing tax breaks and

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[12] *See, e.g.,* McCreary County v. A.C.L.U. of Ky., 545 U.S. 844 (2005).

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

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

[15] *See, e.g.,* Marsh v. Chambers, 463 U.S. 783 (1983); Town of Greece v. Galloway, 134 S.Ct. 1811 (2014).

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

[17] *See, e.g.,* Everson v. Board of Education, 330 U.S. 1 (1946); Valley Forge Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464 (1982).

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

other monetary benefits to support private counseling organizations with ties to certain religious denominations.[19]

Not only did the district court **not** find that the SEO officially preferred any religious denomination, but it also did not even bother to examine the SEO to see if one might infer such a preference from its context. *See, e.g.,* Epperson v. Arkansas, 393 U.S. 97 (1968) (striking down law prohibiting the teaching of evolution found to be based upon a preference for the teaching of the book of Genesis).

In neither the Second Amended Complaint nor in the district court's order is there any effort to demonstrate that, by disfavoring Islam, the SEO is, in fact, exalting Christianity or any other religious faith. Without such evidence, the plaintiffs and the district court labor in vain to bring their religious complaint under the auspices of the Establishment Clause. Rather, as the district court's Order reveals,[20] it is an exercise in futility to apply the three-part Establishment Lemon test to a case such as here where there is no evidence, or even allegation,

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

[20] *See* Order at *31-32.

that the Government was actually preferring one religion over another. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

As the Supreme Court put it in Flast v. Cohen, 392 U.S. 83 (1968):

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to **favor** one religion over another or to **support** religion in general. [*Id.* at 103 (emphasis added).]

On its face, there can be no dispute: the SEO does **not** confer any benefit on any religious person, entity, or practice. In short, this is not an Establishment Clause case, and should have been dismissed by the court below for failure to state a legal claim upon which relief can be granted.

IV. The President of the United States Is Not a Proper Party to this Case.

No federal court has the power to enjoin the President in a case such as this, and thus President Trump never should have been named in his official capacity as a party. *See* Gov't. Brief at 56. Can there be any doubt that President Trump was named as the lead defendant in the complaint not because of any legal necessity, but for political effect? Yet, without raising a question, the district court permitted the case against the President to proceed to judgment, issuing an order that "Donald J. Trump, in his official capacity as President of

the United States" is "enjoined from enforcing or implementing Sections 2 and 6 of the Executive Order across the Nation." Order at *1, 45.

As the Brief for Appellants notes, "[a]t the threshold, the injunction violates the 150-year-old rule that federal courts cannot issue an injunction that runs against the President himself. " Gov't. Brief at 56. That is putting it mildly. In Franklin v. Massachusetts, 505 U.S. 788, 800-03 (1992), the Supreme Court struck down a district court's injunction against the president, noting that, while a district court clearly could enjoin a lower level federal official like a cabinet secretary[21] (note that Secretaries Kelly and Tillerson also were named as defendants in this case), "the District Court's grant of injunctive relief against the President himself is extraordinary, and should have raised judicial eyebrows." *Id.* at 802. Writing in concurrence, Justice Scalia went even further, asserting that "[i]t is a commentary upon the level to which judicial understanding — indeed, even judicial awareness — of the doctrine of separation of powers has fallen, that the District Court entered this order against the

[21] *See, e.g.,* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (President Truman made the decision to seize the steel mills, but it was Secretary Sawyer who was enjoined from enforcing that decision); *see also* Marbury v. Madison, 5 U.S. 137 (1803) (President Jefferson made the decision not to deliver former President John Adams' appointments, but it was Secretary of State James Madison who was party to the case).

President without blinking an eye." *Id.* at 826 (Scalia, J., concurring). Justice Scalia noted that, up until at least 1984, "'[n]o court has ever issued an injunction against the president himself or held him in contempt of court.'" *Id.* at 827. Unfortunately, that long tradition did not stop the district court in this case, which issued its injunction apparently "without blinking an eye."

Over a century before Franklin, the Supreme Court was asked to enjoin a president in Mississippi v. Johnson, 71 U.S. 475 (1866). There, the Supreme Court considered Mississippi's request "to enjoin President Andrew Johnson from enforcing the Reconstruction Acts." Franklin at 827. The Court distinguished between suits against the President seeking to have him perform a "mere ministerial duty [with] no room for the exercise of judgment," and cases which involve "the exercise of Executive discretion." Johnson at 499. Although leaving open the question of whether the president could be ordered to perform mere ministerial acts, the Court nevertheless was "fully satisfied that this court has no jurisdiction … to enjoin the President in the performance of his official duties…." *Id.* at 501. Clearly, President Trump's issuance and enforcement of the SEO was an act in the performance of his official duties.[22]

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[22] *See* Marbury v. Madison at 170 ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or

As early as 1838, the High Court observed that "The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power." Kendall v. United States, 37 U.S. 524, 610 (1838). And, as it is with the President, so too it is with the other branches of government. Twenty-eight years later, in Johnson, the Supreme Court noted that the courts cannot "restrain the **enactment** of an unconstitutional law" by the legislative any more than **the Executive** "can be restrained in its action by the judicial department…." Johnson at 500.[23]

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executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.").

[23] *See also* Nixon v. Fitzgerald, 457 U.S. 731, 829 (1982) (Scalia, J., concurring); Newdow v. Bush, 391 F. Supp. 2d 95, 105 (D.D.C. 2005) ("The issuance of an injunction or a declaratory judgment against the President draws the Court into serious separation-of-powers issues. In particular, there is long-standing legal authority that the courts cannot issue injunctions against the co-equal Executive and Legislative branches of our government."); Swan v. Clinton, 100 F.3d 973, 977-78 (D.C. Cir. 1996) (noting that a court may have authority to order the president to perform "purely 'ministerial' dut[ies]," but cautioning that even in such a case, "[t]he reasons why courts should be hesitant to grant such relief are painfully obvious; the President, like Congress, is a coequal branch of government, and for the President to 'be ordered to [do something]', at best creates an unseemly appearance of constitutional tension and at worst risks a violation of the constitutional separation of powers.").

In Nixon v. Fitzgerald — a civil suit for damages based on the President's official actions as president — the Supreme Court further explained the reasoning behind the president's absolute immunity. There, an Air Force employee was terminated soon after he provided congressional testimony unfavorable to the administration, and alleged that his termination constituted unlawful retaliation. *Id.* at 736. In finding that a president has "absolute immunity from damages liability predicated on his official acts," the Court noted that "'[t]he president cannot … be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.'" *Id.* at 749.[24] In addition, the Court theorized that "'the President, personally, was not the subject **to any process whatever** … For [that] would … put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government.'" *Id.* at 750 n.31 (emphasis added).

By permitting President Trump to be named a party to this litigation, the district court improperly allowed the President to be subject to the jurisdiction of

[24] Indeed, as the Court noted in Fitzgerald, "several delegates … [a]t the Constitutional Convention … expressed concern that subjecting the President even to impeachment would impair his capacity to perform his duties of office." *Id.* at 750 n.31.

a coequal branch of government, and thus theoretically subject even to "imprisonment for disobedience" should the President, for example, refuse to abide by the order and be found to be in contempt of court. *See id.*

The Court explained in Fitzgerald, "[t]he President occupies a unique position in the constitutional scheme." He is "the chief constitutional officer of the Executive Branch," and "it is the President who is charged constitutionally to 'take Care that the Laws be faithfully executed'" and to "conduct … foreign affairs — a realm in which the Court has recognized that '[it] would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive….'" *Id.* at 750. The President's independence from the judiciary is "[t]he essential purpose of the separation of powers … to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches." *Id.* at 760-61. The Constitution sets out only one oath — that to be taken by the President of the United States — and no other federal official or member of the judicial branch is tasked with faithfully executing the laws. To subject the President to the

injunctive power of the courts subverts his duty to execute the laws as the Constitution requires.

Here, the district court inserts the judiciary into the foreign affairs of this nation and, in doing so, has "produce[d] needless head-on confrontation[] between [a] district judge[] and the Chief Executive." Franklin at 828 (Scalia, J., concurring). The district court apparently believed that, among the co-equal branches of our government, it is "more equal than others."[25] In its injunction against the President — the only official elected by all the People, and removable only by impeachment for "Treason, Bribery, or other high Crimes and Misdemeanors"[26] — the district judge (unelected and holding its office only during a period of his "good behavior"[27]) ignored clear and unambiguous language from the Supreme Court chastising past courts that have attempted to do what this district court has done here.

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[25] *See* George Orwell, Animal Farm (Penguin Books: 1996) at 135.

[26] Article II, Section 4.

[27] Article III, Section 1.

The lower court has shown itself to be audacious in its belief as to the scope of its own authority,[28] dismissive of the unique constitutional office of the President, and insensitive to our constitutional separation of powers. The district court's immigration injunction against the President is unprecedented, and has vastly exceeded the district court's authority. The order subverts the President's constitutional and unilateral authority to "take Care that the Laws be faithfully executed," and it cannot stand.[29]

CONCLUSION

For the foregoing reasons, the opinion below should be overturned.

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[28] The judiciary, of course, relies upon the executive branch to enforce its orders. "If the president refuse obedience, it is needless to observe that the court is without power to enforce its process." Johnson at 500-01.

[29] To be sure, this is not the first time a district court has attempted to enjoin a President. *See, e.g.,* Hedges v. Obama, 890 F. Supp. 2d 424 (S.D.N.Y. 2012) (injunction reversed on the merits in Hedges v. Obama, 724 F.3d 170 (2d Cir. 2013), and thus it was not necessary for the circuit court to reach the issue); Int'l Refugee Assistance Project v. Trump, 2017 U.S. Dist. LEXIS 37645 (D. Md. Mar. 15, 2017) (currently on appeal to the U.S. Court of Appeals for the Fourth Circuit).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of U.S. Justice Foundation, *et al*. in Support of Defendants-Appellants and Reversal complies with the limitation set forth by Fed. R. App. P. 29(a)(5) and Circuit Rule 27-1(d), because this brief contains 6,499 words, excluding the parts of the brief exempted by Rule 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 WordPerfect version 18.0.0.200 in 14-point CG Times.

/s/ Herbert W. Titus

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Dated: April 21, 2017

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, in Support of Defendants-Appellants and Reversal was made, this 21st day of April 2017, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

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