No. 17-17168

United States Court of Appeals for the Ninth Circuit

State of Hawaii, et al.,
Plaintiffs-Appellees,
v.
Donald J. Trump, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the District of Hawaii (Watson, D.)
Case No. 1:17-cv-00050

AMICUS CURIAE BRIEF OF THE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Immigration Reform Law Institute is a 501(c)(3) not for profit charitable organization incorporated in the District of Columbia. It has no parent corporation, and does not issue stock.

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The Immigration Reform Law Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies, including *Trump v. Int'l Refugee Assistance Project,* 137 S. Ct. 2080 (2017); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino,* 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

IRLI submits this brief to urge this Court to reverse the U.S. District Court for the District of Hawaii ("the District Court"). Plaintiffs-appellees ("plaintiffs") have not, and cannot, meet their burden of showing that federal courts have subject

[1] The parties have consented to the filing of this *amicus curiae* brief. No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

matter jurisdiction over their statutory claims, and plaintiffs' constitutional claims both are foreclosed under clearly-applicable United States Supreme Court precedent and have legal consequences the stark absurdity of which shows the wisdom of those same precedents.

ARGUMENT

I. THE FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION TO HEAR PLAINTIFFS' STATUTORY CLAIMS.

Both the District Court and this Court lack subject matter jurisdiction over petitioners' statutory claims. Federal courts are "courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am*, 511 U.S. 375, 377 (1994). They possess "only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Id*. (internal citations omitted). Furthermore, the presumption is that "a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id*. (internal citations omitted). Want of subject matter jurisdiction cannot be waived, and federal courts have an independent obligation to examine their own jurisdiction, and dismiss claims over which they lack jurisdiction. *United States v. Hays*, 515 U.S. 737, 742 (1995); *see, e.g., Catholic Charities CYO v. Chertoff,* 622 F. Supp. 2d 865, 876, 883-85, 887-91 (N.D. Cal. 2008) (dismissing Immigration and Nationality Act claims because Congress had not provided a private right of action

and going on to consider constitutional claims); *Victorian v. Miller*, 796 F.2d 94, 95-96 (5th Cir. 1986) (upholding the dismissal of appellants' statutory claims for lack of a private right of action while considering their constitutional claims).

Congress did not provide a private right of action in either of the provisions of the Immigration and Nationality Act ("INA") that the District Court found were violated by President Trump's Proclamation No. 9645 ("the Proclamation"). Nor does either 28 U.S.C. § 1331 or the Administrative Procedure Act ("APA") provide respondents with a private right of action, or otherwise waive sovereign immunity.

A. *Respondents Lack A Cause Of Action Under The INA.*

Relying on an opinion of this Court that has since been vacated, *Trump v. Hawaii*, No. 16-1540, 2017 U.S. LEXIS 6367 (Oct. 24, 2017), the District Court found that the president: 1) failed properly to assert his authority to suspend the entry of classes of aliens under 8 U.S.C. § 1182(f), ER 39 (citing *Hawaii v. Trump*, 859 F.3d 741, 776 (9th Cir. 2017)); and 2) discriminated on the basis of nationality in violation of both 8 U.S.C. § 1152(a)(1)(A) and the INA in general, ER 41 (citing *Hawaii*, 859 F.3d at 779). Yet no cause of action under the INA gave the District Court subject matter jurisdiction to examine these provisions.

Like substantive federal law, private rights of action to enforce it must be created by Congress. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

"Statutory intent" to create a private right of action is "determinative," and without it, a private right of action "does not exist and a court may not create one, no matter how desirable that might be as a policy matter or how compatible with the statute." *Id.* at 286-87. Determining whether causes of action exist under the specified provisions of the INA begins and ends with the "text and structure" of the provisions themselves. *Id.* at 288. If the statute does not "evince Congress' intent to create the private right of action asserted," then "no such action will be created through judicial mandate." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1848 (2017). When it comes to statutory rather than constitutional claims, federal courts must be even more careful to recognize only explicit causes of action. When Congress enacts a statute, "there are specific procedures and times for considering its terms and the proper means for its enforcement." *Id.* at 1856. Hence, it is "logical" to assume that Congress will be "explicit if it intends to create a private cause of action." *Id.*

Thus, plaintiffs must be able to point to explicit language establishing a private right of action in the provisions of the INA they claim the president has violated. But no such explicit cause of action exists for either of the statutory provisions the District Court found had been violated by the Proclamation.

First, the District Court found that the president had improperly asserted his statutory authority for suspending classes of aliens in 8 U.S.C. § 1182(f), which reads:

> Whenever 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.

ER 39. Second, the District Court found that the Proclamation violated 8 U.S.C. § 1152(a)(1)(A) by discriminating on the basis of nationality. ER 41. This provision provides that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."

Neither of these statutory provisions breathes the slightest hint of congressional intent to confer a private right of action. Therefore, under *Sandoval*, no such private right of action may be created by the courts.

For their part, plaintiffs argue that "this Court has equitable authority to enjoin 'violations of federal law by federal officials,' including the President." Plaintiffs' Brief at 14 (quoting *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015)). But *Armstrong* in no way implies that courts' equitable powers give them jurisdiction in the absence of a private right of action. Indeed, the Supreme Court in *Armstrong* held both that "[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law" and that courts could not grant equitable relief under the statute at issue in that case because Congress had foreclosed it. *Id.* at 1385. Furthermore, the only

relief sought in *Sandoval* itself was injunctive relief, which the Court found Congress had foreclosed by not providing a private right of action. *Sandoval*, 532 U.S. at 279, 293. Thus, even if there ever had been a doctrine that federal courts have jurisdiction to consider claims for injunctive relief under federal statutes for which Congress has not created a private right of action, it has not survived *Sandoval*. *See* Plaintiffs' Brief at 14-15 (citing *Chamber of Commerce of U.S.* v. *Reich*, 74 F.3d 1322, 1327-28 (D.C. Cir. 1996); *Dames & Moore* v. *Regan*, 453 U.S. 654, 669 (1981)).

Needless to say, neither plaintiffs nor the District Court have adduced any occasion when a court has found a private right of action under either of the provisions that the District Court held the Proclamation infringed. The District Court did cite the since-vacated *Hawaii*, in which this Court relied on one case in which the Supreme Court considered, and rejected, claims under another section of the INA. ER 30 (citing *Hawaii*, 859 F.3d at 768-69); *Hawaii*, 859 F.3d at 768 (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187-88 (1993)). *See also* Plaintiffs' Brief at 15-16 (citing *Sale*). But *Sale* greatly predates *Sandoval*, and, in any event, the Supreme Court made no mention of a private right of action in *Sale*, or any other basis for subject matter jurisdiction over the claim the Court rejected, and thus cannot be taken to have set a jurisdictional precedent. *See Hagans v. Lavine*, 415 U.S. 528, 533 (1974) ("[W]hen questions of jurisdiction have been

passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us") (citing *United States* v. *More*, 3 Cranch 159, 172 (1805); *King Mfg. Co*. v. *Augusta*, 277 U.S. 100, 134-35 n.21 (1928) (Brandeis, J., dissenting)).

Finally, in cursory fashion, the District Court found that the president had exceeded his authority under the INA as a whole by discriminating on the basis of nationality. ER 41. Here, the District Court merely followed the since-vacated *Hawaii*, in which this Court apparently came to this conclusion on the (inadequate) ground that Congress passed the INA of 1965 with the animating principle of eliminating discrimination in the immigration system. *Hawaii*, 859 F.3d at 776-79. But no private right of action arises by implication from the animating principles of statutory schemes. Even before *Sandoval*, Courts never found that the animating principles of the INA created a cause of action for individuals affected by either the proper or the improper implementation of the INA's provisions. For example, in *United States v. Richard Dattner Architects*, 972 F. Supp. 738, 743 (S.D.N.Y 1997), the court declined to find a private right of action to protect American citizens in the broad policy goals of the INA, which the court described as "a regulatory statute that establishes the circumstances under which people may be admitted to the United States."

B. *The Federal Courts Do Not Have Jurisdiction Over Respondents' Statutory Claims Under Either 28 U.S.C. § 1331 Or The APA.*

28 U.S.C. § 1331, by itself, does not create a private right of action under the INA, and by itself does not confer subject matter jurisdiction on federal courts to hear plaintiffs' statutory claims, because § 1331 does not constitute a waiver of federal sovereign immunity. As the U.S. Court of Appeals for the Sixth Circuit has explained:

> Section 1331 is the general federal-question-jurisdiction statute. Because [appellants] named the secretary of HUD in his official capacity, they must do more than invoke this general statute; they also must "identify a waiver of sovereign immunity in order to proceed." *Reetz v. United States*, 224 F.3d 794, 795 (6th Cir. 2000); *see also United States v. Sherwood*, 312 U.S. 584, 586, 61 S. Ct. 767, 85 L. Ed. 1058 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued."); *Whittle v. United States*, 7 F.3d 1259, 1262 (6th Cir. 1993) (affirming dismissal of suit against federal agency because federal sovereign immunity "extends to agencies of the United States" and "[t]he federal question jurisdictional statute is not a general waiver of sovereign immunity").

Toledo v. Jackson, 485 F.3d 836, 838 (6th Cir. 2007). *See also, e.g., Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 378-379 (2012) ("[W]hen federal law creates a private right of action and furnishes the substantive rules of decision, the claim arises under federal law, and district courts possess federal-question jurisdiction under § 1331"); *Jefferson County v. United States*, 644 F. Supp. 178, 181 (E.D. Mo. 1986) ("§ 1331 does not, of its own force, waive the federal government's sovereign immunity from suit. In the absence of an express waiver

of immunity by Congress, suits against the United States are barred by the doctrine of sovereign immunity. Similarly, suits against a federal agency are barred. This bar is jurisdictional – that is, unless a statutory waiver exists, the district court lacks jurisdiction to entertain a suit against the United States or its agency.") (internal citations omitted).

Nor does the APA provide a private right of action here, or otherwise confer jurisdiction. 5 U.S.C. § 701(a)(2); *Lincoln v. Vigil*, 508 U.S. 182, 190-191 (1993) ("[U]nder § 701(a)(2) agency action is not subject to judicial review to the extent that such action is committed to agency discretion by law.... § 701(a)(2) makes it clear that review is not to be had in those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute (law) can be taken to have committed the decisionmaking to the agency's judgment absolutely.") (internal citations and quotation marks omitted). Here, § 1182(f) gives the president the widest discretion to suspend the entry of classes of aliens "in the national interest." *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498, 1507 (11th Cir. 1992).

Furthermore, the Proclamation is unreviewable under the APA because it is the action of the president. *Dalton v. Specter*, 511 U.S. 462, 468-77 (1994) (holding that decisions of the president's subordinates about military base closings

were not reviewable under the APA because the statute in that case conferred decision-making authority on the president, and, because the president is not an agency, the APA does not apply to actions of the president) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 796-801 (1994)). *See Dalton*, 511 U.S. at 477 ("Where a statute … commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available.").

Addressing this point, plaintiffs assert that "the Department of State and the Department of Homeland Security have made a final decision to 'enforce the President's directive,' and Plaintiffs may obtain '[r]eview of the legality of [the President's] action' that way." Plaintiffs' Brief at 17 (quoting *Franklin*, 505 U.S. at 828 (Scalia, J., concurring) and citing *Franklin*, 505 U.S. at 803 (majority opinion)). Yet in *Franklin*, the Supreme Court squarely held that no review, even of the Secretary of State's actions, was available under the APA, *id.* at 800-801, and on the page of the majority opinion plaintiffs cite, the Court was referring to the reviewability of the Secretary's actions under the Constitution, not the APA. *Id.* at 803.

In any event, plaintiffs miss the point that, because presidents must always act through subordinates, whether an action is that of the president or an agency, for purposes of APA reviewability, hinges not on whether agencies help perform a given action, but on whether Congress has granted authority to take that action to

the president or to an agency. *See Dalton,* 511 U.S. at 477 ("Where a statute … commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available."). Here, Congress has granted authority to the president to issue the Proclamation; in the actions plaintiffs cite, Plaintiffs' Brief at 17, the Departments of State and Homeland Security have merely carried the Proclamation out, as much as permitted by court decisions, on his behalf. As the U.S. District Court for the District of Columbia has explained:

> [A]n unreviewable presidential action must involve the exercise of discretionary authority vested in the President; an agency acting on behalf of the President is not sufficient by itself. Since the Constitution vests the powers of the Executive Branch in one unitary chief executive officer, *i.e.*, the President, an agency always acts on behalf of the President. Nonetheless, there is a difference between actions involving discretionary authority delegated by Congress to the President and actions involving authority delegated by Congress to an agency. Courts lack jurisdiction to review an APA challenge in the former circumstances, regardless of whether the President or the agency takes the final action. However, "[w]hen the challenge is to an action delegated to an agency head but directed by the President, a different situation obtains: then, the President effectively has stepped into the shoes of an agency head, and the review provisions usually applicable to that agency's action should govern." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2351 (2001).

Detroit Int'l Bridge Co. v. Gov't of Can., 189 F. Supp. 3d 85, 101-104 (D.D.C. 2016). *See also, e.g., Tulare County v. Bush,* 185 F. Supp. 2d 18, 28 (D.D.C. 2001) ("A court has subject-matter jurisdiction to review an agency action under the APA only when a final agency action exists. Because the President is not a federal agency within the meaning of the APA, presidential actions are not subject

to review pursuant to the APA.") (citing *Dalton*, 511 U.S. at 470; other internal citations omitted).

Indeed, a court considering a challenge to a precursor of the instant Proclamation under the APA correctly concluded that the APA did not apply because the order in that case was the action of the president:

> [T]he Presidency is not an "agency" as defined in the APA, § 701(b)(1), and thus actions by the President are not subject to the APA…. Here, Congress has granted the President authority to suspend entry for any class of aliens if such entry would be "detrimental to the interests of the United States." 8 U.S.C. 1182(f). Pursuant to, and without exceeding, that grant of discretionary authority, the President issued EO 13,769 and suspended entry of aliens from the seven subject countries. The President's action is thus unreviewable under the APA.

Louhghalam v. Trump, No. 17-10154, 2017 U.S. Dist. LEXIS 15531, at *17-18 (D. Mass. Feb. 3, 2017) (citing *Franklin*, 505 U.S. at 800-01; *Detroit Int'l Bridge,* 189 F. Supp. 3d at 104-05).

Accordingly, this Court should reverse the decision of the District Court and dismiss plaintiffs' statutory claims for lack of jurisdiction. And, as shown below, it should also reject plaintiffs' arguments that the Proclamation violates the Establishment Clause of the First Amendment to the U.S. Constitution.

II. PLAINTIFFS' ARGUMENT FOR ITS ESTABLISHMENT CLAUSE CLAIM LEADS TO MANY ABSURD CONSEQUENCES.

The Constitution should not be interpreted to imperil the safety of the United States, or its people, from foreign threats. *See, e.g., Kennedy v. Mendoza-*

Martinez, 372 U.S. 144, 160 (1963) ("[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact."). Also, the United States has a right inherent in its sovereignty to defend itself from foreign dangers by controlling the admission of aliens. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950) ("The exclusion of aliens is a fundamental act of sovereignty . . . inherent in [both Congress and] the executive department of the sovereign"). Accordingly, the ability of private litigants to challenge presidential exercises of alien-admission powers on grounds of individual rights protected in the Constitution is sharply limited. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."). Thus, even if exercises of these powers were not non-justiciable political acts, they could receive no higher level of scrutiny from a court than a form of rational-basis review. *See, e.g., Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972) ("We hold that when the Executive exercises th[e] power [to exclude aliens] 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.").

Plaintiffs ignore these precedents. First, plaintiffs argue that individuals among them who are U.S. citizens or lawful permanent residents, *see, e.g.*, ER 256, 260, 264, have standing under the Establishment Clause because the Proclamation "contravenes [these plaintiffs'] rights under the Establishment Clause by excluding and denigrating Muslims," a violation that has "separated [them]from their relatives and associates abroad" and "stigmatized [them] as Muslims." Plaintiffs' Brief at 20. They then argue that the Proclamation violates the Establishment Clause because its purpose, revealed by President Trump's failure to renounce his campaign call for a pause in Muslim entry to the United States, is not the secular one of protecting Americans from terrorism, but the "religious" one of excluding Muslims from the country. Plaintiffs' Brief at 54-58.

This reasoning has innumerable absurd consequences that show, without question, both how faulty that reasoning is and the wisdom of the contrary case law that plaintiffs ignore. A few of the more drastic absurdities plaintiffs commit themselves to are drawn out as follows:

A. Private Litigants Could Enjoin President Trump's War Against The Islamic State.

If its own statements are any indication, the Islamic State, also known as ISIS ("the Islamic State of Iraq and Syria") or ISIL ("the Islamic State of Iraq and

the Levant"), is as much a religious group as a military force or aspiring state. It has declared its leader a caliph, that is, "a successor of Muhammad as . . . spiritual head of Islam," Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/caliph, and is dedicated to the forcible conversion of nonbelievers to its distinctive religious faith. *E.g.*, Adam Withnall, *Iraq Crisis: Isis Declares its Territories a New Islamic State with "Restoration of Caliphate" in Middle East*, Independent (June 30, 2014), *available at* http://www.independent.co.uk/news/world/middle-east/isis-declares-new-islamic-state-in-middle-east-with-abu-bakr-al-baghdadi-as-emir-removing-iraq-and-9571374.html (reporting on this declaration); *The Islamic State of Iraq and the Levant*, Wikipedia (June 8, 2017), https://en.wikipedia.org/wiki/Islamic_State_of_Iraq_and_the_Levant ("As caliph, [the leader of ISIL] demands the allegiance of all devout Muslims worldwide . . . ISIL has detailed its goals in its *Dabiq* magazine, saying it will continue to seize land and take over the entire Earth until its: '[b]lessed flag . . . covers all eastern and western extents of the Earth, filling the world with the truth and justice of Islam'").

Many authorities within mainstream Islam have rejected the religious teachings of the Islamic State. *Id.* But even if this group is, properly speaking, not Islamic, and its distinctive beliefs are (at best) a heretical deviation from true Islam, plainly it still is a religious group with a religious leader, and easily qualifies

as a religion under the broad definition used for First Amendment purposes. *See, e.g., O'Hair v. Andrus,* 613 F.2d 931, 936 (D.C. Cir. 1979) (refusing to find that a sermon by the pope was less "religious" than a mass; "[s]uch a distinction would involve the government in the task of defining what was religious and what was non-religious speech or activity[,] an impossible task in an age where many and various beliefs meet the constitutional definition of religion.") (footnote omitted); *Torasco v. Watkins,* 367 U.S. 488, 495 n.11 (1961) (listing "religions in this country," including Secular Humanism, "which do not teach what would generally be considered a belief in the existence of God"); *Fleischfresser v. Directors of Sch. Dist. 200,* 15 F.3d 680, 688 n.5 (7th Cir. 1994) (defining religion as "any set of beliefs addressing matters of ultimate concern occupying a place parallel to that filled by God in traditionally religious persons") (citing *Welsh v. United States,* 398 U.S. 333, 340 (1970)) (internal quotation marks and ellipsis omitted); Black's Law Dictionary 1293-94 (7th ed. 1999) ("In construing the protections under the Establishment Clause and the Free Exercise Clause, courts have construed the term *religion* quite broadly to include a wide variety of theistic and nontheistic beliefs.").

Nevertheless, President Trump has expressed strong animus against the Islamic State, and has even vowed to eradicate it. President Donald Trump, Remarks in Joint Address to Congress (Feb. 28, 2017) ("As promised, I directed

the Department of Defense to develop a plan to demolish and destroy ISIS . . . . We will work . . . . to extinguish this vile enemy from our planet.").

Islamic (in the true sense) or not, persons who bear allegiance to the caliph of the Islamic State may be residing in this country as citizens or lawful permanent residents; indeed, current events show that this is a high likelihood. *See* Holly Yan and Dakin Andone, *Who is New York terror suspect Sayfullo Saipov*, CNN (Nov. 2, 2017), http://www.cnn.com/2017/11/01/us/sayfullo-saipov-new-york-attack/index.html (reporting that a U.S. lawful permanent resident and Islamic State sympathizer killed eight people in a terror attack in New York City on October 31, 2017). Once President Trump's order to the Department of Defense is complied with, and the president further orders the Department to implement its plan to destroy the Islamic State, these U.S. coreligionists of the Islamic State might have close family members placed in immediate peril by the latter order. They also might feel "stigmatized" and "denigrat[ed]" by its message of condemnation of the Islamic State. If plaintiffs' reasoning were correct, these circumstances would be more than enough for them to have standing to challenge that order in court, under the Establishment Clause. *See* Plaintiffs' Brief at 20. Worse, if plaintiffs were correct, they would probably win their case. If, as plaintiffs argue, Plaintiffs' Brief at 54-58, the Proclamation probably violates the Establishment Clause because Donald Trump, during the election campaign, called

for a temporary pause in entry to the country by Muslims, and has never renounced that statement, what would a like-minded court make of President Trump's vow, before a joint session of Congress, to "extinguish" the Islamic State "from our planet"? If calling for a temporary pause in Muslim entry reveals an impermissible "religious" purpose, surely announcing a war of extermination on a particular religious body does so much more. Yet no one believes that a federal court has the power to enjoin our nation's military campaign against the Islamic State.

There is no helpful distinction for plaintiffs here between the president's war-making power and his power to regulate the admission of aliens. Both involve the safety of the nation and its people, and the power to fight our enemies abroad would mean little without the power to prevent them from entering the country. *See Harisiades*, 342 U.S. at 588–89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power . . . ."). But even if the distinction could be made, it would not help plaintiffs; the proposition that the president could not block the entry of members of the Islamic State into the country without violating the Establishment Clause, in light of the "religious" purpose revealed by his avowed intention to destroy that religious group, is an equally-absurd result of plaintiffs' reasoning.

Also, that no one (most likely) would bring a lawsuit challenging President Trump's war on the Islamic State does not avert this absurdity. The logic of plaintiffs' reasoning remains, like a fatal gas. The correct rule of law in this case cannot be one that implies that all of the members of the armed forces who are fighting the war on the Islamic State, and also their civilian superiors, are violating their oaths to uphold the Constitution by prosecuting that war. Yet plaintiffs' reasoning implies just that.

B. Plaintiffs' Reasoning Pits The First Amendment Against Itself.

Free discussion of governmental affairs and the free exchange of ideas during a political campaign are the heart of America's democracy. *Brown v. Hartlage*, 456 U.S. 48, 52-53 (1985). "Freedom of speech reaches its high-water mark in the context of political expression." *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 863 (8th Cir. 2001) *rev'd on other grounds* 536 U.S. 765 (2002). The Free Speech Clause protects not just political speech by private citizens but such speech by political candidates running for public office. *Id.* at 53.

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis' observation that in our country "public discussion is a political duty," *Whitney v. California*, 274 U.S.

> 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (concurring opinion), applies with special force to candidates for public office.

Buckley v. Valeo, 424 U.S. 1, 52-53 (1976). *See also Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) ("Speech on matters of public concern is at the heart of the First Amendment's protection. The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.") (internal citations and quotation marks omitted).

In relying on the campaign statements of President Trump while a candidate, plaintiffs thus set the Establishment Clause against the Free Speech Clause in the latter's most vital application. Yet both provisions are at the same level in the text of the First Amendment, and, accordingly, the Supreme Court has been at least as solicitous of free speech rights as of rights under the Establishment Clause. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (holding that a public university's refusal to permit the funding of a student religious group on equal terms with other groups was viewpoint discrimination that violated the Free Speech Clause and was not required by the Establishment Clause; "[i]t is axiomatic that the government may not regulate speech based on its

substantive content or the message it conveys."); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387, 397 (1993) (holding that a school district violated the Free Speech Clause by denying a group permission to show a film with a religious purpose on school premises); *see also, e.g., Am. Civil Liberties Union of Ill. v. City of St. Charles*, 794 F.2d 265, 274 (7th Cir. 1986) (recognizing that both clauses stand on equal ground).

The chilling effect of such judicial inquiry into campaign statements can easily be imagined; for example, candidates who oppose abortion, or support the State of Israel, might shrink from saying that their religion motivates their position, thus depriving the voters of potentially important information. Given the equal primacy of the Free Speech Clause (and also the Free Exercise Clause), it is absurdly contrary to democratic freedom that candidates for president (or other offices) must tread carefully from now on when commenting on a wide range of policy issues, including national security, for fear that courts will enjoin their actions if they are elected. Yet this chilling effect on core political speech would be the clear result if this Court reached the holding plaintiffs seek.

C. *Plaintiffs' Reasoning Implies That What Is Constitutional For One President Is Unconstitutional For Another.*

Plaintiffs argue that the Proclamation probably violates the Establishment Clause because statements by President Trump when a candidate revealed an impermissible anti-Muslim motivation. It follows that had the exact same order,

with exactly the same stated purpose, been issued by President Obama, it would not have violated the Establishment Clause (assuming that President Obama had never called for a pause, or any reduction, in Muslim immigration). This is an absurd result, if only because a president might have a clear duty to protect the country against a pressing foreign threat, and whether that duty could be performed should not depend on whether the nation had, or did not have, a president who might have an illicit racial or religious purpose in opposing that threat, and enjoy his duty too much. *See, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 745 (1982) ("'In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint.'") (quoting *Spalding v. Vilas*, 161 U.S. 483, 498 (1896)); *cf. Spalding*, *supra* ("[P]ersonal motives cannot be imputed to duly authorized official conduct."); *see also Chang v. United States*, 859 F.2d 893, 896 n.3 (Fed. Cir. 1988) (refusing to examine the president's motives for declaring a national emergency during the Libyan crisis); *but cf. Korematsu v. United States*, 323 U.S. 214, 223 (1944) (stating in dicta that the

internment of an American citizen of Japanese descent during World War II would have been unconstitutional if motivated by racial prejudice).

This result of the plaintiffs' reasoning is dangerous in another way, for if adopted it would give the impression, at least, that courts are taking political sides. Diminishing the power of a particular president, as opposed to others, because of his statements in the political arena seems perilously close to diminishing his power because of his politics – of which an onlooker could easily assume the court disapproves. It goes without saying that the appearance of such political partisanship in judging should be avoided in our democracy, since the Constitution gives the federal courts the power to decide "Cases" and "Controversies," and no other power, U.S. Const., art. III, § 2 – certainly not political power. *See, e.g.*, Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L. Rev. 393, 455 (1996) (surveying cases and commenting that, for the Supreme Court, "[j]udicial restraint preserves separation of powers by avoiding interference with the democratic political branches, which alone must determine nearly all public law matters.") (footnotes omitted); *In re V.V.*, 349 S.W.3d 548, 576 (Tex. App. 2010) (Jennings, J., dissenting) ("Judges should decide the cases that come before them based upon the facts in evidence and the governing law, not upon their moral preferences, desires, or the dictates of their emotions. The obvious problem with results-oriented judging is that it . . . guts the

rule of law . . . [and] produces bad consequences on a system-wide basis.") (internal quotation marks and footnotes omitted); *cf.* Code of Conduct for United States Judges, Canon 5, 28 U.S.C.S. app. (stating that federal judges should refrain from political activity).

D. *Plaintiffs' Reasoning Would Put The United States At The Mercy Of Foreign Threats.*

The following absurdity is wholly hypothetical, but nonetheless devastating to plaintiffs' reasoning. Imagine a religion that, as a fundamental tenet, demanded the sacrifice of children to "the gods" on a regular basis. Suppose this religion, called Molochism,[2] had followers around the world numbering in the billions, but as yet few in the United States. Even though the members of this religion in the U.S. would be (constitutionally) hampered in its exercise by neutral, generally-applicable laws against murder, *see Employment Div. v. Smith*, 494 U.S. 872, 879 (1990), they could still advance their religion, and eventually all of its practices, through the courts and through our immigration system – that is, if the tenor of plaintiffs' argument became generally accepted, and domestic civil rights law applied to all immigration restrictions challenged by suitably-affected U.S. plaintiffs. Specifically, if Congress passed a law barring immigration by, say, those who believe they have an obligation to take innocent human life, it is likely

[2] After the ancient fire god to whom children were sacrificed. Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/Moloch.

that some members of Congress who voted for this ban would have made clear, if only in campaign statements, that it was aimed at Molochians. If U.S.-citizen Molochians felt "stigmatized" and "denigrat[ed]" by this law, and if it separated them from "their relatives and associates abroad," they would have standing to sue, under plaintiffs' reasoning. Plaintiffs Brief at 20. And under that same reasoning, the ban on such immigration would violate the Establishment Clause because it had an improper "religious" purpose. Plaintiffs' Brief at 54-58.

After the ban on immigration by those who believe they have an obligation to take innocent human life was, accordingly, permanently enjoined, let us suppose that the pace of continued Molochian immigration was very rapid, so rapid that a political uproar resulted, complete with anti-Molochian statements by leading politicians promising to stem the tide. At that point, a court inclined to be convinced by plaintiffs' reasoning might well conclude that *any* step with the predictable result of lowering Molochian immigration – even bringing *all* immigration to a near-standstill – would only be a transparent pretext for a measure that really pertained to an anti-Molochian establishment of religion. Thus, by court order, actual or merely threatened, the door to heavy overall immigration would remain open, and Molochians could continue to come in. Over time, let us suppose, American Molochians would become so numerous that any ban on their immigration would become politically difficult, even if the courts would uphold

one. Still later, suppose that Molochians became politically dominant, in part through sheer force of numbers, and were able to adjust U.S. laws to allow their full religious practices, including the long-deferred one of the sacrifice of children to the gods.

Of course, it is to be hoped that no series of events as horrific as this – the transformation of the United States into a country of legalized child sacrifice – would ever take place. Still, that the United States and its people would be without power to defend themselves against that disaster because of the Establishment Clause is absurd in the highest degree. As a matter of pure logic, such gross absurdity is fatal to plaintiffs' reasoning.

CONCLUSION

For the foregoing reasons, the order of the District Court should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(7)(B), the foregoing *amicus curiae* brief is proportionally spaced, has a typeface of 14 point Times New Roman, and contains 6,426 words, excluding those sections identified in Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on November 22, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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