No. 17-1351

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, et al.,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, et al.,

Defendants-Appellants.

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

BRIEF FOR SOUTHEASTERN LEGAL FOUNDATION, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Southeastern Legal Foundation has no parent company, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

United States Constitution

Other Authorities

IDENTITY & INTEREST OF AMICUS CURIAE[1]

Southeastern Legal Foundation (SLF) is a nonprofit, public-interest law firm and policy center. Founded in 1976, SLF is dedicated to advocating for individual liberties in the courts of law and public opinion. SLF's interest in this case stems from its profound commitment to protecting America's legal heritage. That heritage includes the separation of powers—a critical safeguard of individual liberty. In its decision enjoining Executive Order 13,780, the district court undermined the separation of powers by overriding the President's assessment of national security.

SLF submits this brief to address one particularly disturbing aspect of the district court's decision: the court's reliance on random statements from the 2016 presidential campaign to discern the "real purpose" behind the Order. Consulting these statements intrudes on the prerogative of the Executive Branch by allowing individuals outside the Article II hierarchy to speak for the President. Worse still, the district court consulted these inappropriate sources to overturn the President's national-security judgments and to question his fundamental character. None of this bodes well for the separation of powers.

[1] All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party contributed money intended to fund its preparation or submission. No person other than amicus, its members, and its counsel contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Over the past few months, the federal courts have been issuing unprecedented rulings that invoke the Establishment Clause to enjoin an executive order barring aliens from entering the United States. Indeed, Executive Order 13,780 is currently subject to several nationwide injunctions on the ground that is was enacted for the purpose of discriminating against Muslims. That conclusion is untenable. The Order's text treats all religions the same; the effect of the Order is not discriminatory in any constitutional sense; and there are no official statements from government officers indicating that it was enacted for anti-Muslim reasons. Instead, for the first time in our Nation's history, courts have enjoined a President's executive order based almost entirely on things he said *on the campaign trail*. That is precisely what the district court did here.

None of this evidence is relevant or appropriate. When it comes to admission of aliens to this country, courts should—and do—defer to the political branches. They do not probe beyond the law's text to discover its "real" purpose. Moreover, presidential candidates are not the President and, constitutionally, they cannot speak for him. Nor are their statements particularly probative, since proclamations on the campaign trail are contradictory, ambiguous, and quickly forgotten. Courts should not evaluate the constitutionality of federal orders this way. But if courts are going to consult these statements, they should at least give the speaker the benefit of the

doubt and require much more proof of anti-Muslim discrimination than the district court had here. In fact, the *better* reading of the evidence in this case is that Donald Trump abandoned the idea of a "Muslim ban" during the campaign in favor of a territory-based policy like the Order. For all of these reasons, the district court's decision should be reversed.

ARGUMENT

I. The Court's search for the purpose of the Order should begin and end with the text.

As Chief Justice Warren cautioned nearly fifty years ago: "Inquiries into [the government's] motives or purposes are a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). For one thing, "divining subjective … motivation," even for "'a single [actor],'" is notoriously "difficult[]." *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1261 (4th Cir. 1989) (citation omitted). For another, judicial evaluation of a law's "purpose" can easily morph into evaluation of a law's *wisdom*. *See McCray v. United States*, 195 U.S. 27, 54-56 (1904). "[T]hat the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted" is tempting in theory, but awfully dangerous in practice. *Id.* at 56. Indulging it "would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the

permanence of our institutions." *Id.* at 54-55. Courts therefore must evaluate the purpose of a law "with the most extreme caution." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 6 (1947).

To that end, courts generally look to the text of a law to determine its purpose. *See, e.g.*, *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973); *Tilton v. Richardson*, 403 U.S. 672, 678-79 (1971). Because courts "presume that [the government] act[s] in a constitutional manner," *Illinois v. Krull*, 480 U.S. 340, 351 (1987), they are "reluctan[t] to attribute unconstitutional motives" to it, "particularly when a plausible secular purpose … may be discerned from the face of the [law]." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). And because the "text" of a law is the only thing that the government actually "adopted," it is the "best evidence of [the law's] purpose." *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991). That is why courts "must begin with the language employed by [the law] and the assumption that the ordinary meaning of that language accurately expresses [its] purpose." *Engine Mfrs. Assn. v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (citation omitted).

The judicial inquiry must end there, too, when the law regulates the admission of aliens into the United States. In *Kleindienst v. Mandel*, the Supreme Court held that "the Executive" need only offer "a *facially* legitimate and bona fide reason" for denying aliens entry into the United States. 408 U.S. 753, 770 (1972) (emphasis

added). Once the Executive does so, "'courts will neither look behind [it], nor test it by balancing its justification against' the constitutional interests" of the affected individuals. *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring in the judgment) (quoting *Mandel*, 408 U.S. at 770). There are no exceptions. The Court has applied the *Mandel* rule to claims of discrimination under the First Amendment, *see Mandel*, 408 U.S. at 765-70, and to claims of discrimination under the Fifth Amendment, *see Fiallo v. Bell*, 430 U.S. 787, 791-99 (1977). As this Court has recognized, "the immigration context is a special one," where the government "regularly makes rules that would be unacceptable if applied to citizens." *Johnson v. Whitehead*, 647 F.3d 120, 126-27 (4th Cir. 2011) (citation omitted).

The reasons that underlie *Mandel*'s "narrow standard of review" are the same "reasons that preclude judicial review of political questions." *Fiallo*, 430 U.S. at 796 (quoting *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976)). The Constitution generally commits questions concerning the admission of aliens to the political branches—not the courts. Congress has "plenary … power to make policies and rules for exclusion of aliens," which it can and "has delegated … to the Executive." *Mandel*, 408 U.S. at 769-70; *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950); *see* 8 U.S.C. § 1182(f). "'[O]ver no conceivable subject is the legislative power of Congress more complete" because "the admission of aliens" is "a fundamental sovereign attribute." *Fiallo*, 430 U.S. at 792 (citations omitted). In this area, courts

are ill-equipped to weigh the competing concerns. The admission of aliens involves "a wide variety of classifications [that] must be defined in the light of changing political and economic circumstances," and the "decisions in these matters may implicate our relations with foreign powers." *Id.* at 796 (citation omitted). "The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

The *Mandel* rule "has particular force in the area of national security." *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring in the judgment). "[W]hen it comes to collecting evidence and drawing factual inferences" on questions of national security, "the lack of competence on the part of the courts is marked." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34-35 (2010) (citation omitted). When the political branches take action in the national-security realm, courts should be hard-pressed to discard their stated purpose as not "facially legitimate and bona fide," *Mandel*, 408 U.S. at 770, or as "an apparent sham," *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 865 (2005); *see Bennett v. Chertoff*, 425 F.3d 999, 1003 (D.C. Cir. 2005) (explaining that "a court cannot adjudicate" whether a national-security justification "is pretextual"). After all, "most federal judges" do not "begin the day with briefings that may describe new and serious threats to our Nation and its people." *Humanitarian Law Project*, 561 U.S. at 34. It is simply "not the judicial

role in cases of this sort to probe and test the justifications for the [government's] decision." *Fiallo*, 430 U.S. at 799.

The district court concluded that the *Mandel* rule does not apply to a case like this one, *viz.*, one involving "the 'promulgation of sweeping immigration policy' at the 'highest levels of the political branches.'" JA 806 (quoting *Washington v. Trump*, 847 F.3d 1151, 1162 (9th Cir. 2017)). But this distinction "cannot withstand the gentlest inquiry." *See Washington* Bybee Dissental at 12-20. *Mandel* "was based upon … the congressional power to make rules for the exclusion of aliens." *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring in the judgment). And, the Supreme Court has applied the *Mandel* rule to "a wide variety" of "decisions made by the Congress or the President," including whether "particular classes of aliens … shall be denied entry altogether." *Fiallo*, 430 U.S. at 796 (citations omitted). This Court likewise has applied *Mandel* to a federal statute. *See Johnson*, 647 F.3d at 126-27. If *Johnson* is not a case applying the *Mandel* rule to the "highest levels of the political branches," it is not clear what case would be.

The district court's rejoinder—that "the power of the Executive … to create immigration law remains 'subject to important constitutional limitations,'" JA 806-07 (citation omitted)—is tautological. It begs the question of precisely what the constitutional limitations *are* in this context. *Mandel* says that, when a plaintiff argues that the Executive denied entry to an alien for an unconstitutional purpose,

courts are limited to reviewing whether the Executive offered "a facially legitimate and bona fide reason" for its decision. *Mandel*, 408 U.S. at 770. This is not a "*no* judicial review" standard. It is a "limited judicial review" standard. *Fiallo*, 430 U.S. at 795 n.6 (citation omitted). The President's Order easily satisfies this "narrow standard." *Id.* at 796.[2]

II. If the Court ventures beyond the text, it should limit its search for the purpose of the Order to official statements.

When a law does not regulate the admission of aliens into this country, courts sometimes search more broadly for evidence of its purpose. But the judicial inquiry must remain "deferential and limited." *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring in the judgment). Courts cannot engage in "judicial psychoanalysis of a drafter's heart of hearts." *McCreary*, 545 U.S. at 862. Accordingly, courts usually limit their search to "the face of the legislation," "its legislative history," and "its operative effect." *McGowan v. Maryland*, 366 U.S. 420, 453 (1961); *accord Jaffree*, 472 U.S. at 74-75 (O'Connor, J., concurring in the

[2] No case the district court cited involved the circumstances presented here and in *Mandel*: a claim that the denial of an alien's initial entry into the country violates someone's individual constitutional rights. *See Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (deportation); *INS v. Chadha*, 462 U.S. 919, 941-42 (1983) (deportation and not an individual-rights claim); *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986) (statutory claims only), *aff'd by an equally divided Court*, 484 U.S. 1 (1987). "Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Knauff*, 338 U.S. at 543.

judgment) ("[When] there is arguably a secular … value to a [law], courts should find an improper purpose … only if the [law] on its face, in its official legislative history, or in its interpretation by a responsible administrative agency suggests it…."). In all events, the evidence of purpose must be some "official act." *McCreary*, 545 U.S. at 862.

This principle has two important corollaries. First, courts should not rely on the views of private citizens to determine a law's purpose. *Glassman v. Arlington Cty.*, 628 F.3d 140, 147 (4th Cir. 2010); *see, e.g.*, *Modrovich v. Allegheny Cty.*, 385 F.3d 397, 411 (3d Cir. 2004) ("In considering the County's purpose, our focus is on the motivations of the *current* County officials who have *power* over the decision." (emphases added)); *Summum v. City of Ogden*, 297 F.3d 995, 1010 (10th Cir. 2002) ("The purpose inquiry … centers not on the purpose … of a particular private actor … but, rather, on the purpose [of] the government …."). Obviously, only the government can violate the Establishment Clause. "Private purpose" is thus relevant only when "there is evidence that the government has adopted [it]." *ACLU of Ky. v. Grayson Cty.*, 591 F.3d 837, 850-51 (6th Cir. 2010).

Second, courts should not consult informal media statements to determine a law's purpose. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 624 n.52 (2006) ("We have not heretofore, in evaluating the legality of executive action, deferred to comments made by [high-ranking] officials to the media."); *Adland v. Russ*, 307

F.3d 471, 483 n.3 (6th Cir. 2002) ("In evaluating the Commonwealth's avowed secular purpose, we do not rely on the comments attributed to State Senator Albert Robinson in a February 16, 2000, Louisville Courier Journal article."). Statements to the media are not "official acts." And they are unreliable indicia of purpose. Such "informal communications often exhibit a lack of 'precision of draftsmanship,'" and "internal inconsistencies are not unexpected." *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 599 (5th Cir. 1995) (quoting *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987)).

The district court ignored these principles. It concluded that the Order is a "Muslim ban" in disguise based almost entirely on press releases, media interviews, and news articles from the 2016 campaign.[3] This "evidentiary snark hunt" is not normal: "[n]o Supreme Court case … sweeps so widely in probing politicians for

[3] The district court cited only one statement from *President* Trump: "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." JA 797. But this statement is too ambiguous to be probative—and far from the powerful evidence needed to find an Establishment Clause violation. The district court also cited two White House staffers, who said the Order had the same "principles" and "basic policies" as the earlier order with "mostly minor technical differences." JA 799-800. These statements likewise are not evidence of discriminatory purpose. The district court read them to mean that the Order maintains whatever illegal purpose was behind the earlier order. But both staffers insisted that the original order was a lawful national-security measure. JA 339, 379. More importantly, the Cabinet officials who are actually tasked with enforcing the Order—Secretaries Tillerson and Kelly—have stated that the Order is "a vital measure for strengthening our national security" and targets countries with weak vetting procedures, not Muslims. JA 779.

unconstitutional motives." *Washington* Kozinski Dissental at 4.[4] These media statements from nongovernmental actors all suffer from the defects mentioned above. And because most of them were made by a political candidate in the heat of a campaign, the statements present still more concerns.

If statements to the media are unreliable, then statements to the media by a politician in the thick of a campaign are *doubly* unreliable. A candidate's goal is "to get elected," not to make policy. *Id*. at 4. To get elected, the candidate must first win the primary, which often requires drawing attention to himself. *See* Stephen J. Wayne, *Road to the White House 2016*, at 120 (10th ed. 2015) ("Candidates cannot win if they are not known. Recognition as a political leader is most important at the beginning of the nomination cycle …."). "[I]nflammatory" statements often help in this regard. *Washington* Kozinski Dissental at 4. Over the course of the campaign, moreover, a candidate must win over primary voters and the general electorate—two very different groups—all while reacting to shifting poll numbers and swirling

[4] *Glassroth v. Moore* is not to the contrary. *Contra* JA 29. That case involved the installation of the Ten Commandments by Chief Justice Roy Moore in an Alabama courthouse. Although the plaintiffs cited statements from Moore's political campaign to prove that he had an unconstitutional purpose, the district court declined to rely on them. *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1317 (M.D. Ala. 2002). It limited its inquiry to a "speech given by the Chief Justice at the monument's unveiling, the Chief Justice's trial testimony …, and the monument itself." *Id.* The Eleventh Circuit did the same thing on appeal. *See Glassroth v. Moore*, 335 F.3d 1282, 1296 (11th Cir. 2003).

media narratives. Unsurprisingly, "subtle (or not-so-subtle) changes in a candidate's position during the course of the campaign are common." 1 Robert North Roberts et al., *Presidential Campaigns, Slogans, Issues, and Platforms: The Complete Encyclopedia* 160 (2012). But to avoid the dreaded label of a "flip flop," candidates also tend to insist that their position has been the same all along. All of these dynamics result in a smatter of contradictory, chaotic, and ambiguous statements—not the kind of evidence that should decide the fate of a federal law. *See Washington* Kozinski Dissental at 5.

The district court insisted that ignoring this evidence would be ignoring "common sense." JA 796. But this brand of "common sense" has no place in a court of law:

> [T]he Court ought to shut its mind to much of what all others think they see. That is precisely what courts are for. They try things out on evidence, by process of proof and refutation, and shut their minds to the kind of surmise by which the general public may reach politically sufficient conclusions. No doubt, … courts as triers of fact draw inferences concerning matters of common knowledge in the shared experience of the community. But such common knowledge is not common gossip, or common political judgment…. [A court should not] infer, along with common gossip, that a legislature is corrupt, or that a politician is a self-seeking powermonger rather than a disinterested statesman[.]

Alexander M. Bickel, *The Least Dangerous Branch* 220 (1962). In fact, in any other case, many of the sources cited here would be disregarded as "hearsay" remarks that "do not constitute legal evidence." *ACLU of Ky. v. Grayson Cty.*, 605 F.3d 426, 430

(6th Cir. 2010); *see, e.g.*, JA 385 (CNN report that quotes "a source familiar with the process" behind the first order); JA 798 ("Mayor Giuliani's account of his conversations with President Trump"). "[T]o rely in any way on what *these articles say* various [government officials] *said* is both incorrect and inappropriate." *ACLU of Ky.*, 605 F.3d at 430.

Nor can a court assume that the positions an official takes during the campaign match the policies he enacts once in office. Officials "change their own thinking as a function of whether they are running for office or having to make the hard choices that come with power…. A politician who is not in office can make strong promises and claims …. Once in office, however, … their speech and thinking become more complex than they were during the campaign…." Roy F. Baumeister, *The Cultural Animal* 236 (2005).

Beyond these practical differences between campaigns and governance, our constitutional structure rejects any attempts to conflate a presidential candidate with the President. *See Washington* Kozinski Dissental at 5 n.4. The President is not just a person; the President is an "Office." U.S. Const. art. II, § 1. While the Constitution vests "[t]he executive Power" in the President alone, U.S. Const. art. II, § 1, the President can appoint "Officers of the United States" and "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," *id.* § 2. This last part—the

Opinion Clause—"place[s] the President at the apex of [an] awesome pyramid[] of power … as Chief Administrator of the Executive Bureaucracy." Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 Va. L. Rev. 647, 652 (1996). A presidential candidate does not have access to, and is not part of, this constitutional hierarchy.

Also unlike the President, a presidential candidate has not "take[n] the … Oath" in Article II. U.S. Const. art. II, § 1. The oath requires the President to "swear" that he will "preserve, protect and defend the Constitution," *id.*, and it activates his duty to "take Care that the Laws be faithfully executed," *id.* § 3. The oath is not a formality: it triggers the presumption that the President's actions are constitutional. *Evans v. Stephens*, 387 F.3d 1220, 1222 (11th Cir. 2004) (en banc). Indeed, while the Constitution requires all officials to take an oath, *see* U.S. Const. art. VI, Article II actually spells out the presidential oath with "emphatic language." Richard M. Re, *Promising the Constitution*, 110 Nw. U. L. Rev. 299, 338 (2016). That fact "indicates that the President's promise may be especially demanding and unyielding." *Id.* Conflating the pre-oath intentions of a candidate with the post-oath policies of a President, however, treats that oath as a nullity.

For all these reasons, the district court should have steered clear of campaign and other unofficial statements in evaluating the Order's purpose. Our constitutional design renders this evidence out of bounds, and the reality of political campaigns

renders it too unreliable for the judicial process. The constitutionality of an executive order should not rise or fall on this kind of evidence.[5]

III. Even if the Court consults unofficial statements, the statements here do not establish that the Order has an impermissible purpose.

As explained above, this Court should not consider unofficial statements from political candidates or nongovernmental actors when evaluating the purpose behind the Order. But even if the Court takes the no-holds-barred approach of the district court, there is not enough evidence here to conclude that the Order was enacted for an impermissible purpose.

Recall that, under the *Lemon* test, all that the President must show is that the "purpose on the face of the [Order]" is "not a sham." *Glassman*, 628 F.3d at 146-47 (citations omitted). This is "a 'fairly low hurdle.'" *Id.* (citation omitted); *accord Modrovich*, 385 F.3d at 411 ("The purpose prong of the *Lemon* test … is a 'low threshold.'" (citation omitted)). Unless it is "obvious" that a law has an unconstitutional purpose, courts "uniformly hold that facially constitutional

[5] The use of campaign statements to find a violation of the Establishment Clause raises other constitutional concerns. Namely, it turns the First Amendment against itself. "To view [campaign] statements as indicative of bad faith … would … chill political debate during campaigns … in contravention of First Amendment values." *Phelps v. Hamilton*, 59 F.3d 1058, 1068 (10th Cir. 1995). "[O]ur most basic free speech principles have their 'fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Washington* Kozinski Dissental at 5 (quoting *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014)).

legislation may not be stricken because of suspect legislative motivation." *Holt v. City of Richmond*, 459 F.2d 1093, 1098 (4th Cir. 1972). "[T]he stakes are sufficiently high for [courts] to eschew guesswork." *O'Brien*, 391 U.S. at 383-84.

The statements the district court consulted here do not prove that the Order's stated purpose is a "sham." In fact, a court could arrive at that conclusion only by plucking statements about the Order out of context and reading them in the worst possible light for the President. "[T]he purpose inquiry is not," however, "an invitation to courts to cherry pick." *Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 567 F.3d 595, 601 n.7 (9th Cir. 2009). And if courts are going to treat politicians like government officials, then they should at least give political statements the deference and presumptive constitutionality that government officials receive. With these principles in mind, the statements about the Order paint a very different picture: the best reading of the evidence is that the President was always concerned with national security, and he abandoned his initial call for a "Muslim ban" in favor of a policy that better served his goal because it focused on geography instead of religion.

The first statement that the district court considered was the "Statement on Preventing Muslim Immigration" that Mr. Trump posted on his campaign website in December 2015. JA 796. True, this statement—made two months before the Iowa Caucus and over a year before President Trump signed the first executive order—

focused on "Muslims." Notably, however, even this initial statement was concerned with national security. It was made in response to the terrorist attack in San Bernardino, and it discussed the need to prevent the country from being "the victims of horrendous attacks." JA 346.

What the district court did not appreciate, however, is that Mr. Trump clearly abandoned this initial policy. In May 2016, shortly before clinching the Republican nomination, he stated on a radio interview that his initial statement from December was "just a suggestion." *Kilmeade's Wide-Ranging Interview w/ Donald Trump*, Fox News Radio (May 11, 2016), goo.gl/C55oeX. Then, on June 13—one day after the nightclub shooting in Orlando—Mr. Trump announced his new plan to "suspend immigration from areas of the world when there is a proven history of terrorism." Press Release, *Donald J. Trump Addresses Terrorism, Immigration, and National Security* (June 13, 2016), goo.gl/Tr6aZJ. In the ensuing weeks, members of the Trump campaign explained that his new focus on "terror states" was a "changed" position and a "pivot[]" away from the initial statement he made in December. Jeremy Diamond, *Trump on Latest Iteration of Muslim Ban*, CNN (July 24, 2016), goo.gl/lIu40E.

The district court speculated that Mr. Trump did not really change positions, but rather announced this policy because he concluded that "a partial Muslim ban"

was all he could get away with "politic[ally]." JA 797. This speculative theory is not supported by the evidence.

The district court supported its theory by citing Mr. Trump's interview on Meet the Press in July, where Chuck Todd asked him whether his new policy was a "rollback" from his original statement. Mr. Trump pushed back on the use of the word "rollback" but confirmed that he was "looking now at territories":

> I don't think so. I actually don't think it's a rollback. In fact, you could say it's an expansion. *I'm looking now at territories*. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim. But just remember this: Our Constitution is great. But it doesn't necessarily give us the right to commit suicide, okay? Now, we have a religious, you know, everybody wants to be protected. And that's great. And that's the wonderful part of our Constitution. I view it differently. Why are we committing suicide? Why are we doing that? But you know what? I live with our Constitution. I love our Constitution. I cherish our Constitution. *We're making it territorial*. We have nations and we'll come out, *I'm going to be coming out over the next few weeks with a number of the places*.

Meet the Press (Transcript) (July 24, 2016), goo.gl/rS8wij (emphases added).

The district court read this statement as an admission that "territory" is code for "Muslim," JA 797, but that reading is implausible. Mr. Trump clearly stated that he was *not* using religion and was now "looking … at territories" and "making it territorial." His characterization of the territory-based proposal as an "expansion" of his initial statement was true—looking at territories is an "expansion" in the sense

that it involves considering people of *all* religions in a given territory. This is not evidence of an anti-Muslim purpose.

Next, the district court concluded that Mayor Giuliani's statement during an interview on Fox News was a confession that the territory-based proposal was just a way to create a Muslim ban that would stand up in court. JA 797. Putting aside the absurdity of crediting a hearsay statement about what the President said from a nongovernmental consultant, *see Jaffree*, 472 U.S. at 74-75 (O'Connor, J., concurring in the judgment) ("It is particularly troublesome to denigrate an expressed secular purpose due to postenactment testimony … by interested persons who witnessed the drafting of the statute."), Mayor Giuliani actually said the opposite:

> OK. I'll tell you the whole history of it. So when he first announced it he said "Muslim ban." He called me up and said, "put a commission together, show me the right way to do it legally." I put a commission together with Judge Mukasey, with Congressman McCaul, Pete King, a whole group of other very expert lawyers on this. And what we did was *we focused on, instead of religion, danger*. The areas of the world that create danger for us. *Which is a factual basis. Not a religious basis*. Perfectly legal, perfectly sensible, and *that's what the ban is based on. It's not based on religion*. It's based on places where there are substantial evidence that people are sending terrorists into our country.

Aziz v. Trump, No. 1:17-cv-116, 2017 WL 580855, at *5 (E.D. Va. Feb. 13, 2017) (emphases added) (quoting Dkt. No. 61-4).

The district court focused on "show me the right way to do it legally" and read it to mean "show me how to discriminate and get away with it." But it could have

just as plausibly meant "show me how to prevent terrorism without engaging in religious discrimination." Indeed, that is precisely what Mayor Giuliani said it meant in the rest of his statement. Although the district court credited the first two sentences of Mayor Giuliani's statement, it inexplicably did not credit his assurances that "we focused on, instead of religion, danger" and that the Order is "not based on religion." The omission is glaring.

The district court also found it important that, "[o]n December 21, 2016, when asked whether a recent attack in Germany affected his proposed Muslim ban, President-Elect Trump replied, 'You know my plans. All along, I've proven to be right. 100% correct.'" JA 797. But this statement is horribly ambiguous. The district court assumed "plans" meant "Muslim ban," but the only "plan" that Mr. Trump had discussed for the previous six months was his territory-based policy. As Kellyanne Conway, his spokesperson, explained the next day: "You're going back to over a year ago in what he said about the ban" but later "he made it much more specific and talked about countries where we know that they've got a higher propensity of training and exporting terrorists." Gregory Krieg, *Conway: Trump Will Not Pursue Immigration Ban Based Solely on Religion*, CNN (Dec. 22, 2016), goo.gl/0fDOq6.

At bottom, the various statements that purportedly show the Order is just a "Muslim ban" in disguise do not hold up. Undeterred, the district court concluded that the Order was an attempt to discriminate against Muslims for another reason:

because Mr. Trump allegedly expressed "anti-Muslim sentiments" on two occasions during the campaign. JA 796. But in the first statement—an interview with CNN where Mr. Trump said "Islam hates us"—he clarified that the reference was to "radical Islam," not all Muslims. Theodore Schleifer, *Donald Trump: "I Think Islam Hates Us"*, CNN (Mar. 10, 2016), goo.gl/wcLcF7. And in the second statement—a response to the terrorist attack in Berlin—Mr. Trump's statement was not "anti-Muslim" at all. He criticized "ISIS and other Islamic terrorists"—not Muslims or Islam generally. JA 797.

More troublingly, by resorting to these generic statements, the district court was implying that the President is *generally* anti-Muslim. By this logic, *any* action he takes with respect to a majority-Muslim country is ripe for invalidation under the Establishment Clause. Even if his comments were somehow insensitive, they cannot "forever taint" the President's ability to take actions in the Middle East. *McCreary*, 545 U.S. at 873-74. Such a standard would be impossible to administer. *See Washington* Kozinski Dissental at 7 ("If a court were to find that campaign skeletons prevented an official from pursuing otherwise constitutional policies, what could he do to cure the defect? Could he stand up and recant it all ("just kidding!") and try again? Or would we also need a court to police the sincerity of that mea culpa[?]"). And it would draw courts into the thicket of assessing the character of government officials. *See id.* at 5.

Consider an example. During the 2008 presidential campaign, then-Senator Obama made a statement about "bitter" people in "small towns" who "cling to guns or religion … to explain their frustrations"—a statement that many perceived to be anti-Christian. Ed Pilkington, *Obama Angers Midwest Voters with Guns and Religion Remark*, The Guardian (Apr. 14, 2008), goo.gl/ICSSVi. After he was elected, President Obama's administration issued a regulation requiring Catholic nonprofits to, in their view, facilitate contraceptive coverage and violate their deeply held religious beliefs. *See Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016). Is Senator Obama's statement from the 2008 campaign evidence that he is an anti-Christian bigot and, thus, evidence that the regulation has an unconstitutional purpose under the Establishment Clause? Under the district court's logic, a court would at least have to consider the possibility. And what may be a "common sense" interpretation of President Obama's motive for one judge may not be for another. This is where we are headed under the district court's approach.

Indeed, given the sheer amount of times that politicians reference the Bible in political campaigns, other possible scenarios abound. That is why considering this sort of evidence would be a "huge, total disaster." *Washington* Kozinski Dissental at 7. The Court should not countenance it in this case, no matter one's views about the wisdom of the Order. Even if the Court does countenance it, it should reverse the district court. Read fairly and accurately, the media statements made during the

campaign indicate that President Trump maintained a bona fide interest in national security and that any initial calls for a "Muslim ban" were abandoned, not smuggled into the Order. The district court reached the opposite conclusion by cherry picking snippets of statements and reading them in the light least favorable to the President—just the opposite of what the law requires.

CONCLUSION

For all of these reasons, the Court should reverse the district court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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March 31, 2017 /s/ *William S. Consovoy*

CERTIFICATE OF SERVICE

I certify that on March 31, 2017, this brief was served on all parties or their counsel of record through the CM/ECF system.

March 31, 2017 /s/ *William S. Consovoy*