Nos. 16-1436 & 16-1540

In the

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,

Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF FOR AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The American-Arab Anti-Discrimination Committee (ADC) is a nonprofit, grassroots civil rights organization committed to defending the rights of people of Arab descent and promoting their rich cultural heritage. Founded in 1980 by U.S. Senator James Abourezk, ADC is non-sectarian and non-partisan. With members from all fifty states and chapters nationwide, ADC is the largest Arab-American grassroots organization in the United States. ADC protects the Arab-American and immigrant communities against discrimination, racism, and stereotyping, and it vigorously advocates for immigrant rights and civil rights.

ADC worked with thousands of individuals from around the world who have been directly and adversely affected by Section 2(c) of the Executive Order at issue in this case, which bans people from six majority-Muslim countries from entering the United States, five of which are nations with ethnic Arab majorities.[2]

For example, ADC has worked with K.S., who is a legal permanent resident in the United States. His wife, an Iranian citizen, is not. K.S.'s wife has applied for a green card, but processing can take up to five years. Green card holders can see their spouses and

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[1] ADC certifies that all parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus or its counsel made such a monetary contribution.

[2] Libya, Sudan, Somalia, Syria, and Yemen.

their children only in six-month increments under B-2 tourist visas. K.S.'s wife came to see him in November 2016, but her six-month allotment and visa expired in March 2017. K.S.'s wife requested and was denied a visa extension. If the injunction preventing the Executive Order's enforcement is lifted, K.S.'s wife's application for a new visa will probably be denied because she is Iranian. K.S.'s life is in limbo; he does not know when he will see his wife again.

ADC also worked with E.M., a U.S. citizen living in the District of Columbia. Her fiancé is Syrian. His K-1 visa interview scheduled for February 2017 at the U.S. consulate in Turkey was cancelled. If Section 2(c) of the Executive Order is enforced, E.M.'s fiancé will not be able to enter the United States, and she will not be able to marry the man that she loves.

Another ADC client, A.S., is a Syrian national whose interview for a green card at the consulate in Turkey was cancelled. The interview is a necessary step in the process to obtain a valid visa. Thus, with enforcement of the Executive Order, A.S. will be denied a visa.

ADC has worked diligently to assist K.S., E.M., and A.S. while Section 2(c) has been fully and partially stayed, but their hardships remain ongoing. This is a small sample of the hardships ADC has had to help Arab-Americans (and their friends and family in Arab-majority nations) navigate as a result of the Executive Order.

Moreover, the Executive Order was intended to have and has had the effect of branding Islam as a dangerous religion and making clear that Muslims are not fully welcome in the United States. Plainly, this adversely affects Muslim American Arabs. But it

also adversely affects American Arabs who are *not* Muslim. Americans frequently conflate Arabic ethnicity with belief in Islam, despite the fact that most Muslims are not Arab. *See generally* Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575, 1584 (2002); *see also President Trump's Speech to the Arab Islamic American Summit* (May 21, 2017), (describing as a single category "Arab, Muslim and Middle Eastern nations").[3] Accordingly, Arab-Americans regardless of faith suffer from the effects of a government-sanctioned message that Muslims are un-American.

ADC therefore submits this brief to urge the Court to invalidate the Executive Order.

INTRODUCTION AND SUMMARY OF ARGUMENT

One of the key issues in this case is whether courts may inquire into whether the stated justification for the Executive Order is pretextual. Any reasonable person making that inquiry will conclude that Section 2(c) was the product of religious animus—specifically, hostility to Islam—and that the stated national security basis for the Executive Order is pretextual.

Candidate Trump promised "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." *See* J.A. 179 (quoting President Trump's campaign "Statement on Preventing Muslim Immigration"). Candidate Trump explained his view

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[3] *Available at* https://www.whitehouse.gov/the-press-office/2017/05/21/president-trumps-speech-arab-islamic-american-summit.

in a nationally televised interview: "I think Islam hates us [and] * * * we can't allow people coming into the country who have this hatred." J.A. 180. He reiterated the same position in another interview: "[W]e're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.A. 180-81.

The government suggests that President Trump had an epiphany after his inauguration that removed any trace of his prior anti-Muslim animus. But in fact he signed the first Executive Order, J.A. 1404-15 ("January Executive Order"), that, among other things, barred entry by people from seven majority-Muslim countries after the inauguration, without consulting any government national security experts. *See* J.A. 1167. With a wink and a nod, he made clear that the Executive Order instituted his promise of a Muslim ban even though the ban applied to immigration from majority-Muslim *countries*. J.A. 182 ("This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means."). Any ambiguity on that score was clarified by the Order's provisions ensuring that non-Muslims from the affected countries would be given preferential treatment. *See* January Executive Order § 5. After the January Executive Order was invalidated, President Trump made clear that the Executive Order he enacted in response, J.A. 1416-40 ("March Executive Order"), was a revised Muslim ban. *See* J.A. 183 (President Trump reiterated his intent to "keep my campaign promises" despite the invalidation of the January Executive Order, and

described the March Executive Order as "a watered down version of the first order.").

The government's continued insistence on the need to bar entry by nationals of six majority-Muslim countries by implementing Section 2(c), even after having already had far more time than the face of the Executive Order contends would be necessary to conduct the review of vetting procedures that allegedly necessitated the ban, thoroughly undermines the contention that the ban was motivated by national security concerns. An administration that was serious about national security concerns would have completed its review of the vetting procedures months ago.

The government urges the Court to look away, contending that, under the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(f), the President's exercise of his authority to suspend the entry of aliens is effectively unreviewable. Pet. Br. 38-39. As an initial matter, that would mean a president need not disguise his motives, but could, for example, explicitly ban all Muslims from entering the United States on the ground that he believes that Islam "hates us" and Muslims are therefore presumptively dangerous. But as the Court explained in *Sherbert* v. *Verner*, under the Free Exercise Clause the government may not "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities." 374 U.S. 398, 402 (1963). Moreover, as Respondents ably explain, the Establishment Clause imposes a similar limit. Hawaii Br. 53. It may be unlikely that another Chief Executive would purposefully attack a particular religious group, but it is unsettling that the

government's position would permit executive orders explicitly aimed at members of a particular faith.

In any event, Section 1182(f) does not provide discretion to discriminate on the basis of religion. Section 1182(f) allows the President to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants" whenever he "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." 8 U.S.C. § 1182(f). The government erroneously reads "finds" to mean nothing more than that the President must *say* that the entry of certain aliens "would be detrimental to the interests of the United States." *Id.* But "finds" is more naturally understood to mean that the President must provide a genuine explanation of *why* such entry would be "detrimental." *Id.*

Other language in Section 1182(f) confirms this reading. In addition to the "finding" requirement, Section 1182(f) separately contains a "proclamation" requirement ("[H]e 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 * * * *."). Pet. Br. 39. The Executive Order may satisfy the proclamation requirement, but it does not satisfy the finding requirement. The government's reading treats the finding and proclamation requirements as if they were the same, impermissibly reading one or the other out of the statute. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983).

The President has explained why he thinks it would be detrimental to allow entry from the six majority-Muslim countries listed in the Executive

Order—but he did so in various public statements outside of the face of the Executive Order and through the order's structure and effect. As explained below, the courts below are likely to conclude the President based Section 2(c) on his view that admission of Muslims harms the United States.

Such a motive renders Section 2(c) unlawful because, in addition to posing constitutional problems, it conflicts with Section 1182(f). Section 1182(f) must be construed in harmony with the Religious Freedom Restoration Act (RFRA). That Act, which applies to laws passed before and after its enactment, codifies the protections of the Free Exercise Clause and creates additional protections for the free exercise of religion. RFRA provides that the government may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it can show that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

This case involves a rare but sure-fire indicator of substantial burden: evidence that Section 2(c) was designed to disfavor belief in one particular religion. That the President had this motive is strong evidence that the Order, in fact, disfavors belief in Islam. History shows that laws designed to single out and discriminate against members of a minority religion almost always serve their intended purpose, and then some.

Accordingly, Respondents should be given the opportunity to show that the justifications offered on the face of the Executive Order are mere pretext for

religious discrimination—or, more precisely given the procedural posture here, that Respondents are likely to succeed on the merits of their showing that the proffered justifications are pretextual. The Court should direct the lower courts to adapt the well-developed frameworks for unmasking unlawful discrimination concealed behind facially reasonable, pretextual justifications that have been developed in cases involving jury selection, employment discrimination, and the free exercise of religion.

It bears emphasis that permitting such inquiry should not prevent the adoption of executive orders under Section 1182(f) that are really aimed at advancing national security interests, because such interests are indeed compelling. It surely must be the unusual case where an executive order addressing national security interests is the product of religious animus and is not narrowly tailored to advance a compelling government interest.

ARGUMENT

I. SECTION 1182(f) DOES NOT PERMIT THE PRESIDENT TO INTENTIONALLY DISCRIMINATE AGAINST MUSLIMS.

ADC agrees with Respondents and several lower courts that the Constitution precludes enforcement of Section 2(c). However, before turning to the constitutionality of the Executive Order, the Court can engage in a straightforward analysis of whether the Order is a lawful exercise of the President's authority under the INA. It is not.

The government argues that the President can use his Section 1182(f) powers to exclude *any* alien or class

of aliens for *any* reason for *any* period of time. *See, e.g.*, Pet. Br. 39. The logical—and alarming—conclusion of that reasoning is that the President might simply assert that he has every right to find that Muslims' entry is detrimental to the interests of the United States simply because they are Muslim. Clear statutory limits on the President's Section 1182(f) authority forestall that troubling conclusion.

According to the plain text of Section 1182(f), the President must have made a finding that the entry of nationals from the six designated countries is detrimental to the United States. The mere assertion or proclamation that the President makes on the face of the Executive Order does not suffice because, as Part II shows, the proclaimed reasons are mere pretext for the real factual finding motivating Section 2(c): that the entry of Muslims harms the United States.

This is not a factual finding that can lawfully serve as the basis for Presidential action under Section 1182(f). Despite the provision's facial breadth, Congress limited the President's authority under Section 1182(f) when it enacted RFRA. RFRA prohibits courts from simply taking at face value a proclamation that entry of a group of individuals would be detrimental to the United States based on a facially religiously neutral finding when there are very good reasons to believe the finding is pretext for purposeful discrimination against Muslims. Put differently, RFRA requires more of the government than does the Establishment Clause or the Free Exercise Clause. Because RFRA makes this an easy case of statutory interpretation, it provides the Court

with an alternative, non-constitutional basis for upholding the decisions under review.

A. Section 1182(f). The INA delegates to the President authority to control entry of aliens under certain circumstances:

> 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.

8 U.S.C. § 1182(f). In this provision, Congress did not give the President unlimited authority to suspend alien entry into the United States. Instead, it created a condition precedent: the President must "find" that those aliens' entry would be "detrimental to the interests of the United States." 8 U.S.C. § 1182(f).[4] In other words, the INA requires the President to "find" a particular fact: detriment to the United States. *See* Finding of Fact, Black's Law Dictionary (10th ed. 2014) (noting that "finding of fact" is often shortened to "finding"). In that context, "to find" means "[t]he result of a judicial examination or inquiry" or "[t]hat which is found or discovered." Finding, 1 Compact Edition of the Oxford English Dictionary 226 (1986). The requirements of "examination" or "inquiry" distinguish "finding" from "deeming" or "declaring"

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[4] Because, as the Ninth Circuit explained, Section 1185(a)(1) provides coextensive authority, it is not separately analyzed here. *See* J.A. 1196 n.10.

something to be true. It may sometimes—even ordinarily—be the case that the face of an executive order reflects the required consideration. But here, where the pretext inquiry shows that the President actually relied on his view that Muslims are dangerous because they hate the United States, and not the factual assertions spelled out in the Executive Order on review, additional evidence is required to evaluate the President's compliance with the INA.

Other language in Section 1182(f) confirms that the "finding" prerequisite requires something more than writing down at least one facially lawful reason. Congress separately required the President to make a "proclamation" before suspending alien entries, and conditioned that requirement on satisfaction of the finding requirement. 8 U.S.C. § 1182(f). The Executive Order satisfies the proclamation requirement, but it does not free the President from judicial review of his fact finding. The government's reading ignores Congress's decision to structure this delegation of authority with two distinct requirements—one conditioned on the other—and treats the finding and proclamation requirements as if they were the same, impermissibly reading a requirement out of the statute. *Russello*, 464 U.S. at 23. Thus, the plain text of the INA supports the conclusion that it is necessary and appropriate to look beyond the face of the Executive Order to consider pretext.

B. RFRA. RFRA also limits the President's ability to apply Section 1182(f) in a way that substantially burdens Respondents' exercise of religion. Under RFRA, a federal government action that "substantially burden[s] a person's exercise of religion even if the burden results from a rule of general

applicability" is valid only if it "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.[5] The President's motive in adopting Section 2(c) is highly relevant to—if not determinative of—the issue of whether the Order passes muster under RFRA.

1. ***The interplay between animus and various religious liberty protections.*** In the decisions under review, lower courts examined the religious liberty implications of the Executive Order only under the Establishment Clause. But if Respondents successfully show that the Executive Order was motivated by animus against Muslims, the Order would be subject to strict scrutiny under *both* (1) the Establishment Clause and (2) the statutory and constitutional protections for free exercise, including RFRA. Because both the Establishment Clause and RFRA limit the President's authority under the INA, whether the President adopted the Executive Order in order to have fewer Muslims in the United States—or

[5] Respondents stated claims based on RFRA's cause of action—independent from the INA claims implicated by the Court's grant of certiorari—before the district courts. *See* J.A. 1045-46; Mem. Supp. Pls.' Mot. for TRO at 40 n. 2, *Hawaii*, No. 17-cv-00050 (Mar. 8, 2017); J.A. 110; First Am. Mot. for a Prelim. Inj. and/or TRO at 27, *Int'l Refugee Assistance Project*, No. 17-CV-00361, (Mar. 11, 2017). No lower court has yet evaluated whether Respondents are likely to succeed on the merits of their RFRA claim. If the Court determines that Respondents are not entitled to preliminary relief for their Establishment Clause or INA causes of action, the Court should evaluate whether RFRA provides an alternative basis for affirming the decisions below, or remand to the district court with instructions to consider the issue.

another reason evincing actual disfavor based on religious belief—is highly relevant to whether the Executive Order exceeds the President's authority under the INA.

Government action that privileges belief in one religion over another undoubtedly implicates the Establishment Clause. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) (courts have repeatedly held that government activity designed to "discriminate[] against some or all religious beliefs" leads to an impermissible entanglement between government and religion, thereby violating the Establishment Clause). Accordingly, ADC echoes Respondents' arguments that the Establishment Clause prevents the President from exercising Section 1182(f) in a manner designed to favor certain religions over others.

But favoring belief in one religion over another also implicates the Free Exercise Clause. Religious belief is a form of religious exercise and an extraordinarily protected form at that. As the Court explained in *Sherbert*, "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such." 374 U.S. at 402. Government may not "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities." *Id.*; *see also* 42 U.S.C. § 2000bb (incorporating the *Sherbert* standard into RFRA); *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770 (2014) (explaining that the term "exercise of religion" within the meaning of RFRA involves religious belief that does not result in action, in addition to religiously motivated speech and conduct).

This is because government action undertaken for religiously discriminatory reasons, almost without fail, will penalize belief in that religion. *See Lukumi*, 508 U.S. at 564 (striking down a "rare example of a law actually aimed at suppressing religious exercise" on Free Exercise Clause grounds); Brief of Scholars of Mormon History & Law as *Amici Curiae* in Supp. Of Neither Party (filed Aug. 17, 2017). Accordingly, *both* free exercise and anti-establishment jurisprudence "prevent the government from singling out specific religious sects for special benefits or burdens." Ronald D. Rotunda & John E. Nowak, 6 *Treatise on Constitutional Law-Substance & Procedure* § 21.1(a) (5th ed. 2017).

Sherbert and its Free Exercise Clause progeny require courts to apply strict scrutiny to government action inspired by animus toward belief in a particular religion. Such government action is also subject to strict scrutiny under RFRA. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2770 (using Free Exercise jurisprudence to determine whether government action substantially burdens the exercise of religion within the meaning of RFRA). This is a product of history and of statute: In *Employment Division* v. *Smith*, 494 U.S. 872, 883-90 (1990), this Court substantially limited the application of *Sherbert*, holding that the Free Exercise Clause did not subject facially neutral laws of general applicability to strict scrutiny. Congress enacted RFRA in direct response to *Smith*, and applied statutory protections that mirrored the

protections for free exercise set out in *Sherbert* and its progeny. 42 U.S.C. § 2000bb.[6]

To further advance the free exercise of religion, Congress applied RFRA to all previously-enacted federal statutes that could substantially burden religion without passing strict scrutiny. 42 U.S.C. § 2000bb-3 (RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993 [the date RFRA went into effect]."). In other words, to the extent that any statute (before RFRA's passage) could be construed to impose a substantial burden on the exercise of religion in a manner that did not pass strict scrutiny, that construction must be altered in light of RFRA.

Importantly, RFRA does not contain an exception for the immigration or national security arenas; it "applies to *all* Federal law." *Id.* (emphasis added). Consequently, "[s]eemingly reasonable regulations based upon speculation [and] exaggerated fears of thoughtless policies cannot stand," even in contexts where the political branches are due considerable

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[6] Section 2000bb states: "The Congress finds that * * * in *Employment Division* v. *Smith*, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion[.] * * * The purposes of [RFRA] are--(1) to restore the compelling interest test as set forth in *Sherbert* v. *Verner*, and *Wisconsin* v. *Yoder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government." (internal citations omitted).

deference. H.R. Rep. No. 103-88, at 8 (1993) (explaining that RFRA applies even to the military context, where executive authority is at its height); *accord* S. Rep. No. 103-111, at 8, 12 (1993).

2. *The substantial burden here.* *Lukumi* and *Sherbert* show that government action based on animus toward believers in any particular faith so strongly suggests the imposition of a substantial burden that, if the Executive Order was adopted to discriminate against Muslims, Respondents need to show little more (if anything) for strict scrutiny to apply under RFRA. Respondents are likely to make such a showing. As the Ninth Circuit Respondents explained in their amended complaint:

> Religious communities in the United States cannot welcome visitors, including religious workers, from designated countries. And some non-citizens currently in the United States may be prevented from travelling abroad on religious trips, including pilgrimages or trips to attend religious ceremonies overseas, if they do not have the requisite travel documents or multiple-entry visas.

J.A. 1045. As the Fourth Circuit Respondents explained, the Executive Order has the effect of "denying or impeding Muslim Plaintiffs, on account of their religion, from accessing benefits relating to their own or their family members' immigration status." J.A. 110.

The government is also unlikely to show that the Executive Order is narrowly tailored to further a compelling government interest. *See* 42 U.S.C. § 2000bb-1. The government has no compelling interest in discriminating against belief in a minority religion. Although the government does have a

compelling interest in national security, the Executive Order is not narrowly tailored to meet that interest; instead, the Executive Order is both over- and under-inclusive with respect to national security. *See infra* Part II(B)(3). Therefore, Respondents are likely to show that the Executive Order violates RFRA—and consequently that the INA cannot be interpreted to provide the President with the authority to adopt the Executive Order—if it was motivated by religious animus.

C. Kleindienst v. Mandel. The government contends that *Kleindienst* v. *Mandel*, 408 U.S. 753, 769–70 (1972), precludes the Court from "looking behind" the rationale put forth in the text of the Executive Order. Pet. Br. 21. But even assuming arguendo that *Mandel* precludes the Court from examining the President's motives as part of its *constitutional* analysis,[7] *Mandel* plainly does not apply to the Court's *statutory* analysis. *Mandel* did not involve an application of Section 1182(f) and was decided before RFRA was enacted. As shown above, Section 1182(f) is properly construed to permit courts to fully examine the "finding" upon which the President based Section 2(c), and RFRA requires courts to examine whether the President adopted

[7] It does not. As Respondents explain, *Mandel* and other precedents requiring deference to the President's national security judgment do not bar an inquiry beyond the face of his justifications where, as in this case, there has been an "affirmative showing of bad faith" or an unconstitutional purpose. Hawaii Br. 49-51.

Section 2(c) with an intent to discriminate against Muslims.

II. THE PURPORTED JUSTIFICATIONS FOR THE EXECUTIVE ORDER ARE PRETEXTUAL.

As the Court has long recognized, discriminatory actions are often sheltered behind facially legal reasoning. Accordingly, this Court has developed robust tools for determining whether a party's stated reason for acting is actually a pretext for an impermissible discriminatory motive, including in cases involving the free exercise of religion, jury selection, and employment. Here, where the President's extraordinary public statements reveal the Executive Order's true motivations and where RFRA narrows the deference ordinarily owed to the President in the immigration and national security arenas, those tools can aid the Court or the lower courts in determining that the Executive Order results from animus toward Muslims.

A. Sources of Guidance for Detecting Pretext. In a variety of contexts where motivations matter, courts routinely decide whether lawful, non-discriminatory reasons are authentic or merely pretext. Three areas of law—the jury selection, employment discrimination, and free exercise of religion contexts—provide particularly well-developed models for identifying pretext.

1. ***Peremptory Strikes.*** When criminal defendants allege racial discrimination in prosecutors' use of peremptory strikes, courts evaluate prosecutors' proffered reasons for pretext as part of the *Batson* v. *Kentucky* three-step framework. 476

U.S. 79, 96 (1986). *First*, the defendant produces evidence that gives rise to an inference of discrimination. *Id.* at 97. *Second*, once the *prima facie* case is established, the government must come forward with a neutral non-discriminatory explanation for the strike. *Id.* at 97-98. *Third*, the court determines whether, in light of the prosecution's proffered reason, the defendant has nevertheless established purposeful discrimination. *Id.* at 98.

Batson's third step often turns on a pretext analysis. *See, e.g.*, *Miller-El* v. *Cockrell*, 537 U.S. 322, 339 (2003) (At *Batson* step three, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.") (quotations omitted).

2. *Employment Discrimination.* Allegations brought under Title VII of the Civil Rights Act and other employment discrimination statutes often include a pretext inquiry. For example, "single-motive" employment discrimination cases—those where the employee alleges that a single, prohibited motive caused the employer's adverse employment action—require the plaintiff to prove pretext in many cases. Applying the *McDonnell Douglas* framework, courts first analyze whether the plaintiff has pled a few basic prerequisites of discrimination. *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973).[8] If the plaintiff carries that burden, the burden of production then shifts to the defendant, who must provide evidence of a nondiscriminatory reason

[8] The elements of the *prima facie* case vary with the circumstances. *See id.* at 802 n.13 (noting that the *prima facie* case recited therein "is not necessarily applicable in every respect to differing factual situations.").

for the challenged action. If the defendant does so, then the plaintiff bears the burden of persuading the factfinder that the defendant's stated reason for the action is a pretext for discrimination. *See id.* at 802-04.[9] Because making out a *prima facie* case and producing a nondiscriminatory reason are both relatively light burdens, *McDonnell Douglas* cases often focus on a pretext inquiry. *See, e.g.*, *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 187-88 (1989), *abrogated on other statutory grounds* ("Although petitioner retains the ultimate burden of persuasion, our cases make clear that she must also have the opportunity to demonstrate that respondent's proffered reasons for its decision were not its true reasons.").

3. *The Free Exercise Clause.* The Court has also evaluated pretext in the context of a Free Exercise Clause challenge to government action allegedly motivated by religious animus. In *Lukumi*, the Court held that "[f]acial neutrality" of government action "is not determinative" of whether it is designed to limit the free exercise of religion. 508 U.S. at 534. After noting that the text, history, and application of the challenged city ordinance suggested potential discrimination on the basis of religious belief, the Court engaged in an independent analysis of whether the ordinance was adopted for a religiously neutral purpose. *Id.*

B. Application of Factors Showing Pretext. In ferreting out discrimination in these areas, a few

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[9] Mixed motive cases also "employ a burden-shifting framework…with different burdens that shift." *Shifting Burdens of Proof in Employment Discrimination Litigation*, 109 Harv. L. Rev. 1579, 1582 (1996).

categories of evidence are especially probative of pretext. Courts have been particularly alert to: (1) shifting rationales for a challenged action; (2) unexplained differences between the treatment of members of different groups; (3) a lack of fit between the stated reasons for an action and that action's results; (4) an atmosphere of discrimination, based on past statements or actions; and (5) the plausibility of an explanation. Looking to those forms of evidence in this case, the inevitable conclusion is that the rationale stated for Section 2(c) on the face of the Executive Order was not the President's true motivation.[10]

1. *Shifting Rationales*. When a party provides shifting rationales for the same action, those rationales are likely to be pretextual. *See, e.g.*, *Foster* v. *Chatman*, 136 S. Ct. 1737, 1751 (2016) ("As an initial matter, the prosecution's principal reasons for the strike shifted over time, suggesting that those reasons may be pretextual."); *Miller-El* v. *Dretke*, 545 U.S. 231, 245-46 (2005) (refusing to credit a prosecutor's explanation because when "defense counsel called him on his misstatement [as to one reason], he neither defended what he said nor withdrew the strike. Instead, he suddenly came up with * * * another reason for the strike."). Government officials' change in explanation for their

[10] As in many pretext cases, the early stages of an inquiry analogous to *Batson*, *McDonnell Douglas*, or *Lukumi* are easily satisfied here: Respondents have shown that Section 2(c) of the Executive Order, which targets Muslim-majority countries, disproportionately impacts Muslims, and the government has pointed to the facially neutral reasoning in the Executive Order.

actions—especially after the initial proffered explanation has been declared invalid—"reeks of afterthought," strongly suggesting that their stated reasons are not the true ones. *Id.* at 246.

The rapidly shifting rationales provided for the President's executive action fit this pattern. In January 2017, the President halted the entry of nationals from seven designated countries. When courts preliminarily ruled that the President enacted the Executive Order for impermissible reasons—*see Washington* v. *Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 02, 2017), *stay denied*, 847 F.3d 1151, 1156 (9th Cir. 2017)—the President "neither defended what he said nor withdrew" the order; instead, he "suddenly came up with * * * another reason for" it. *Dretke*, 545 U.S. at 245-46.

Though they achieve very similar ends, the January and March Executive Orders offer entirely different rationales for their entry ban provisions. *See* January Executive Order §§ 1, 2; March Executive Order §§ 1(a), (f). The January Executive Order's statements of purpose and policy focused on the risks posed by *individuals* from the countries subject to the ban. It mentioned conditions in those countries only to emphasize the supposed risks their nationals posed. *See* January Executive Order § 1 ("Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States."). The purpose of the January action was to "ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles" and to avoid admitting

"those who engage in acts of bigotry or hatred (including 'honor' killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation." *Id.*

None of that reasoning appears in the March Executive Order. Indeed, that document hardly discusses *individuals* at all. Instead, the March Executive Order focuses entirely on the selected countries' *governments*:

> Nationals from the countries previously identified under section 217(a)(12) of the INA warrant additional scrutiny in connection with our immigration policies because the conditions in these countries present heightened threats. Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States.

March Executive Order § 1(d). This shift "reeks of afterthought," *Dretke*, 545 U.S. at 246, and "suggest[s]

that those reasons may be pretextual," *Chatman*, 136 S. Ct. at 1751.

2. *Comparisons*. Courts also use comparisons between individuals or groups subject to a challenged action and those not affected in order to assess whether a proffered non-discriminatory motive is pretextual. In the Free Exercise context, a strong inference of discriminatory motive arises when the burden of governmental action "in practical terms, falls on adherents [of a particular religion] but almost no others" or the challenged government action exempts non-religiously motivated conduct. *Lukumi*, 508 U.S. at 536-537. In employment discrimination cases, such comparisons are "especially relevant" to a finding of pretext. *See McDonnell Douglas*, 411 U.S. at 804. In the *Batson* context, "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Dretke*, 545 U.S. at 241; *see also Chatman,* 136 S. Ct. at 1750 (finding certain explanations "difficult to credit because the State willingly accepted white jurors with the same traits that supposedly rendered Garrett an unattractive juror").

Comparison evidence tends to demonstrate pretext for obvious reasons: if a party claims to have a particular rationale for its actions, but then applies that rationale in a disparate manner based on race, gender, or religion, that strongly suggests that race, gender, or religion is the true basis for the party's actions. When "no explanation" is offered for that

disparate application, the inference of discrimination becomes stronger still. *Cockrell*, 537 U.S. at 345.

The stated rationale for Section 2(c) of the current Executive Order—alleviating the risk that a foreign government's vetting procedures will fail to identify a dangerous individual—has quite clearly been applied disparately, in a way that is nearly impossible to explain without reference to religion. The Executive Order provides three rationales for singling out these six particular countries: each is a "state sponsor of terrorism" that has been "significantly compromised by terrorist organizations, or contains active conflict zones." J.A. 1420. According to the government, those characteristics harm information sharing with the United States in ways that can be exploited by terrorists, and "once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents." March Executive Order § 1(d).

Whether any of those factors actually increases the risk of terrorism by a foreign national is far from certain. But even if they did, Iran, Libya, Sudan, Somalia, Syria, and Yemen are not uniquely imbued with these characteristics. Then-Secretary of Homeland Security John Kelly said as much at the time of the March Executive Order's signing, stating in an interview "that there are probably '13 or 14 countries' that have 'questionable vetting procedures,' not all of which are Muslim countries or in the Middle East." J.A. 184. Secretary Kelly did not name which countries he had in mind, but among them might have been Pakistan, Cuba, Ethiopia, Iraq, and Uzbekistan—all of which were among the top

countries of origin for foreign-born individuals who planned or attempted terrorist attacks, not all of which are majority-Muslim[11] and none of which are included in Section 2(c).[12] *See* J.A. 1052.

The selected countries are, however, united by shared religious demographics. The six countries singled out in the Executive Order are overwhelmingly Muslim. Iran's population is 99.5 percent Muslim, Libya's is 96.6 percent Muslim, Sudan's is 90.7 percent Muslim, Somalia's is 99.8 percent Muslim, Syria's is 92.8 percent Muslim, and Yemen's is 99.1 percent Muslim. *See* J.A. 173 n.2. The ban does not include *every* majority-Muslim country, but it includes *only* majority-Muslim countries, without explaining its exclusion of similarly situated non-Muslim countries. The government's "proffered reason for" banning entry of nationals from the designated countries "applies just as well to * * * otherwise-similar" non-Muslim countries. *Dretke*, 545 U.S. at 241. "[T]hat is evidence tending to prove purposeful discrimination." *Id.*

3. *Lack of Fit Between Reasons and Results*. The inference of discriminatory pretext becomes stronger still when a party's stated goal could be accomplished just as effectively without a disparate impact. *See Albemarle Paper Co.* v. *Moody*, 422 U.S.

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[11] Cuba and Ethiopia both have large majorities of Christians. *See* Pew Research Center, *The Global Religious Landscape: A Report on the Size and Distribution of the World's Major Religious Groups as of 2010*, 46 (2012).

[12] The previous Administration's decision to exclude these countries from the visa waiver program was motivated by different concerns—and created different consequences—from those animating Section 2(c). *See* IRAP Br. 52-53.

405, 425 (1975) (explaining that evidence that an employment policy's goal could be accomplished without an "undesirable racial effect" demonstrates pretext). Likewise, in the jury selection context, this Court has often examined the "fit" between prosecutors' stated reason for striking jurors and the actual impact on the jury pool. *See, e.g.*, *Dretke*, 545 U.S. at 260. The utility of this proof is similar to that of comparison evidence: if a more efficient method exists to accomplish a stated goal, the natural question to ask is why someone would choose the less efficient method. When ignoring efficiency creates clear disparate impact on members of a particular class, that question answers itself: the stated goal is a pretext for discrimination.

A blanket entry ban for all nationals of six countries with overwhelmingly Muslim populations is not an effective way to combat terrorism. Section 2(c) is addressed neither to the primary sources of terrorist threats to the United States nor to any identifiable problem with the government's existing vetting procedures. A Department of Homeland Security draft report, prepared about two weeks before the March Executive Order took effect, concluded that citizenship "is unlikely to be a reliable indicator of potential terrorist activity." J.A. 1052.

Moreover, the Department found that nationals of the countries listed in the January Executive Order—which, with the exception of Iraq, are the same in the March Executive Order—were "[r]arely [i]mplicated in U.S.-[b]ased [t]errorism." J.A. 1173. The Department examined eighty-two instances where individuals were inspired by foreign terrorist organizations to plan or attempt an attack in the

United States. J.A. 1173. Of those eighty-two individuals, only six were nationals of the countries designated in Section 2(c) of the current Executive Order. J.A. 1173-1174. More than half were United States citizens. J.A. 1173. Among the foreign-nationals, the most common countries of origin were Pakistan, Somalia, Bangladesh, Cuba, Ethiopia, Iraq, and Uzbekistan, only one of which is designated in the current Executive Order. J.A. 1173. By the Executive Order's own standard—preventing "the entry into the United States of foreign nationals who may commit, aid, or support acts of terrorism," March Executive Order § 1(i)—its choice of designated countries is a poor fit.

The Executive Order's efforts to explain why it singled out these particular countries is unconvincing. None of the governmental failings identified in the Executive Order distinguishes the six designated countries from many others, including the "13 or 14" countries with questionable vetting procedures identified by Secretary Kelly. J.A. 184. And neither Secretary Kelly nor the Executive Order explained why a flat ban on entry is needed for nationals from six of those 13 or 14 countries, but no measures at all need be taken for the remaining seven or eight.

Moreover, the suspension of entry by *all* nationals of the six enumerated countries who are not lawful permanent residents of the United States for a period of ninety days bears no relationship to the Order's stated goals. A temporary pause on entry or change in vetting procedures would do little to nothing to reduce the terror threat, because even the vanishingly few foreign-born individuals who do end up committing acts of terror almost never have an inclination to do

so at the time they enter the United States. Rather, as the Department of Homeland Security explained, most foreign-born, U.S.-based violent extremists likely developed an intent to engage in terrorist acts "several years *after* their entry into the United States." J.A. 1059.

The point is not that Section 2(c) constitutes bad policy or relies on questionable national security judgments. Rather, this evidence makes it clear that Section 2(c)'s means have little to do with its stated ends. There is no "fit of fact and explanation." *Dretke*, 545 U.S. at 260. And when a party's stated explanation deviates so sharply from the clear facts, this Court often draws the obvious inference that the stated explanation is not the true one.

That inference is even stronger when, as here, a different, discriminatory explanation leads to a "much tighter fit of fact and explanation." *Id.* Although Section 2(c) does a poor job of fulfilling its stated goals, it makes significant strides toward fulfilling a campaign promise to curtail the entry of Muslims into the United States. *See* J.A. 179 (quoting President Trump's campaign "Statement on Preventing Muslim Immigration").

4. ***Atmosphere of Discrimination***. An atmosphere of discrimination can also provide evidence of pretext. *See, e.g.*, *Patterson*, 491 U.S. at 188 ("[P]etitioner could seek to persuade the jury that respondent had not offered the true reason for its promotion decision by presenting evidence of respondent's past treatment of petitioner, including the instances of the racial harassment which she alleges and respondent's failure to train her for an accounting position."); *Lukumi*, 508 U.S. at 539

(looking to the timing and circumstances surrounding an ordinance's passage when evaluating its constitutionality). In the *Batson* context, the Court has held that "historical evidence of racial discrimination" and a "culture * * * [that] in the past was suffused with bias" tend "to erode the credibility of the prosecution's assertion that race was not a motivating factor," especially when the prosecution uses the same tactics that had previously been shown to be racially motivated. *Cockrell*, 537 U.S. at 346-47.

Repeated statements of the President and his advisors evince just the sort of "culture * * * suffused with bias" that justifies a hard look at an alleged discriminator's stated reasons for action. *Id.* at 347. Most prominently, for a long period of time during his presidential campaign, President Trump called—on his website and in oral statements—explicitly for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." *See* J.A. 179. This statement provides strong evidence that religion "was on [President Trump's] mind when he considered" Section 2(c). *Dretke*, 545 U.S. at 266.

Other statements made by President Trump and his close associates reinforce that conclusion. When he first called for a ban on Muslim entry to the United States, President Trump said it was "a very important policy statement on the extraordinary influx of hatred & danger coming into our country." J.A. 180. Discussing the ban at a campaign rally that night, he reiterated that Muslims were his focus: "I have friends that are Muslims. They are great people—but they know we have a problem." J.A. 180. Three months later, as he moved closer to securing his party's

nomination for the presidency, President Trump went further still, saying in a nationally televised interview, "I think Islam hates us [and] * * * we can't allow people coming into the country who have this hatred." J.A. 180. He reiterated the same position in another interview later that month: "[W]e're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.A. 180-81.

As the presidential campaign went on, President Trump altered his language slightly. In July of 2016, reporters discovered that Trump's recently-announced running mate, Indiana Governor Mike Pence, had previously issued a statement declaring: "Calls to ban Muslims from entering the U.S. are offensive and unconstitutional." J.A. 181. Asked about this statement, Trump responded: "So you call it territories. OK? We're gonna do territories." J.A. 181. President Trump later explained, "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." J.A. 181.

After Election Day, President-Elect Trump did not back down from these positions. When asked whether some recent violence in Europe attributed to immigrants had affected his plans to ban Muslims from entering the United States, President-Elect Trump replied, "You know my plans. All along, I've been proven to be right. 100% correct. What's happening is disgraceful." J.A. 182. Nor did he do so after his inauguration. The January Executive Order applied to "territories," as President Trump had promised, but it echoed language about presumed

hate and anti-American attitudes among Muslims that he had used in his original calls for a ban:

> In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles. The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law. In addition, the United States should not admit those who engage in acts of bigotry or hatred (including "honor" killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.

January Executive Order § 1. In signing that Executive Order, President Trump said, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." J.A. 182. The clear implication, from the Executive Order's text and that statement, is that the Order furthered President Trump's longstanding promise to implement a "shutdown of Muslims entering the United States." J.A. 179.

The March Executive Order was signed against this backdrop, less than four weeks after the Ninth Circuit declined to stay a district court's injunction against the January Executive Order. *See Washington* v. *Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017) (denying stay on February 9, 2017). During that time, President Trump never disavowed his earlier anti-Muslim sentiments. To the contrary, President Trump reiterated his intent to "keep my campaign promises"

despite the Ninth Circuit's decision. J.A. 183. Senior Policy Advisor to the President Stephen Miller, in discussing plans for a new Executive Order, explained that it would produce the "same basic policy outcome for the country," with "mostly minor technical differences." J.A. 183. Then-White House Press Secretary Sean Spicer concurred, saying, "The principles of the Executive Order remain the same." J.A. 183. And after he had signed the March Executive Order, President Trump described it in a major speech as "a watered down version of the first order." J.A. 183.

Taken together, statements made by President Trump and his staff before and after inauguration gave rise to the sort of atmosphere of discrimination that this Court has long held "tends to erode the credibility of" assertions that impermissible discrimination "was not a motivating factor." *Cockrell*, 537 U.S. at 346. Given President Trump's numerous, unequivocal statements that he was concerned with the threat of "hatred and danger" from Muslims, the stated reason for Section 2(c) can only be taken as a pretext for discrimination.

5. *Implausibility.* Finally, courts apply the common-sense rule of disregarding plainly "implausible or fantastic justifications" as "pretexts for purposeful discrimination." *Purkett* v. *Elem*, 514 U.S. 765, 768 (1995). In *Chatman*, a prosecutor claimed to have struck a juror because the juror's son committed "basically the same thing that this defendant is charged with"—when the juror's son had stolen hubcaps but the defendant was "charged with capital murder of a 79–year–old widow after a brutal sexual assault." 136 S. Ct. at 1752. This Court's

response was clear: "Nonsense. * * * The 'implausible' and 'fantastic' assertion that the two had been charged with 'basically the same thing' supports our conclusion that the focus on Hood's son can only be regarded as pretextual." *Id.* The Court has taken the same approach to employer explanations that are simply "unworthy of credence," finding them "quite persuasive" in proving intentional discrimination. *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000).

There are several factors that make the stated explanation for Section 2(c) frankly implausible. One is timing. President Trump signed the January Executive Order, with similar restrictions on entry, one week after taking office, and without engaging in any interagency review. J.A. 120. Indeed, the district court for the District of Hawaii found "there was *no consultation* with the Department of State, the Department of Defense, the Department of Justice, or the Department of Homeland Security" before issuing the Executive Order. J.A. 120 (emphasis added). But the Executive Order purports to be responding to deficiencies in those departments' screening procedures. *See* January Executive Order § 1; March Executive Order § 1(f). Foundational to the Executive Order's reasoning, then, is that within a week of taking office, and without consulting any of the relevant agencies, President Trump was able to identify potential flaws in the government's vetting procedures and identify the countries as to which those flaws were of the greatest concern. To be sure, the Executive Order now at issue took effect somewhat later, on March 6, 2017—some six weeks after President Trump took office. But the passage of that extra time does little to make the timeline more

plausible, because the March Executive Order identified exactly the same countries as the first one, minus Iraq. Of course, the March Order also asserted somewhat different rationales for banning the entry of those six countries' nationals; but as discussed above, that sudden change in justification makes the government's assertions less credible, not more.

The passage of time and status of the administration's review of the vetting process provide another basis for implausibility. The January and March Executive Orders were, purportedly, intended to temporarily halt entry to the United States from places of special danger while the Departments of State and Homeland Security reviewed their vetting procedures over a period of 90 days. Since the January and March Executive Order were issued, 234 and 196 days have passed, respectively, giving the government (on its own schedule) sufficient time to conduct such a review. Indeed, the State Department apparently did undertake a review of its procedures, even while Section 2(c) remained blocked. *See* Arshad Mohammed, *U.S. Demands Nations Provide More Traveler Data or Face Sanctions*, Reuters, July 13, 2017 (describing a diplomatic cable from the Secretary of State initiating a review of State Department vetting procedures).[13]

But the government nonetheless continues to assert that a total ban on entry is necessary for nationals of the six designated countries. Indeed, the President specifically amended the Executive Order

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[13] *Available at* http://www.reuters.com/article/usa-immigration-travelban/u-s-demands-nations-provide-more-traveler-data-or-face-sanctions-idUSL1N1K41HE.

in June to make it clear that Section 2(c) would enter into force whenever the injunction against it was lifted, irrespective the passage of time. *See* J.A. 1441 ("Memorandum of June 14, 2017: Effective Date in Executive Order 13780"); Pet. Br. 37. The ban will remain in place until 90 days after a final ruling, whenever that may be and no matter how thoroughly the government has been able to review vetting procedures in the interim. That the government continues to press for the need to enforce Section 2(c) now—weeks after its supposed purpose has been served, and 144 days after it would have expired under the January Executive Order—renders the justification for it implausible.

CONCLUSION

The Court should uphold the judgments of the Fourth and Ninth Circuits.

Respectfully submitted,

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