Nos. 17-2231(L), 17-2232, 17-2233, 17-2240 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself and its clients; HIAS, INC., on behalf of itself and its clients; JOHN DOES #1 AND 3; JANE DOE #2; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; ARAB AMERICAN ASSOCIATION OF NEW YORK, on behalf of itself and its clients,
Plaintiffs - Appellees,

and ALLAN HAKKY; SAMANEH TAKALOO,
Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; ELAINE C. DUKE; in her official capacity as Acting Secretary of Homeland Security; REX TILLERSON, in his official capacity as Secretary of State; DANIEL R. COATS, in his official capacity as Director of National Intelligence,
Defendants - Appellants.

[Caption continued on inside cover]

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

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No. 17-2231(L)
On Cross-Appeal from the United States District Court for the District of Maryland, Southern Division
(8:17-cv-00361-TDC)

No. 17-2232
(8:17-cv-02921-TDC)

IRANIAN ALLIANCES ACROSS BORDERS; JANE DOE #1, JANE DOE #2, JANE DOE #3, JANE DOE #4, JANE DOE #5, JANE DOE #6,
Plaintiffs – Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; ELAINE C. DUKE, in her official capacity as Acting Secretary of Homeland Security; KEVIN K. MCALEENAN, in his official capacity as Acting Commissioner of U.S. Customs and Border Protection; JAMES MCCAMENT, in his official capacity as Acting Director of U.S. Citizenship and Immigration Services; REX TILLERSON; JEFFERSON B. SESSIONS III, in his official capacity as Attorney General of the United States,
Defendants – Appellants.

No. 17-2233
(1:17-cv-02969-TDC)

EBLAL ZAKZOK; SUMAYA HAMADMAD; FAHED MUQBIL; JOHN DOE #1; JOHN DOE #2; JOHN DOE #3,
Plaintiffs – Appellees,

CORPORATE DISCLOSURE STATEMENT

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

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INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and lawful permanent residents, and also to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); and *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

IRLI submits this *amicus curiae* brief to assist this Court in understanding that the federal courts lack jurisdiction to hear plaintiffs-appellees' statutory claims, and in drawing out the disastrous legal consequences of the constitutional holding of the court below.

All of the parties have stated in writing that they consent to the filing of this *amicus curiae* brief.

RULE 29(a)(4)(E) STATEMENT

No counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, has contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

The United States District Court for the District of Maryland ("the District Court") found that most of the statutory claims of plaintiffs-appellees ("plaintiffs") were unlikely to succeed. J.A. 1041-53. The District Court did find, however, that plaintiffs were likely to succeed on their claim that Presidential Proclamation 9645 ("the Proclamation"), found at 82 Fed. Reg. 45,161 (2017), violated 8 U.S.C. § 1152(a)(1)(A), the provision of the Immigration and Nationality Act ("INA") barring national-origin discrimination in the issuance of immigrant visas. J.A. 1034-40.

In fact, the District Court and this Court lack jurisdiction to hear that claim. This portion of the INA provides no private right of action; neither is jurisdiction provided, nor sovereign immunity waived, by the Administrative Procedure Act ("APA"), which does not apply to presidential actions such as the Proclamation.

The District Court went on to find that plaintiffs were likely to succeed on their claims under the Establishment Clause. JA. 1053-76. In reaching this holding, the District Court defied a large body of United States Supreme Court

precedents establishing that, in First Amendment challenges, courts should give no more than limited scrutiny to presidential directives in the area of war, foreign relations, and the admission of aliens. The District Court's reasoning, moreover, carries with it a train of striking absurdities that unmistakably shows the wisdom of these same precedents.

I. THE FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION TO HEAR PLAINTIFFS' CLAIM UNDER 8 U.S.C. § 1152(A)(1)(A).

Federal courts are "courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). They possess "only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Id*. (internal citations omitted). Furthermore, the presumption is that "a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id*. (internal citations omitted). Want of subject matter jurisdiction cannot be waived, and federal courts have an independent obligation to examine their own jurisdiction, and dismiss claims over which they lack jurisdiction. *United States v. Hays*, 515 U.S. 737, 742 (1995); *see, e.g.*, *Catholic Charities CYO v. Chertoff*, 622 F. Supp. 2d 865, 876, 883-85, 887-91 (N.D. Cal. 2008) (dismissing INA claims because Congress had not provided a private right of action and going on to consider constitutional claims); *Victorian v. Miller*, 796 F.2d 94, 95-96 (5th Cir. 1986) (upholding the

dismissal of appellants' statutory claims because of a lack of a private right of action while considering their constitutional claims).

Congress did not provide a private right of action for persons to sue under 8 U.S.C. § 1152(a)(1)(A). Nor does the APA provide plaintiffs with a private right of action, or otherwise waive sovereign immunity.

A. Plaintiffs Lack A Cause Of Action Under 8 U.S.C. § 1152(a)(1)(A).

Like substantive federal law itself, private rights of action to enforce federal law must be created explicitly by Congress. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). "Statutory intent" to create a private right of action is "determinative," and without it, a private right of action "does not exist and a court may not create one, no matter how desirable that might be as a policy matter or how compatible with the statute." *Id.* at 286-87. Determining whether causes of action exist under the specified provisions of the INA begins and ends with the "text and structure" of the provisions themselves. *Id.* at 288. If the statute does not "evince Congress' intent to create the private right of action asserted," then "no such action will be created through judicial mandate." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1848 (2017). When it comes to statutory rather than constitutional claims, federal courts must be even more careful to recognize only explicit causes of action. When Congress enacts a statute, "there are specific procedures and times for considering its terms and the proper means for its enforcement." *Id*. at 1856. Therefore, it is "logical"

to assume that Congress will be "explicit if it intends to create a private cause of action." *Id*.

The District Court found that the Proclamation violated § 1152(a)(1)(A) of the INA by discriminating on the basis of nationality. J.A. 1034-40. This provision reads: "[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."

This provision breathes not the slightest hint of congressional intent to confer a private right of action. Therefore, under *Sandoval*, no such private right of action may be created by the courts. Needless to say, neither plaintiffs nor the District Court adduced any occasion when a court has found a private right of action under this provision. The District Court did cite *Hawaii v. Trump*, 859 F.3d 742 (9th Cir. 2017), a since-vacated opinion, *Trump v. Hawaii*, No. 16-1540, 2017 U.S. LEXIS 6367 (Oct. 24, 2017), in which the United States Court of Appeals for the Ninth Circuit relied on one case in which the Supreme Court considered, and rejected, claims under another section of the INA. J.A. 1029 (citing *Hawaii*, 859 F.3d at 768); *Hawaii*, 859 F.3d at 768 (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187-88 (1993)). But the Supreme Court made no mention of a private right of action in *Sale*, or any other basis for subject matter jurisdiction over the claim the Court rejected, and thus cannot be taken to have set a jurisdictional

precedent. *See Hagans v. Lavine*, 415 U.S. 528, 533 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us") (citing *United States* v. *More*, 3 Cranch 159, 172 (1805); *King Mfg. Co*. v. *Augusta*, 277 U.S. 100, 134-35 n.21 (1928) (Brandeis, J., dissenting)).

Federal courts are courts of limited jurisdiction rather than common law courts free to fashion remedies at will for parties who have suffered statutory wrongs. *See, e.g., City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision."). The need for a private right of action before federal courts may hear statutory claims prevents exactly the kind of free-ranging analysis, not sanctioned by the intent of Congress, that the District Court engaged in here.

B. The Federal Courts Do Not Have Jurisdiction Over Plaintiffs' Statutory Claims Under The APA.

The APA does not provide a private right of action here, or otherwise confer jurisdiction. 5 U.S.C. § 701(a)(2); *Lincoln v. Vigil*, 508 U.S. 182, 190-91 (1993) ("[U]nder § 701(a)(2) agency action is not subject to judicial review to the extent that such action is committed to agency discretion by law . . . . § 701(a)(2) makes it clear that review is not to be had in those rare circumstances where the relevant

statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute (law) can be taken to have committed the decisionmaking to the agency's judgment absolutely.") (internal citations and quotation marks omitted). Here, 8 U.S.C. § 1182(f) gives the president the widest discretion to suspend the entry of classes of aliens "in the national interest." *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498, 1507 (11th Cir. 1992).

Furthermore, the Proclamation is unreviewable under the APA because it is the action of the president. *Dalton v. Specter*, 511 U.S. 462, 468-77 (1994) (holding that decisions of the president's subordinates about military base closings were not reviewable under the APA because the statute in that case conferred decision-making authority on the president, and, because the president is not an agency, the APA does not apply to actions of the president) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 796-01 (1994)). *See id.* at 477 ("Where a statute . . . commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available."). Here, contrary to the District Court's holding that the APA permitted that court to enjoin actions taken pursuant to the Proclamation by agencies, J.A. 1031, the Proclamation is an exercise of power delegated to the president, and thus presidential action, even when it is (as all

presidential actions must be) implemented by subordinates. As the United States District Court for the District of Columbia has explained:

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

Detroit Int'l Bridge Co. v. Gov't of Can., 189 F. Supp. 3d 85, 101-04 (D.D.C. 2016)*; see also, e.g.*, *Tulare Cty. v. Bush*, 185 F. Supp. 2d 18, 28 (D.D.C. 2001) ("A court has subject-matter jurisdiction to review an agency action under the APA only when a final agency action exists. Because the President is not a federal agency within the meaning of the APA, presidential actions are not subject to review pursuant to the APA.") (citing *Dalton*, 511 U.S. at 470) (other internal citations omitted)).

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

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

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

Accordingly, this Court should reverse the decision of the District Court, and hold that it lacked jurisdiction to consider plaintiffs' § 1152(a)(1)(A) claims. And, as shown below, it should also reverse the ruling of the District Court that the Proclamation probably violates the Establishment Clause of the First Amendment to the U.S. Constitution.

II. THE DISTRICT COURT FLOUTED CLEARLY-APPLICABLE PRECEDENT IN REACHING ITS ESTABLISHMENT CLAUSE HOLDING.

The Constitution should not be interpreted to imperil the safety of the United States, or its people, from foreign threats. *See, e.g., Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) ("[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact."). Also, the United States has a right inherent in its sovereignty to defend itself from foreign dangers by controlling the admission of aliens. *United States ex rel. Knauff v. Shaughnessy*,

338 U.S. 537, 542-43 (1950) ("The exclusion of aliens is a fundamental act of sovereignty . . . inherent in [both Congress and] the executive department of the sovereign"). Accordingly, the ability of private litigants to challenge presidential exercises of alien-admission powers on grounds of individual rights protected in the Constitution is sharply limited. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."). Thus, even if exercises of these powers were not non-justiciable political acts, they could receive no higher level of scrutiny from a court than a form of rational-basis review. *See, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972) ("We hold that when the Executive exercises th[e] power [to exclude aliens] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant."). In applying (indeed, misapplying) a much higher level of scrutiny to the Proclamation, the District Court erred egregiously.

The District Court, taking *Mandel*'s holding that courts will not look behind "a facially legitimate and bona fide reason" as authorizing judicial inquiry into whether a proffered reason for an exclusion was given in bad faith, looked behind the proffered reason for the Proclamation at statements President Trump had made as a candidate. J.A. 1055-56. Based on these statements, the court held that the proffered reason was a pretext for the president's actual motivation: to exclude Muslims from this country. J.A. 1056. Then the court looked behind the proffered reason again, at those same campaign statements, and concluded that the Proclamation was primarily motivated by a desire to exclude Muslims, and therefore probably violated the Establishment Clause. J.A. 1056-76.

It is hard to imagine a more thorough evisceration of *Mandel*'s bar on looking behind proffered reasons for exclusion orders, at least when they are challenged under the Establishment Clause. In any given case where there is insufficient evidence of pretext, there also will be insufficient evidence that religion was the primary motive for a challenged decision. Thus, under the District Court's rubric, courts will obey *Mandel*'s injunction not to look behind the proffered reason only when their so refraining will make no difference to the outcome of the case.

If, instead of seizing on the above means of gutting *Mandel*, the District Court had adequately considered the inherent right to sovereignty of the United

States, and the separation of powers found in the structure of the Constitution, it would have found every reason to apply the *Mandel* line of cases straightforwardly — and so (as will be seen) avoid many unfortunate results.

III. THE DISTRICT COURT'S REASONING LEADS TO MANY ABSURD CONSEQUENCES.

The District Court's reasoning has innumerable absurd consequences that show, without question, both how faulty that reasoning is and the wisdom of the contrary case law that the District Court brushed aside. A few of the more notable absurdities that court committed itself to are drawn out as follows:

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

If its own statements are any indication, the Islamic State, also known as ISIS ("the Islamic State of Iraq and Syria") or ISIL ("the Islamic State of Iraq and the Levant"), is as much a religious group as a military force or aspiring state. It has declared its leader a caliph, that is, "a successor of Muhammad as . . . spiritual head of Islam," *Caliph*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/caliph (last visited Nov. 6, 2017), and is dedicated to the forcible conversion of nonbelievers to its distinctive religious faith. *E.g.*, Adam Withnall, *Iraq Crisis: Isis Declares its Territories a New Islamic State with "Restoration of Caliphate" in Middle East,* Independent (June 30, 2014), http://www.indepen dent.co.uk/news/world/middle-east/isis-

declares-new-islamic-state-in-middle-east-with-abu-bakr-al-baghdadi-as-emir-removing-iraq-and-9571374.html (reporting on this declaration); *The Islamic State of Iraq and the Levant*, Wikipedia (June 8, 2017), https://en.wikipedia.org/wiki/Islamic_State_of_Iraq_and_the_Levant ("As caliph, [the leader of ISIL] demands the allegiance of all devout Muslims worldwide . . . ISIL has detailed its goals in its *Dabiq* magazine, saying it will continue to seize land and take over the entire Earth until its: '[b]lessed flag . . . covers all eastern and western extents of the Earth, filling the world with the truth and justice of Islam'").

Many authorities within mainstream Islam have rejected the religious teachings of the Islamic State. *Id.* But even if this group is, properly speaking, not Islamic, and its distinctive beliefs are (at best) a heretical deviation from true Islam, plainly it still is a religious group with a religious leader, and easily qualifies as a religion under the broad definition used for First Amendment purposes. *See, e.g.*, *O'Hair v. Andrus*, 613 F.2d 931, 936 (D.C. Cir. 1979) (refusing to find that a sermon by the pope was less "religious" than a mass; "[s]uch a distinction would involve the government in the task of defining what was religious and what was non-religious speech or activity[,] an impossible task in an age where many and various beliefs meet the constitutional definition of religion.") (footnote omitted); *Torasco v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (listing "religions in this

country," including Secular Humanism, "which do not teach what would generally be considered a belief in the existence of God"); *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 688 n.5 (7th Cir. 1994) (defining religion as "any set of beliefs addressing matters of ultimate concern occupying a place parallel to that filled by God in traditionally religious persons") (citing *Welsh v. United States*, 398 U.S. 333, 340 (1970)) (internal quotation marks and ellipsis omitted); Black's Law Dictionary 1293-94 (7th ed. 1999) ("In construing the protections under the Establishment Clause and the Free Exercise Clause, courts have construed the term *religion* quite broadly to include a wide variety of theistic and nontheistic beliefs.").

Nevertheless, President Trump has not merely expressed animus against the Islamic State, but has vowed to eradicate it. President Donald Trump, Remarks in Joint Address to Congress (Feb. 28, 2017) ("As promised, I directed the Department of Defense to develop a plan to demolish and destroy ISIS . . . . We will work . . . . to extinguish this vile enemy from our planet.").

Islamic (in the true sense) or not, persons who bear allegiance to the caliph of the Islamic State may be residing in this country as citizens or lawful permanent residents; indeed, current events show that this is a high likelihood. Holly Yan and Dakin Andone, *Who is New York terror suspect Sayfullo Saipov*, CNN (Nov. 2, 2017), http://www.cnn.com/2017/11/01/us/sayfullo-saipov-new-york-

attack/index.html. Once President Trump's order to the Department of Defense is complied with, and the president further orders the Department to implement its plan to destroy the Islamic State, these U.S. coreligionists of the Islamic State might have close family members placed in immediate peril by the latter order. They also might feel marginalized by its message of condemnation of the Islamic State. If the District Court's reasoning were correct, these circumstances would be more than enough for them to have standing to challenge that order in court, under the Establishment Clause. *See* J.A. 1026 (holding that plaintiffs had standing because of their feelings of marginalization). Worse, if the District Court were correct, they would probably win their case. If the Proclamation probably violated the Establishment Clause because Donald Trump, during the election campaign, called for a temporary pause in entry to the country by Muslims, as the District Court held, J.A. 1056-76, what would a like-minded court make of President Trump's vow, before a joint session of Congress, to "extinguish" the Islamic State "from our planet"? If calling for a temporary pause in Muslim entry reveals impermissible animus, surely announcing a war of extermination on a particular religious body does so even more. Yet no one believes that a federal court has the power to enjoin our nation's military campaign against the Islamic State.

There is no helpful distinction for the District Court here between the president's war-making power and his power to regulate the admission of aliens.

Both involve the safety of the nation and its people, and the power to fight our enemies abroad would mean little without the power to prevent them from entering the country. *See Harisiades*, 342 U.S. at 588-89 ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power . . . .").[1] But even if the distinction could be made, it would not help the District Court; the proposition that the president could not block the admission of members of the Islamic State into the country without violating the Establishment Clause, in light of the animus revealed by his avowed intention to destroy that religious group, is an equally-absurd result of the District Court's reasoning.

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

[1] Another seeming defense against this *reductio ad absurdum* – namely, that a court would never enjoin a war, because to do so would be giving aid and comfort to the enemy in time of war, and thus, by definition, be treason, U.S. Const. art. III, § 3, cl. 1 — begs the question. A court as averse as the District Court to accepting that presidential determinations in this area are close to unreviewable could easily conclude that treason cannot lie if the underlying war is unconstitutional, as, of course, it would be if it violated the Establishment Clause.

their oaths to uphold the Constitution by prosecuting that war. Yet the District Court's reasoning implies just that.

B.The District Court's Reasoning Pits The First Amendment Against Itself.

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

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis' observation that in our country "public discussion is a political duty," *Whitney v. California*, 274 U.S. 357, 375, 47 S. Ct. 641, 648, 71 L.Ed. 1095 (1927) (concurring opinion), applies with special force to candidates for public office.

Buckley v. Valeo, 424 U.S. 1, 52-53 (1976). *See also Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) ("Speech on matters of public concern is at the heart of the First Amendment's protection. The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited,

robust, and wide-open. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.") (internal citations and quotation marks omitted).

In relying on the campaign statements of President Trump while a candidate, the District Court thus set the Establishment Clause against the Free Speech Clause in the latter's most vital application. Yet both provisions are at the same level in the text of the First Amendment, and, accordingly, the Supreme Court has been at least as solicitous of free speech rights as of rights under the Establishment Clause. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (holding that a public university's refusal to permit the funding of a student religious group on equal terms with other groups was viewpoint discrimination that violated the Free Speech Clause and was not required by the Establishment Clause; "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387, 397 (1993) (holding that a school district violated the Free Speech Clause by denying a group permission to show a film with a religious purpose on school premises); *see also, e.g., Am. Civil Liberties*

Union of Ill. v. City of St. Charles, 794 F.2d 265, 274 (7th Cir. 1986) (recognizing that both clauses stand on equal ground).

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

C. The District Court's Reasoning Implies That What Is Constitutional For One President Is Unconstitutional For Another.

The District Court held that the Proclamation probably violated the Establishment Clause because statements by President Trump as a candidate revealed an impermissible anti-Muslim motivation. It follows that had the exact same proclamation, with exactly the same stated purpose, been issued by President Obama, it would not have violated the Establishment Clause (assuming that President Obama had made no statements the court could construe as revealing animus toward the Muslim religion). This is an absurd result, if only because a

president might have a clear duty to protect the country against a pressing foreign threat, and whether that duty could be performed should not depend on whether the nation had, or did not have, a president who might feel illicit racial or religious animus against that threat, and enjoy his duty too much. *See, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 745 (1982) ("'In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint.'") (quoting *Spalding v. Vilas*, 161 U.S. 483, 498 (1896)); *cf. Spalding*, *supra* ("[P]ersonal motives cannot be imputed to duly authorized official conduct."); *see also Chang v. United States*, 859 F.2d 893, 896 n.3 (Fed. Cir. 1988) (refusing to examine the president's motives for declaring a national emergency during the Libyan crisis); *but cf. Korematsu v. United States*, 323 U.S. 214, 223 (1944) (stating in dicta that the internment of an American citizen of Japanese descent during World War II would have been unconstitutional if motivated by racial prejudice).

This result of the District Court's holding is dangerous in another way, for it gives the impression, at least, that courts are taking political sides. Diminishing

the power of a particular president, as opposed to others, because of his statements in the political arena seems perilously close to diminishing his power because of his politics — of which an onlooker could easily assume the court disapproves. It goes without saying that the appearance of such political partisanship in judging should be avoided in our democracy, since the Constitution gives the federal courts the power to decide "Cases" and "Controversies," and no other power, U.S. Const., art. III, § 2 — certainly not political power. *See, e.g.*, Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L. Rev. 393, 455 (1996) (surveying cases and commenting that, for the Supreme Court, "[j]udicial restraint preserves separation of powers by avoiding interference with the democratic political branches, which alone must determine nearly all public law matters.") (footnotes omitted); *In re V.V.*, 349 S.W.3d 548, 576 (Tex. App. 2010) (Jennings, J., dissenting) ("Judges should decide the cases that come before them based upon the facts in evidence and the governing law, not upon their moral preferences, desires, or the dictates of their emotions. The obvious problem with results-oriented judging is that it . . . guts the rule of law . . . [and] produces bad consequences on a system-wide basis.") (internal quotation marks and footnotes omitted); *cf.* Code of Conduct for United States Judges, Canon 5, 28 U.S.C.S. app. (stating that federal judges should refrain from political activity).

D. The District Court's Reasoning Would Put The United States At The Mercy Of Foreign Threats.

The following absurdity is wholly hypothetical, but nonetheless devastating to the District Court's reasoning. Imagine a religion that, as a fundamental tenet, demanded the sacrifice of children to "the gods" on a regular basis. Suppose this religion, called Molochism,[2] had followers around the world numbering in the billions, but as yet few in the United States. Even though the members of this religion in the United States would be (constitutionally) hampered in its exercise by neutral, generally-applicable laws against murder, *see Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990), they could still advance their religion, and eventually all of its practices, through the courts and through our immigration system — that is, if the tenor of the District Court's reasoning became generally accepted, and domestic civil rights law applied to all immigration restrictions challenged by suitably-affected U.S. plaintiffs. Specifically, if Congress passed a law barring immigration by, say, those who believe they have an obligation to take innocent human life, it is likely that some members of Congress who voted for this ban would have made clear, if only in campaign statements, that it was aimed at Molochians. If U.S.-citizen Molochians felt marginalized by this law, they would

[2] After the ancient fire god to whom children were sacrificed. *Moloch*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/Moloch (last visited Nov. 6, 2017).

have standing to sue, under the District Court's reasoning. And, under that same reasoning, the ban on such immigration would violate the Establishment Clause because it was improperly motivated by anti-Molochian animus.

After the ban on immigration by those who believe they have an obligation to take innocent human life was, accordingly, permanently enjoined, let us suppose that the pace of continued Molochian immigration was very rapid, so rapid that a political uproar resulted, complete with anti-Molochian statements by leading politicians promising to stem the tide. At that point, a court of the District Court's stripe might well conclude that *any* step with the predictable result of lowering Molochian immigration — even bringing *all* immigration to a near-standstill — would only be a transparent pretext for a measure that really pertained to an anti-Molochian establishment of religion. Thus, by court order, actual or merely threatened, the door to heavy overall immigration would remain open, and Molochians could continue to come in. Over time, let us suppose, American Molochians would become so numerous that any ban on their immigration would become politically difficult, even if the courts would uphold one. Still later, suppose that Molochians became politically dominant, in part through sheer force of numbers, and were able to adjust U.S. laws to allow their full religious practices, including the long-deferred one of the sacrifice of children to the gods.

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

To safeguard the vital right of the people of the United States, acting through the political process, to protect themselves and their interests by controlling the admission of aliens, this Court must reject the District Court's holding and its rationale.

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rules of Appellate Procedure 29, 32(a)(5), and 32(a)(7), the foregoing *amicus curiae* brief is proportionally spaced, has a typeface of 14 point Times New Roman, and contains 5,750 words, excluding those sections identified in Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on November 6, 2017, the foregoing *amicus curiae* brief was served on all parties or their counsel of record through the CM/ECF system.

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