No. 17-15589

United States Court of Appeals for the Ninth Circuit

State of Hawaii and Ismail Elshikh,
Plaintiffs-Appellees,

v.

Donald J. Trump, et al.,
Defendants-Appellants.

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

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

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CORPORATE DISCLOSURE STATEMENT

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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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 *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 99 (B.I.A. 2016); and *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 the deeply unfortunate legal consequences of the injunction entered by 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

In finding that plaintiffs-appellees the State of Hawaii and a United States citizen ("plaintiffs") were likely to succeed in their lawsuit, the U.S. District Court for the District of Hawaii ("the District Court") first found that plaintiffs had standing to seek an injunction of President Trump's travel order issued on March 6, 2017 ("the Order"). The District Court found that Hawaii had standing because "its universities will suffer monetary damages and intangible harms" from the Order and "the State's economy is likely to cause a loss of revenue due to a decline in tourism" because of the Order. District Court's Order Converting TRO to Preliminary Injunction, Doc. No. 270 below ("Prel. Inj. Order"), at 10. The District Court found that the U.S.-citizen plaintiff, a Muslim, had standing because he claimed to be "deeply saddened . . . . by the message [the Order] convey[s] – that a broad travel ban is 'needed' to prevent people from certain Muslim countries from entering the United States," and because he believed that the Order would harm the ability of members of his mosque to associate freely with those of other faiths. Prel. Inj. Order at 10-11. The District Court then relied on President Trump's statements as a candidate for president in finding that the Order was impermissibly motivated by what the court deemed the president's anti-Muslim animus. Prel. Inj. Order at 15; Order Granting TRO, Doc. No. 219 below ("TRO Order"), at 30-37. On the basis of this supposed motivation, the District Court

concluded that the Order likely violated the Establishment Clause, and converted a nationwide temporary restraining order against key provisions of it into a preliminary injunction. Prel. Inj. Order at 20, 23.

In so ruling, the District Court defied a large body of 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, entails a train of striking absurdities that unmistakably shows the wisdom of these same precedents.

I. 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 Order, the District Court made a drastic error of law and woefully abused its discretion.

The District Court did not even attempt to distinguish *Mandel* on the (unconvincing) ground that it concerned only the Free Speech Clause, as opposed to the Establishment Clause, of the First Amendment. (Had it done so, it would have been hard-pressed to explain why the claimed loss of rights under the latter

clause triggers a higher level of scrutiny than the claimed loss of rights under the former, despite the equal prominence given to the two provisions textually.) Instead, the District Court, citing a panel of this Court in *Washington v. Trump*, 847 F.3d 1151, 1162, 1167-68 (9th Cir. 2017), held that *Mandel* does not apply to protect the president's discretion when he exercises it most fully, that is, when he issues "sweeping" policies on the admission of aliens. Prel. Inj. Order at 15-16. As the government shows in its opening brief, this interpretation of *Mandel* rests on a misreading of this Court's holding in *Washington*. Government's Opening Brief, Doc. 23 ("Gov't Op. Br."), at 39-42. As the government also shows, the District Court's interpretation is foreclosed by post-*Mandel* Supreme Court precedent, Gov't Op. Br. at 34 (citing *Fiallo v. Bell*, 430 U.S. 787, 794-95 (1977) (applying *Mandel* to uphold an immigration statute passed by Congress)), and also precedent of this Court, Gov't Op. Br. at 34-35 (citing *Taniguchi v. Schultz*, 303 F.3d 950, 957-58 (9th Cir. 2003) (same)).

If, instead of misreading *Washington*, 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.

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

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

1. *Private litigants could enjoin President Trump's war against the Islamic State.*

If its own statements are any indication, the Islamic State, also known as ISIS ("the Islamic State of Iraq and Syria") or ISIL ("the Islamic State of Iraq and the Levant"), is as much a religious group as a military force or aspiring state. It has declared its leader a caliph, that is, "a successor of Muhammad as . . . . spiritual head of Islam," Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/caliph, and is dedicated to the forcible conversion of nonbelievers to its distinctive religious faith. *E.g.*, Adam Withnall, *Iraq Crisis: Isis Declares its Territories a New Islamic State with "Restoration of Caliphate" in Middle East*, Independent, June 30, 2014, *available at* http://www.independent.co.uk/news/world/middle-east/isis-declares-new-islamic-state-in-middle-east-with-abu-bakr-al-baghdadi-as-emir-removing-iraq-and-9571374.html (reporting on this declaration); Wikipedia, *The Islamic State of Iraq and the Levant*, https://en.wikipedia.org/wiki/Islamic_State_of_ Iraq_and_the_Levant ("As caliph, [the

leader of ISIL] demands the allegiance of all devout Muslims worldwide . . . . ISIL has detailed its goals in its *Dabiq* magazine, saying it will continue to seize land and take over the entire Earth until its: '[b]lessed flag . . . . covers all eastern and western extents of the Earth, filling the world with the truth and justice of Islam'").

Many authorities within mainstream Islam have rejected the religious teachings of the Islamic State. *Id.* But even if this group is, properly speaking, not Islamic, and its distinctive beliefs are (at best) a heretical deviation from true Islam, plainly it still is a religious group with a religious leader, and easily qualifies as a religion under the broad definition used for First Amendment purposes. *See, e.g., O'Hair v. Andrus,* 613 F.2d 931, 936 (D.C. Cir. 1979) (refusing to find that a sermon by the pope was less "religious" than a mass; "[s]uch a distinction would involve the government in the task of defining what was religious and what was non-religious speech or activity[,] an impossible task in an age where many and various beliefs meet the constitutional definition of religion.") (footnote omitted); *Torasco v. Watkins,* 367 U.S. 488, 495 n.11 (1961) (listing "religions in this country," including Secular Humanism, "which do not teach what would generally be considered a belief in the existence of God"); *Fleischfresser v. Directors of Sch. Dist. 200,* 15 F.3d 680, 688 n.5 (7th Cir. 1994) (defining religion as "any set of beliefs addressing matters of ultimate concern occupying a place parallel to that filled by God in traditionally religious persons") (citing *Welsh v. United States,*

398 U.S. 333, 340 (1970)) (internal quotation marks and ellipsis omitted); Black's Law Dictionary 1293-94 (7th ed. 1999) ("In construing the protections under the Establishment Clause and the Free Exercise Clause, courts have construed the term *religion* quite broadly to include a wide variety of theistic and nontheistic beliefs.").

Nevertheless, President Trump has vowed not only to attack the Islamic State, but to eradicate it. President Donald Trump, Remarks in Joint Address to Congress (Feb. 28, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/02/28/remarks-president-trump-joint-address-congress ("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. 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 coreligionists of the Islamic State might have close family members placed in immediate peril by the latter order. They also might feel "deeply saddened" by it, and be worried that it would lessen their ability to associate with those of other faiths. 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. Worse, if the District Court were correct, they would probably win their case. If the Order in this case 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, TRO Order at 30-37, 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 district 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 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies

in regard to the conduct of foreign relations [and] the war power . . . .").[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.

In short, if the District Court's reasoning in this case were correct, private litigants could have standing to seek an injunction on President Trump's war on the Islamic State, and federal district courts, at their behest, would have to enjoin that war. Since there is no such standing and no such necessity (at least in combination), the District Court's reasoning was drastically incorrect.

2. *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

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[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.

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.

3. *The District Court's reasoning implies that what is constitutional for one president is unconstitutional for another.*

The District Court held that President Trump's Order probably violated the Establishment Clause because statements by him revealed an impermissible anti-Muslim motivation. It follows that had the exact same Order, with exactly the same stated purpose, been issued by President Obama, it would not have violated the Establishment Clause (assuming that President Obama had made no statements the court could construe as revealing animus toward the Muslim religion). This is an absurd result. For example, if some pressing foreign threat appeared, giving rise to an urgent presidential duty to oppose it, the danger should not go unmet if the country happened to have a president who harbored illicit racial or religious animus toward that threat, and would 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 see 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 even 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 modern 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. Houston 1st Dist. 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).

4. *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

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

billions, but as yet few in the United States. Even though the members of this religion in the U.S. would be (constitutionally) hampered in its exercise by neutral, generally-applicable laws against murder, *see Employment Div. v. Smith*, 494 U.S. 872, 879 (1990), they could still advance their religion, and eventually all of its practices, through the courts and through our immigration system – that is, if the tenor of 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 "deeply saddened" by this law, and feared it would lessen their ability to associate with those of other faiths, they would 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 dire and extravagant 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.

CONCLUSION

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

DATED: April 21, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 21, 2017. I certify that participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Christopher J. Hajec
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Circuit Rule 32-1 because it contains 4,127 words according to the word count feature of Microsoft Word, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Christopher J. Hajec
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