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

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 17-2331 (L)
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, et al.
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, et al.
Defendants-Appellants

On Appeal from the United States District Court
For the District of Maryland
(Hon. Theodore D. Chuang, United States District Judge)
[Caption Continues on Inside Cover]

BRIEF OF *AMICUS CURIAE*, THE AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE IN SUPPORT OF PLAINTIFFS-APPELLEES

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NO. 17-2232
IRANIAN ALLIANCES ACROSS BORDERS, et al.
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, et al.
Defendants-Appellants

On Appeal from the United States District Court
For the District of Maryland
(Hon. Theodore D. Chuang, United States District Judge)
(8:17-cv-020921-TDC)

NO. 17-2233
EBLAL ZAKZOK, et al.
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, et al.
Defendants-Appellants

On Appeal from the United States District Court
For the District of Maryland
(Hon. Theodore D. Chuang, United States District Judge)
(1:17-cv-2969-TDC)

NO. 17-2240
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, et al.
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, et al.
Defendants-Appellants

On Appeal from the United States District Court
For the District of Maryland
(Hon. Theodore D. Chuang, United States District Judge)
(8:17-cv-361-TDC)

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INTEREST OF AMICUS CURIAE

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, it 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 and civil rights.[1]

Presidential Proclamation 9645 places a significant and undeserved burden on ADC and its members. It indefinitely bans from entry into the United States immigrants who are nationals of six Muslim-majority nations: Iran, Libya, Somalia, Syria, Yemen, and Chad. Proclamation 9645 also significantly limits or bans the entry of

[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.

non-immigrants who are nationals of these six nations. JA 624; *see also* 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). Four of these nations are majority-Arab,[2] and the other two have significant Arab minority populations.[3] Proclamation 9645 also affects nationals of two non-Muslim-majority nations: all nationals of North Korea and certain specific individuals who are Venezuelan nationals. JA 624. However, the overwhelming majority of individuals harmed by Proclamation 9645 are nationals of Muslim-majority nations, as was the case with the Presidents' earlier efforts to prevent Muslims and Arabs from entering into the United States.[4]

ADC has worked with thousands of close friends and family of ADC members located in the United States affected by the ban. By way of example, A.A. is a Yemeni citizen who trained as an engineer; his sister and brother-in-law are lawful permanent residents of the U.S.

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[2] Libya, Somalia, Syria, and Yemen.
[3] Iran and Chad.
[4] Proclamation 9645 follows two executive orders that exclusively banned entry by nationals of certain majority-Muslim nations. Executive Order 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017) ("January Order"); Executive Order 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) ("March Order").

Unable to secure work due to ongoing armed conflict in Yemen, A.A. studied English. He applied and was selected for a diversity visa interview. After his interview, a consular official informed A.A. that, due to a predecessor travel ban that, *see infra* 6-8, A.A. must prove a bona fide, close familial relationship with a U.S. citizen or green card holder before receiving his visa. A.A. quickly provided this information, but the delay meant that all 50,000 diversity visas that could be issued in 2017 had already been allotted before his application was processed. A.A. is currently in limbo; his family in the United States lives in fear for his safety and feel that they, too, are unwelcome in the U.S. because, like A.A., they are Muslim Yemeni nationals. If Proclamation 9645 is implemented, A.A. may remain perpetually in limbo.

Similarly, Q.A. is a Muslim Yemeni national whose daughter is a lawful permanent resident of the United States. He also "won" eligibility for a diversity visa in the lottery. The visa would have enabled him, his wife, and his four other children to enter the United States. Q.A. faced similar administrative delays associated with having to prove his bona fide connection to the United States; as a result, he could not get his visa processed before all of the 2017 diversity visas

had already been issued, despite quickly providing information regarding his bona fide ties. Q.A.'s daughter remains in the United States without the familial, religious, and economic support of her parents and siblings.

Moreover, Proclamation 9645 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 harms Muslim American Arabs. But it also harms American Arabs who are not Muslim. Americans frequently conflate Arabic ethnicity with belief in Islam, despite the fact that most Muslims are not Arab.[5] Accordingly, Arab-Americans, regardless of faith, suffer from the effects of a government-sanctioned message that Muslims are threatening and un-American. ADC therefore urges the Court to uphold the portions of the district court's decision that granted relief to appellees, and to overturn the district court's conclusion that plaintiffs are not

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[5] *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), https://www.whitehouse.gov/the-press-office/2017/05/21/president-trumps-speech-arab-islamic-american-summit (describing as a single category "Arab, Muslim and Middle Eastern nations").

substantially likely to succeed in their claim that Proclamation 9645 exceeds the President's statutory authority under 8 U.S.C. § 1182(f).

INTRODUCTION AND SUMMARY OF ARGUMENT

Presidential motive matters here. It may not always (or even often) matter when the President bars a given category of individuals from entering the United States. But the specific history behind Proclamation 9645 and the discriminatory manner in which it operates require the Court to examine whether the President is telling the truth about why he adopted the Proclamation, or if his purported national security rationale shelters the primary motive: disadvantaging belief in Islam.

Various courts, including this one, have already concluded that the two Executive Orders, on which the President based Proclamation 9645, were specifically designed to keep Muslims out of America based largely on extraordinary statements where President Trump declared his intent to discriminate against Muslims in the immigration context. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir.), *vacated and remanded*, No. 16-1436, 2017 WL 4518553 (U.S. 2017). In describing his plans for future immigration policy, 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." JA 135. He made his animus for Muslims inside and outside of the U.S. clear, stating in public interviews that "Islam hates us [and] . . . we can't allow people coming into the country who have this hatred," and, "[W]e're having problems with the Muslims, and we're having problems with Muslims coming into the country." JA 305-306, 311.

Almost immediately after taking office, President Trump signed a first Executive Order, which both imposed a temporary travel ban and set the criteria officials should examine when designing a permanent travel ban, without consulting any government national security experts. *See* JA 173. With a wink and a nod, he made clear that the first Executive Order made good on his promise of a Muslim ban even though the ban applied to immigration from majority-Muslim *countries*. JA 192 ("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 Executive Order's provisions ensuring that non-Muslims from the affected countries would be given preferential treatment. *See* January Order § 5. The Executive

Order directed the Secretary of Homeland Security, in consultation with additional government officials, to conduct a worldwide review of whether foreign governments could provide additional information that would suffice for the U.S. to determine an applicant is not a security threat and (if so) what additional information was needed for each country. January Order § 2(a). After giving each country the opportunity to provide any necessary and sufficient additional information, the Secretary was to recommend a list of countries whose nationals should be included in a permanent travel ban. *Id.* § 2(e).

After the first Executive Order was invalidated, President Trump enacted a revised Muslim ban designed to evade judicial scrutiny. *See* JA 778-779. Like the January Executive Order, the March Executive Order required the Secretary of Homeland Security to engage in an analysis that would evaluate countries' citizens for inclusion in a future, permanent travel ban. March Order § 2.

After this Court (and others) found the second Executive Order to likely be unlawful, the President enacted the Proclamation now under review. The face of the Proclamation claims that it is designed to "protect the security and interests of the United States and its people"

and that it neutrally affects nationals of countries that "remain deficient . . . with respect to their identity-management and information-sharing capabilities, protocols, and practices." JA 620. But Proclamation 9645 is more of the same: Presidential action that is designed to keep Muslims out of the United States because of their faith, despite being facially neutral toward religion. It indefinitely bans from entry into the United States immigrants who are nationals of six Muslim-majority nations (all but one of which had been covered by the earlier Executive Orders) and indefinitely limits non-immigrant entry by nationals of these countries—impacting tens of thousands of individuals from these nations on the theory that Muslims are dangerous. JA 624-626. While on its face the Proclamation also affects nationals of two non-Muslim-majority nations, Venezuela and North Korea, *id.*, in practice, it excludes only a handful of individuals from those nations. *See* JA 1066. All the while, the President has continued to demonstrate that he personally has animus against Muslims, *see* JA 644, 1073-1074. The government has refused to disclose whether Proclamation 9645 is materially inconsistent with the advice he received from his advisors. JA 952-953.

The government urges the Court to look away, contending that, under the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(f), the Court must take the President at his word that his primary motivation in enacting Proclamation 9645 was national security—and that the Court must decline to take the President at his earlier word that he intended to impose a travel ban on Muslims. *See* Appellants' Br. at 29-32, 40-43. Not so.

As the district court properly held, the Establishment Clause enables courts to examine the President's motives because appellees had "plausibly alleged" that the President's national security rationale was "not bona fide." JA 1056. It applied an analysis of the President's motive grounded in Establishment Clause jurisprudence, and it concluded appellees were likely to show that Proclamation 9645 was unconstitutional because it was primarily motivated by religious animus.

However, the district court did not fully analyze the interplay between primary presidential motive and the extent of the President's power in the statutory context. The district court held that § 1182(f) authorized the President to adopt Proclamation 9645, and that

Congress had not provided "any clear limit on the President's authority under § 1182(f) that this proclamation has crossed." JA 1051. But promulgating a proclamation based on religious animus would exceed the limit Congress placed on the President's § 1182(f) authority in adopting the Religious Freedom Restoration Act (RFRA).

When adopting RFRA, Congress revoked any prior authority the President may have had under § 1182(f) to take any action that "substantially burden[s] a person's exercise of religion even if the burden results from a rule of general applicability," unless he 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. A showing of animus provides clear-cut evidence that the Proclamation, 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. Thus, RFRA requires the Court to examine whether the Presidents' purported justification for Proclamation 9645 conceals unlawful animus against Muslims.

In engaging in this statutory pretext analysis—or, for that matter,

a pretext analysis under the Establishment Clause—the Court can reply on well-developed frameworks for unmasking unlawful discrimination underlying facially reasonable justifications. These frameworks, developed in cases involving jury selection, employment discrimination, and the free exercise of religion, confirm the district court's conclusion that the President's primary motivation in promulgating Proclamation 9645 was animus toward Muslims—making the Proclamation subject to strict scrutiny under both RFRA and the Establishment Clause.

Looking at motive here does not prevent executive action under § 1182(f) that is primarily aimed at advancing national security interests, because such interests are indeed compelling. It surely must be the unusual case where executive action addressing national security interests is the product of religious animus and is not narrowly tailored to advance a compelling government interest. But the Court is presented with such an unusual case here.

ARGUMENT

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

The district court properly concluded that (1) the President may

not use § 1182(f) in a manner that violates the Establishment Clause and (2) courts, in Establishment Clause cases, have the power to find the President acted with a primary purpose of religious animus upon an affirmative showing of bad faith. However, the district court did not consider that the same holds true as a matter of *statutory* analysis. Section 1182(f) provides an alternative reason for affirming the district court's ruling that is supported by the record.

The government contends that § 1182(f) authorized the President to promulgate Proclamation 9645. That section provides:

> 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). While this provision is facially quite broad, Congress mandated that it be read in harmony with RFRA. RFRA makes clear that the President has no power to use § 1182(f) in a way that substantially burdens belief in Islam, unless his action represents the least restrictive means of furthering some compelling governmental

interest.[6] Substantial burden can be presumed if the President was substantially motivated by religious animus when invoking § 1182(f). Congress intended RFRA to apply with equal force to the President's power in the immigration arena. As such, this Court must examine whether the President was substantially motivated by religious animus when he adopted the Proclamation pursuant to 1182(f).

A. RFRA limits the scope of the President's § 1182(f) power.

RFRA limits the federal government's ability to "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1. Such action, even if supported by statute and facially religion-neutral, 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."

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[6] The IRAP appellees' complaint includes a claim based on RFRA's independent cause of action. JA 539. The district court did not evaluate whether the IRAP appellees were likely to succeed on the merits of their RFRA claim. If the Court determines that appellees 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 decision below, or remand with instructions to consider the issue.

RFRA limits *all* federal statutes that were passed before its effective date; it prevents *any* government official from interpreting a statute or engaging in statutorily authorized action that could substantially burden religion, unless the action or interpretation can survives strict scrutiny. 42 U.S.C. § 2000bb-3. In other words, to the extent that § 1182(f) could be construed to impose a substantial burden on the exercise of religion in a manner that did not pass strict scrutiny, that construction is invalid.

Importantly, RFRA does not contain an exception for the immigration or national security arenas, or for the President; it "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." *Id.* 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 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). Thus, Proclamation 9645 exceeds the President's § 1182(f) authority if it

imposes a substantial burden on the exercise of religion in a manner that fails strict scrutiny.

B. The Court must examine presidential motive to determine whether Proclamation 9645 substantially burdens appellees' belief in Islam.

The district court examined the religious liberty implications of Proclamation 9645 only under the Establishment Clause. But if appellees successfully show that the Proclamation was motivated by animus against Muslims, the Proclamation would be subject to strict scrutiny under *both* the Establishment Clause and 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 Proclamation due to religious animus is highly relevant to whether the Proclamation 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" violates the

Establishment Clause). Accordingly, ADC echoes the district court's conclusion that the Establishment Clause prevents the President from exercising § 1182(f) with the aim of disfavoring Islam.

But favoring belief in one religion over another also implicates protections for the free exercise of religion. Holding a religious belief is a form of religious exercise and an extraordinarily protected form at that. *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such."); *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 any additional action). Government may not "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities." *Sherbert*, 374 U.S. at 402; *see also* 42 U.S.C. § 2000bb (incorporating the *Sherbert* standard into RFRA). This is because government action adopted to discriminate against religious beliefs, 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*, *Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436, 16-1540 (U.S. 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 Rotunda & John E. Nowak, 6 *Treatise on Constitutional Law-Substance & Procedure* § 21.1(a) (5th ed. 2017).

Because *Sherbert* and its progeny require courts to apply strict scrutiny to government action animated by animus a particular religious belief, 374 U.S. at 402, so too does RFRA. This approach is a product of history and of statute: In *Employment Division v. Smith*, 494 U.S. 872, 883-90 (1990), the Supreme Court substantially limited the application of *Sherbert*, holding that the Free Exercise Clause did not subject most 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 by specific reference. 42 U.S.C. § 2000bb. Thus, the Supreme Court has used the *Sherbert* line of Free Exercise Clause jurisprudence to determine whether government action substantially

burdens the exercise of religion within the meaning of RFRA. *Hobby Lobby*, 134 S. Ct. at 2770.

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 Proclamation 9645 was adopted to discriminate against Muslims, appellees need to show little more (if anything) to demonstrate Proclamation 9645 imposes a substantial burden on them. Appellees are likely to make such a showing. Multiple organizational appellees allege that their members "will remain in limbo as to whether they will ever be reunited" with family members who could not enter the U.S. due to the Proclamation. JA 521; *accord* JA 517. Another organizational appellee represents students who, under the Proclamation, "lose their ability to visit family and friends abroad with an assurance they will be permitted to reenter," including for religious and secular holidays. JA 524. Yet another has members who, since the issuance of the President's first travel ban, "have been subjected to harassment by law enforcement agencies conducting new security checks" and "been detained at airports, or rejected from flights multiple times even though they are

presenting valid visas." JA 517. Individual appellees also allege significant burdens, including being accosted by a customer or experiencing differential treatment when wearing a headscarf due to the travel ban. JA 537-538. If proven, these allegations would surely suffice to demonstrate that appellees are substantially burdened because they believe in (or are an organization serving individuals that believe in) Islam.

Kleindienst v. Mandel, 408 U.S. 753, 769-70 (1972), does not alter this conclusion. The government contends that *Mandel* precludes the Court from "looking behind" the rationale put forth in the text of Proclamation 9645. Appellants' Br. 40. 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 § 1182(f) and was decided before RFRA was enacted.

[7] It does not. As this Court previously held, *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." *IRAP*, 857 F.3d at 590-91.

II. RELIGIOUS ANIMUS SUBSTANTIALLY MOTIVATED PROCLAMATION 9645.

As courts have long recognized, discriminatory actions are often sheltered behind or intertwined with facially legal reasoning. Accordingly, courts have developed robust tools for determining whether a party's stated reason for acting masks 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 cannot help but raise the specter of religious animus (and where RFRA narrows the deference ordinarily owed to the President in the immigration and national security arenas), those tools can aid the Court in evaluating whether the Proclamation is unlawful, despite the government's assertions that it was adopted solely to promote national security.

A. Well-developed tools can guide the Court in this case.

1. *Jury Selection.*

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* framework. 476 U.S. 79, 96 (1986). In a *Batson* challenge, the defendant

must first produce evidence that gives rise to an inference of discrimination. *Id.* at 97. 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. The court then 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). In mixed motive cases—cases where a strike "has been exercised in part for a discriminatory purpose" and in part for a non-discriminatory purpose—a strike survives *Batson* step three only if the prosecutor persuasively demonstrates that "the strike would have nevertheless been exercised even if an improper factor had not motivated in part the decision to strike." *Jones v. Plaster*, 57 F.3d 417, 420-21 (4th Cir. 1995). While a *Batson* analysis is deferential to the government, it "is not toothless in the face of . . . blatant" discrimination. *Kesser v. Cambra*, 465 F.3d 351, 358 (9th Cir. 2006).

2. *Employment Discrimination.*

Allegations brought under employment discrimination statutes often include a pretext inquiry even in mixed-motive cases, where an

employer allegedly engaged in adverse employment action "where both legitimate and illegitimate reasons motivated the decision." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93 (2003). To succeed in such mixed-motive cases where pretext is alleged, the plaintiff must show that discrimination "was a substantial motivating factor" in the employer's decision to engage in adverse action. *Mereish v. Walker*, 359 F.3d 330, 339 (4th Cir. 2004). Proof that "would have taken the same action even absent" discriminatory intent serves as an affirmative defense. *Id.*

3. *Free Exercise Clause.*

The Supreme 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 Supreme 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 ordinance suggested discrimination on the basis of religious belief, the Supreme Court engaged in an independent analysis of whether the ordinance was adopted for a religiously neutral purpose. *Id.*

B. Religious animus impermissibly motivated Proclamation 9645.

In ferreting out discrimination in these areas, a few categories of evidence are especially probative of pretext. Courts have been particularly alert to:

(1) unexplained differences between the treatment of members of different groups;

(2) a lack of fit between the stated reasons for an action and that action's results; and

(3) an atmosphere of discrimination, based on past statements or actions.

Looking to those forms of evidence here, the inevitable conclusion is that animus towards Muslims substantially motivated Proclamation 9645.

1. *Comparisons.*

Courts compare individuals or groups subject to a challenged action to those not affected in order to assess whether an unlawful motive hides behind a facially valid one. 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

536-37. In employment discrimination cases, such comparisons are "especially relevant" to a finding of pretext. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973). 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." *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005); *see also Foster v. Chatman,* 136 S. Ct. 1737, 1750 (2016) (finding certain explanations "difficult to credit because the State willingly accepted white jurors with the same traits that supposedly rendered Garrett an unattractive juror").

Put simply, 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 plausible explanation is offered for that disparate application, the inference of discrimination becomes stronger still. *Cockrell*, 537 U.S. at 345; *see also Purkett v. Elem*, 514 U.S. 765, 768 (1995) (characterizing "implausible or fantastic justifications" as "pretexts for purposeful discrimination").

The stated rationale for Proclamation 9645—alleviating the risk

that a foreign government's vetting procedures will fail to identify a dangerous individual, JA 624—has quite clearly been applied disparately, in a way that is nearly impossible to explain without reference to religion. Most of the nations covered by Proclamation 9645 are majority-Muslim. But more importantly for a religious discrimination analysis, *Lukumi*, 508 U.S. at 536-37, almost all of the *individuals* whose entry into the United States is affected are nationals of majority-Muslim nations.[8] The Proclamation affects roughly 65,000 nationals of majority-Muslim nations—every single national of six nations who seeks entry to the United States. *See* JA 866 (estimating number of affected individuals). Less than a hundred nationals of non-majority-Muslim nations are likely effected. *See id.* (estimating 61 affected individuals for North Korea and a small handful of specific individuals from Venezuela). In other words, an estimated 99.9% of individuals affected by the ban will be nationals of Muslim-majority nations.

This gross disparity might conceivably be justified if only

[8] There are various ways to estimate the number of affected individuals, but all show that almost everyone affected is the national of a Muslim-majority nation. *See* First Cross-Appeal Br. for Appellees at 7.

governments of Muslim-majority countries had security and information-sharing problems. Or if entry from all non-Muslim-majority countries with security and information-sharing problems were rare. The Proclamation's treatment of Venezuelan nationals, however, shows that neither of these scenarios exists.

A large and growing number of Venezuelan nationals seek to enter the United States. *See* Christopher Woody, *The Tipping Point: More And More Venezuelans Are Uprooting Their Lives To Escape Their Country's Crises*, Business Insider (Dec. 2, 2016). The President concluded that "Venezuela's government fails to share public-safety and terrorism-related information adequately, fails to satisfy at least one key risk criterion, and has been assessed to be not fully cooperative with respect to receiving its nationals subject to final orders of removal from the United States." JA 625. Nonetheless, unlike similarly situated majority-Muslim nations, the Proclamation restricts entry only by "officials of government agencies of Venezuela involved in screening and vetting procedures" rather than all Venezuelan nationals. *Id.*

The Proclamation attempts to dismiss this disparity, stating "[t]here are . . . alternative sources for obtaining information to verify

the citizenship and identity of nationals from Venezuela." *Id.* This leaves entirely unaddressed the Proclamation's own conclusions that Venezuela fails to satisfy at least one key risk criterion (i.e., that terrorist groups are active within Venezuela, *see* JA 1296) and does not cooperate with taking back Venezuelans who have been deported from the U.S. The President used these same factors to justify restricting entry by *any* citizen from Chad and Somalia. *See* JA 624, 626.

Comparing the Proclamation's treatment of Somalia to non-majority-Muslim nations is also telling. Somalia met the information-sharing requirements that the government applied to every other nation. JA 626. Nonetheless, the President deemed Somalia—and no other country—to present such a risk to national security that all Somalian nationals should face severe restrictions on entry into the U.S. *Id.* The government provides no evidence that it engaged in the same type of analysis with respect to non-majority-Muslim nations that met the government's information-sharing requirements. The government's religion-neutral explanation for imposing a burden on a large group of individuals, 99.9% of whom come from Muslim-majority nations, simply does not add up.

2. *Lack of Fit.*

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. 405, 425 (1975) (explaining that evidence that an employment policy's goal could be accomplished without an "undesirable racial effect" demonstrates pretext); *Dretke*, 545 U.S. at 260 (examining the "fit" between prosecutors' stated reason for striking jurors and the actual impact on the jury pool). If a more efficient method exists to accomplish a stated goal, the natural question to ask is why someone chose 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.

Restricting all nationals of six majority-Muslim nations and North Korea is not an effective way to combat terrorism. A Department of Homeland Security draft report, prepared about two weeks before the President's second Executive Order took effect, concluded that citizenship "is unlikely to be a reliable indicator of potential terrorist activity." JA 898. Indeed, the biggest nationality-based predictor of

someone committing a terrorist act on U.S. soil is *American* citizenship. *Id.* Yet the President directed the Department of Homeland Security to focus on citizenship when recommending which countries should be included in a permanent travel ban—recommendations that laid the basis for Proclamation 9645.

The point is not that the Proclamation constitutes bad policy or relies on questionable national security judgments. Rather, this evidence makes clear that the Proclamation's means do not match 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 dramatically from clear facts, this Court often draws the obvious inference that the stated explanation is not really the main 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 the Proclamation does a poor job of preventing terrorist attacks on U.S. soil, it makes significant strides toward fulfilling a campaign promise to curtail the entry of Muslims into the United States.

3. *Atmosphere of Discrimination.*

An atmosphere of discrimination also provides evidence of pretext. *See, e.g.*, *Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989), *abrogated on other statutory grounds* ("[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."); *Lukumi*, 508 U.S. at 539 (looking to the timing and circumstances surrounding an ordinance's passage when evaluating its constitutionality); *Cockrell*, 537 U.S. at 346-47 (explaining "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). Repeated invidious statements by the President and his advisors evince just the sort of culture suffused with bias that warrants skepticism toward alleged explanations. Most prominently, for a long period of time during his presidential campaign, President Trump explicitly called for "a total and complete shutdown of Muslims entering

the United States until our country's representatives can figure out what is going on." JA 135. But President Trump did not back down from these positions after Election Day. The text of the January Executive Order echoed language about presumed hate and anti-American attitudes among Muslims that he had used in his original calls for a ban, alluding to stereotypes particularly commonly applied to Arab Muslims:

> 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 Order § 10. 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." JA 192. The clear implication is that the Order furthered President Trump's longstanding promise to implement a "shutdown of Muslims entering the United States." JA 257.

President Trump has never disavowed his earlier anti- Muslim sentiments. To the contrary, President Trump reiterated his intent to "keep my campaign promises" despite negative judicial decisions regarding the legality of his first Executive Order. JA 141. Senior Policy Advisor to the President Stephen Miller, in discussing plans for a second Executive Order, explained that it would produce the "same basic policy outcome for the country," with "mostly minor technical differences." JA 756. Then-Press Secretary Sean Spicer concurred, saying, "The principles of the Executive Order remain the same." JA 168. 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." JA 779.

The President's discriminatory statements continued through shortly before he signed Proclamation 9645. While awaiting recommendations from his advisors, the President promised that his final travel ban, now embodied in Proclamation 9645, would impose a "much tougher version" of his earlier travel bans. JA 664. On August 17, 2017, President Trump tweeted, "Study what General Pershing of the United States did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!" JA 509. As appellees explain:

> This statement refers to the apocryphal story of General Pershing executing 49 out of 50 terrorists with bullets dipped in pigs' blood, leaving the fiftieth person alive to tell the tale. While this is not the first time President Trump has referred to this story, it has been routinely debunked by historians and the press.

Id.

These statements provide strong evidence that religion "was on [President Trump's] mind[] when [he] considered" the Proclamation. *Dretke*, 545 U.S. at 266. This case presents the sort of atmosphere of discrimination that "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 focused on the threat of "hatred and danger" from Muslims, the reasons proffered for implementing Proclamation 9645 were, at the very most, secondary to religious animus.

III. THE PROCLAMATION CANNOT SURVIVE STRICT SCRUTINY.

Because Proclamation 9645 imposes a substantial burden on belief in Islam, the President only has authority to promulgate it under § 1182(f) if the Proclamation sets forth the least restrictive means of furthering the government's indisputably compelling interest in national security. Under this "more robust standard of review,"

appellees' § 1182(f) argument must "carry the day." JA 1043. As the district court concluded, the government has "not shown that national security cannot be maintained without an unprecedented eight-country travel ban." JA 1078.

The government is also unlikely to show that the Proclamation 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 Islam. Although national security is a compelling interest, the Proclamation is not narrowly tailored to meet it; instead, focusing on entrants' nationality is at best a crude and ineffective proxy for the security risks they present. *See supra* Part II(B)(2). Therefore, the Proclamation cannot survive the scrutiny required by the Establishment Clause and § 1182(f) as limited by RFRA.

CONCLUSION

We respectfully request that the Court grant appellees' cross-appeal and deny appellants' cross-appeal.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 17-2231 **Caption:** IRAP et al. v. Trump et al.

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