No. 16-1436

In The
Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE DECALOGUE SOCIETY OF LAWYERS

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INTEREST OF THE AMICUS[1]

The Decalogue Society was founded in 1934. It is the oldest continually functioning Jewish bar association in the United States. Decalogue maintains a broad range of programs to benefit its members, the Jewish community, the legal community, and the general public. Most Decalogue members practice in Illinois, but the membership includes lawyers located throughout the United States and in Israel and other countries. Decalogue believes that its members, through their membership and involvement in the organization's activities, seek to combine those attributes of our lives unique to being both attorneys and Jews. There are many methods for members to express and develop as attorneys and Jews separately, but Decalogue serves as a crucial and unique forum to combine those aspects in the activities, potential and strength of a bar association.

The goals and mission of the Decalogue Society of Lawyers include:

1. Acting to address special problems and opportunities available to its members as attorneys and Jews to enhance the goals of its members;

[1] No counsel for any party authored this brief in whole or in part. No person or entity other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have provided written consent to the filing of this brief.

2. Devoting itself to special problems or opportunities, the solving or addressing of which will benefit our constituencies and bring increased dignity and honor to all members of the legal profession and appreciation for the inspiration provided by our Jewish heritage;

3. Fostering the traditions and ideals of American democracy;

4. Maintaining vigilance against public and private practices which are anti-social, discriminatory, anti-Semitic or oppressive and join with other groups and minorities to protect legal rights and privileges;

5. Raising the standards of the bar and the bench and educate the public to better understand and appreciate the function and status of the lawyer and judge in free society;

6. Fostering friendly relations, networking and goodwill among our members, and between our members and other attorneys, bar associations, the courts, and the public;

7. Helping to resolve legal controversies particular to the Jewish community;

8. Actively participating in social action, rendering useful community service and cooperating as lawyers, citizens and Jews in worthy movements for the public welfare;

9. Advancing and improving the law, administration of justice and legal profession and cooperate with other bar associations to attain those objectives; and

10. Promoting human rights.

As a bar association concerned with, and organized to combat, anti-Semitism and every other form of baseless hatred, the Decalogue Society has a special interest in combatting an insidious hatred, hatred and mistrust of Muslims and Arabs, that has swept this country of late.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Jewish community, unfortunately, has experience with nativist movements. While it is possible to support changes to the nation's immigration policies without giving into nativist fears, it appears all too clear that the president's Executive Orders are not based upon sound policy objectives, but rather on simple prejudice. They are neither facially neutral, nor neutral in their application. Rather, they penalize potential refugees

to this great country on the basis of their religion – a massive betrayal of the values to which this great country aspires.

The Decalogue Society of Lawyers therefore urges this Honorable Court to find the Executive Orders that are the subject of these appeals unconstitutional.

ARGUMENT

Before the Court now is a consolidated appeal from decisions of the Fourth and Ninth Appellate Circuits. The Fourth Circuit's Opinion explicitly relies upon the Establishment Clause of the Constitution as the basis of its ruling, in contrast to the Ninth Circuit's later ruling, which declined to address the Establishment Clause. This Brief's focus will be the Establishment Clause, and it will reference the Fourth Circuit's Opinion as a result, for it is that Opinion which the Decalogue Society asks this Court to uphold.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Larson v. Valente, 456 U.S. 228, 244 (1982). The Supreme Court has created a helpful test for identifying when a law runs afoul of the Establishment Clause. For a law to be upheld under the Establishment Clause, it (1) must have a primary secular purpose, (2) may not have the

principal effect of advancing or inhibiting religion, and (3) may not foster excessive entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (hereinafter "Executive Order," or, "Muslim Ban") violates the first and second prongs of this test.

A. The Jewish Community possesses the wisdom of unfortunate experience in the area of nativist crackdowns

The United States has a promised role as a refuge for the marginalized, and the predicament of those banned from entry by the Executive Order

The words of Emma Lazarus that have been immortalized at the base of the Statue of Liberty have never been more relevant to a generation of frightened Americans. "Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to me, I lift my lamp beside the golden door!" E. Lazarus, "The New Colossus." The United Nations has estimated that conflicts in the Middle East and Northern Africa have created a refugee crisis affecting millions of people. Global Trends: Forced Displacement In 2015, United Nations High Commissioner for Refugees (http://www.unhcr.org/576408cd7.pdf). Of those, the lion's share of refugees are from two countries: 4.9

million of those refugees come from Syria, while 1.1 million come from Somalia, both countries that are targeted by the Muslim Ban. Id. For a Jewish bar association, that number – 6 million people – has special significance. See United States Holocaust Memorial Museum, Documenting Numbers of Victims of the Holocaust and Nazi Persecution, https://www.ushmm.org/wlc/en/article.php?ModuleId=10008193, (accessed July 4, 2017) (Numbers of Deaths. Jews: up to 6 million).

The same United Nations report estimated that 3.2 million people were active asylum seekers. In response to this humanitarian catastrophe, the White House has barred the "golden door," and doused Lady Liberty's torch.

The Executive Order is part of the current president's promised nativist crackdown, and it targets the Muslim community specifically. As an association of Jewish lawyers and judges, the Decalogue Society is familiar with this form of nativism. Not long ago, the Jewish community was its victim.

Indeed, the attacks against refugees from predominately Muslim countries are reminiscent of attacks on the Jewish community that it has faced throughout its history, and which continue to haunt the Jewish community even into the modern era. Henry Ford became a popular (and populist) figure in the wake of World War I, claiming that

"international financiers are behind all war. *They are what is called the international Jew: German Jews, French Jews, English Jews, American Jews. I believe that in all those countries except our own the Jewish financier is supreme… here the Jew is a threat." Howard M. Sachar, A History of Jews in America, (New York: Alfred A. Knopf, 1992), 311. A decade after the war, he had not been convinced otherwise: "What I oppose most is the international Jewish money power that is met in every war. I oppose a power that has no country and that can order the young men of all countries out to death." S. Watts, The People's Tycoon: Henry Ford and the American Century, First Vintage Books Ed. (2006), 383.

When World War II broke out, one of the major forces preventing the United States from joining the war effort against Adolf Hitler's Germany was a strong nativist movement in America's conservative wing, which complained loudly that "the Jews" were behind the war. See Entry on Charles E. Coughlin, The Holocaust Encyclopedia, US Holocaust Museum (https://www.ushmm.org/wlc/en/article.php?ModuleId=10005516). One of the chief figures in that nativist movement was Father Charles E. Coughlin, who was of a mind with the likes of Joseph Goebbels on the question of who was responsible for the spread of Marxism in Europe: (Spoiler Warning: it was the Jews).

The accusations that Jews control the banks (or the media, or Hollywood, or the government, or whatever other entity a given anti-Semite finds himself upset at on any given day) have not abated in the modern era. Many within the American Jewish community heard echoes of it in then-candidate Trump's statement that "Hillary Clinton meets in secret with international banks to plan the destruction of global sovereignty in order to enrich these global interest powers, her special interest friends and her donors." N. Guttman, At Florida Rally, Trump Evokes Specter of 'International Banks' and Jews Cheer, Too, The Forward, Oct. 13, 2016 (http://forward.com/news/351984/at-florida-rally-trump-evokes-specter-of-international-banks-and-jews-cheer/).

Indeed, the claim that Jews secretly plot control is not new. In fact, it is the oldest form of incitement against the Children of Israel. The Bible recounts that Egypt's Pharaoh, in justifying the enslavement of the Jewish people, claimed "behold, the people of the children of Israel are too many and too mighty for us; come, let us deal wisely with them, lest they multiply, and it come to pass, that, when there befalleth us any war, they also join themselves unto our enemies, and fight against us, and get them up out of the land.'" Exodus, 1:9-10, Jewish Publication Society. Later in antiquity, the evil advisor to Persia's King Ahasuerus, Haman, argued

> there is a certain people scattered abroad and dispersed among the peoples in all the provinces of thy kingdom; and their laws are diverse from those of every people; neither keep they the king's laws; therefore it profiteth not the king to suffer them. If it please the king, let it be written that they be destroyed. Esther 3:8-9, Jewish Publication Society.

Jews are no strangers to the malignant claim that they have divided loyalties, and are biding their time for an opportunity to exercise national domination.

At the time of Decalogue's founding, the United States and the world confronted unprecedented hatred and animosity directed towards minorities and specific groups, including Jews. Americans in the 1930s were extremely concerned with the Depression and the economic impact of immigrants. During the 1930s Jews were often rejected for immigration based upon quotas in favor or those from certain countries and also based upon economic hardship issues. Even after the horrors of German anti-Semitism were known, the United States turned away more than 900 Jews who had fled Germany on the liner SS St. Louis. The Holocaust Encyclopedia, United States Holocaust Memorial Museum, Voyage of the St. Louis, https://www.ushmm.org/wlc/en/article.php?ModuleId

=10005267 (last visited March 19, 2017). Many of those refugees were sent back to face their persecutors, and joined the fate of the rest of European Jewry at the hands of the Nazis and their enablers.

Though this was one of the most visible and historically poignant examples of nativism exercised against the Jewish people in the history of this country, it was hardly the only the such example; nor was it the only example of nativism creating victims of immigrants and minorities hoping to benefit from the dream that America once hoped to offer a world full of sectarian strife and ethnic conflict. Five short years after the ill-fated voyage of the St. Louis, the United States Supreme Court institutionalized discrimination in rendering its infamous decision in the matter of Korematsu v. United States, 323 U.S. 214 (1944). In that matter, as here, the justification for what could only be an act of utmost prejudice was couched in terms of national security:

> Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military

> urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in our military leaders — as inevitably it must — determined that they should have the power to do just this. *Id.* at 223.

Though that craven decision is a stain across this country's history, it would be inaccurate to say that brave members of the judiciary did not stand up to the constitution's "temporary" suspension. Justice Murphy's dissent demonstrated the appropriate deference to the constitution that the moment demanded:

> Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting, but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must, accordingly, be treated at all

> times as the heirs of the American experiment, and as entitled to all the rights and freedoms guaranteed by the Constitution. *Id.* at 242.

The current situation similarly demands wisdom and dispassionate analysis that should be characteristic of the legal profession, and the bench.

B. The Executive Order is yet another iteration of unconstitutional animus being directed at a minority religious group

The president could not have been more clear about the animus underlying the Executive Order before he was elected to our nation's highest office. As the District Court of Hawai'i, and the Fourth Circuit Court of Appeals pointed out, at length, the president was not shy about identifying the religious nature of his anticipated immigration policy as a candidate for president: "The Muslim ban is something that in some form has morphed into a[n] extreme vetting from certain areas of the world," explained candidate Trump. The American Presidency Project, Presidential Debates: Presidential Debate at Washington University in St. Louis, Missouri (Oct. 9, 2016), (https://goo.gl/iIzf0A).

Though the president himself has been trained not to use the expression "Muslim Ban," and his new official position is that the Muslim Ban is not, in fact, a Muslim Ban, his supporters are not fooled. Andrew

McCarthy, of the National Review, called the Muslim Ban a "a defensive war against sharia supremacism. A. McCarthy, The Travel Ban is about Vetting – Which Means Its about Islam, National Review, March 18, 2017, (http://www.nationalreview.com/article/445894/trump-travel-ban-executive-order-muslims-islam-sharia-supremacism-judge-derrick-watson). The article noted that "it is unfortunate that innocent, pro-American Muslims have to be put through more paces than other aliens. But it is not quite as unfortunate as the incontestable fact that inadequately vetted Muslims commit mass-murder attacks." It is hard to tell whether Mr. McCarthy is unwittingly referring to the Bowling Green Massacre – a made up event used by a White House Spokesperson to justify banning people from entry on the basis of their religion. S. Schmidt and L. Bever, Kellyanne Conway cites 'Bowling Green massacre' that never happened to defend travel ban, Washington Post, Feb. 3, 2017 (https://www.washingtonpost.com/news/morning-mix/wp/2017/02/03/kellyanne-conway-cites-bowling-green-massacre-that-never-happened-to-defend-travel-ban/?utm_term=.f3ba114af922). But Mr. McCarthy, like the White House, found himself unable to identify any refugees or immigrants from the six countries singled out who had committed mass murder attacks.

Despite the passage of the 90 day period during which immigration from the six targeted countries was to be enjoined, and despite the judiciary's injunction barring the Muslim Ban from taking effect during that time, this remains true. No mass murder events have taken place involving residents of the six countries singled out in the ban. The Muslim hordes have somehow failed to harm this nation, despite the judiciary's caving to the "bad dudes" in the world. See @realDonaldTrump's Twitter post (or Tweet) from January 30, 2017, https://twitter.com/realdonaldtrump/statuas/826060143825666051?lang=en. "If the ban were announced with a one week notice, the "bad" would rush into our country during that week. A lot of bad "dudes" out there!"

The Petition for Writ of Certiorari, for example, claims that the President is in a unique position to identify the national security needs of the nation. But it never identifies a credible and specific threat that a terrorist, whether allied with Al Qaeda, the Islamic State, or any other terrorist organization, might attempt to infiltrate this country and commit an act of mass murder here; and while the administration took to the media to defend its Executive Order in the weeks following the lower courts' issuance of injunctions, the Petition it filed here was notably sparse in identifying the national security threats that the Executive Order supposedly addressed.

Notably, the nation that produced Dzokhar Tsarnaev and Tamerlan Tsarnaev – Chechnya – was not one of the six nations singled out by the president. The Boston Marathon Bombings, One Year On: A Look Back to Look Forward, Hearing before the Committee on Homeland Security House of Representatives, 113-64, April 9, 2014 (https://www.gpo.gov/fdsys/pkg/CHRG-113hhrg88783/pdf/CHRG-113hhrg88783.pdf). Saudi Arabia, the nation that produced Osama bin Laden, and the majority of his minions who perpetrated the attacks on this country that occurred on September 11, 2001, cannot be found on the White House's list of countries singled out. See Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, Report of the US Senate Select Committee on Intelligence and US House Permanent Select Committee on Intelligence, December, 2002, (Accessed at: http://www.cnn.com/2016/07/15/politics/congress-releases-28-pages-saudis-9-11/). Instead, the six countries identified in the Order, Iran, Libya, Somalia, Syria, Yemen, and Iraq, have not produced any terrorists who have directly attacked this country.

The Order takes great pains to identify the connection between each of the six countries and terrorism. For example, Libya is described as "an active combat zone" where "violent extremist groups […] have exploited these conditions to expand their

presence in the country." Respectfully, Germany was an active combat zone during the Second World War. If a Jewish person had been denied entry to this country during that period due to concerns that he or she was a Nazi, that would be an absurd result. The Muslim ban is no less absurd for preventing those most victimized by the "active combat zone" from seeking refuge in this great nation.

The Muslim Ban should therefore be viewed properly as an attack on the Muslim community. This is underscored dramatically by the repeated references, among those who support the ban, to the specter of Sharia Law. Candidate Trump made references to Sharia Law during the campaign in conjunction with his then policy position of banning Muslims from entering this country. A news site that was frequently called his mouthpiece, Breitbart, quoted him as having said:

> In the Cold War, we had an ideological screening test. The time is overdue to develop a new screening test for the threats we face today," Trump said. "I call it extreme, extreme vetting. Our country has enough problems. We don't need more. And these are problems like we've never seen before.
>
> In addition to screening out all members or sympathizers of terrorist groups, we must also screen out any

> who have hostile attitudes toward our country or its principles — or who believe that Sharia law should supplant American law. Donald Trump Calls for Sharia Law Ban, August 16, 2016 (http://www.breitbart.com/2016-presidential-race/2016/08/16/huffington-post-donald-trump-calls-for-sharia-law-ban/).

These references, by candidate Trump, and to his supporters today, to Sharia Law are particularly worrisome to many in the Jewish community, because they so closely resemble the aforementioned attacks on the Jewish community, which is frequently accused of harboring the hope of world domination by acting as a fifth column within this Western democracy.

These claims about the Muslim community, that the White House plays into, and that many in the Alt-Right relish, are the same conspiracy theories in an updated wrapping. Somehow, people from war torn and beleaguered countries are using the strife that their homes are undergoing as a means to launch a long-game war against Western values by moving to the United States and biding their time until they can force good Americans to accept Sharia Law. The president's wink and nod to his own supporters invokes these fears, and seeks to quell them through the insidious Muslim Ban.

Islamophobia is a form of hatred that has, in many ways, augmented the anti-Semitism of old, becoming the nativist movement *du jour*. In the eyes of many members of the Jewish community, including the community of Jewish attorneys and jurists, it is no coincidence that this new strain of institutionalized hatred comes in tandem with a massive rise in anti-Semitism, and anti-Semitic hate crimes. See M. Strom, Love Thy Neighbor: An Interfaith Gathering Against Hate, The Decalogue Tablets, 9, Spring, 2017 (http://www.decaloguesociety.org/wp-content/uploads/2017/03/Spring-2017-Tablets-0315.pdf); A. Amend and J. Morgan, Breitbart under Bannon: Breitbart's Comment Section Reflects Alt-Right, Anti-Semitic Language, Southern Poverty Law Center, February 21, 2017 (https://www.splcenter.org/hatewatch/2017/02/21/breitbart-under-bannon-breitbarts-comment-section-reflects-alt-right-anti-semitic-language).

If the Executive Order has accomplished anything good, it has been to create alliances between beleaguered people in this country who have, for too long, sat at odds with one another. The Decalogue Society hereby joins many voices from many ethnic and legal communities in asking this Court to see discrimination for what it is, and uphold the decision of the Fourth Circuit, and the United States District Court of Hawai'i.

C. The Matter before the Court was not rendered moot by the passage of 90 days from the entry of the Executive Order.

Significantly, the government does not ask for a finding of mootness. That is likely because, despite the passage of 90 since the Executive Order went into effect, this administration will revive the Order as soon as it is able to do so. As long as the administration is free to reissue the Muslim Ban, the matter is not moot. United States v. WT Grant Co., 345 U.S. 629, 632 (1953). So long as the administration is "free to return to its old ways," the matter is not moot. *Id.* Indeed, there is a "public interest in having the legality of the practices settled," that "militates against a mootness conclusion." Id.

It is significant that this country has gone, without incident, for the full 90 days contemplated by the Executive Order, and the Muslim Ban was inactive during the bulk of that period. Instead of taking this as a sign that the purpose of the 90 day ban – protecting this great nation – was fulfilled, the administration seeks to reenact the ban if this Court gives it leave to do so. Perhaps no greater evidence exists that the purpose of the temporary ban was always to foster animus against Muslim immigrants, and not to protect the country. Either way, it is clear that the matter is not moot.

The issue of mootness was raised not by the government, but by the Respondents. The Decalogue Society asks that this Court not find the matter moot, because, one way or the other, this matter will rear its ugly head at some point in the near future. Indeed, in the same Order that granted Certiorari, this Court lifted the injunction against certain disputed aspects of the Executive Order. The matter has come to a head, and is far from moot. This great Country deserves some clarity about these issues. We will need it over the next four years.

CONCLUSION

The President, in issuing his Executive Order, violated one of this country's founding principles, that no religious group be singled out for unequal treatment without purpose. The purposes that the White House claims it is advancing in issuing this ban against travel from six countries, all of which are Muslim majority countries, and none of which has produced an individual who has committed a mass murder or terrorist attack on the United States, are pretextual. The Jewish people know, all too well, that promises of security can be used to justify discriminatory policies. The Decalogue Society, as the nation's oldest Jewish bar association, therefore has an interest in preventing these discriminatory policies from being put into place in the modern era – they are nothing more than what we have seen, too many times, in a past rife with discriminatory action

taken for no good reason. This country, sadly, has not always made the right decision when it comes to guarding against discriminatory applications of law in the name of security. But the sins of our past need not be repeated, particularly in light of the wisdom we hopefully have gained from our ill experience.

Respectfully Submitted,

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