AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Individual Rights/Religion

**Trump v. Hawaii, \_\_\_ U.S. \_\_\_** (2018)

*Donald Trump as candidate and as president-elect repeatedly called for a ban on Muslim immigration into the United States. Shortly after taking office, Trump issued Executive Order No. 13769 (EO-1), which suspended foreign nations from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen from entering the United States. After a federal district court issued a temporary restraining order, Trump issued Executive Order No. 13780 (EO-2). That order suspended entry from all the above countries but Iraq on the ground that each sponsored terrorism. Several lower courts issued temporary restraining orders, but those were vacated by the Supreme Court in* Trump v. URAP *(2017). When EO-2 expired, Trump issued Proclamation 9645. After doing required factfindings, the Acting Secretary of Homeland Security determined that because those countries did not ensure the “integrity of travel documents,” did not disclose “suspected terrorist links,” and presented a “national security risk,” the United States should forbid entry by nationals from Chad, Iran, Iraq, North Korea, Syria, Venezuela, and Yemen. President Trump immediately adopted that recommendation, restrict entry by all or most nationals from these nations. The state of Hawaii challenged EO-2 on statutory grounds and on the basis that the executive order was a dressed up Muslim ban in violation of the First Amendment. A lower federal court issued a preliminary injunction that was sustained in part by the Court of Appeals. The Trump administrated appealed to the Supreme Court of the United States.*

 *The Supreme Court, after staying the injunction in 2017, in 2018 reversed the preliminary injunction by a 5-4 vote. Chief Justice John Roberts’s majority opinion held that the injunction, despite the President’s injudicious remarks, met a rational basis standard. Why does Roberts require only a rational basis standard? Why does Justice Sotomayor disagree with the rational basis standard and the majority’s application of that standard? Who has the better of the argument? In particular, what do you believe ought to be the constitutional status of President Trump’s anti-Muslim remarks? The dissent insists the majority made the same mistake that the Court made in* Korematsu v. United States *(1944). Roberts disagrees. How do the various opinions understand* Korematsu *and who has the better of this argument? Sotomayor claims* Trump v Hawaii *is indistinguishable for* Masterpiece Bakeshop *(2017) in which the court invalided a Colorado decision on the grounds that a member of the decisionmaking commission had exhibited prejudice against religious believers? Are the two cases analogous?*

CHIEF JUSTICE [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I5ac17746794611e8ab20b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) delivered the opinion of the Court.

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Federal courts have authority under the Constitution to decide legal questions only in the course of resolving “Cases” or “Controversies.” One of the essential elements of a legal case or controversy is that the plaintiff have standing to sue. Standing requires . . . allegations—and, eventually, proof—that the plaintiff “personal[ly]” suffered a concrete and particularized injury in connection with the conduct about which he complains. . . . That is an issue here because the entry restrictions apply not to plaintiffs themselves but to others seeking to enter the United States. . . . We agree that a person's interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact. . . . The Government responds that plaintiffs' Establishment Clause claims are not justiciable because the Clause does not give them a legally protected interest in the admission of particular foreign nationals. But that argument—which depends upon the scope of plaintiffs' Establishment Clause rights—concerns the merits rather than the justiciability of plaintiffs' claims. . . .

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At the heart of plaintiffs' case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. For example, while a candidate on the campaign trail, the President published a “Statement on Preventing Muslim Immigration” that 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.” . . . One week after his inauguration, the President issued EO–1. In a television interview, one of the President's campaign advisers explained that when the President “first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’” . . . .

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Plaintiffs argue that this President's words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.

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For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a “fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.” Because decisions in these matters may implicate “relations with foreign powers,” or involve “classifications defined in the light of changing political and economic circumstances,” such judgments “are frequently of a character more appropriate to either the Legislature or the Executive.” Given the authority of the political branches over admission, we held [in *Kleindienst v. Mandel* (1972)] that “when the Executive exercises this [delegated] power 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 asserted constitutional interests of U.S. citizens.

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*Mandel*'s narrow standard of review “has particular force” in admission and immigration cases that overlap with “the area of national security.” For one, “[j]udicial inquiry into the national-security realm raises concerns for the separation of powers” by intruding on the President's constitutional responsibilities in the area of foreign affairs. For another, “when it comes to collecting evidence and drawing inferences” on questions of national security, “the lack of competence on the part of the courts is marked.”

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Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where we have done so, a common thread has been that the laws at issue lack any purpose other than a “bare ... desire to harm a politically unpopular group.” . . . The Proclamation does not fit this pattern. It cannot be said that it is impossible to “discern a relationship to legitimate state interests” or that the policy is “inexplicable by anything but animus.” . . . The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks.

The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review, pointing to deviations from the review's baseline criteria resulting in the inclusion of Somalia and omission of Iraq. But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country. . . .

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More fundamentally, plaintiffs and the dissent challenge the entry suspension based on their perception of its effectiveness and wisdom. They suggest that the policy is overbroad and does little to serve national security interests. But we cannot substitute our own assessment for the Executive's predictive judgments on such matters, all of which “are delicate, complex, and involve large elements of prophecy.” . . .

Three additional features of the entry policy support the Government's claim of a legitimate national security interest. First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries—Iraq, Sudan, and Chad—have been removed from the list of covered countries. . . . Second, for those countries that remain subject to entry restrictions, the Proclamation includes significant exceptions for various categories of foreign nationals. . . . Third, the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants. According to the Proclamation, consular officers are to consider in each admissibility determination whether the alien demonstrates that (1) denying entry would cause undue hardship; (2) entry would not pose a threat to public safety; and (3) entry would be in the interest of the United States. . . .

Finally, the dissent invokes *Korematsu v. United States* (1944). Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—“has no place in law under the Constitution.”

JUSTICE [KENNEDY](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=I5ac17746794611e8ab20b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), concurring.

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. . . . There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.

The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.

JUSTICE [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I5ac17746794611e8ab20b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), concurring.

. . . [T]he President has inherent authority to exclude aliens from the country. Further, the Establishment Clause does not create an individual right to be free from all laws that a “reasonable observer” views as religious or antireligious. . . .

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I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding. And they appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts. If their popularity continues, this Court must address their legality.

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The scope of the federal courts' equitable authority under the Constitution was a point of contention at the founding, and the “more limited construction” of that power prevailed. . . . Hamilton explained that the judiciary would be “bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.” Although the purpose of a court of equity was “to give relief in extraordinary cases, which are exceptions to general rules,” “the principles by which that relief is governed are now reduced to a regular system.” The Federalists' explanation was consistent with how equity worked in 18th-century England. . . . Although courts of equity exercised remedial “discretion,” that discretion allowed them to deny or tailor a remedy despite a demonstrated violation of a right, not to expand a remedy beyond its traditional scope.

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Universal injunctions do not seem to comply with those principles. These injunctions are a recent development, emerging for the first time in the 1960s and dramatically increasing in popularity only very recently. And they appear to conflict with several traditional rules of equity, as well as the original understanding of the judicial role.

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The English system of equity did not contemplate universal injunctions. As an agent of the King, the Chancellor had no authority to enjoin him. . . . American courts inherited this tradition. Moreover, as a general rule, American courts of equity did not provide relief beyond the parties to the case. . . . Courts would employ “bills of peace” to consider and resolve a number of suits in a single proceeding. But the “general rule” was that “all persons materially interested ... in the subject-matter of a suit, are to be made parties to it ..., however numerous they may be, so that there may be a complete decree, which shall bind them all.” . . .

American courts' tradition of providing equitable relief only to parties was consistent with their view of the nature of judicial power. For most of our history, courts understood judicial power as “fundamentall[y] the power to render judgments in individual cases.” . . . The judiciary's limited role was also reflected in this Court's decisions about who could sue to vindicate certain rights. A plaintiff could not bring a suit vindicating public rights—i.e., rights held by the community at large—without a showing of some specific injury to himself. . . .

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By the latter half of the 20th century, however, some jurists began to conceive of the judicial role in terms of resolving general questions of legality, instead of addressing those questions only insofar as they are necessary to resolve individual cases and controversies. . . .

No persuasive defense has yet been offered for the practice. Defenders of these injunctions contend that they ensure that individuals who did not challenge a law are treated the same as plaintiffs who did, and that universal injunctions give the judiciary a powerful tool to check the Executive Branch. But these arguments do not explain how these injunctions are consistent with the historical limits on equity and judicial power. They at best “boi[l] down to a policy judgment” about how powers ought to be allocated among our three branches of government. But the people already made that choice when they ratified the Constitution.

JUSTICE [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I5ac17746794611e8ab20b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom JUSTICE [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I5ac17746794611e8ab20b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins, dissenting.

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In my view, the Proclamation's elaborate system of exemptions and waivers can and should help us answer this question. . . . On the one hand, if the Government is applying the exemption and waiver provisions as written, then its argument for the Proclamation's lawfulness is strengthened. For one thing, the Proclamation then resembles more closely the two important Presidential precedents on point, President Carter's Iran order and President Reagan's Cuba proclamation, both of which contained similar categories of persons authorized to obtain case-by-case exemptions. . . . Further, since the case-by-case exemptions and waivers apply without regard to the individual's religion, application of that system would help make clear that the Proclamation does not deny visas to numerous Muslim individuals (from those countries) who do not pose a security threat. And that fact would help to rebut the First Amendment claim that the Proclamation rests upon anti-Muslim bias rather than security need. Finally, of course, the very fact that Muslims from those countries would enter the United States (under Proclamation-provided exemptions and waivers) would help to show the same thing.

On the other hand, if the Government is not applying the system of exemptions and waivers that the Proclamation contains, then its argument for the Proclamation's lawfulness becomes significantly weaker. . . . [I]f the Government is not applying the Proclamation's exemption and waiver system, the claim that the Proclamation is a “Muslim ban,” rather than a “security-based” ban, becomes much stronger. How could the Government successfully claim that the Proclamation rests on security needs if it is excluding Muslims who satisfy the Proclamation's own terms? At the same time, denying visas to Muslims who meet the Proclamation's own security terms would support the view that the Government excludes them for reasons based upon their religion.

Unfortunately there is evidence that supports the second possibility, i.e., that the Government is not applying the Proclamation as written. The Proclamation provides that the Secretary of State and the Secretary of Homeland Security “shall coordinate to adopt guidance” for consular officers to follow when deciding whether to grant a waiver. Yet, to my knowledge, no guidance has issued. . . . An examination of publicly available statistics also provides cause for concern. The State Department reported that during the Proclamation's first month, two waivers were approved out of 6,555 eligible applicants. In its reply brief, the Government claims that number increased from 2 to 430 during the first four months of implementation. That number, 430, however, when compared with the number of pre-Proclamation visitors, accounts for a miniscule percentage of those likely eligible for visas, in such categories as persons requiring medical treatment, academic visitors, students, family members, and others belonging to groups that, when considered as a group (rather than case by case), would not seem to pose security threats.

. . . . Other data suggest the same. The Proclamation does not apply to asylum seekers or refugees. Yet few refugees have been admitted since the Proclamation took effect. While more than 15,000 Syrian refugees arrived in the United States in 2016, only 13 have arrived since January 2018. Similarly few refugees have been admitted since January from Iran (3), Libya (1), Yemen (0), and Somalia (122).

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[I]n a pending case in the Eastern District of New York, a consular official has filed a sworn affidavit asserting that he and other officials do not, in fact, have discretion to grant waivers. According to the affidavit, consular officers “were not allowed to exercise that discretion” and “the waiver [process] is merely ‘window [dressing](https://1.next.westlaw.com/Link/Document/FullText?entityType=gdrug&entityId=Iff1648516c7111e18b05fdf15589d8e8&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).’“

Declarations, anecdotal evidence, facts, and numbers taken from amicus briefs are not judicial factfindings. The Government has not had an opportunity to respond, and a court has not had an opportunity to decide. But, given the importance of the decision in this case, the need for assurance that the Proclamation does not rest upon a “Muslim ban,” and the assistance in deciding the issue that answers to the “exemption and waiver” questions may provide, I would send this case back to the District Court for further proceedings. And, I would leave the injunction in effect while the matter is litigated. Regardless, the Court's decision today leaves the District Court free to explore these issues on remand.

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JUSTICE [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I5ac17746794611e8ab20b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom JUSTICE [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I5ac17746794611e8ab20b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins, dissenting.

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The Establishment Clause forbids government policies “respecting an establishment of religion.” . . . To determine whether plaintiffs have proved an Establishment Clause violation, the Court asks whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion. In answering that question, this Court has generally considered the text of the government policy, its operation, and any available evidence regarding “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by” the decisionmaker. . . .

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During his Presidential campaign, then-candidate Donald Trump pledged that, if elected, he would ban Muslims from entering the United States. . . . On December 8, 2015, Trump justified his proposal during a television interview by noting that President Franklin D. Roosevelt “did the same thing” with respect to the internment of Japanese Americans during World War II. In January 2016, during a Republican primary debate, Trump was asked whether he wanted to “rethink [his] position” on “banning Muslims from entering the country.” He answered, “No.” . . . . . As Trump's presidential campaign progressed, he began to describe his policy proposal in slightly different terms. . . . Asked in July 2016 whether he was “pull[ing] back from” his pledged Muslim ban, Trump responded, “I actually don't think it's a rollback. In fact, you could say it's an expansion.” He then explained that he used different terminology because “[p]eople were so upset when [he] used the word Muslim.”

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On January 27, 2017, one week after taking office, President Trump signed Executive Order No. 13769 (2017) (EO–1), entitled “Protecting the Nation From Foreign Terrorist Entry Into the United States.” As he signed it, President Trump read the title, looked up, and said “We all know what that means.” That same day, President Trump explained to the media that, under EO–1, Christians would be given priority for entry as refugees into the United States. . . . The following day, one of President Trump's key advisers candidly drew the connection between EO–1 and the “Muslim ban” that the President had pledged to implement if elected. According to that adviser, “[W]hen [Donald Trump] first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’ ”

. . . .

While litigation over EO–2 was ongoing, President Trump repeatedly made statements alluding to a desire to keep Muslims out of the country. For instance, he said at a rally of his supporters that EO–2 was just a “watered down version of the first one” and had been “tailor[ed]” at the behest of “the lawyers.” He further added that he would prefer “to go back to the first [executive order] and go all the way” and reiterated his belief that it was “very hard” for Muslims to assimilate into Western culture. . . . On November 29, 2017, President Trump “retweeted” three anti-Muslim videos, entitled “Muslim Destroys a Statue of Virgin Mary!”, “Islamist mob pushes teenage boy off roof and beats him to death!”, and “Muslim migrant beats up Dutch boy on crutches!”. . . When asked about these videos, the White House Deputy Press Secretary connected them to the Proclamation, responding that the “President has been talking about these security issues for years now, from the campaign trail to the White House” and “has addressed these issues with the travel order that he issued earlier this year and the companion proclamation.”

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Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications. Even before being sworn into office, then-candidate Trump stated that “Islam hates us,” warned that “[w]e're having problems with the Muslims, and we're having problems with Muslims coming into the country,” promised to enact a “total and complete shutdown of Muslims entering the United States,” . . . . Notably, the Court recently found less pervasive official expressions of hostility and the failure to disavow them to be constitutionally significant. Cf. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n* (2018). . . .

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. . . . In his controlling concurrence in *Kerry v. Din* (2015), Justice Kennedy applied *Mandel*'s holding and elaborated that courts can “ ‘look behind’ the Government's exclusion of” a foreign national if there is “an affirmative showing of bad faith on the part of the consular officer who denied [the] visa.” . . . Indeed, even the Government agreed at oral argument that where the Court confronts a situation involving “all kinds of denigrating comments about” a particular religion and a subsequent policy that is designed with the purpose of disfavoring that religion but that “dot[s] all the i's and ... cross[es] all the t's,” *Mandel* would not “pu[t] an end to judicial review of that set of facts.”

In light of the Government's suggestion “that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order,” the majority rightly declines to apply *Mandel*'s “narrow standard of review” and “assume [s] that we may look behind the face of the Proclamation.” In doing so, however, the Court, without explanation or precedential support, limits its review of the Proclamation to rational-basis scrutiny. That approach is perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review. . . .

But even under rational-basis review, the Proclamation must fall. That is so because the Proclamation is “‘divorced from any factual context from which we could discern a relationship to legitimate state interests,’ and ‘its sheer breadth [is] so discontinuous with the reasons offered for it’” that the policy is “‘inexplicable by anything but animus.’” The President's statements, which the majority utterly fails to address in its legal analysis, strongly support the conclusion that the Proclamation was issued to express hostility toward Muslims and exclude them from the country. Given the overwhelming record evidence of anti-Muslim animus, it simply cannot be said that the Proclamation has a legitimate basis. . . . Indeed, even a cursory review of the Government's asserted national-security rationale reveals that the Proclamation is nothing more than a “‘religious gerrymander.’”

. . . . Given the record here, including all the President's statements linking the Proclamation to his apparent hostility toward Muslims, it is of no moment that the Proclamation also includes minor restrictions on two non-Muslim majority countries, North Korea and Venezuela, or that the Government has removed a few Muslim-majority countries from the list of covered countries since EO–1 was issued. Consideration of the entire record supports the conclusion that the inclusion of North Korea and Venezuela, and the removal of other countries, simply reflect subtle efforts to start “talking territory instead of Muslim,” precisely so the Executive Branch could evade criticism or legal consequences for the Proclamation's otherwise clear targeting of Muslims. . . .

. . . . [T]he worldwide review does little to break the clear connection between the Proclamation and the President's anti-Muslim statements. . . . The President campaigned on a promise to implement a “total and complete shutdown of Muslims” entering the country, translated that campaign promise into a concrete policy, and made several statements linking that policy (in its various forms) to anti-Muslim animus. Ignoring all this, the majority empowers the President to hide behind an administrative review process that the Government refuses to disclose to the public. . . .

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Congress has already erected a statutory scheme that fulfills the putative national-security interests the Government now puts forth to justify the Proclamation. Tellingly, the Government remains wholly unable to articulate any credible national-security interest that would go unaddressed by the current statutory scheme absent the Proclamation. . . . For many of these reasons, several former national-security officials from both political parties—including former Secretary of State Madeleine Albright, former State Department Legal Adviser John Bellinger III, former Central Intelligence Agency Director John Brennan, and former Director of National Intelligence James Clapper—have advised that the Proclamation and its predecessor orders “do not advance the national-security or foreign policy interests of the United States, and in fact do serious harm to those interests.”

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Just weeks ago, the Court rendered its decision in *Masterpiece Cakeshop*. . . . But unlike in *Masterpiece*, where a state civil rights commission was found to have acted without “the neutrality that the Free Exercise Clause requires,” the government actors in this case will not be held accountable for breaching the First Amendment's guarantee of religious neutrality and tolerance. Unlike in *Masterpiece*, where the majority considered the state commissioners' statements about religion to be persuasive evidence of unconstitutional government action, the majority here completely sets aside the President's charged statements about Muslims as irrelevant. . . .

Today's holding is all the more troubling given the stark parallels between the reasoning of this case and that of *Korematsu v. United States* (1944). As here, the Government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion. As here, the exclusion order was rooted in dangerous stereotypes about, inter alia, a particular group's supposed inability to assimilate and desire to harm the United States. As here, the Government was unwilling to reveal its own intelligence agencies' views of the alleged security concerns to the very citizens it purported to protect. And as here, there was strong evidence that impermissible hostility and animus motivated the Government's policy. . . . By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one “gravely wrong” decision with another.

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