

TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. v. HAWAII ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 17-965. Argued April 25, 2018—Decided June 26, 2018

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

I

A

Shortly after taking office, President Trump signed Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States. EO-1 directed the Secretary of Homeland Security to conduct a review to examine the adequacy of information provided by foreign governments about their nationals seeking to enter the United States. Pending that review, the order suspended for 90 days the entry of foreign nationals from seven countries — Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen — that had been previously identified by Congress or prior administrations as posing heightened terrorism risks. The District Court for the Western District of Washington entered a temporary restraining order blocking the entry restrictions...

In response, the President revoked EO-1, replacing it with Executive Order No. 13780 (EO-2), which again directed a worldwide review. Citing investigative burdens on agencies and the need to diminish the risk that dangerous individuals would enter without adequate vetting, EO-2 also temporarily restricted the entry (with case-by-case waivers) of foreign nationals from six of the countries covered by EO-1: Iran, Libya, Somalia, Sudan, Syria, and Yemen...

On September 24, 2017, after completion of the worldwide review, the President issued the Proclamation before us — Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats. The Proclamation (as its title indicates) sought to improve vetting procedures by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present “public safety threats.” To further that purpose, the Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate.

The Proclamation described how foreign states were selected for inclusion based on the review undertaken pursuant to EO-2. As part of that review, the Department of Homeland Security (DHS), in consultation with the State Department and several intelligence agencies, developed a “baseline” for the information required from foreign governments to confirm the identity of individuals seeking entry into the United States, and to determine whether those individuals pose a security threat. The baseline included three components. The first, “identity-management information,” focused on whether a foreign government ensures the integrity of travel documents by issuing electronic passports, reporting lost or stolen passports, and making available additional identity-related information. Second, the agencies considered the extent to which the country discloses information on criminal history and suspected terrorist links, provides travel document exemplars, and facilitates the U.S. Government’s receipt of information about airline passengers and crews traveling to the United States. Finally, the agencies weighed various indicators of national security risk, including whether the foreign state is a known or potential terrorist safe haven and whether it regularly declines to receive returning nationals following final orders of removal from the United States.

DHS collected and evaluated data regarding all foreign governments. It identified 16 countries as having deficient information-sharing practices and presenting national security concerns, and another 31 countries as “at risk” of similarly failing to meet the baseline. The State Department then undertook diplomatic efforts over a 50-day period to encourage all foreign governments to improve their practices...

Following the 50-day period, the Acting Secretary of Homeland Security concluded that eight countries — Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen — remained deficient in terms of their risk profile and willingness to provide requested information. The Acting Secretary recommended that the President impose entry restrictions on certain nationals from all of those countries except Iraq. She also concluded that although Somalia generally satisfied the information sharing component of the baseline standards, its “identity-management deficiencies” and “significant terrorist presence” presented special circumstances justifying additional limitations. She therefore recommended entry limitations for certain nationals of that country...

After consulting with multiple Cabinet members and other officials, the President adopted the Acting Secretary’s recommendations and issued the Proclamation...

The Proclamation exempts lawful permanent residents and foreign nationals who have been granted asylum. It also provides for case-by-case waivers when a foreign national demonstrates undue hardship, and that his entry is in the national interest and would not pose a threat to public safety. The Proclamation further directs DHS to assess on a continuing basis whether entry restrictions should be modified or continued, and to report to the President every 180 days. Upon completion of the first such review period, the President, on the recommendation of the Secretary of Homeland Security, determined that Chad had sufficiently improved its practices, and he accordingly lifted restrictions on its nationals...

III

Plaintiffs argue that the Proclamation is not a valid exercise of the President’s authority under the INA...But by its plain language, §1182(f) grants the President broad discretion to suspend the entry of aliens into the United States...

A

The text of §1182(f) states:

“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 non-immigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.”

By its terms, §1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry; whose entry to suspend; for how long; and on what conditions. It is therefore unsurprising that we have previously observed that §1182(f) vests the President with “ample power” to impose entry restrictions in addition to those elsewhere enumerated in the INA.

The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in §1182(f) is that the President “find[]” that the entry of the covered aliens “would be detrimental to the interests of the United States.” The President has undoubtedly fulfilled that requirement here. He first ordered DHS and other agencies to conduct a comprehensive evaluation of every single country’s compliance with the information and risk assessment baseline. The President then issued a Proclamation setting forth extensive findings describing how deficiencies in the practices of

select foreign governments — several of which are state sponsors of terrorism — deprive the Government of “sufficient information to assess the risks [those countries’ nationals] pose to the United States.” Based on that review, the President found that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information — both to protect national security and public safety, and to induce improvement by their home countries...In short, the Proclamation does not exceed any textual limit on the President’s authority.

C

Plaintiffs’ final statutory argument is that the President’s entry suspension violates §1152(a)(1)(A), which provides that “no person shall...be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.” They contend that we should interpret the provision as prohibiting nationality-based discrimination throughout the *entire* immigration process, despite the reference in §1152(a)(1)(A) to the act of visa issuance alone...

We reject plaintiffs’ interpretation because it ignores the basic distinction between admissibility determinations and visa issuance that runs throughout the INA...

IV

A

We now turn to plaintiffs’ claim that the Proclamation was issued for the unconstitutional purpose of excluding Muslims...

B

The First Amendment provides, in part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof.” Our cases recognize that “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” Plaintiffs believe that the Proclamation violates this prohibition by singling out Muslims for disfavored treatment. The entry suspension, they contend, operates as a “religious gerrymander,” in part because most of the countries covered by the Proclamation have Muslim-majority populations. And in their view, deviations from the information-sharing baseline criteria suggest that the results of the multi-agency review were “foreordained.” Relying on Establishment Clause precedents concerning laws and policies applied domestically, plaintiffs allege that the primary purpose of the Proclamation was religious animus and that the President’s stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims...

C

The Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order. For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government’s stated objective to protect the country and improve vetting processes. As a result, we may consider plaintiffs’ extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.

D

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.” ...Because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.

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. Although Somalia generally satisfies the information-sharing component of the baseline criteria, it “stands apart...in the degree to which [it] lacks command and control of its territory.” As for Iraq, the Secretary of Homeland Security determined that entry restrictions were not warranted in light of the close cooperative relationship between the U.S. and Iraqi Governments and the country’s key role in combating terrorism in the region. It is, in any event, difficult to see how exempting one of the largest predominantly Muslim countries in the region from coverage under the Proclamation can be cited as evidence of animus toward Muslims...

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... While we of course “do not defer to the Government’s reading of the First Amendment,” the Executive’s evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving “sensitive and weighty interests of national security and foreign affairs.”

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. The Proclamation emphasizes that its “conditional restrictions” will remain in force only so long as necessary to “address” the identified “inadequacies and risks,” and establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be terminated...

Second, for those countries that remain subject to entry restrictions, the Proclamation includes significant exceptions for various categories of foreign nationals. The policy permits nationals from nearly every covered country to travel to the United States on a variety of nonimmigrant visas. These carveouts for nonimmigrant visas are substantial: Over the last three fiscal years — before the Proclamation was in effect — the majority of visas issued to nationals from the covered countries were nonimmigrant visas. The Proclamation also exempts permanent residents and individuals who have been granted asylum.

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. On its face, this program is similar to the humanitarian exceptions set forth in President Carter’s order during the Iran hostage crisis...

Finally, the dissent invokes *Korematsu v. United States*. 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 entry suspension is an act that is well within executive authority and could have been taken by any other President...

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.”

* * *

Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review. We express no view on the soundness of the policy. We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim...

V

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE KAGAN joins, dissenting.

The question before us is whether Proclamation No. 9645 is lawful. If its promulgation or content was significantly affected by religious animus against Muslims, it would violate the relevant statute or the First Amendment itself. If, however, its sole *ratio decidendi* was one of national security, then it would be unlikely to violate either the statute or the Constitution. Which is it? Members of the Court principally disagree about the answer to this question, *i.e.*, about whether or the extent to which religious animus played a significant role in the Proclamation's promulgation or content.

In my view, the Proclamation's elaborate system of exemptions and waivers can and should help us answer this question. That system provides for case-by-case consideration of persons who may qualify for visas despite the Proclamation's general ban. Those persons include lawful permanent residents, asylum seekers, refugees, students, children, and numerous others. There are likely many such persons, perhaps in the thousands. And I believe it appropriate to take account of their Proclamation-granted status when considering the Proclamation's lawfulness...

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... 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...If 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 been 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...

Amici have suggested that there are numerous applicants who could meet the waiver criteria. For instance, the Proclamation anticipates waivers for those with “significant business or professional obligations” in the United States, and *amici* identify many scholars who would seem to qualify. The Proclamation also anticipates waivers for those with a “close family member (*e.g.*, a spouse, child, or parent)” in the United States, and *amici* identify many such individuals affected by the Proclamation. The

Pars Equality Center identified 1,000 individuals — including parents and children of U.S. citizens — who sought and were denied entry under the Proclamation, hundreds of whom seem to meet the waiver criteria.

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) ...

Declarations, anecdotal evidence, facts, and numbers taken from *amicus* briefs are not judicial fact-findings. 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.

If this Court must decide the question without this further litigation, I would, on balance, find the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders preceding the Proclamation, along with the other statements also set forth in JUSTICE SOTOMAYOR’s opinion, a sufficient basis to set the Proclamation aside. And for these reasons, I respectfully dissent.

**JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins,
dissenting.**

The United States of America is a Nation built upon the promise of religious liberty. Our Founders honored that core promise by embedding the principle of religious neutrality in the First Amendment. The Court’s decision today fails to safeguard that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a “total and complete shutdown of Muslims entering the United States” because the policy now masquerades behind a facade of national security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination...Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus. That alone suffices to show that plaintiffs are likely to succeed on the merits of their Establishment Clause claim. The majority holds otherwise by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens. Because that troubling result runs contrary to the Constitution and our precedent, I dissent.

I
A

The Establishment Clause forbids government policies “respecting an establishment of religion.” The “clearest command” of the Establishment Clause is that the Government cannot favor or disfavor one religion over another. Consistent with that clear command, this Court has long acknowledged that governmental actions that favor one religion inevitably foster “the hatred, disrespect and even contempt of those who [hold] contrary beliefs.” That is so, this Court has held, because such acts send messages to members of minority faiths ““that they are outsiders, not full members of the political community.”” To guard against this serious harm, the Framers mandated a strict “principle of denominational neutrality.” ...

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...

B

1

Although the majority briefly recounts a few of the statements and background events that form the basis of plaintiffs' constitutional challenge, that highly abridged account does not tell even half of the story. The full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith.

During his Presidential campaign, then-candidate Donald Trump pledged that, if elected, he would ban Muslims from entering the United States. Specifically, on December 7, 2015, he issued a formal statement "calling for a total and complete shutdown of Muslims entering the United States." App. 119. That statement, which remained on his campaign website until May 2017 (several months into his Presidency), read in full:

"Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on. According to Pew Research, among others, there is great hatred towards Americans by large segments of the Muslim population. Most recently, a poll from the Center for Security Policy released data showing '25% of those polled agreed that violence against Americans here in the United States is justified as a part of the global jihad' ...

"Mr. Trum[p] stated, 'Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension... Until we are able to determine and understand this problem and the

dangerous threat it poses, our country cannot be the victims of the horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life...”

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...A month later, at a rally in South Carolina, Trump told an apocryphal story about United States General John J. Pershing killing a large group of Muslim insurgents in the Philippines with bullets dipped in pigs’ blood in the early 1900’s. In March 2016, he expressed his belief that “Islam hates us...[W]e can’t allow people coming into this country who have this hatred of the United States...[a]nd of people that are not Muslim.” That same month, Trump asserted that “[w]e’re having problems with the Muslims, and we’re having problems with Muslims coming into the country.” He therefore called for surveillance of mosques in the United States, blaming terrorist attacks on Muslims’ lack of “assimilation” and their commitment to “sharia law.” ...

As Trump’s presidential campaign progressed, he began to describe his policy proposal in slightly different terms. In June 2016, for instance, he characterized the policy proposal as a suspension of immigration from countries “where there’s a proven history of terrorism.” 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.” ...

On January 27, 2017, one week after taking office, President Trump signed Executive Order No. 13769 (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.” ...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.’” ...

On March 6, 2017, President Trump issued a new executive order, which, like its predecessor, imposed temporary entry and refugee bans... After EO-2 was issued, the White House Press Secretary told reporters that, by issuing EO-2, President Trump “continue[d] to deliver on...his most significant campaign promises.” That statement was consistent with President Trump’s own declaration that “I keep my campaign promises, and our citizens will be very happy when they see the result.”

Before EO-2 took effect, federal District Courts in Hawaii and Maryland enjoined the order’s travel and refugee bans... 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.” ...

In September 2017, President Trump tweeted that “[t]he travel ban into the United States should be far larger, tougher and more specific — but stupidly, that would not be politically correct!” Later that month, on September 24, 2017, President Trump issued Presidential Proclamation No. 9645, which restricts entry of certain nationals from six Muslim-majority countries. 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!” Those videos were initially tweeted by a British political party whose mission is to oppose “all alien and destructive politic[al] or religious doctrines, including...Islam.” 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.”

2

As the majority correctly notes, “the issue before us is not whether to denounce” these offensive statements. Rather, the dispositive and narrow question here is whether a reasonable observer, presented with all “openly available data,” the text and “historical context” of the Proclamation, and the “specific sequence of events” leading to it, would conclude that the primary purpose of the Proclamation is to disfavor Islam and its adherents... The answer is unquestionably yes.

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,” and instructed one of his advisers to find a “lega[l]” way to enact a Muslim ban. The President continued to make similar statements well after his inauguration, as detailed above...

Ultimately, what began as a policy explicitly “calling for a total and complete shutdown of Muslims entering the United States” has since morphed into a “Proclamation” putatively based on national security concerns. But this new window dressing cannot conceal an unassailable fact: the words of the President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers.

II

Rather than defend the President’s problematic statements, the Government urges this Court to set them aside and defer to the President on issues related to immigration and national security. The majority accepts that invitation and incorrectly applies a watered-down legal standard in an effort to short circuit plaintiffs’ Establishment Clause claim...

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...

The majority first emphasizes that the Proclamation “says nothing about religion.” Even so, the Proclamation, just like its predecessors, overwhelmingly targets Muslim-majority nations. 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 re-moved 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...

The majority next contends that the Proclamation “reflects the results of a worldwide review process undertaken by multiple Cabinet officials.” ...But the worldwide review does little to break the clear connection between the Proclamation and the President’s anti-Muslim state-ments. For “[n]o matter how many officials affix their names to it, the Proclamation rests on a rotten foundation.” 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...

Equally unavailing is the majority’s reliance on the Proclamation’s waiver program. As several *amici* thoroughly explain, there is reason to suspect that the Proclamation’s waiver program is nothing more than a sham. The remote possibility of obtaining a waiver pursuant to an ad hoc, discretionary, and seemingly arbitrary process scarcely demonstrates that the Proclamation is rooted in a genuine concern for national security.

In sum, none of the features of the Proclamation highlighted by the majority supports the Government’s claim that the Proclamation is...rooted in a legitimate national-security interest. What the unrebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country...

IV

The First Amendment stands as a bulwark against official religious prejudice and embodies our Nation’s deep commitment to religious plurality and tolerance. That constitutional promise is why, “[f]or centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom.” Instead of vindicating those principles, today’s decision tosses them aside. In holding that the First Amendment gives way to an executive policy that a reasonable

observer would view as motivated by animus against Muslims, the majority opinion upends this Court’s precedent, repeats tragic mistakes of the past, and denies countless individuals the fundamental right of religious liberty...

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*. In *Korematsu*, the Court gave “a pass [to] an odious, gravely injurious racial classification” authorized by an executive order. 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...

In the intervening years since *Korematsu*, our Nation has done much to leave its sordid legacy behind. Today, the Court takes the important step of finally overruling *Korematsu*, denouncing it as “gravely wrong the day it was decided.” This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority’s decision here acceptable or right. 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.

Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments. Because the Court’s decision today has failed in that respect, with profound regret, I dissent.