No. 16-1436

In the
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *ET AL.*,
PETITIONERS
V.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, A PROJECT OF THE URBAN JUSTICE CENTER, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, *ET AL.*,
RESPONDENTS

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

Brief of the Public Policy Legal Institute and Center for Competitive Politics As *Amici Curiae* Supporting Petitioners

BARNABY W. ZALL
Counsel of Record for Amici Curiae
Law Office of Barnaby Zall
685 Spring St. #314
Friday Harbor, WA 98250
360-378-6600
bzall@bzall.com

ALLEN DICKERSON
ZAC MORGAN
Center for Competitive Politics
124 West St. #201
Alexandria, VA 22314
703-894-6800
adickerson@campaignfreedom.org

QUESTIONS PRESENTED

The Questions Presented in the Petition include: "2. Whether Section 2(c)'s [of Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)] temporary suspension of entry violates the Establishment Clause." Pet. I.

The Court of Appeals below rested its decision, in substantial part, on statements made by Donald Trump while he was a candidate for president. The majority opinion below acknowledged that such review of campaign statements might "chill[] campaign promises," but thought such chill "a welcome restraint" on certain speech. *Int'l Refugee Assistance Project, et al. v. Trump, et al.*, No. 17-1351 (4th Cir. May 31, 2017), slip op. 68, Pet. App. 62a.

Amici believe that Petitioners' Question 2 fairly includes the question of whether a court's determinative reliance on candidates' campaign statements poses an unacceptable risk to First Amendment interests.

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STATEMENT OF INTEREST

Amicus curiae Public Policy Legal Institute is a national non-profit educational organization dedicated to protecting the right of Americans to advocate for and against public policies.[1] www.publicpolicylegal.com.

Amicus curiae Center for Competitive Politics is a nonpartisan, nonprofit organization that defends the First Amendment rights of speech, assembly, and petition through litigation, research, and education. www.campaignfreedom.org.

Amici take no position on the propriety of the underlying immigration order in this case, nor on the Establishment Clause questions addressed below. They write separately to address a portion of the Fourth Circuit's opinion, discussed at pages 28-30 of the Petition, that creates a new and unprecedented danger by welcoming the chilling of "campaign promises to condemn and exclude entire religious groups." This new "welcome restraint" doctrine – which could be used by other courts to probe candidates' campaign speech and associations, including speech bearing little resemblance to the

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[1] Pursuant to Rule 37.2, amici certifies that counsel of record for all parties received notice of their intention to file this brief ten days prior to its due date. Petitioners filed a blanket consent with the Clerk, and Counsel of Record for Respondents has consented to the filing of this brief. A copy of the Respondents' consent has been filed with the Clerk.

Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

utterances at issue here – offers significant dangers to free speech and association.

PRELIMINARY STATEMENT

> To the extent that our review chills campaign promises to condemn and exclude entire religious groups, we think that a **welcome restraint**.

Int'l Refugee Assistance Project, et al. v. Trump, et al., No. 17-1351 (4th Cir. May 31, 2017), slip op. 68, Pet. App. A, 62a (emphasis added).

The parties have not focused on the Fourth Circuit's new assertion that the chilling of certain disfavored speech would be a "welcome restraint." Pet. App. 62a. The "restraint" the majority below would "welcome" is self-censorship.[2]

Within the second Question Presented[3] is the substantive question of whether Section 2(c) of the Executive Order[4] may be subjected to Establishment Clause scrutiny based upon campaign "promises" by candidate Donald Trump, or whether the constitutionality of that order should instead rise or fall based upon evidence less likely to chill political

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[2] *Speiser v. Randall,* 357 U.S. 513, 526 (1958)("the possibility of mistaken factfinding – inherent in all litigation – will create the danger that legitimate utterance will be penalized. … It can only result in a deterrence of speech which the Constitution makes free.").

[3] Whether Section 2(c)'s temporary suspension of entry violates the Establishment Clause.

[4] Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017).

speech and association. See, e.g., Pet. 28-30; Pet. App. 129a-130a (Thacker, J., concurring in part); 162a-163a (Niemeyer, J. dissenting). Indeed, one member of the Fourth Circuit majority wrote separately, in part, to note her view that the court's review of the campaign statements was not necessary and that the Order could be found unconstitutional without considering those statements. Pet. App. 129a-130a (Thacker, J., concurring in part).

Although this case concerns an Establishment Clause dispute, the Fourth Circuit majority quotation above poses important questions concerning free speech, content and speakers. Yet, rather than maintain the courts' traditional respect for vigorous campaign speech,[5] the lower court here "welcome[d] restraint" on "campaign promises" of a particular type and by a particular speaker.[6] Pet. App. 62a.

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[5] *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002)("the notion that the special context of electioneering justifies an abridgment of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head.") (emphasis omitted); *Brown v. Hartlage*, 456 U. S. 45, 60 (1982) ("It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign.")(internal citation and quotation marks omitted); *Eu v. San Francisco County Dem. Central Cmte*, 489 U.S. 214, 223 (1989) ("[D]ebate on the qualifications of candidates" is "at the core of our electoral process and of the First Amendment freedoms")(citation and quotation marks omitted).

[6] The identity of the speaker was important in this case:

> "Indeed, the plaintiffs conceded during oral argument that if another candidate had won the presidential election in November 2016 and thereafter

Whether or not the majority below thought their "welcome restraint" analysis was mere dicta, this Court has never held or suggested that the Establishment Clause can restrain campaign speech. Nor can the "welcome restraint" formulation be limited, as the majority below suggests, to only "highly unique" situations. Once confirmed (or left unrestrained by this Court's review) the number of applications of "welcome restraint" analysis of campaign speech on religious or other grounds will likely multiply.

> entered this same Executive Order, they would have had no problem with the Order. As counsel for the plaintiffs stated, "I think in that case [the Order] could be constitutional."

Niemeyer, J., dissenting, Pet. App. 167a-168a.

SUMMARY OF ARGUMENT

By undertaking a novel review of campaign speech in an Establishment Clause challenge, the Fourth Circuit majority below created a free speech dilemma. The majority below compounded that dilemma by "welcom[ing]" the "restraint" its analysis might place on campaign speech.

A review of campaign speech – even speech that sheds light on the reasons for later official action – chills expression and conflicts with numerous long-standing protections for campaign speech. As this Court recently held: "the First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'"[7]

A religious aspect to campaign speech does not lessen its protections. In the realms of religion and political belief, "exaggeration, … vilification" and "false statement" are predictable.[8] "But the people of this nation have ordained, in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[9] For example, if a candidate's speech on religious topics is "restrain[ed]" by the Fourth Circuit's review analysis, the public will not know if a candidate

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[7] *McCutcheon v. Fed. Election Comm'n*, 572 U.S. __, ___, 134 S.Ct. 1434, 1441 (2014), *quoting Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971).

[8] *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964) (citation and quotation marks omitted).

[9] *Id.*

holds such views, and will be unable to act on that knowledge when casting their ballots.

This Court has never confronted this analysis or given the lower courts direction on how to review such a case. Nor has a lower court, even the ones cited by the majority below, ever relied almost entirely on campaign statements to find an Establishment Clause "purpose." But in similar areas, such as false statements by elected officials, this Court has rejected a "free-floating test for First Amendment coverage … [based on] an ad hoc balancing of relative social costs and benefits."[10] At least one judge in the majority below felt that the case could have been decided equally well without considering campaign speech.

Finally, the Fourth Circuit majority's reliance on campaign speech could lead to numerous difficult and divergent decisions before future courts. The majority below defended its reliance on campaign speech by claiming "highly unique" circumstances, but divisive campaign speech is fairly common. Even in tiny local government units, candidates may make divisive statements that generate legal challenges to their later official actions. These challenges to offensive campaign statements may themselves generate Establishment Clause problems.

Because the "welcome restraint" analysis used below could conflict with established precedent, and because it is unnecessary and likely counterproductive, this Court should review it. The Petition should be granted.

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[10] *United States v. Stevens*, 559 U.S. 460, 470 (2010).

ARGUMENT

This case comes to this Court as an Establishment Clause challenge to an Executive Order. But in reviewing that challenge, the Fourth Circuit relied heavily upon its parsing of campaign speech, and suggested that any chill resulting from that approach would be a "welcome restraint" on certain messages. That position conflicts with settled law protecting a variety of speech and speakers, was not necessary to the resolution of this case, and is applicable to many more situations than the Fourth Circuit's "highly-unique" prediction would suggest.

I. The Fourth Circuit's "Welcome Restraint" Analysis Conflicts With Numerous Settled Precedents.

Elected officials have to campaign for office, leaving trails of campaign statements, promises, and speeches. Often, those campaign trails are littered with scorching controversies, including those over religion.[11]

When these individuals speak during their campaigns, what they say is highly protected: "Indeed, as we have emphasized, the First Amendment 'has its fullest and most urgent

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[11] For example, the courts below cited *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), a case involving "the Ten Commandments Judge," Alabama Chief Justice Roy Moore, who was later removed from office for his stance on the public display of the Ten Commandments. Pet. App. 51a-52a, 60a, 245a, 248a. Judge Moore is currently running for the Senate from Alabama. Ed Kilgore, "Alabama's 'Ten Commandments Judge' Is Running for Senate," *New York*, April 27, 2017, http://nymag.com/daily/intelligencer/2017/04/alabamas-ten-commandments-judge-is-running-for-senate.html.

application precisely to the conduct of campaigns for political office.'" *McCutcheon*, 134 S.Ct. at 1441, *quoting Monitor Patriot Co.*, 401 U. S. at, 272.

Equally important,

> the degree to which speech is protected cannot turn on a legislative or judicial determination that particular speech is useful to the democratic process. The First Amendment does not contemplate such "ad hoc balancing of relative social costs and benefits." *United States v. Stevens*, 559 U. S. 460, 470 (2010); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803, 818 (2000) ("What the Constitution says is that" value judgments "are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority").

McCutcheon, 134 S. Ct. at 1449. "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United v. Fed. Election Comm'n*, 558 U. S. 310, 340 (2010); *Playboy Entertainment Group, Inc.*, 529 U. S. at 813 (striking down content-based restriction).

In this case, the two entwined concerns are speech about religion and speech about politics and candidates. The high degree to which those two areas of speech are protected is settled law:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as

> we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained, in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

New York Times, 376 U.S. at 271, *quoting Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

> Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials – and especially one that puts the burden of proving truth on the speaker. *Cf. Speiser v. Randall*, 357 U.S. 513, 525-526 [(1958)]. The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 445 [(1963)].

New York Times, 376 U.S. at 271.

Further, the degree of speech protection does not depend on the identity of the speaker:

> Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. *See First Nat. Bank of Boston v. Bellotti*, 435 U. S. 765, 784 (1978). As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the

> speaker are all too often simply a means to control content.

Citizens United, 558 U. S. at 340.

Even where the candidates in question are judges, who must maintain the highest degree of impartiality, the candidates' speech is protected at the highest levels. *Republican Party of Minn.*, 536 U.S. at 776-777. Judges who had participated in formulating laws and even spoken out on them are not automatically disqualified. *Laird v. Tatum*, 409 U.S. 824, 831 (1972) (Justice Black participated in deliberations over the Fair Labor Standards Act, even though he was one of its principal authors in the Senate).

These liberties are protected not merely in the interest of the speaker. The "right to receive information and ideas, regardless of their social worth, is fundamental to our free society." *Stanley v. Georgia,* 394 U.S. 557, 564 (1969) (internal citation omitted).

The Fourth Circuit's invitation to self-censorship, then, is self-defeating: if candidates intend to act contrary to the Constitution, including the Establishment Clause, they must "have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate [their] personal qualities and their positions on vital public issues" before voting. *Brown v. Hartlage,* 456 U.S. 45, 53 (1982) (citation and quotation marks omitted). It is not obvious that the cause of religious nondiscrimination is furthered by hiding candidates' views on relevant policies from scrutiny by the electorate.

Having been announced by a federal court of appeals sitting en banc, this invitation to chill speech will inevitably be influential. And dicta or not, the concept of "welcome restraint" will be tempting authority for future litigants probing the intentions of elected officials, with "every repetition imbed[ing] that principle more deeply in our law and thinking and expand[ing] it to new purposes." *Korematsu v. United States,* 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

Certiorari should be granted to correct the Fourth Circuit's injudicious overreach.

II. The Fourth Circuit's "Welcome Restraint" Analysis Was Not Necessary.

The "welcome restraint" analysis sets up a clash between the Free Speech, Association and Establishment Clauses of the First Amendment. This Court has not set a standard for reviewing candidate campaign statements as part of an Establishment Clause review, but in the context of false statements made by elected officials,[12] this Court rejected as "startling and dangerous" a "free-floating test for First Amendment coverage … [based on] an ad hoc balancing of relative social costs and

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[12] *See, generally*, Richard Hasen, "A Constitutional Right to Lie in Campaigns and Elections?" 74 MONTANA L.REV. 53 (2013) http://scholarship.law.umt.edu/mlr/vol74/iss1/4. Margaret H. Zhang, "Note: *Susan B. Anthony List v. Driehaus* and the (Bleak) Future of Statutes That Ban False Statements In Political Campaigns," 164 U. PA. L. REV. ONLINE 19 (2015), www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-19.pdf.

benefits." *United States v. Alvarez,* 507 U.S. 709, 711 (2012), *quoting Stevens*, 559 U.S. at 470.

At least one judge below felt that the majority could have come to the same conclusion – "for more practical reasons" – without using candidate Trump's statements. Pet. App. 129a (Thacker, J., concurring).[13] Judge Thacker noted that candidate Trump's statements: "reveal religious animus that is deeply troubling. Nonetheless, I do not adhere to the view that we should magnify our analytical lens simply because doing so would support our conclusion, particularly when we need not do so." Pet. App. 130a (citation omitted).

None of the cases cited for support in the majority opinion below, Pet. App. 59a-60a, found it necessary to look at candidates' campaign statements for Establishment Clause reviews. In *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), the "Ten Commandments Judge" case relied upon by both courts below to show that other courts have looked at campaign statements in Establishment Clause reviews, Pet. App. 51a, 60a, 245a, 248a, the Eleventh Circuit did not need the campaign statements of Chief Justice Moore to show his religious purpose. The Eleventh Circuit found Chief Justice Moore's purpose in his statements while in office at the unveiling of the Ten Commandments statue at issue, and in his testimony at trial.

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[13] Judge Thacker noted that courts "should hesitate to attach constitutional significance to words a candidate offers on the campaign trail." Pet. App. 129a.

Glassroth, 335 F.3d at 1286-87. The campaign statements were mentioned only in passing.[14]

This suggests that the Fourth Circuit majority's "welcome restraint" analysis was not narrowly-tailored or the least-restrictive alternative for dealing with candidate Trump's "troubling" campaign statements. Indeed, there is no indication that campaign statements, as opposed to other statements made after the President took the oath of office and accepted his duties to the Constitution, added anything to the Fourth Circuit's analysis worth the threat of chill to campaign speech and consequent distortion of our national political debates. The Petition should be granted to correct the use of the "welcome restraint" analysis.

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[14] Similarly, *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998), Pet. App. 59a n. 20, did not involve either government officials or candidates for office. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 463 (1982), was an Equal Protection challenge. *California v. United States*, 438 U.S. 645, 663-64 (1978), was a challenge to the Reclamation Act of 1902, and noted only that both major political parties supported the act and, *once he assumed office*, so did the successful Presidential candidate: "In his first message to Congress after assuming the Presidency, Theodore Roosevelt continued the cry for national funding of reclamation." 438 U.S. at 664; *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) was another Equal Protection challenge, and addressed only official legislative or administrative histories.

III. The Broad Potential Application of the Fourth Circuit's "Welcome Restraint" Analysis Would Generate Its Own Problems.

The majority below contends that its new "welcome restraint" analysis will not be a jurisprudential burden because it is applicable only to a "**highly unique** set of circumstances."[15] Pet. App. 61a (emphasis added). It contends: "The campaign statements here are probative of purpose because they are closely related in time, attributable to the primary decisionmaker, and specific and easily connected to the challenged action." Pet. App. 59a-60a.

Yet there is nothing "highly unique" in the circumstances identified by the majority opinion below that cabins the application of the "welcome restraint" doctrine just to Candidate and President Trump. A wide variety of candidates, from presidential to local specialty districts, make statements that some may find offensive to religious sensitivities.[16]

In tiny, rural San Juan County, Washington, for example, the San Juan County Public Hospital District #1 is a junior taxing district, administering,

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[15] The District Court below also felt its Establishment Clause review of candidates' campaign statements was "highly unique." Pet. App. 252a.

[16] *See, e.g.,* the multiple suits including *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), involving the actions of Chief Justice Roy Moore – "the Ten Commandments Judge" case discussed in n. 10 *supra*; *New York Times*, 376 U.S. at 271 ("To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement.").

inter alia, a public subsidy to a local rural hospital.[17] The local hospital, Peace Island Medical Center, is a Catholic-affiliated institution.[18] In 2015, a slate of candidates, headed by Monica Harrington, successfully ran for the Hospital District Board.[19] Harrington runs a website and blog called "Catholic Watch, Keeping Watch on Catholic Healthcare."[20] In 2017, Harrington and her colleagues on the Hospital District Board withdrew $50,000 of the public hospital subsidy and contracted with Planned

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[17] www.sjcphd.org.

[18] https://www.peacehealth.org/about-peacehealth/mission-values.

[19] "The Journal Endorses Sharp, Williams and Harrington For Hospital District Board," *The Journal of the San Juan Islands*, Oct. 20, 2015, http://www.sanjuanjournal.com/opinion/the-journal-endorses-sharp-williams-and-harrington-for-hospital-district-board-editorial/ ("We too sense that Harrington has a wider scope of issues with Catholic organizations than PeaceHealth, however her commitment to affordable healthcare and serving islanders comes first and foremost.").

[20] www.catholicwatch.org. "CatholicWatch is committed to safeguarding patients, physicians, and taxpayers from the imposition of theocracy-based medicine."

Harrington herself has publicly made statements that could reasonably be considered "vilification of men who have been, or are, prominent in church," *New York Times*, 376 U.S. at 271. Seattle Community Media, "Catholic HealthCare Your Only Choice," June 14, 2013, http://seattlecommunitymedia.org/series/moral-politics/episode/catholic-healthcare-your-only-choice, at 2:54 ("what it's about is increasing the span of control for the Catholic bishops and the health-care policies that they direct. … It would be paranoid if it weren't for the fact that real women are paying the price with their lives and with their fertility.").

Parenthood to provide services which they claimed were not offered by the Catholic-affiliated hospital.[21]

These are the same circumstances that the majority below thought were "highly unique," though writ small. Even assuming that the Hospital District's Board vote was based on facially-neutral concerns and the District's resolution did not mention Catholic beliefs or Catholicism, under the Fourth Circuit's "welcome restraint" analysis, do the clear and relevant views in 2015 of candidates Harrington and her colleagues on the Board so taint the 2017 vote that the Planned Parenthood contract decision must be reviewed under the Establishment Clause? Given the contention over even this small taxing district's actions, would the Washington or federal courts have to judge Harrington's motives based on her blogging and campaign statements? By what standards would those courts decide these cases?[22]

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[21] Hayley Day, "Public Hospital District Votes to Contract With Planned Parenthood," *The Journal of the San Juan Islands*, May 31, 2017, http://www.sanjuanjournal.com/news/public-hospital-district-votes-to-contract-with-planned-parenthood/.

[22] As Judge Kozinski wrote in dissent in *Washington v. Trump*, No. 17-35105 (9th Cir. Mar. 17, 2017), pp. 5-6:

> [Review of candidate statements] will mire us in a swamp of unworkable litigation. Eager research assistants can discover much in the archives, and those findings will be dumped on us with no sense of how to weigh them. Does a Meet the Press interview cancel out an appearance on Face the Nation? Does a year-old presidential proclamation equal three recent statements from the cabinet? What is the appropriate place of an overzealous senior thesis or a poorly selected yearbook quote?

As this Court noted in *Meek v. Pittenger*, 421 U.S. 349 (1975), the possibility of repeated, diverse challenges to such offensive statements may itself generate Establishment Clause problems.[23] It is not difficult to envision similar concerns arising from complex and difficult judicial analyses.

Under a "welcome restraint" analysis, the potential for litigation premised upon campaign speech, and divergent interpretations of various phrases in different courts and before different judges, is enormous. This is not an analysis that can be limited to presidential candidates and Executive Orders; the Fourth Circuit's treatment of campaign speech will inevitably be applied to Establishment Clause cases arising from the full range of political disputes. It should be reviewed.

> Weighing these imponderables is precisely the kind of "judicial psychoanalysis" that the Supreme Court has told us to avoid. *McCreary County v. ACLU of Ky.,* 545 U.S. 844, 862 (2005). … Limiting the evidentiary universe to activities undertaken while crafting an official policy makes for a manageable, sensible inquiry. But the panel has approved open season on anything a politician or his staff may have said, so long as a lawyer can argue with a straight face that it signals an unsavory motive.

[23] "This potential for political entanglement, together with the administrative entanglement which would be necessary to ensure that auxiliary services personnel remain strictly neutral and nonideological when functioning in church-related schools, compels the conclusion that Act 194 violates the constitutional prohibition against laws 'respecting an establishment of religion.'" *Pittenger,* 421 U.S. at 372.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully requests that this Court grant the Petition.

BARNABY W. ZALL
Counsel of Record for Amici Curiae
Law Office of Barnaby Zall
685 Spring St. #314
Friday Harbor, WA 98250
360-378-6600
bzall@bzall.com

ALLEN DICKERSON
ZAC MORGAN
Center for Competitive Politics
124 West St. #201
Alexandria, VA 22314
703-894-6800
adickerson@campaignfreedom.org