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PRESS RELEASE

Trump's Executive Order Barring Refugees is Unconstitutional

Order Expresses a Religious Preference in Violation of the Establishment Clause

NEW YORK, January, 30 2017—Columbia Law School's Public Rights/Private Conscience Project joins with thousands of lawyers, law professors, and legal organizations across the country in announcing that President Donald Trump's recent Executive Order writing a religious preference into U.S. policy is unconstitutional. The Order—issued late Friday afternoon, hours after the administration recognized Holocaust Remembrance Day—suspends the entire U.S. Refugee Admissions Program, declares that “entry of nationals of Syria as refugees is detrimental to the interests of the United States,” and cuts off entry into the U.S. for nationals of certain majority-Muslim countries. Several provisions of the order are clearly intended to block immigration by Muslim refugees while providing a preference for some Christian refugees to escape violence and persecution by resettling in the U.S. The Executive Order amounts to both a form of state sponsored discrimination against persons of one particular faith and a religious preference for persons of another faith, in violation of the First Amendment of the Constitution.

While the Refugee Admissions Program is suspended, Trump's Executive Order nevertheless allows entry of refugees on a case-by-case basis if the administration deems their admission “in the national interest,” specifically mentioning members of minority religions abroad. When and if the program is reinstated, the Order directs the agencies to “prioritize” religiously persecuted members of minority religions. The Order also directs agencies to recommend legislation to the President that would “assist with such prioritization.” There is no Constitutionally legitimate reason why the U.S. should prioritize the entry of particular religious groups, or determine that the entry of certain religious believers is or is not in the “national interest.” While written in ostensibly neutral language, it is apparent that the Order's preference for religiously persecuted refugees who are religious minorities in their country of origin is intended to shut out Muslim refugees.

Current federal law prohibits any preference, priority, or discrimination in the issuance of immigrant visas on account of the applicant's race, sex, nationality, place of birth, or place of residence - religion is not on the list, 8 U.S.C. § 1152(a)(1)(A). Yet, under the Supreme Court's interpretation of the Establishment Clause of the First Amendment, the new Trump immigration Executive Order is clearly unconstitutional. The state may not “act[] with the intent of promoting

a particular point of view in religious matters,” nor may it “aid, foster, or promote one religion or religious theory against another.” Similarly, the state's laws and policies must be neutral with respect to religion and between religions - that is, it may not favor adherents of one religion over another. The Court, and Justice Kennedy in particular, has taken the view that the Establishment Clause together with the Free Exercise Clause embrace an anti-persecution principle - expressly linking the religion clauses to the Equal Protection clause's non-discrimination norm. In the words of Chief Justice Rehnquist, “we have sometimes characterized the Establishment Clause as prohibiting the State from ‘disapprov[ing] of a particular religion.’” Thus, there are many grounds on which to challenge the new anti-immigrant Executive Order, both for persons holding valid immigrant visas and for those seeking new visas or refugee status. One of those grounds is that this odious new policy violates the Establishment Clause of the First Amendment.

While the Order leaves open the confounding questions of what constitutes a religious “minority” considering the great diversity of beliefs and practices within major world religions, as well as how the State will identify religious adherents, it is clear from both the face of the Order and the context around its creation that Trump’s actions are intended to discriminate based on religious belief. President Trump has pledged to instate a Muslim ban throughout his campaign, and he has now taken a significant step to fulfill this promise. “At its core, the Establishment Clause of the First Amendment forbids the U.S. government from determining which religions or religious beliefs are or are not acceptable, desirable, or American,” said Elizabeth Reiner Platt, Director of PRPCP. “This Order violates that crucial limitation.”

“It is alarming that one of the Trump Administration’s first policies is to issue a religious litmus test for refugees and immigrants seeking entry to the U.S.,” observed Katherine Franke, Sulzbacher Professor of Law and Faculty Director of PRPCP. “If the First Amendment of the U.S. Constitution stands for anything it is that the state must neither prefer or discriminate members of any particular religious tradition when it issues policy.”