

**UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK**

HAMEED KHALID DARWEESH, et al.,

on behalf of themselves and others
similarly situated,

Petitioners,

v.

DONALD J. TRUMP, President of the
United States, et al.,

Respondents.

Case No. 1:17-cv-00480
(Amon, J.)

Date: February 16, 2017

**BRIEF OF FORMER NATIONAL SECURITY OFFICIALS
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

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George Washington University Program on Extremism, <i>ISIS in America: From Retweets to Raqqa</i> 6 (Dec. 2015).....	5
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Memorandum from Stuart Levey, Assoc. Deputy Att’y Gen., to Dan Levin, Counsel to the Att’y Gen., & David Ayres, Dep’t of Justice Chief of Staff (Oct. 3, 2001)	23
Michael D. Shear & Ron Nixon, <i>How Trump’s Rush to Enact an Immigration Ban Unleashed Global Chaos</i> , N.Y. Times (Jan. 29, 2017).....	24, 25
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Refugee Processing Center, Interactive Reporting, Admissions and Arrivals ...	7, 19
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U.S. Dep't of Defense & Dep't of State, <i>Joint Report to Congress: Foreign Military Training</i> (FY 2015-2016)	17
U.S. Dep't of Justice, <i>1980 Statistical Yearbook of the Immigration and Naturalization Service</i> (1981)	15
U.S. Dep't of Justice, <i>1987 Statistical Yearbook of the Immigration and Naturalization Service</i> (1987)	15
U.S. Dep't of State et al, <i>Report to the Congress, Proposed Refugee Admissions for Fiscal Year 2016</i> (2016)	17
U.S. Dep't of State, Bureau of Consular Affairs, <i>Report of the Visa Office</i> (2000)	16

U.S. Dep’t of State, <i>U.S. Refugee Resettlement Processing for Iraqi and Syrian Beneficiaries of an Approved I-130 Petition</i> (Mar. 11, 2016).....	12
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INTEREST OF *AMICI CURIAE*

Amici curiae are former national security, foreign policy and intelligence officials who have worked on pressing national security matters in the U.S. government. A number of amici have worked at senior levels in administrations of both political parties. Amici have collectively devoted decades to combatting the various terrorist threats that the United States faces in an increasingly dangerous and dynamic world. Amici have all held the highest security clearances. A significant number were current on active intelligence regarding credible terrorist threat streams directed against the United States as recently as one week before the issuance of the January 27, 2017 Executive Order on “Protecting the Nation from Foreign Terrorist Entry into the United States” (“Order”).¹

Amici all agree that the United States faces real threats from terrorist networks and must take all prudent and effective steps to combat them, including the appropriate vetting of travelers to the United States. Amici are nevertheless not aware of any specific threat that would justify the broad bans on entry into the United States established by this Order. In amici’s professional opinion, the Order

¹ This amicus brief derives from the sworn Joint Declaration of ten of the signatories, first submitted in *Washington v. Trump*, No. 17-35105, __ F.3d __, 2017 WL 526497, slip op. (9th Cir. Feb. 9, 2017) [hereinafter “Ninth Circuit Opinion”], and also attached to the Petitioners’ motion.

cannot be justified on national security or foreign policy grounds, and ultimately, the Order undermines—rather than enhances—the security of the United States.

ARGUMENT

The Order serves no rational national security or foreign policy purpose. Certainly, it does not perform its declared task of “protecting the nation from foreign terrorist entry into the United States.” To the contrary, the Order disrupts thousands of lives, including those of refugees and visa holders who have already been vetted by standing procedures that Respondents have not shown to be inadequate.

Left in place, the Order could do long-term damage to our national security and foreign policy interests. It will endanger troops in the field, and disrupt key counterterrorism and national security partnerships. It will aid the propaganda effort of the Islamic State in Iraq and the Levant (“ISIL”) and support its recruitment message. By feeding the narrative that the United States is at war with Islam, the Order will impair relationships with the very Muslim communities that law enforcement professionals rely on to address the threat of terrorism. And it will have a damaging humanitarian and economic impact.

In prior cases, courts have deferred to the “considered judgment” of the President only after administrative records have revealed that the President’s decision rested on counsel from expert agencies with broad experience on the

matters presented. Here, there is no evidence that the Order was subjected to an interagency legal and policy process. Rebranding a proposal first advertised as a “Muslim Ban” as “Protecting the Nation from Foreign Terrorist Entry into the United States” does not disguise the Order’s discriminatory intent, or make it necessary, effective or faithful to America’s Constitution, laws, and values.

I. THE EXECUTIVE ORDER CANNOT BE JUSTIFIED ON NATIONAL SECURITY OR FOREIGN POLICY GROUNDS.

On January 27, 2017, President Donald Trump signed an executive order imposing a number of bans on the entry of non-citizens into the United States.² The President’s stated goals for the Order were to “protect[] the nation from foreign terrorist entry into the United States” and to “ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism.”³

As former U.S. officials responsible for the national security and foreign relations of the United States in multiple presidential administrations, we have devoted our careers to the same goals. Our first priority has always been the

² Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017). The Order bans entry into the United States by nationals of Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen for 90 days, bans all refugee admissions for 120 days, and indefinitely bans the entry of all Syrian refugees. The Order exempts diplomats (from the ban on entry for nationals) and refugees whom on a case-by-case basis are deemed to be in the national interest (from the ban on all refugee admissions for 120 days).

³ *Id.*

safety and welfare of the American people. Yet the Order bears no rational relation to the President’s stated aims. It targets countries whose nationals have committed no lethal terrorist attacks on U.S. soil in the last forty years. It bars the entry of refugees—the vast majority of whom are vulnerable women and children⁴—when in the modern era of screening, no refugee has ever killed a U.S. citizen in a terrorist attack in the United States.⁵

Even now, weeks after the signing of the Order, Respondents have supplied no information that would justify such a categorical ban. They identify no basis for believing that there is a heightened or particularized threat from these seven countries. They make no showing that our immigration system has suffered from inadequate consideration of national origin or religious affiliation, and identify no flaw in the current individualized vetting procedures—developed by national security officials across several presidential administrations in response to particular threats identified by U.S. intelligence.⁶

⁴ U.S. Dep’t of State, *The Refugee Processing and Screening System*, <https://www.state.gov/documents/organization/266671.pdf>.

⁵ Alex Nowrasteh, *Little National Security Benefit to Trump’s Executive Order on Immigration*, CATO at Liberty (Jan. 25, 2017) [hereinafter “Nowrasteh 2017”].

⁶ Ninth Circuit Opinion, *supra* note 1, at 26 (“Although we agree that the Government’s interest in combating terrorism is an urgent objective of the highest order, the Government has done little more than reiterate that fact.” (internal citations and quotation marks omitted)); *Aziz v. Trump*, No. 1:17-cv-00116-LMB-TCB, ___ F.Supp.3d ___ at 6, 2017 WL 580855 (E.D. Va. Feb. 13, 2017).

A. There is no national security or foreign policy basis for suspending entry of aliens from the seven named countries.

No rational national security purpose is served by the Order's blanket ban on entry into the United States of nationals of Iraq, Syria, Sudan, Iran, Somalia, Libya, and Yemen.

First, not a single American has died in a terrorist attack on U.S. soil at the hands of citizens of these seven nations in the last forty years.⁷ The Order opens with a reference to the September 11, 2001 attacks, and White House officials have since pointed to those attacks as justification for its restrictions.⁸ But none of the September 11 hijackers were citizens of the seven targeted countries.⁹ In fact, the overwhelming majority of individuals who were charged with—or who died in the course of committing—terrorist-related crimes inside the United States since September 11 have been U.S. citizens or legal permanent residents.¹⁰

(“Defendants . . . have not offered any evidence to identify the national security concerns that allegedly prompted this EO, or even described the process by which the president concluded that this action was necessary.” (citations omitted)).

⁷ Nowrasteh 2017, *supra* note 5.

⁸ Jan. 27 Order §1; Sabrina Siddiqui, *Trump Signs ‘Extreme Vetting’ Executive Order for People Entering the US*, The Guardian (Jan. 27, 2017).

⁹ Central Intelligence Agency, *11 September 2001 Hijackers*, https://www.cia.gov/news-information/speeches-testimony/2002/DCI_18_June_testimony_new.pdf.

¹⁰ See Peter Bergen et al., *Terrorism in America After 9/11*, New America Foundation, www.newamerica.org/in-depth/terrorism-in-america/; George Washington University Program on Extremism, *ISIS in America: From Retweets to*

Second, Respondents have identified no information or basis for believing that a heightened or particularized future threat has suddenly arisen from the seven named countries. Those of us who were current on active intelligence concerning all credible terrorist threat streams directed against the United States as of January 20, 2017 know of no specific threat—just seven days later—that would justify the ban of these seven countries. The Order itself points to no such factual basis, and Respondents have offered none.¹¹

Third, Respondents have identified no flaw in existing procedures that would justify the bans in the Order. They offer no reason to shift abruptly to group-based bans, when the United States already has a tested system of individualized vetting, developed and implemented by national security professionals across the government. Since the September 11, 2001 attacks, the United States has developed a rigorous system of security vetting, leveraging the

Raqqa 6 (Dec. 2015), <https://cchs.gwu.edu/isis-in-america>; Nora Ellingsten, *It's Not Foreigners Who Are Plotting Here: What the Data Really Show*, Lawfare (Feb. 7, 2017); see also Felicia Schwartz & Ben Kesling, *Countries Under U.S. Entry Ban Aren't Main Sources of Terror Attacks*, The Wall St. J. (Jan. 29, 2017). One other set of data, relied on by White House officials, has been widely criticized for its definition of terrorism-related offenses, among other issues. See, e.g., Molly Redden, *Trump Powers "Will Not be Questioned" on Immigration, Senior Official Says*, The Guardian (Feb. 12, 2017), <https://www.theguardian.com/us-news/2017/feb/12/trump-administration-considering-narrower-travel-ban>.

¹¹ Oral Argument, *Washington v. Trump*, No. 17-35105, at 9:30, http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010885.

full capabilities of the law enforcement and intelligence communities. This vetting system is applied to travelers not once, but multiple times, and it is continually re-evaluated to ensure its effectiveness. Successive administrations have strengthened the vetting process through robust information-sharing and data integration. This allows the government to identify potential terrorists without resorting to blanket bans on countries or refugees.¹²

Finally, the Order cannot be defended as a mere continuation of recent U.S. counterterrorism policy. Because threat streams constantly evolve, we sought continually to improve vetting when serving as national security officials. That effort included reviews in 2011 and 2015-16, when the U.S. government acted in response to particular threats identified by intelligence sources. In 2011, after receiving derogatory information regarding two Iraqi nationals who had entered the United States as refugees, the U.S. government undertook an extensive interagency review of its vetting system. The flow of refugees from Iraq slowed during the pendency of the review,¹³ and upon completion of the review, the U.S.

¹² See, e.g., *The Security of U.S. Visa Programs: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2016) (written statements of David Donahue and Sarah R. Saldaña), <https://www.hsgac.senate.gov/hearings/the-security-of-us-visa-programs>.

¹³ Refugee Processing Center, Interactive Reporting, http://ireports.wrapsnet.org/Interactive-Reporting/EnumType/Report?ItemPath=/rpt_WebArrivalsReports/MX%20-%20Arrivals%20by%20Nationality%20and%20Religion; Jon Finer, *Sorry, Mr.*

government implemented new, stronger security procedures in areas of identified vulnerability.¹⁴

Likewise, in late 2015 and early 2016, in response to the emerging threat posed by ISIL, the U.S. government took several steps to strengthen the Visa Waiver Program, which allows citizens from thirty-eight approved countries to travel to the United States without first obtaining a visa. President Obama introduced a series of new measures to enhance security screenings and traveler risk assessments in the program and bolster our relationship with partner countries.¹⁵ Around the same time, President Obama signed into law a statute that removed from the Visa Waiver Program those nationals of existing Visa Waiver Program countries who: (1) had been present in Iraq, Syria, Iran or Sudan after

President: The Obama Administration Did Nothing Similar to Your Immigration Ban, Foreign Policy (Jan. 30, 2017).

¹⁴ *Ten Years After 9/11: Preventing Terrorist Travel*, Hearing Before the United States S. Comm. on Homeland Sec. and Governmental Affairs, 112th Cong. 522 (2011) (written statements of Rand Beers and Janice L. Jacobs), <https://www.hsgac.senate.gov/hearings/ten-years-after-9/11-preventing-terrorist-travel>; Andorra Bruno, *Iraqi and Afghan Special Immigrant Visa Programs*, Cong. Research Serv., 14 (2016).

¹⁵ The White House, *Visa Waiver Program Enhancements* (Nov. 30, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/11/30/fact-sheet-visa-waiver-program-enhancements>; U.S. Dep't of Homeland Security, *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016), <https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program>.

March 1, 2011, or (2) were dual nationals of one of those four countries.¹⁶ Several months later, the Secretary of Homeland Security—acting under the new statute and in consultation with the Director of National Intelligence and the Secretary of State—expanded the list of four countries to include Yemen, Libya and Somalia.¹⁷

Contrary to Respondents' claims, these previous reforms provide no justification for a blanket, group-based ban on the entry of nationals from these seven countries. The enhancement of security in the refugee system allowed for *more searching, individualized vetting* of travelers, the opposite of the categorical ban in this Order. Likewise, the reforms to the Visa Waiver Program did not automatically bar anyone—including nationals of any country—from travel to the United States. The affected individuals were simply required to obtain *individually-vetted visas* before entering the United States, just as nationals from the more than 150 other nations not currently part of the Visa Waiver Programs must do.

To keep our country safe from terrorist threats, the U.S. government must gather all credible evidence about growing threat streams—including through the

¹⁶ 8 U.S.C. § 1187; U.S. Dep't of State, *Visa Waiver Program*, <https://travel.state.gov/content/visas/en/visit/visa-waiver-program.html>.

¹⁷ The exemptions for Yemen, Libya and Somalia only applied to those who had traveled to or been present in one of those countries, not dual nationals. U.S. Dep't of Homeland Security, *DHS Announces Further Travel Restrictions for the Visa Waiver Program*, *supra* note 15.

best available intelligence—to thwart those threats before they ripen. Through the years, national security-based immigration restrictions have: (1) responded to specific, credible threats based on individualized information, (2) rested on the best available intelligence, and (3) been subject to thorough interagency legal and policy review. The present Order does not rest on such tailored grounds, but rather on (1) generalized bans, (2) that are not supported by any new intelligence that Respondents have cited or of which we are aware, and (3) were not vetted through careful interagency legal and policy review.

B. The suspension of refugee admissions is not justified by national security or foreign policy concerns.

The Order's 120-day ban on refugee admissions, and its indefinite ban on Syrian refugee admissions, serve no national security or foreign policy purpose. We know of no factual basis for Respondents' claim that refugees pose a particular security threat to the United States that would justify the Order's categorical bans.

From 1975 to the end of 2015, over three million refugees have been admitted to the United States. According to a recent study, only three have killed people in terrorist attacks on U.S. soil.¹⁸ All three were Cuban refugees, who murdered three people in two attacks in the 1970s. Critically, these refugees were admitted and carried out their crimes before the creation of the modern refugee

¹⁸ Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, Cato Institute (Sept. 13, 2016).

vetting system in 1980.¹⁹ No refugee has killed an American in a terrorist attack in the United States since that system was put in place.²⁰ According to the study, over that same period, only twenty refugees were convicted of any terrorism-related crimes on U.S. soil at all.²¹

In part, this is because refugees already receive the most thorough vetting of any travelers to the United States.²² Refugee candidates are vetted recurrently throughout the resettlement process, as “pending applications continue to be checked against terrorist databases, to ensure new, relevant terrorism information has not come to light.”²³ By the time refugees referred by the United Nations High Commissioner for Refugees (“UNHCR”) are approved for resettlement in the United States, they have been reviewed not only by UNHCR but also by the National Counterterrorism Center, the Federal Bureau of Investigation, the Department of Homeland Security, the Department of Defense, the Department of State and the U.S. intelligence community more broadly.²⁴

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*; see also Nowrasteh 2017, *supra* note 5.

²² U.S. Dep’t of State, *U.S. Refugee Admissions Program FAQs*, <https://www.state.gov/j/prm/releases/factsheets/2017/266447.htm>.

²³ Amy Pope, *The Screening Process for Refugee Entry into the United States* (Nov. 20, 2015), <https://obamawhitehouse.archives.gov/blog/2015/11/20/infographic-screening-process-refugee-entry-united-states>.

²⁴ U.S. Dep’t of State, *U.S. Refugee Admissions Programs FAQs*, *supra* note 22.

The refugee vetting process is also reviewed and strengthened on an ongoing basis in response to particular threats.²⁵ For Syrian applicants, the Department of Homeland Security recently added a layer of enhanced review that involves collaboration between the Refugee, Asylum, and International Operations Directorate and the Fraud Detection and National Security Directorate. Among other measures, this review provided additional, intelligence-driven support to refugee adjudicators that U.S. officials could then use to more precisely question refugees during their security interviews.²⁶ Respondents allege no specific information about any vetting step omitted by current procedures.

While the United States' own individualized vetting process is the most important step, additional considerations make the U.S. refugee system difficult for terrorists to exploit. Under current vetting procedures, refugees often wait eighteen to twenty-four months to be cleared for entry into the United States.²⁷ Further, of all refugees determined by the UNHCR to be eligible for resettlement, less than

²⁵ U.S. Dep't of Homeland Security, *U.S. Citizenship and Immigration Services* (Dec. 3, 2015), https://www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20Asylum%2C%20and%20Int%271%20Ops/Refugee_Security_Screening_Fact_Sheet.pdf.

²⁶ U.S. Dep't of State, *The Refugee Processing and Screening System*, *supra* note 5; Andorra Bruno, *Syrian Refugee Admissions and Resettlement in the United States: In Brief*, Cong. Research Serv., 4-5 (2016).

²⁷ U.S. Dep't of State, *U.S. Refugee Resettlement Processing for Iraqi and Syrian Beneficiaries of an Approved I-130 Petition* (Mar. 11, 2016), <https://www.state.gov/j/prm/releases/factsheets/2016/254649.htm>.

one percent were resettled in any country at all in 2015,²⁸ meaning that a would-be terrorist posing as a refugee has very little chance of being resettled *anywhere*.

Finally, the UNHCR resettlement program places refugees in dozens of countries, and refugees do not decide where they are resettled or which country accepts them, meaning that the odds of any individual refugee being settled into the United States in particular are exceedingly low.

II. THE ORDER'S OVERBREADTH HARMS OUR NATIONAL SECURITY AND FOREIGN POLICY INTERESTS.

The Order's overreach will do lasting harm to the national security and foreign policy interests of the United States.

A. The Order is of unprecedented scope.

The Order effectively amounts to a bar on entry to the United States of nationals from any of the seven listed countries. The Order revoked the visas of anywhere between 60,000 to 100,000 people,²⁹ initially encompassed as many as 500,000 green card holders,³⁰ and creates a forward-looking ban on countless more

²⁸ U.N. High Commissioner for Refugees, *Resettlement*, <http://www.unhcr.org/en-us/resettlement.html>.

²⁹ Justin Jouvenal et al., *Justice Dept. Lawyer Says 100,000 Visas Revoked Under Travel Ban; State Dept. Says about 60,000*, Wash. Post (Feb. 3, 2017).

³⁰ Marcelo Rochabrun, *Trump Order Will Block 500,000 Legal U.S. Residents from Returning to America from Trips Abroad*, ProPublica (Jan. 28, 2017). The Order could conceivably again encompass green card holders depending upon whether a

individuals. The Order bars doctors and patients, grandmothers and infants, parents and children, tourists and business travelers, police officers and those fighting alongside our Service Members abroad, all without regard to individual threat or circumstance.

This is an order of unprecedented scope. We know of no case where a president has invoked authority under the Immigration and Nationality Act to suspend admission of such a sweeping class of people. Even after the September 11 attacks, the U.S. government did not invoke the provisions of law cited by the Administration to broadly bar entrants based on nationality, national origin or religious affiliation. Across the decades, executive orders under the Immigration and Nationality Act have generally targeted specific government officials,³¹ undocumented immigrants³² or individuals whose personalized screenings indicated that they posed a national security risk.³³

White House Counsel opinion is deemed authoritative by the implementing agencies. *See* Ninth Circuit Opinion, *supra* note 2, at 21-22.

³¹ *See, e.g.*, Proclamation No. 6958, 61 Fed. Reg. 60,007 (Nov. 22, 1996).

³² *See, e.g.*, Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (May 24, 1992); Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981).

³³ *See, e.g.*, Exec. Order No. 13,726, 81 Fed. Reg. 23,559 (Apr. 19, 2016); Exec. Order No. 13,694, 80 Fed. Reg. 18,077 (Apr. 1, 2015).

Some have claimed that historical examples involving Cuba, Iran, or Haiti are akin to this Order. But the first two orders included large exceptions,³⁴ and the third imposed no restrictions on lawful travel by visa holders at all.³⁵ And above

³⁴ In 1980, during the Iranian Hostage Crisis, President Carter invalidated all visas issued or reissued to Iranian citizens for future entry into the country. Sanctions Against Iran Remarks Announcing U.S. Actions, April 7, 1980, <http://www.presidency.ucsb.edu/ws/?pid=33233>. But the White House also carved out exceptions for humanitarian need, to include those “visiting a sick aunt,” and students who were in a course of study in the United States. The White House even encouraged Iranians in the United States whose visas were set to expire to apply for asylum. One White House official said, “[o]nce in the good old United States legally, or illegally for the matter, they are cloaked in the mantle of the constitutional and legal protections we all value.” Charles R. Babcock, *Carter’s Visa Crackdown Won’t Hurt Immediately*, Wash. Post (Apr. 9, 1980); Robert Pear, *Visa Restrictions Chiefly Apply to Iranians Outside of America*, N.Y. Times (Apr. 8, 1980); see U.S. Dep’t of Justice, 1980 Statistical Yearbook of the Immigration and Naturalization Service (1981).

In 1986, in the course of a diplomatic impasse over a migration agreement, President Reagan issued a presidential proclamation suspending the “[e]ntry of Cuban nationals as immigrants” into the United States. Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986). But that proclamation included a major exception for the immediate relatives of U.S. citizens. *Id.*; U.S. Dep’t of Justice, 1987 Statistical Yearbook of the Immigration and Naturalization Service (1987); see also David Bier, *Trump’s Ban on Immigration from Certain Countries is Illegal*, Cato at Liberty, Dec. 8, 2016. Both actions were taken to exert pressure against a particular national government—and in the case of Cuba, to “resume normal migration”—not to minimize a threat posed by particular people.

³⁵ In 1991, President Bush issued an Executive Order that imposed restrictions on “undocumented aliens” who were “coming by sea to the United States without necessary documents.” Exec. Order 12,807, 57 Fed. Reg. 23,133 (June 1, 1992). However, legal travel and immigration continued from Haiti into the United States in this period. Even as to those without documents, the Bush Administration offered those repatriated the option of seeking in-country refugee processing. Maureen Taft-Morales, Cong. Research Serv., *Haiti: Efforts to Restore President*

all, no modern example even approaches the unqualified sweep of this Order, which bans nearly 220 million people from seven separate countries from traveling to the United States.

B. The Order will do serious damage to our national security and foreign policy interests.

The Order will harm the interests of the United States in a number of respects.

1. The Order will endanger U.S. troops in the field.

Every day, U.S. Service Members work and fight alongside allies from some of the named countries, who put their lives on the line to protect Americans and further American interests abroad. Those barred by the Order include individuals working alongside our men and women in Iraq fighting against ISIL.³⁶ Soldiers from these countries have already voiced resentment at the Order.³⁷ The Order

Aristide, 1991-1994, 14 (1995); U.S. Dep't of State, Bureau of Consular Affairs, *Report of the Visa Office* (2000), tables XII, XIII, XIV, XV, XVIII, XIX, <https://travel.state.gov/content/visas/en/law-and-policy/statistics/annual-reports/report-of-the-visa-office-2000.html>.

³⁶ Rebecca Kheel, *Trump Travel Order Complicates ISIS Fight in Iraq*, The Hill (Feb. 1, 2017); Dan de Luce, *Trump's Immigration Order Gives Ammunition to ISIS, Endangers U.S. Troops*, Foreign Policy (Jan. 29, 2017).

³⁷ David Zucchino, *Travel Ban Drives Wedge Between Iraqi Soldiers and Americans*, N.Y. Times (Feb. 3, 2017).

may also obstruct ongoing training, education, and other security cooperation programs underway with several of the listed countries.³⁸

Moreover, the Order will affect interpreters and others who have assisted our troops at great risk to their own lives. The Order initially banned all such individuals from coming to the United States. Days later, U.S. officials announced that it would allow “the entry of Iraqi nationals with a Special Immigrant Visa to the United States.”³⁹ But even that step leaves unaddressed tens of thousands of others who assisted the United States and who are waiting for admission as “Priority 2” refugees outside of the now closed Special Immigrant Visa program.⁴⁰ By discouraging future assistance and cooperation from these and other affected military allies and partners, the Order will jeopardize the safety and effectiveness of our troops.

2. The Order will disrupt essential counterterrorism, foreign policy, and national security partnerships.

³⁸ U.S. Dep’t of Defense & Dep’t of State, *Joint Report to Congress: Foreign Military Training* (FY 2015-2016).

³⁹ U.S. Customs and Border Protection, *Protecting the Nation from Foreign Terrorist Entry into the United States* (Feb. 2, 2017).

⁴⁰ U.S. Dep’t of State et al., *Report to the Congress, Proposed Refugee Admissions for Fiscal Year 2016*, at 57 (2016); Stephanie Ott, *What Happens to Iraqis who Worked with the U.S. military*, Al Jazeera (Feb. 1, 2017); Urban Justice Center, International Refugee Assistance Project, *IRAP Stands With Iraqi Allies of the United States Affected by Executive Order* (Feb. 1, 2017).

The Order will disrupt key counterterrorism, foreign policy, and national security partnerships that are critical to our country's efforts to address the threat posed by terrorist groups such as ISIL. The Order has sparked intense international criticism and alienated U.S. allies. Partner countries in the Middle East, on whom we rely for vital counterterrorism cooperation, are expressing disapproval and even threatening reciprocity, jeopardizing years of diplomatic effort.⁴¹

The Order will also endanger U.S. intelligence sources in the field. For up-to-date information, our intelligence officers often rely on human sources in some of the countries listed. The Order breaches faith with those very sources, who have risked much or all to keep Americans safe—and whom our officers had promised to protect.⁴² Finally, by suspending visas, this Order halts the collection of important intelligence that occurs during visa screening processes, information that can be used to recruit agents and identify regional trends of instability.⁴³

⁴¹ Rebecca Savransky, *Iraq Parliament Approves 'Reciprocity Measure' In Trump Immigration Ban's Wake*, The Hill (Jan. 30, 2017); Loveday Morris, *Iraqi Leader to U.S.: Americans Come to Iraq to Fight With ISIS, but I Haven't Banned You*, Wash. Post (January 31, 2017); Kevin Liptak, *Travel Ban Remains Sticking Point in Trump Calls with US Allies*, CNN (Feb. 9, 2017).

⁴² Michael V. Hayden, *Former CIA Chief: Trump's Travel Ban Hurts American Spies – and America*, Wash. Post (Feb. 5, 2017).

⁴³ This process is particularly important in countries like Iran and Libya, where internal conflict or lack of diplomatic ties limit on-the-ground intelligence collection.

3. The Order will hinder domestic law enforcement efforts.

Domestic law enforcement relies heavily on partnerships with American Muslim communities to fight homegrown terrorism.⁴⁴ One report found that in the years since September 11, 2001, Muslim communities have helped U.S. security officials prevent nearly two out of every five Al-Qaeda plots threatening the United States.⁴⁵ By alienating Muslim-American communities in the United States, the Order will harm our efforts to enlist their aid in identifying radicalized individuals who might launch attacks of the kind recently seen in San Bernardino and Orlando.

The Order's disparate impact on Muslim travelers and immigrants feeds ISIL's propaganda narrative and sends the wrong message to the Muslim community at home and abroad: that the U.S. government is at war with them based on their religion.⁴⁶ Less than a day after President Trump signed the Order,

⁴⁴ Kristina Cooke & Joseph Ax, *U.S. Officials Say American Muslims Do Report Extremist Threats*, Reuters (Jun. 16, 2016).

⁴⁵ Muslim Public Affairs Council, *Data on Post-9/11 Terrorism in the United States* (Jun. 2012), <http://www.mpac.org/assets/docs/publications/MPAC-Post-911-Terrorism-Data.pdf>.

⁴⁶ Muslim refugees from the seven listed countries made up 82.2 percent of all Muslim refugee arrivals to the United States from January 1, 2016 to February 11, 2017. Refugee Processing Center, Interactive Reporting, Admissions and Arrivals http://ireports.wrapsnet.org/InteractiveReporting/EnumType/Report?ItemPath=/rpt_WebArrivalsReports/MX%20%20Arrivals%20by%20Nationality%20and%20Religion.

jihadist groups began citing its contents in recruiting messages online.⁴⁷ The Order may even endanger Christian communities overseas, by handing ISIL a recruiting tool and propaganda victory that spreads their message that the United States is engaged in a religious war.

4. The Order will have a devastating humanitarian impact.

The Order will have an immediate and devastating humanitarian impact. First and foremost, the Order disrupts the travel of men, women and children who have been victimized by actual terrorists. Tens of thousands of other travelers today face deep uncertainty about whether they may travel to or from the United States for reasons including medical treatment, study or scholarly exchange, funerals or other pressing family reasons. While the Order allows the Secretaries of State and Homeland Security to admit travelers from targeted countries on a case-by-case basis, in our experience it would be unrealistic for these overburdened agencies to apply such procedures to every one of the thousands of affected individuals with urgent and compelling needs to travel. Finally, closing our borders to refugees who otherwise would have had the opportunity to resettle in the United States will keep them in dangerous conditions and shift the burden to overstretched allies who are currently accepting far more than their fair share of refugees.

⁴⁷ Joby Warrick, *Jihadist Groups Hail Trump's Travel Ban as a Victory*, Wash. Post (Jan. 29 2017).

5. The Order will cause economic damage to American citizens and residents.

Finally, the Order will affect many foreign travelers who annually inject hundreds of billions of dollars into the U.S. economy, supporting well over a million U.S. jobs.⁴⁸ Since the Order was issued, dozens of affected companies have noted the damaging impact it can be expected to have on strategic economic sectors including defense, technology, and medicine.⁴⁹ About a third of U.S. innovators were born outside the United States, and their scientific and technological innovations often contribute to making our nation and the world safe.⁵⁰ The harm caused by the ban to the economic dynamism of our country will carry long-term negative and serious consequences for our national security.

⁴⁸ U.S. Dep't of Commerce, *Department of Commerce Releases October Travel and Tourism Expenditures* (Dec. 15, 2016), <http://trade.gov/press/press-releases/2016/department-of-commerce-releases-october-travel-tourism-expenditures-121516.asp>.

⁴⁹ See, e.g., Br. for Technology Companies and Other Businesses as Amici Curiae in Support of Appellees, *Washington v. Trump*, No. 17-35105, __ F.3d __, 2017 WL 526497 (9th Cir. Feb. 9, 2017).

⁵⁰ Adams Nager, et al., *The Demographics of Innovation in the United States*, Information Technology & Innovation Foundation 29 (Feb. 2016), <http://www2.itif.org/2016-demographics-of-innovation.pdf>. Iran's universities, for example, have produced an "inordinate amount of intellectual talent in computer science and cybersecurity." These scientists are drawn to universities in the United States, where their research is then used by entities such as the Office of Naval Research and DARPA. Patrick O'Neill, *How Academics Are Helping Cybersecurity Students Overcome Trump's Immigration Order*,

III. THE ORDER WAS ILL-CONCEIVED, POORLY IMPLEMENTED AND ILL-EXPLAINED.

Respondents have presented no evidence that the Order was subject to the thorough interagency policy and legal processes designed to address current terrorist threats.

In every recent administration, presidents considering a change to immigration policy have followed an interagency review process that allows experts and security professionals to ensure that all relevant uncertainties are addressed by policy and legal experts, appropriate preparations are made for implementation, and any potential risks are effectively mitigated. Before recommendations are submitted to the President, the National Security Council oversees a legal and policy process that typically includes the following important components: a review by the career professionals in institutions of the U.S. government charged with implementing an order; a review by the career lawyers in those institutions to ensure legality and consistency in interpretation; and a senior policy review across all relevant agencies, including Deputies and Principals at the cabinet level.

Cyberscoop (Jan. 30, 2017), <https://www.cyberscoop.com/trump-immigration-ban-cybersecurity-iran-protests/>.

This practice of interagency deliberation has been followed even—and especially—in times of national emergency in order to set temporary exclusions or establish criteria for admission to the United States. In the immediate aftermath of the September 11, 2001 attacks, when the Bush Administration considered whether the President should invoke 8 U.S.C. § 1182(f) to bar certain immigrants or take other actions to secure the border, officials engaged in consultations across the national security agencies to arrive at a decision.⁵¹ The reexamination of the vetting system in 2011⁵² and the security reforms to the Visa Waiver Program in 2015-16⁵³ reflect similar interagency consultation.

The process that produced this Order departed from decades of standard practice across administrations of both parties.⁵⁴ Respondents offer no evidence that the present Order resulted from experienced intelligence and security professionals recommending changes in response to identified threats. We know

⁵¹ Edward Alden, *The Closing of the American Border* 104-06 (2008); Thomas R. Eldridge, et al., *9/11 and Terrorist Travel: A Staff Report of the National Commission on Terrorist Attacks Upon the United States* 151-54 (2004); Memorandum from Stuart Levey, Assoc. Deputy Att’y Gen., to Dan Levin, Counsel to the Att’y Gen., & David Ayres, Dep’t of Justice Chief of Staff (Oct. 3, 2001).

⁵² Jon Finan, *supra* note 13.

⁵³ See *supra* notes 15-17 and surrounding text.

⁵⁴ This is no less true of executive orders issued at the start of a new presidency. See, e.g., Henry B. Hogue, Cong. Research Serv., *Presidential Transition Act: Provisions and Funding* (2016); William Glaberson & Helene Cooper, *Obama’s Plan to Close Prison at Guantánamo May Take Year*, N.Y. Times (Jan. 12, 2009).

of no process underway before January 20, 2017 to change current immigration vetting procedures. According to extensive reporting, since that date, Respondents followed no such process.⁵⁵ Nor, apparently, did the White House consult officials from any of the seven agencies tasked with enforcing immigration laws, much less the congressional committees and subcommittees that oversee them. Respondents' repeated need to clarify confusion that ensued in the wake of the Order only confirms that the Order received little, if any, advance scrutiny by the Departments of State, Justice, Homeland Security or the intelligence community.⁵⁶

As telling, this Order was apparently issued without interagency legal process. In recent history, administrations of both political parties have followed a protocol of submitting proposed Orders to the Attorney General, the Justice Department's Office of Legal Counsel ("OLC") and all other agency legal offices

⁵⁵ The Secretary of Homeland Security reportedly received his first full briefing as the President signed the Order. Michael D. Shear & Ron Nixon, *How Trump's Rush to Enact an Immigration Ban Unleashed Global Chaos*, N.Y. Times (Jan. 29, 2017). The Secretary of Defense was neither consulted during the drafting of the order nor given an opportunity to provide input. Evan Perez et al., *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017). Most State Department officials reportedly first heard of the Order through the media. Jonathan Allen & Brendan O'Brien, *How Trump's Abrupt Immigration Ban Sowed Confusion at Airports, Agencies*, Reuters (Jan. 29, 2017).

⁵⁶ Customs and border officials reported that their superiors could not provide clear guidance about the new policy. Shear & Nixon, *supra* note 55; *see also* Allen & O'Brien, *supra* note 54 (quoting CBP chief of passenger operations at John F. Kennedy International Airport declaring, "[w]e are as much in the dark as everybody else.").

involved with enforcing the law.⁵⁷ Legal review by multiple agencies helps to identify potentially unforeseen legal implications of an order, determines the lawfulness of the proposed action, and analyzes whether the proposed language has established legal meaning that can be interpreted consistently with other laws and regulations governing the field. Here, the White House reportedly never asked the Department of Homeland Security for legal review in advance of the Order being promulgated, so “[t]he Department . . . was left making a legal analysis on the order after [President] Trump signed it.”⁵⁸ Unsurprisingly, the resulting Order contains numerous ambiguities and inconsistencies that immediately caused confusion, forcing implementing agencies to improvise.⁵⁹

On January 27, the Office of Legal Counsel issued a cursory memorandum that declared the Order “approved with respect to form and legality.”⁶⁰ But the OLC memorandum conspicuously omits any legal analysis or discussion of either the Order’s impact on permanent U.S. residents or the constitutional provisions plainly implicated, *i.e.*, the Due Process, Equal Protection, and Establishment and Free Exercise of Religion Clauses. Soon thereafter, the Acting Attorney General

⁵⁷ See, e.g., Exec. Order No. 11,030, 27 Fed. Reg. 5,847 (Jun. 19, 1962).

⁵⁸ Perez et al., *supra* note 54; Shear & Nixon, *supra* note 54.

⁵⁹ Allen & O’Brien, *supra* note 54.

⁶⁰ Memorandum from Curtis E. Gannon, Acting Assistant Att’y Gen. (Jan. 27, 2017).

concluded that the Department of Justice would not defend the Order because she was not “convinced that the Executive Order is lawful.”⁶¹

The Department of Homeland Security initially construed the Executive Order not to apply to people with lawful permanent residence. Overnight, the White House overruled the Department and instructed the agency to allow lawful permanent residents entry only on a case-by-case basis. Five days later, the White House reversed itself and announced that the Order did not apply to either “green card holders”⁶² or dual nationals.⁶³

When courts in previous cases have deferred to the “considered judgment” of the President, they did so on the basis of administrative records showing that the President’s decision rested on cleared views from expert agencies with broad experience on the matters presented to him. And as the Supreme Court has noted, “[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role.”⁶⁴

⁶¹ Memorandum from Sally Yates, Acting Att’y Gen., to the Dep’t of Justice (Jan. 30, 2017).

⁶² Memorandum from Donald F. McGahn II, Counsel to the President, to the Acting Sec’y of State, the Acting Att’y Gen., and the Sec’y of Homeland Sec. (Feb. 1, 2017).

⁶³ Geneva Sands et al., *Officials Aim to Clarify Impact on Dual Nationals From Trump’s Immigration Executive Order*, ABC News (Feb. 1, 2017).

⁶⁴ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

CONCLUSION

Ours is a nation of immigrants, committed to the faith that we are all equal under the law and that we abhor discrimination, whether based on race, religion, sex, or national origin. As government officials, we sought diligently to protect our country, even while maintaining an immigration system free from intentional discrimination, a system that applies no religious tests and that measures individuals by their merits, not by stereotypes of countries or groups.

Unjustified blanket bans of certain countries or classes of people are beneath the dignity of the nation and Constitution that we took oaths to protect. Although our nation was founded by immigrants fleeing religious persecution, the Order discriminates based on religion. Although our Constitution enshrines the principle that all are equal under the law, the Order discriminates on the basis of national origin. And although the United States accepted over four million refugees in the decades after World War II,⁶⁵ the Order willfully ignores the greatest refugee crisis since that time.

Allowing the Order to take effect would wreak havoc on our nation's security and deeply held American values and threaten innocent lives. Blocking the Order while the underlying legal issues are being adjudicated would not

⁶⁵ Carl J. Bon Tempo, *Americans at the Gate: The United States and Refugees during the Cold War* 1 (2008).

jeopardize national security. It would simply preserve the *status quo ante*, still subjecting individuals to all the rigorous legal vetting processes that are currently in place.

For all of these reasons, the January 27, 2017 Executive Order does not further—but instead harms—sound U.S. national security and foreign policy.

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APPENDIX: LIST OF *AMICI*

1. Madeleine K. Albright served as Secretary of State from 1997 to 2001. A refugee and naturalized American citizen, she served as U.S. Permanent Representative to the United Nations from 1993 to 1997. She has also been a member of the Central Intelligence Agency External Advisory Board since 2009 and of the Defense Policy Board since 2011, in which capacities she has received assessments of threats facing the United States.

2. Jeremy Bash served as Chief of Staff at the U.S. Department of Defense from 2011 to 2013, and as Chief of Staff at the Central Intelligence Agency from 2009 to 2011.

3. Rand Beers served as Deputy Homeland Security Advisor to the President of the United States from 2014 to 2015.

4. Daniel Benjamin served as Ambassador-at-Large for Counterterrorism at the U.S. State Department from 2009 to 2012.

5. Antony Blinken served as Deputy Secretary of State from 2015 to January 20, 2017. He also served as Deputy National Security Advisor to the President of the United States from 2013 to 2015.

6. R. Nicholas Burns served as Under Secretary of State for Political Affairs from 2005 to 2008. He previously served as U.S. Ambassador to NATO and as U.S. Ambassador to Greece.

7. William J. Burns served as Deputy Secretary of State from 2011 to 2014. He previously served as Under Secretary of State for Political Affairs from 2008 to 2011, as U.S. Ambassador to Russia from 2005 to 2008, as Assistant Secretary of State for Near Eastern Affairs from 2001 to 2005, and as U.S. Ambassador to Jordan from 1998 to 2001.

8. James Clapper served as U.S. Director of National Intelligence from 2010 to January 20, 2017.

9. David S. Cohen served as Under Secretary of the Treasury for Terrorism and Financial Intelligence from 2011 to 2015 and as Deputy Director of the Central Intelligence Agency from 2015 to January 20, 2017.

10. Ryan Crocker served as U.S. Ambassador to Afghanistan from 2011 to 2012, U.S. Ambassador to Iraq from 2007 to 2009, U.S. Ambassador to Pakistan from 2004 to 2007, U.S. Ambassador to Syria from 1998 to 2001, U.S. Ambassador to Kuwait from 1994 to 1997, and U.S. Ambassador to Lebanon from 1990 to 1993.

11. Daniel Feldman served as U.S. Special Representative for Afghanistan and Pakistan from 2014 to 2015, Deputy U.S. Special Representative for Afghanistan and Pakistan from 2009 to 2014, and previously Director for Multilateral and Humanitarian Affairs at the National Security Council.

12. Jonathan Finer served as Chief of Staff to the Secretary of State from 2015 until January 20, 2017, and Director of the Policy Planning Staff at the U.S. State Department from 2016 until January 20, 2017.

13. Robert S. Ford served as U.S. Ambassador to Syria from 2011 to 2014, as Deputy Ambassador to Iraq from 2009 to 2010, and as U.S. Ambassador to Algeria from 2006 to 2008.

14. Michèle Flournoy served as Under Secretary of Defense for Policy from 2009 to 2013.

15. Avril D. Haines served as Deputy National Security Advisor to the President of the United States from 2015 to January 20, 2017. From 2013 to 2015, she served as Deputy Director of the Central Intelligence Agency.

16. General (ret.) Michael V. Hayden, USAF, served as Director of the Central Intelligence Agency from 2006 to 2009. From 1995 to 2005, he served as Director of the National Security Agency.

17. Christopher R. Hill served as Assistant Secretary of State for East Asian and Pacific Affairs from 2005 to 2009. He also served as U.S. Ambassador to Macedonia, Poland, the Republic of Korea, and Iraq.

18. John F. Kerry served as Secretary of State from 2013 to January 20, 2017.

19. Marcel Lettre served as Under Secretary of Defense for Intelligence from 2015 to 2017.

20. John E. McLaughlin served as Deputy Director of the Central Intelligence Agency from 2000 to 2004 and as Acting Director in 2004. His duties included briefing President-elect Bill Clinton and President George W. Bush.

21. Lisa O. Monaco served as Assistant to the President for Homeland Security and Counterterrorism and Deputy National Security Advisor from 2013 to January 20, 2017.

22. Michael J. Morell served as Acting Director of the Central Intelligence Agency in 2011 and from 2012 to 2013; as Deputy Director of the Central Intelligence Agency from 2010 to 2013; and as a career official from 1980 onward. His duties included briefing Presidents George W. Bush and Barack Obama.

23. Janet A. Napolitano served as Secretary of Homeland Security from 2009 to 2013.

24. James C. O'Brien served as Special Presidential Envoy for Hostage Affairs from 2015 to January 20, 2017. He served in the State Department from 1989 to 2001, including as Principal Deputy Director of Policy Planning and as Special Presidential Envoy for the Balkans.

25. Matthew G. Olsen served as Director of the National Counterterrorism Center from 2011 to 2014.

26. Leon E. Panetta served as Secretary of Defense from 2011 to 2013. From 2009 to 2011, he served as Director of the Central Intelligence Agency.

27. Samantha J. Power served as U.S. Permanent Representative to the United Nations from 2013 to January 20, 2017. From 2009 to 2013, she served as Senior Director for Multilateral and Human Rights on the National Security Council.

28. Susan E. Rice served as U.S. Permanent Representative to the United Nations from 2009 to 2013 and as National Security Advisor from 2013 to January 20, 2017.

29. Anne C. Richard served as Assistant Secretary of State for Population, Refugees and Migration from 2012 to January 20, 2017.

30. Eric P. Schwartz served as Assistant Secretary of State for Population, Refugees and Migration from 2009 to 2011. From 1993 to 2001, he was responsible for refugee and humanitarian issues on the National Security Council, ultimately serving as Special Assistant to the President for National Security Affairs and Senior Director for Multilateral and Humanitarian Affairs.

31. Wendy R. Sherman served as Under Secretary of State for Political Affairs from 2011 to 2015.

32. Vikram Singh served as Deputy Special Representative for Afghanistan and Pakistan from 2010 to 2011 and as Deputy Assistant Secretary of Defense for Southeast Asia from 2012 to 2014.

33. James B. Steinberg served as Deputy National Security Adviser from 1996 to 2000 and as Deputy Secretary of State from 2009 to 2011.

34. Jake Sullivan served as National Security Adviser to the Vice President from 2013 to 2014. From 2011 to 2013, he served as Director of the Policy Planning Staff at the U.S. State Department.

35. Samuel M. Witten served as Principal Deputy Assistant Secretary of State for Population, Refugees, and Migration from 2007 to 2010. From 2001 to 2007, he served as Deputy Legal Adviser at the State Department.

CERTIFICATE OF SERVICE

I, Jonathan Freiman, hereby certify that on February 16, 2017, the foregoing document was filed and served through the CM/ECF system. Parties may access the filings through the Court's CM/ECF System.

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