Nos. 16-1436, 16A1191

IN THE

Supreme Court of the United States

DONALD J. TRUMP, ET AL.,

Applicants,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,

DONALD J. TRUMP, ET AL.,

Applicants,

v.

STATE OF HAWAII, ET AL.

Applications for a Stay Pending Disposition of a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and an Appeal to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE* FORMER NATIONAL SECURITY OFFICIALS IN OPPOSITION TO THE APPLICATIONS FOR A STAY

JONATHAN FREIMAN
TAHLIA TOWNSEND
WIGGIN AND DANA LLP
265 Church Street
P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4584

WILLIAM J. MURPHY
JOHN J. CONNOLLY
ZUCKERMAN SPAEDER LLP
100 E. Pratt St.
Suite 2440
Baltimore, MD 21202
(410) 332-0444

HAROLD HONGJU KOH
Counsel of Record
HOPE METCALF
RULE OF LAW CLINIC
YALE LAW SCHOOL
127 Wall Street
P.O. Box 208215
New Haven, CT 06520-8215
(203) 432-4932
harold.koh@yale.edu

Counsel of Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE FORMER NATIONAL SECURITY OFFICIALS IN OPPOSITION TO THE APPLICATIONS FOR A STAY

The applications filed by Applicants Donald J. Trump, et al., for a stay pending disposition of: (i) a petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit (in Trump v. International Refugee Assistance Project, No. 16-1436) and (ii) an appeal to the United States Court of Appeals for the United States Court of Appeals for the Ninth Circuit (in Trump v. State of Hawaii, No. 16A1191) raises issues of critical importance. Were this Court to grant the application for a stay, the March 6, 2017, Executive Order on "Protecting the Nation from Foreign Terrorist Entry into the United States" (the "Order") at issue in the dispute would go into immediate effect while the Court considered the petition. Because that Order prohibits the entry into the United States of nationals from six countries for 90 days and bans refugee admissions for 120 days, allowing the Order to take effect would result in immediate chaos in the nation's airports and worldwide, akin to that seen on January 27 following the issuance of a nearly identical executive order. But just as importantly, permitting the Order to go into effect would cause lasting damage to U.S. national security and foreign policy interests.

Amici, a group of former national security officials identified in the Appendix to the attached brief, are in a unique position to provide guidance to the Court regarding the consequences to U.S. security and foreign policy that would result from granting the petitioners' application for a stay. As a result, amici can explain to the Court that denial of the petitioners'

application for a stay would not cause any irreparable harm to the national security or foreign policy of the United States. Finally, amici's substantial experience with the procedures the Executive Branch has long used to promulgate new security policies based on credible intelligence allows amici to demonstrate that the government's inaction over the last few months while the Order has been stayed fatally undermines the petitioners' present claims of urgency. For these reasons, amici can provide useful information to the Court regarding the petitioners' requested relief.

On June 5, 2017, amici requested and received consent to file the proposed amicus brief from counsel for all parties. Due to the expedited nature of these proceedings, amici requested the consent less than 10 days prior to the due date of respondents' papers as set out in Rule 37.2(a). Also, Supreme Court Rule 37.2 does not expressly address the procedure by which an amicus may submit a brief regarding an application for a stay. Accordingly, and on the advice of the Clerk's Office, amici respectfully moves this Court for leave to file the accompany brief in support of respondents' opposition to petitioners' application for a stay.

Respectfully submitted,

JONATHAN FREIMAN
TAHLIA TOWNSEND
Wiggin and Dana LLP
265 Church Street
P.O. Box 1832
New Haven, CT
06508-1832
(203) 498-4584

WILLIAM J. MURPHY
JOHN J. CONNOLLY
Zuckerman Spaeder LLP
100 E. Pratt St.
Suite 2440
Baltimore, MD 21202
(410) 332-0444

HAROLD HONGJU KOH
Counsel of Record
HOPE METCALF
Rule of Law Clinic
Yale Law School
127 Wall Street
P.O. Box 208215
New Haven, CT
06520-8215
(203) 432-4932
harold.koh@yale.edu

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Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES, RULES AND REGULATIONS

MISCELLANEOUS

STATEMENT OF INTEREST[1]

Amici curiae are former national security, foreign policy, intelligence, and other public officials who have worked on security matters at the most senior levels of the United States government.[2]

Amici have collectively devoted decades to combatting the various terrorist threats that the United States faces in an increasingly dangerous and dynamic world. A number of amici have worked at senior levels in the administrations of Presidents from both major political parties. Amici have 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 original January 27, 2017 Executive Order on "Protecting the Nation from Foreign Terrorist Entry into the United States" ("January 27 Order"), and one was current as recently as the start of March 2017, shortly before the issuance of the identically titled March 6, 2017 Executive Order ("March 6 Order").

Amici 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 nevertheless do not believe that the risk merits

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[1] No party or counsel for a party to this appeal authored this brief in whole or in part, or contributed monetarily to the preparation or submission of any portion of this brief. On June 5, 2017, amici requested and received consent from the parties to file this brief. Due to the expedited nature of these proceedings, amici requested their consent fewer than 10 days prior to the due date of the responsive papers. Amici have submitted a motion for leave to file this brief.

[2] A complete list of signatories may be found in the Appendix.

the blanket and counterproductive ban on entry established by the revised Order at issue in this case. They submit that the costs of any stay by this Court that would put that ban into immediate effect would far exceed any conceivable benefit.

SUMMARY OF ARGUMENT

Amici agree that to keep our country safe from terrorist threats, the U.S. government must gather all credible evidence about growing threat streams—including through the 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. Neither the March 6 Order at issue in this application for a stay nor its predecessor rest on such tailored grounds, but rather, (1) are generalized entry bans, (2) are not supported by any new intelligence that the Government has cited or of which amici are aware, and (3) were not vetted through the kind of careful interagency legal and policy review that would compel judicial deference.

The Government is unable to point to any national security or foreign policy harm that would result from the denial of a stay. In reality, a stay allowing the Order to go into effect would cause serious harm to those interests. A stay would endanger U.S. troops in the field, by barring many foreigners who have assisted our troops at great risk to their own lives. A stay would disrupt essential counterterrorism, intelligence, and other security partnerships with countries that are critical to our country's efforts

to address the threat posed by terrorist groups such as the so-called "Islamic State" ("IS" or Daesh).

Letting the Order take effect, even temporarily, would feed IS's propaganda narrative, and hinder law enforcement efforts to fight homegrown terrorism by alienating Muslim-American communities. Over the longer term, the Order would cause devastating humanitarian impact and economic damage to the United States, including in ways that affect strategic economic sectors such as defense, technology and medicine. Finally, a stay at this point would lead to confusion and disruption that would itself undermine our national security interests.

Rebranding the proposal first advertised as a "Muslim Ban", as "Protecting the Nation from Foreign Terrorist Entry into the United States", did not convert the overbroad travel ban into an effective vetting mechanism against genuine terrorist threats. Nor did that rebranding disguise the January 27 Order's discriminatory origins or make it a necessary or effective national security tool. The few changes that were introduced by the March 6 Order at issue in this application did not cure this discriminatory intent, or suddenly provide a legitimate foreign policy or national security basis for this Order.

ARGUMENT

An applicant for a stay pending the disposition of a petition for a writ of certiorari "bears a heavy burden" of showing that there is "(1) 'a reasonable probability' that this Court will grant certiorari, (2) 'a fair prospect' that the Court will then reverse the decision

below, and (3) 'a likelihood that irreparable harm will result from the denial of a stay.'"[3]

In opposing a stay, amici confine their submission to three points peculiarly within their collective expertise.[4] First, the Government has manifestly failed to establish any irreparable harm to foreign or national security justifying a stay. Second, by allowing the March 6 Order temporarily to take effect, a stay would in fact cause serious damage to U.S. national security and foreign policy interests. Third, the defective and aberrant process that led to the Order buttresses the Fourth Circuit's finding that the Order was both overbroad and discriminatory.

I. No National Security or Foreign Policy Harm Will Result from the Denial of a Stay

The Government offers no evidence of any national security or foreign policy harm that would result from the denial of a stay. Instead, in claiming "irreparable harm," the Government gestures to ab-

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[3] *Maryland v. King*, 133 S. Ct. 1, 2 (2012); *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3 (2010).

[4] In opposing a stay, amici affirm their conviction that no grant of certiorari is warranted at this time, and that there is no "fair probability" that this Court will reverse the decision below. Amici believe that the decisions of the Fourth Circuit and the District of Hawaii are more faithful to America's Constitution, laws, and values than the Administration's overbroad and counterproductive travel ban. A number of cases challenging the Order are winding their way through the judicial system, but there is presently no division among the Courts of Appeal. Because there is no split in the circuits, and because others will detail why the Fourth Circuit's ruling is fundamentally correct, amici focus here on why there is no national security or foreign policy imperative to stay the Fourth Circuit decision at this time.

stract concepts of executive prerogative and generalized injury that results "whenever elected representatives . . . are enjoined in their official conduct."[5]

Amici know of no national security or foreign policy imperative for staying the injunctions of the Fourth Circuit and the District of Hawaii against the March 6 Order. A number of amici were current on active intelligence concerning all credible terrorist threat streams directed against the United States as recently as January 20, 2017, and one was current as recently as the start of March 2017. They know of no specific threat that justified either the January 27 Order suspending travel from a number of listed countries ("the country ban") or refugee admissions ("the refugee ban"), or any intervening security threat after that date that required the similar bans in the slightly revised March 6 Order.

Amici submit that the country and refugee bans bear no rational relation to the President's stated aim of protecting the nation from foreign terrorism. Indeed, the Government's own conduct since January 27 casts doubt on its claim that a sudden urgency now warrants a judicial stay.

A. The Country Ban. The current Order targets six countries whose nationals have committed no lethal terrorist attacks on U.S. soil in the last forty years.[6] Although the administration initially invoked the September 11, 2001 attacks as a rationale for the

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[5] App. for Stay in *Trump v. International Refugee Assistance Project*, No. 16-1436, at 34 (S. Ct.)

[6] Alex Nowrasteh, *Little National Security Benefit to Trump's Executive Order on Immigration*, CATO at Liberty, Jan. 25, 2017.

ban,[7] none of the September 11 hijackers were citizens of the six targeted countries. 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 after September 11 have been U.S. citizens or legal permanent residents.[8]

Against this history, the Government offers no persuasive evidence that the threat from the banned areas has so increased recently as to warrant the renewed country-based ban in the March 6 Order, or an

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[7] Exec. Order: Protecting the Nation From Foreign Terrorist Entry Into the United States, Jan. 27, 2017, §1 [hereinafter "Jan. 27 Order"].

[8] *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 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*, Wall St. J. (Jan. 29, 2017); Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis,* Cato Institute (Sept. 13, 2016) [hereinafter "Nowrasteh Sept. 2016"]. The March 6 Order asserts that "[s]ince 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States." Exec. Order Protecting The Nation From Foreign Terrorist Entry Into The United States §1(h) (March 6, 2017) [hereinafter "March 6 Order"]. The Order does not cite any support for this statement, but a similar set of data has been widely criticized for its definition of terrorism-related offenses, among other issues. *See* Nora Ellingsen & Lisa Daniels, *What the Data Really Show about Terrorists Who "Came Here"*, Lawfare (Apr. 11, 2017); Molly Redden, *Trump Powers "Will Not be Questioned" on Immigration, Senior Official Says*, The Guardian (Feb. 12, 2007); Alex Nowrasteh, *42 Percent of 'Terrorism-Related' Convictions Aren't for Terrorism*, Cato Institute, Mar. 6, 2017.

interim judicial stay of the rulings below. The Government pointed to no such evidence at all in the January 27 Order. In the March 6 Order, the Government cited general excerpts from the 2015 Department of State Country Reports on Terrorism describing how these nations are home to violent extremist groups, and do not cooperate in U.S. counterterrorism efforts.[9] On examination, those Country Reports only confirm the gross imprecision of the Order's country bans. The reports show that over 55 percent of 2015 terrorist attacks took place in five countries, *none of which are subject to the travel ban.*[10]

The only other evidence cited by the March 6 Order to support a sweeping ban on travel from the six listed countries were two anecdotal cases in which refugees from those countries were later sentenced for terrorism-related crimes.[11] But the current refugee procedures had already been fully reviewed and revised to address the issues raised by one of those cases, which involved no acts on U.S. soil, only terror activities undertaken *before* the individual came to the United States. The other individual never executed on his plans, and was in any event admitted as a baby and radicalized in America, so any suspension of travel to improve the vetting process would not have affected his entry. Even now, months after the

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[9] March 6 Order §1(e). A March 6 letter from the Attorney General and the Secretary of Homeland Security to the President principally relies on similar information. *See* Letter from Jeffrey B. Sessions, Att'y Gen. and John Francis Kelly, Sec'y of Homeland Sec. to President Donald J. Trump, Mar. 6, 2017.

[10] Annex of Statistical Information, Country Reports on Terrorism 2015 (June 2016) (addressing Iraq, Afghanistan, Pakistan, India and Nigeria).

[11] March 6 Order §1(h).

supposed emergency conditions necessitating issuance of the Executive Orders, the government can point to no genuine security threat, or any flaw in our existing security screening of travelers that would warrant either the March 6 Order, or a stay of the lower court orders.

Since the September 11, 2001 attacks, the United States has developed a rigorous system of security vetting, leveraging the full capabilities of the law enforcement and intelligence communities. The current individualized 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 approach allows the government to identify potential terrorists without resorting to blanket bans.[12] The government offers no national security justification for abruptly moving to a country-based travel ban, particularly when the United States already has in place a tested system of individualized vetting. In contrast to the irregular process that produced the two Orders, see Part III *infra*, the existing vetting system was carefully developed and implemented by national security professionals across the government and across several presidential administrations in response to particular threats identified by U.S. intelligence.

B. The Refugee Ban. For similar reasons, the March 6 Order's 120-day ban on refugee admissions

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[12] *See 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).

serves no legitimate national security or foreign policy purpose. From 1975 to the end of 2015, over three million refugees have been admitted to the United States. Of that number, no refugee has killed an American in a terrorist attack in the United States since the modern refugee vetting system began in 1980. Over that same period, only twenty refugees were convicted of any terrorism-related crimes on U.S. soil at all.[13]

Refugees already receive the most thorough vetting of any travelers to the United States.[14] 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."[15] 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.[16]

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[13] *See* Nowrasteh Sept. 2016, *supra* note 8.

[14] U.S. Dep't of State, *U.S. Refugee Admissions Program FAQs*, https://www.state.gov/j/prm/releases/fact-sheets/2017/266447.htm.

[15] 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.

[16] U.S. Dep't of State, *supra* note 14.

The refugee vetting process is also reviewed and enhanced on an ongoing basis in response to particular threats.[17] 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.[18]

Under current vetting procedures, refugees often wait eighteen to twenty-four months to be cleared for entry into the United States; fewer than one percent were settled in any single country in 2015.[19] Because refugees do not decide where they will be resettled, the odds that any terrorist posing as a refugee will be resettled in the United States are vanishingly small. Ultimately, the Government alleges no specific information about any vetting step omitted by these current procedures that demand a stay in this case.

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[17] 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%20.

Asylum%2C%20and%20Int%27l%20Ops/Refugee_Security_Screening_Fact_Sheet.pdf.

[18] U.S. Dep't of State, *The Refugee Processing and Screening System*, https://www.state.gov/documents/organization/266671.pdf; Andorra Bruno, *Syrian Refugee Admissions and Resettlement in the United States: In Brief*, Cong. Research Serv., 4-5 (Sept. 16, 2016).

[19] U.N. High Commissioner for Refugees, *Resettlement*, http://www.unhcr.org/en-us/resettlement.html.

C. *No Sudden Urgency*. The Government's own conduct belies the notion that a judicial stay is needed to prevent urgent national security or foreign policy harm. When the initial Executive Order suspended travel from the listed countries for 90 days, it cited as its rationale the need to establish a period to review existing screening and vetting protocols. Specifically, Section 3 of the Order: (i) instructed the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to "*immediately conduct* a review" to identify what additional information will be needed from any country to ensure that an application by a national of those countries for a visa or other benefit is not a security or public safety threat, §3(a); (ii) instructed the same officials to submit to the President a report on the results of the review *within 30 days of the effective date of the Order*, §2(b), (iii) ordered the Secretary of State, *upon submission of the report*, to request that all foreign governments that do not supply the necessary information begin providing it within 60 days of notification, §2(c), and (iv) instructed the Secretary of Homeland Security after the 50-day period expires, in consultation with the Secretary of State, to submit to the President a list of countries recommended for inclusion in a subsequent Presidential proclamation to prohibit the entry of foreign nationals until compliance is achieved, §2(d).

The Order instructed that within the first 20 days, the named officials would complete the review, submit to the President the relevant report, and then start making the necessary requests to the foreign governments. But a full 47 days then passed between January 27, 2017 (when the first Executive Order went into effect) and March 15, 2017 (when the U.S.

District Court for the District of Hawaii blocked similar provisions set out in the revised March 6 Executive Order). During those 47 days, the Government only managed to start to do "some work" on the required review.[20] The Government's leisurely approach toward implementing its own Order refutes the urgency it now suddenly asserts in support of a judicial stay.[21]

II. A Stay Would Cause Serious Damage to National Security and Foreign Policy Interests.

A stay pending review by this Court is not only unnecessary to protect the national security or foreign policy interests of the United States; it would do actual damage to those interests.

At this juncture, imposing a stay would be massively disruptive. The few days between when the January 27 Order took effect and when it was halted were a time of well-documented chaos.[22] Since then, the administrative apparatus has functioned relatively smoothly, largely because career officials have been applying well-understood procedures. Allowing the March 6 Order to similarly take effect during the

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[20] Oral arg. in *Int'l Refugee Assistance Project v. Trump*, No. 17-1351 at 8:02 (4th Cir. May 8, 2017) (en banc), http://www.ca4.uscourts.gov/opinions/en-banc-cases.

[21] There are other reasons to doubt the Administration's sudden claims of urgency. For instance, the revised Order exempts people who were previously approved to enter the U.S., making clear the President does not think that irreparable harm would occur when admitting individuals vetted under the current system. March 6 Order § 3(a).

[22] Jonathan Allen & Brendan O'Brien, *How Trump's Abrupt Immigration Ban Sowed Confusion at Airports, Agencies*, Reuters (Jan. 29, 2017); Patrick Hatch et al., *Trump Travel Ban Causes Business Chaos*, Sydney Morning Herald (Jan. 30, 2017).

pendency of Supreme Court review would again massively disrupt this status quo, with the likelihood that the administrative process would be disrupted again should the Court ultimately find the Order unlawful.

The Order that the Government would have this Court impose by stay is 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 usually have targeted specific government officials,[23] undocumented immigrants,[24] or individuals whose personalized screenings indicated that they posed a national security risk.[25] No example in the modern era approaches the breadth of this Order, which with one stroke of the pen bans more than 180 million people in six separate countries from traveling to the United States based solely on their national origin.

The Order's sweep would cause multiple harms to the nation's security interests. First, the Order would affect interpreters and others who have assisted our troops at great risk to their own lives. While Iraq has

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[23] *See, e.g.,* Proclamation No. 6,958, 61 Fed. Reg. 60,007 (Nov. 22, 1996).

[24] *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).

[25] *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).

been removed from the list of banned countries, the Order would halt the entire U.S. Refugee Assistance Program for 120 days for all countries. This pause would affect the thousands of individuals who, because they assisted the United States, are waiting for admission under the already backlogged "Priority 2" program.[26] By discouraging future assistance and cooperation from these and other affected military allies and partners, the Order would jeopardize the safety and effectiveness of our troops.

Second, the Order would disrupt key counterterrorism, foreign policy, and national security partnerships. These partnerships are critical to our country's efforts to address the threat posed by terrorist groups such as IS. The Order would 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.[27] 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.

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[26] *See* U.S. Dep't of State, et al., *Report to the Congress, Proposed Refugee Admissions for Fiscal Year 2016,* at 57 (2016); Urban Justice Center, International Refugee Assistance Project, *IRAP Stands With Iraqi Allies of the United States Affected by Executive Order* (Feb. 1, 2017).

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

Third, the Order's disparate impact on Muslim travelers and immigrants feeds IS'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 Muslims based on their religion. The day after President Trump signed the January 27 Order, jihadist groups began citing its contents in recruiting messages online.[28] Likewise, domestic law enforcement relies heavily on partnerships with American Muslim communities to fight homegrown terrorism.[29] 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.

Fourth, the Order would have a devastating humanitarian impact. The travel ban would disrupt the travel of men, women and children who have been victimized by actual terrorists. Countless other travelers would face deep uncertainty about whether they would be able to 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 affected individuals with urgent and compelling needs to travel.

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

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

Finally, the Order would 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.[30] The travel ban also could be expected to have a negative economic impact on strategic economic sectors including defense, technology, and medicine. About a third of U.S. innovators were born outside the United States, and their scientific and technological innovations have contributed to making our nation and the world safe.[31] The harm caused by the ban to the economic dynamism of our country would carry long-term negative and serious consequences for our national security.

III. The Aberrant Procedure that Produced the Travel Ban Supports the Fourth Circuit's Conclusion that the Ban was Motivated by Discriminatory Intent, Not a National Security Threat

The Fourth Circuit concluded that the "Executive Order . . . in text speaks with vague words of national

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[30] 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.

[31] 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; Patrick O'Neill, *How Academics Are Helping Cybersecurity Students Overcome Trump's Immigration Order*, Cyberscoop (Jan. 30, 2017), https://www.cyberscoop.com/trump-immigration-ban-cybersecurity-iran-protests/.

security, but in context drips with religious intolerance, animus, and discrimination."[32] The Fourth Circuit points to statements that, "taken together, provide direct, specific evidence of what motivated both EO-1 and EO-2: President Trump's desire to exclude Muslims from the United States."[33] Judge Thacker's concurrence adds that the country-based ban in the January 27 order identified only Muslim-majority nations, banning about 10 percent of the world's Muslim population from entering the United States.[34] She notes: "if the conditions in the six countries subject to EO-2 truly motivated the Government's travel ban, the Government would have based its ban on contact with the listed countries, not *nationality*" per se.[35] Finally, the concurrence notes that on its face, the revised Order "seeks information on honor killings—a stereotype affiliated with Muslims—even though honor killings have no connection whatsoever to the stated purpose of the Order."[36]

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[32] *Int'l Refugee Assistance Project v. Trump*, No. 17-1351, slip op. at 12 (4th Cir. May 25, 2017) (en banc) [hereinafter "Fourth Circuit Opinion"].

[33] *Id.* at 58.

[34] *Id.* at 139 (Thacker, J., concurring).

[35] *Id.* at 138; *see id.* at 139 ("[A] person who is a citizen of Syria would not be allowed to enter the United States even if they had never set foot in Syria," while "a person who lived his or her whole life in Syria but never obtained Syrian citizenship, and had even recently lived near terrorist-controlled regions of Syria, would be unaffected and freely allowed to enter the United States.").

[36] *Id.* at 139; *see* Gerald Neuman, *Neither Facially Legitimate Nor Bona Fide—Why the Very Text of the Travel Ban Shows It's Unconstitutional*, Just Security (June 9, 2017).

The aberrant process that produced the Executive Orders supports the finding below that the Order was driven by invidious intent. This Court has held that "[d]epartures from the normal procedural sequence . . . might afford evidence that improper purposes are playing a role" in government action.[37] Moreover, this Court has observed that evidence of an improper motivation cannot be cured by a later-in-time order that perpetuates the essential policies and practices of the first.[38] In this case, the process that produced the original January 27 Order departed dramatically from the traditional national security policy-making process, with little to no consultation or scrutiny across the Departments of State, Justice, Homeland Security or the Intelligence Community. And while further consideration no doubt went into the March 6 Order, on its face that order plainly was structured to track the old ban as closely as possible.

In every recent administration, Presidents considering an important change to immigration policy have followed an interagency review process that allows national security professionals to ensure that all relevant uncertainties are addressed by policy and legal

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

[38] *See McCreary County v. ACLU of Kentucky,* 545 U.S. 844, 851 (2005) (finding that a third version of a display of the Ten Commandments surrounded by religious references did not cure evidence of improper intent that animated earlier exhibits, as "the development of the presentation should be considered when determining its purpose"); *U.S. v. Fordice*, 505 U.S. 717, 741-42 (1992) (holding that Mississippi's re-classification of its state colleges and universities in ways that were facially neutral but perpetuated racial segregation continued to violate *Brown v. Board of Education*).

experts, appropriate preparations are made for implementation, and any potential risks are effectively identified and 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 those 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 policy review among senior leadership across all relevant agencies, including Deputies and Principals at the cabinet level.[39]

This practice of interagency deliberation has been followed even—and especially—in times of national emergency to set temporary exclusions or establish criteria for admission to the United States. For example, in the immediate aftermath of the September 11, 2001 attacks, 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.[40]

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[39] This is no less true of executive orders issued at the very start of a new presidency. *See, e.g.,* Henry B. Hogue, Cong. Research Serv., *Presidential Transition Act: Provisions and Funding* (2016).

[40] *See, e.g.,* 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). That same statute—8 U.S.C. § 1182(f)—authorizes the President to act only if he "finds" the entry of the individuals "would be detrimental to the interests of the United States." As Judge Keenan observed

The process that produced the January 27 Order departed sharply from this standard practice. We know of no process in the Government that was underway before January 20, 2017 to change current immigration vetting procedures. According to extensive reporting, the Government followed no such interagency review in producing the January 27 Order. 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. There is every indication that that Order received little, if any, advance scrutiny by the Departments of State, Justice, Homeland Security or the intelligence community.[41]

As telling, the January 27 Order was apparently issued without the ordinary interagency legal process for review of Executive Orders. 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 involved with enforcing the law.[42] Legal review by multiple agencies helps to identify potentially unforeseen

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in her concurrence below, the Order in this case fails to articulate any basis at all for the suggestion that entry by "any of the approximately 180 million individuals subject to the ban" would be so detrimental. Fourth Circuit Opinion at 87 (Keenan, J., concurring).

[41] Michael D. Shear & Ron Nixon, *How Trump's Rush to Enact an Immigration Ban Unleashed Global Chaos*, N.Y. Times (Jan. 29, 2017); Evan Perez et al., *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017); Allen & O'Brien, *supra* note 22.

[42] *See* Exec. Order No. 11,030, 27 Fed. Reg. 5,847 (Jun. 19, 1962).

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. 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."[43]

Although the White House apparently brought more agencies into the fold in the days leading up to the March 6 Order, whatever process took place after January 27, 2017 plainly was meant to preserve the same structure, substance and purpose of the original flawed executive order. Indeed, White House political advisor Stephen Miller admitted that the March 6 Order would reflect "mostly minor technical differences," and achieve "the same basic policy outcome for the country," statements that were echoed by other senior officials.[44]

Even months later, there is scant evidence that the country-based approach that is maintained in the executive orders emerged from the considered judgment of national security experts from across multiple affected agencies. In fact, internal governments documents have shown just the opposite. When DHS officials were asked by the new administration to identify the terrorist threat from the countries listed in that Order, an internal document shows that they reached two critical conclusions that were directly at

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[43] Shear & Nixon, *supra* note 41; Perez et al., *supra* note 41.

[44] Matthew Nussbaum et al., *White House Creates Confusion About Future of Trump's Travel Ban*, Politico (Feb. 21, 2017).

odds with the Order: that citizenship is likely an unreliable indicator of terrorist threat, and that, as noted above, few of the listed countries are home to terrorist groups that threaten the United States.[45]

As Justice Thomas explained in *U.S. v. Fordice*, "if a policy remains in force, without adequate justification and despite tainted roots and segregative effect, it appears clear—clear enough to presume conclusively—that the State has failed to disprove discriminatory intent."[46] The hasty and plainly defective process here supports the Fourth Circuit's conclusion that the Order here was based on unlawful discriminatory intent, and not an actual national security need.

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In sum, a stay pending review by this Court would be extremely disruptive to the security of the nation. By contrast, maintaining the status quo while the case is under submission would preserve settled expectations. The injunctions below have not barred the Government from adopting a range of new security measures to strengthen the status quo.[47] The President himself acknowledged as much when he recently

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[45] *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States*, https://assets.documentcloud.org/documents/3474730/DHS-intelligence-document-on-President-Donald.pdf.

[46] *Fordice*, 505 U.S. at 747 (Thomas, J., concurring).

[47] *See, e.g.,* Yeganeh Torbati et al., *U.S. Embassies Ordered to Identify Population Groups for Tougher Visa Screening*, Reuters (Mar. 23, 2017).

noted that the injunctions had not prevented his administration from adopting "extreme vetting" of those coming into the United States.[48]

While this matter was under submission, the President publicly criticized the Justice Department for defending a "watered-down" revised Order, signaling that if this Court does honor his request for a stay and expedited review of the current Order, his administration might then "seek [a] much tougher version" of the Order in any event.[49] It is unclear why this Court should now jump into this fray on an expedited basis, to overturn judicial decisions invalidating an Executive Order that the President himself dismisses. The Administration's continuing inability to identify precisely what pressing national security threat allegedly requires the current Order, what changes are purportedly needed to vetting procedures to strengthen our security, or even which version of the Order they want to defend, all counsel this Court against rushing to stay the judgment below.

CONCLUSION

For the foregoing reasons, the Court should deny the applications for a stay.

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[48] Maya Rhodan, *President Trump Blasts Justice Department Over 'Watered Down' Travel Ban*, Time (June 5, 2017).

[49] *Id.*

Respectfully submitted,

JONATHAN FREIMAN
TAHLIA TOWNSEND
Wiggin and Dana LLP
265 Church Street
P.O. Box 1832
New Haven, CT
06508-1832
(203) 498-4584

WILLIAM J. MURPHY
JOHN J. CONNOLLY
Zuckerman Spaeder LLP
100 E. Pratt St.
Suite 2440
Baltimore, MD 21202
(410) 332-0444

HAROLD HONGJU KOH
Counsel of Record
HOPE METCALF
Rule of Law Clinic
Yale Law School
127 Wall Street
P.O. Box 208215
New Haven, CT
06520-8215
(203) 432-4932
harold.koh@yale.edu

June 12, 2017

Counsel for Amici Curiae

APPENDIX

List of *Amici Curiae*

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. General (ret.) John R. Allen, USMC, served as Special Presidential Envoy for the Global Coalition to Counter ISIL from 2014 to 2015. Previously, he served as Commander of the International Security Assistance Force and U.S. Forces Afghanistan.

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. Eliot A. Cohen served as Counselor of the U.S. Department of State from 2007 to 2009.

11. 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.

12. 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.

13. 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.

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

15. 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.

16. Josh Geltzer served as Senior Director for Counterterrorism at the National Security Council from 2015 to 2017. Previously, he served as Deputy Legal Advisor to the National Security Council and as Counsel to the Assistant Attorney General for National Security at the Department of Justice.

17. Suzy George served as Deputy Assistant to the President and Chief of Staff and Executive Secretary to the National Security Council from 2014 to 2017.

18. Phil Gordon served as Special Assistant to the President and White House Coordinator for

the Middle East, North Africa and the Gulf from 2013 to 2015, and Assistant Secretary of State for European and Eurasian Affairs from 2009 to 2013.

19. 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.

20. 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.

21. 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.

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

23. Prem Kumar served as Senior Director for the Middle East and North Africa on the National Security Council staff of the White House from 2013 to 2015.

24. Sen. Richard Lugar served as U.S. Senator for Indiana from 1977 to 2013, and as Chairman of the Senate Committee on Foreign Relations from 1985 to 1987 and 2003 to 2007, and as ranking member of the Senate Committee on Foreign Relations from 2007 to 2013.

25. 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.

26. 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.

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

28. 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.

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

30. 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.

31. Jeffrey Prescott served as Special Assistant to the President and Senior Director for Iran, Iraq, Syria and the Gulf States from 2015 to 2017.

32. 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.

33. 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.

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

35. Kori Schake served as the Deputy Director for Policy Planning at the U.S. State Department from December 2007 to May 2008. Previously, she was the director for Defense Strategy and Requirements on the National Security Council in President George W. Bush's first term.

36. 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.

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

38. 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.

39. Jeffrey H. Smith served as General Counsel of the Central Intelligence Agency from 1995 to 1996. Previously, he served as General Counsel of the Senate Armed Services Committee.

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

41. William Wechsler served as Deputy Assistant Secretary for Special Operations and Combating Terrorism at the U.S. Department of Defense from 2012 to 2015.

42. 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.