No. 17-15589

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAII, et al.

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, et al.

Defendants-Appellants

On Appeal from an Order of the United States District Court for the District of Hawaii

United States District Judge Derrick K. Watson
Case No. 1:17-cv-00050-DKW-KSC

BRIEF OF *AMICUS CURIAE* T.A., A U.S. CITIZEN OF YEMENI DESCENT, IN SUPPORT OF APPELLEES, AFFIRMANCE OF THE PRELIMINARY INJUNCTION, AND DENIAL OF THE GOVERNMENT'S MOTION FOR A STAY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes & Rules **Page(s)**

Other Authorities **Page(s)**

STATEMENT OF INTEREST

Amicus files this brief in support of Appellees. The Court should affirm the order issued below preliminarily enjoining Sections 2 and 6 of President Trump's Amended Executive Order, dated March 6, 2017 (the "Amended Order" or the "Amended Executive Order"). This brief demonstrates that there is no pertinent national security justification for a travel or refugee ban to which a court could or should defer. In particular, since March 17, 2017, the new Administration has implemented its *own* additional vetting and screening procedures. Not even the Government asserts that *this* Administration's *current* vetting procedures may be inadequate for nationals from the six countries identified in the Amended Order or refugees.

T.A.[1] is a United States citizen who was raised in Yemen. T.A. is a Muslim. T.A.'s father and many members of T.A.'s extended family hold Yemeni passports and reside abroad. The Amended Order would bar them from entering the United States. Although the Government states that banned persons "could" apply for "[c]ase by case" waivers under Section 3 of the Amended Order, Section

[1] The brief uses T.A.'s initials to reduce the risk of potential reprisals to T.A. or his family members. *United States v. Doe*, 655 F.2d 920, 922 n.1 (9th Cir. 1981) (Even for a party, "[w]here it is necessary, however, to protect a person from harassment, injury, ridicule or personal embarrassment, courts have permitted the use of pseudonyms."). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to its preparation or submission. All parties consent to the filing of this brief.

16(c) provides that nothing in the Amended Order provides any "enforceable" right, "substantive or procedural." 82 Fed. Reg. 13209 (Amended Order) at § 16(c). The Amended Order does not even provide for any *un*enforceable opportunity to be heard as to any purported reason to deny a waiver, any timing for or notification of a denial, much less any reason, or any ability to appeal a denial.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief focuses on one issue: the Government's failure even to address whether the travel and refugee bans *remain* justified by national security despite this Administration's *own, current enhanced* vetting. Any such assertion would not pass even rational basis scrutiny. Yet the Administration continues to pursue travel and refugee bans. This confirms that the real reason for the bans always has been fulfilling the President's appeals to religious prejudice.

First, even before this Administration, since early 2016, every national of the six countries identified must seek a visa and undergo substantial vetting, including an in-person interview at a U.S. embassy or consulate. After that vetting, when such persons have been granted a visa, *none* has committed or attempted a terrorist attack in the United States. And *this* Administration already has enhanced such screening with longer interviews, more-detailed questions, and a mandatory social media review if a visa applicant *ever* was present in an ISIS-controlled territory. The Government does not even assert that *its own, current vetting* for

travelers who are nationals of the six countries is inadequate. The same is true for its current refugee screening. Thus, the entirety of the Amended Order's bans is irrationally overbroad.

Second, the Executive Order entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States" issued on January 27, 2017 (the "Original Order") asserted a travel ban was needed while the Administration conducted a 90-day review of vetting procedures. By May 15, 2017, when this Court holds oral argument, that review will have been going on for *108 days*. Yet the Amended Order would continue that ban until at least June 14, 2017, even though that review has already led to enhanced vetting procedures and has produced *no* evidence to support any ban. In particular, there is no evidence of a correlation between the adequacy of another country's vetting procedures and the likelihood that, *after passing U.S. vetting*, one of the six countries' nationals or a refugee will commit a terrorist attack here. And without any ban, *this* Administration has introduced, and will continue to introduce, its own procedures for additional screening by United States officials that moot any prior purported screening deficiencies for nationals of the six countries or refugees.

Third, the timing surrounding the Amended Order belies its supposed national security justification. For example, were national security the impetus for the Amended Order, the Administration would not have waited at least 41 days

after the courts restrained the enforcement of the Original Order to roll out the Amended Order and make it effective. Indeed, the Administration held the Amended Order back for a week to extend favorable press coverage for a speech by President Trump.

All of the above and more demonstrate that national security is a pretext rather than a reason for the Amended Order. Stripped of this pretext, the Amended Order is what it seems—a payoff on the President's lamentable campaign promises to ban Muslims. No precedent supports the Government's argument that the Court must bury its head in the sand and ignore the undebatable public record.

FACTUAL BACKGROUND

A. President Trump's Campaign Promise To Ban All Muslims.

The decision below demonstrates President Trump's repeated campaign promises for a "shutdown of Muslims entering the United States." Order Granting Motion for Temporary Restraining Order, *Hawaii v. Trump*, CV. No. 17-00050 DKW-KSC ("*Hawaii*"), 2017 WL 1011673 (D. Haw. Mar. 15, 2017), ECF No. 219, at 35, *available at* E.R.[2] 59 (citing Press Release, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015)).

[2] "E.R." refers to the Excerpts of Record, ECF No. 24.

The public record below documents the President's campaign admission that the ban would be dressed up in different clothes: "I'm talking territory instead of Muslim." *See* E.R. 34, 147 (citing *Meet the Press* (NBC television broadcast July 24, 2016), transcript *available at* https://goo.gl/jHc6aU). Likewise, Mr. Trump admitted: "The Muslim ban . . . has morphed into a[n] extreme vetting from certain areas of the world." E.R. 34, 145 (citing The American Presidency Project, *Presidential Debates: Presidential Debate at Washington University in St. Louis, Missouri* (Oct. 9, 2016), *available at* https://goo.gl/iIzf0A).

B. Both Executive Orders "Deliver On" The President's "Campaign Promises."

The words and actions of the President *as President*, as well as those of his official White House Press Secretary, demonstrate that public fulfillment of these anti-Muslim campaign promises *remains* the purpose of the Amended Order. President Trump unveiled the Original Order on January 27, 2017. *See* 82 Fed. Reg. 8977 (Jan. 27, 2017). Section 5(b) of the Original Order directed the Secretaries of State and Homeland Security to "prioritize refugee claims" where "the religion of the individual is a minority religion in the individual's country of nationality." *Id.* § 5(b). President Trump, in a January 27, 2017 interview with the Christian Broadcasting Network, stated that under his Original Order, "Christians" would be given priority over "Muslim[s]" in refugee admissions. *See* E.R. 150

(citing *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority as Refugees*, Christian Broadcasting Network (Jan. 27, 2017, https://goo.gl/2GLB5q).

On March 6, 2017, President Trump issued the Amended Order. 82 Fed. Reg. 13209. The next day, the White House Press Secretary, in *prepared* remarks made before taking questions from reporters, heralded the Amended Order as the fulfillment of President Trump's campaign promises: "President Trump yesterday *continue[d]* to *deliver on* . . . his *most significant campaign promises*: protecting the country against radical *Islamic* terrorism." *Hawaii*, ECF No. 201-2 (Press Briefing by Press Secretary Sean Spicer (Mar. 7, 2017), *available at* http://bit.ly/2mW39oB) (emphasis added). Thus, the Amended Order remains inextricably linked to the President's campaign promises.

Indeed, on March 15, 2017, President Trump stated at a campaign-style rally not only that the Amended Order was a "watered-down version of the first order," but also that both Orders were justified by "radical *Islamic*" terrorism. *Hawaii*, ECF No. 239-1 (Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak'*, Time (Mar. 16, 2017), *available at* http://ti.me/2o09ixe) (emphasis added).

C. T.A.

T.A. is a Muslim and a United States citizen who grew up in Yemen. When T.A. was eighteen, he returned to the United States to attend college. He currently lives and works here as a videographer.

T.A.'s father, aunts, uncles, and cousins—all of whom hold Yemeni passports—now live in Jordan, where they fled as refugees from the ongoing Yemeni Civil War. Many of them want to travel to the United States to visit T.A. and their extended family. In particular, T.A.'s cousin, with whom he is close, wishes to travel to this country to look at schools and visit his brother, a U.S. citizen, as well as T.A. The Amended Order would bar T.A.'s father, cousin and his extended family from traveling to this country.

D. The District Court Ruling.

On March 29, 2017, the District Court issued a preliminary injunction barring enforcement of Sections 2 and 6 of the Amended Order. The District Court found that "the record here" is "full of religious animus, invective and *obvious pretext*." *Hawaii,* No. 17-00050 DKW-JSC, 2017 WL 1167383 (D. Haw. Mar. 29, 2017), ECF No. 270, at *17 (emphasis added).

ARGUMENT

I. THE PUBLIC RECORD SHOWS THAT NATIONAL SECURITY IS NOT THE PRIMARY OBJECTIVE OF THE AMENDED ORDER.

The Supreme Court cases previously cited by the Ninth Circuit prudently demonstrate that under our rule of law, when constitutional limitations are at stake, the judiciary examines the Executive's invocation of national security. *See Washington v. Trump*, 847 F.3d 1151, 1161-62 (9th Cir. 2017). Indeed, "[d]eference does not mean abdication" of the judiciary's "ultimate responsibility to decide the constitutional question." *Rostker v. Goldberg*, 453 U.S. 57, 67, 70 (1981). History is replete with many scares, terrors, and pogroms that were enabled because a country's judiciary lacked either the authority or the resolve to perform such a constitutional role. In our system, the invocation of national security does not create a no-go zone for the Constitution. *See id.* at 67 ("None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs.").

Review of the national security assertion is warranted here. First, under the Establishment Clause, such a review shows that, even *assuming* the national security assertion were genuine, that reason would be, at most, "secondary to a religious objective" of banning the entry of Muslims, as President Trump promised in his campaign. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 864 (2005). The plain, undebatable *public* record, including the

President's own statements, debunks that national security is the primary objective of the Amended Order. Because of the President's public statements, there is no need for "judicial psychoanalysis." *Id.* at 862. This is especially so as it is equally unconstitutional under the Establishment Clause, whether the primary objective of a government action is religious prejudice, or an opportunistic, public appeal to religious prejudice. *Cf. Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) (finding "violation" where "primary purpose" was "to *endorse* a particular religious doctrine") (emphasis added).

Nor does reliance on the *public* record here open the door to routine legal challenges to visa denials, as the Government argues. Gov't Br. at 42, 47. By definition, reliance on a *public* statement is the opposite of attempting to discover a *secret* reason. Here, the public statements of the President establish religious animus. *Supra,* at 4-6. Likewise, reliance on the President's campaign statements is warranted here by the unique statement of the White House Press Secretary on March 7, 2017 that the *Amended Order* "*deliver[s]* on his [the President's] most significant *campaign promises*: protecting the country against radical *Islamic* terrorism." *Supra*, at 6 (emphasis added). Reliance on campaign statements in any future case lacking this express and specific link, or involving an act of Congress, would be distinguishable.

Second, even under rational basis scrutiny, when the "breadth" of government action is "so far removed" from the government's "particular justifications," those justifications are "impossible to credit." *Romer v. Evans*, 517 U.S. 620, 635 (1996). When the "sheer breadth [of government action] is so discontinuous with the reasons offered for it that the [action] seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Id*. at 632.

A. The Government Does Not Even Assert That This Administration's Own, Current Vetting Procedures Are Inadequate.

The Amended Order "suspend[s] entry" into the United States of individuals from six countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen. 82 Fed. Reg. 13209 (Amended Order) at § 2(c). The Amended Order asserts that national security requires preventing nationals from these countries from entering the United States, with limited unenforceable potential waivers, "[i]n light of the conditions in the[] six countries, until the assessment of current screening and vetting procedures required by section 2 of this order is completed." *Id.* § 1(f).

The District Court correctly found that this was an "obvious pretext" for "religious animus." *Supra*, at 7. To start, the Government relies upon the suspension that began in 2015-16 of the visa waiver program for these six countries as purported support for the travel ban. *See* Gov't Brief at 6-7, 44. But

the visa waiver suspension was not a travel ban. To the contrary, under the visa waiver suspension, nationals of the six countries "go through the full vetting ofthe regular visa process, which includes an in-person interview at a U.S. embassy or consulate." Karoun Demirjian & Jerry Markon, *Obama administration rolls out new visa waiver program rules in wake of terror attacks*, Washington Post (Jan. 21, 2016); U.S. Customs and Border Protection, *Visa Waiver Program Improvement and Terrorist Travel Prevention Act Frequently Asked Questions* (Nov. 28, 2016), *available at* http://bit.ly/1Tz4wRn. Since the visa waiver suspension, there has been *no actual or attempted terrorist attack* in this country by any national of any of the six countries.

Thus, a letter to President Trump from more than 130 generals and national security experts from across the political spectrum—including two former Secretaries of the Department of Homeland Security—stands unrebutted. That letter explains that the United States has been able to "implement any necessary [vetting] enhancements without a counterproductive ban or suspension on entry of nationals of particular countries or religions." *Hawaii*, ECF No. 201-5 (Nat'l Security Experts' March 10, 2017 Letter to President Trump, *available at* http://bit.ly/2oYlgLf).

Indeed, *this* Administration has enhanced vetting procedures *without* a travel or refugee ban. Since March 17, 2017, the State Department has engaged in

enhanced visa screening by requiring longer interviews, more detailed questions by consular officials, and a "mandatory social media review" by the "Fraud Prevention Unit" if an "applicant may have ties to ISIS or other terrorist organizations or has ever been present in an ISIS-controlled territory." State Dep't Cable 25814, ¶¶ 8, 10, 13, *available at* http://bit.ly/2o0wBqt, Ex. 1.[3]

That this Administration already has enhanced vetting confirms that there never was a link between the bans and national security. The Government repeatedly asserts that the travel and refugee bans were supposed to be only "short" and "temporary," and would end when this Administration established "current screening and vetting procedures [that] are adequate to detect terrorists seeking to infiltrate this Nation." Gov't Br. at 1-2, 10, 12, 36, 43. Not even the Administration asserts, however, that its *own enhanced* vetting procedures for entry by nationals of the six countries and refugees are *currently* inadequate. Yet the Administration stubbornly continues to pursue the bans. This disconnect removes any doubt that the real reason for the bans always has been fulfilling the President's campaign appeals to religious prejudice. Because the Government has not asserted a national security justification for why the Amended Order's travel

[3] This is the sole exhibit contained in the proposed addendum attached to *Amicus*'s concurrently-filed Motion for Leave to File Addendum to Brief of *Amicus Curiae* T.A. Even before this Administration, *every* refugee was vetted by *numerous* federal agencies and the office of the United Nations High Commissioner for Refugees. *See* Brief of *Amicus Curiae* HIAS, at 9-12.

and refugee bans *remain* appropriate, there is nothing to which a court could or should defer in a final decision on the merits or on this appeal. *Cf. Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987) (preliminary injunction inquiry is whether plaintiffs have a likelihood of success "after a trial on the merits").

Moreover, even *before* the Amended Order, a DHS draft report, made public on February 25, 2017, concluded that being a national of any of the six countries is an "unlikely indicator" of terrorism threats against the United States. *Hawaii*, ECF No. 64-10 (DHS Report, *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States*, *available at* http://bit.ly/2mh0GVh). A second DHS report, dated March 1, 2017, further concluded that "most foreign-born, U.S.-based violent extremists [are] likely radicalized several years *after* their entry to the United States." *Hawaii*, ECF No. 64-11 (DHS Report, *Most Foreign-born, US-based Violent Extremists Radicalized after Entering Homeland; Opportunities for Tailored CVE Programs Exist* (March 1, 2017)) (emphasis added). Thus, the lack of "extreme vetting" before entry could not have contributed to their attacks.

Conversely, although the Original and Amended Orders cite the attacks of September 11, 2001, the Orders imposed no restrictions on travelers from the countries whose nationals carried out those attacks (Egypt, Lebanon,

Saudi Arabia, and the United Arab Emirates). Internal FBI data likewise "undermine a key premise of the travel ban," because the data show that the vast majority of foreign nationals who have posed risk to the United States have hailed from "countries unaffected" by the Amended Order. *See* Devlin Barrett, *Internal Trump Administration Data Undercuts Travel Ban*, Washington Post (Mar. 16, 2017), *available at* http://wapo.st/2nVszOX. This is part of a "significant amount of internal government data" that demonstrates the Amended Order "is not likely to be effective in curbing the threat of terrorism in the United States." *Id.* In reality, as nearly a dozen high-ranking national security and intelligence officials have declared under oath, the travel ban "ultimately undermines the national security of the United States, rather than making us safer." *See* Decl. Nat'l Security Advisors ¶ 3; *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 6, 2017), ECF. No. 28-2 (concluding there is no national security purpose for an entry ban).

The only two examples of individual terrorists cited in the Amended Order merely serve to highlight the Amended Order's irrational inconsistencies. First, the Amended Order points to a "January 2013 . . . [incident in which] two *Iraqi* nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses." *Id.* (emphasis added). But Iraq was removed from the list of banned countries in the Amended Order. *Id.* at § 1(f).

The second example does not fare any better. The Amended Order states, "in October 2014, a native of Somalia *who had been brought to the United States as a child refugee* and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon." *Id.* (emphasis added). This is the only reference in the Amended Order to *any* actual or attempted attack by a native of one of the six countries. But the Amended Order does not apply to naturalized citizens. Moreover, the Amended Order does not and cannot claim that this naturalized citizen was radicalized before he came to this country as a "child refugee." That single child refugee thus cannot be an example of failed vetting that supports any ban.

B. The Amended Order's Unexplained Extensions Of The Travel And Refugee Bans Beyond Their Original Deadlines Further Suggests National Security Is A Pretext.

The Amended Order extends the travel ban until June 14, 2017, and the refugee ban until July 14, 2017. The Amended Order explains neither extension. These inexplicable extensions further suggest national security is a pretext.

The January 27, 2017 Original Order suspended travel by nationals of the seven listed countries for 90 days, through *April 27, 2017*, and banned refugees

until May 27, 2017. Both bans were purportedly to allow for a vetting review. 82 Fed. Reg. 8977 (Original Order) at §§ 3(c), 5(a). The original 90-day period travel ban would have ended 18 days *before* this Court's oral argument on May 15, 2017.

Yet, the March 6, 2017 Amended Order, issued 38 days after the Original Order, delayed its new effective date *another* 10 days and called for an *additional* 90-day review and travel ban—*until June 14, 2017*. *Compare* 82 Fed. Reg. 13209 (Amended Order) at §§ 2(c), 14, *with* 82 Fed. Reg. 8977 (Original Order) at § 3(c). Likewise, the refugee ban was extended 48 days from May 27, 2017, to July 14, 2017. The Amended Order does not even try to explain why any ban is appropriate after the deadlines in the Original Order.

The Amended Order does not and cannot blame any TRO or preliminary injunction as a means to justify the 48-day extensions. As the DHS internal reports and State Department actions show, *supra*, at 11-13, the vetting review not only continued, it led to enhanced screening. The President does not need an executive order to direct cabinet members, or the Director of National Intelligence, to engage in a vetting review. To the contrary, presidential direction to appointed officials is usually accomplished by phone call, email, letter, or other informal communication.

Curiously, the conclusory March 6, 2017 letter from the Attorney General and Secretary of DHS, cited by the Government's Brief at 38, 49, does not

even purport to request or justify the 48-day extensions of the vetting review, the travel ban, and the refugee ban. Nor was that letter joined by the three current senior national security officials with the most experience—namely, FBI Director James Comey, NSA Director Admiral Michael Rogers, and National Security Advisor H.R. McMaster. Moreover, the letter does not contradict the President's admission that the Amended Order is merely a "watered-down version of the first order." *Supra*, at 6. The Original Order was issued *without* consulting "senior national security officials." *Aziz v. Trump*, No. 1:17-cv-116 (LMB/TCB), 2017 WL 580855, at *9 (E.D. Va. Feb. 13, 2017). All this provides yet more evidence that national security has been a pretext for the travel and refugee bans.

C. The Government's Vetting Justification Illustrates The Amended Order's Irrationality.

The Administration's vetting justification further demonstrates the irrationality of the travel ban. First, the Amended Order does not even purport to demonstrate any correlation between (a) the adequacy of another country's vetting procedures and (b) the likelihood that *after screening using current U.S. vetting procedures*, a traveler or refugee would commit a terrorist attack within the United States.

Second, vetting concerns cannot explain the Amended Order's irrational distinction between where a foreign national was born and where that foreign national lives, works, and would be vetted. For example, the Amended

Order would ban travel by a doctor who is a Sudanese national who lives, works, and would be vetted by a U.S. consular official in Saudi Arabia. E.R. 153, n.41 (citing Jane Morice, *Two Cleveland Clinic doctors vacationing in Iran detained in New York, then released*, Cleveland.com (Jan. 29, 2017), *available at* https://goo.gl/J8x2iu). But the Amended Order permits travel by a Saudi national of any background who lives and works in, and would be vetted in, Sudan.

Because of this irrational disparity, groups of Canadian girl scouts and school children would not visit the United States because their groups contain some young people who reside in Canada but are nationals of the six countries. *See* Derek Hawking, *Worried about Trump's travel ban, Canada's largest school district calls off U.S. trips*, Washington Post (Mar. 24, 2017), *available at* http://wapo.st/2nVbHrP. This nonsensical exclusion is not justified by our nation's security or anything else.

Third, the Government's brief does not explain why, if the Administration was unsatisfied with prior vetting procedures, the Administration has not had sufficient time to establish its own adequate screening. To the contrary, as discussed *supra,* at 11-12, the State Department has enhanced visa screening. Likewise, the Amended Order removed Iraq from the travel ban list, and instead imposed additional U.S. screening procedures for Iraqi nationals. 82 Fed. Reg. 13209 (Amended Order) at § 4 (stating that Iraqi applications will be

subject "to thorough review, including, as appropriate, consultation with a designee of the Secretary of Defense and use of the additional information that has been obtained in the context of the close U.S.-Iraqi security partnership . . . ."). Further, the Departments of both Homeland Security and State have publicly discussed for weeks additional screening procedures for all visa applicants and refugees. *See* Laura Meckler, *U.S. Crafts Extreme Vetting Methods --- Changes considered could require visitors to reveal passwords*, Wall Street Journal (Apr. 5, 2017). The Government offers no reason why additional vetting by *this* Administration is not adequate for nationals of the remaining six countries on the travel ban list or refugees. Indeed, the Government does not contend that, in the 115 days between the inauguration and this Court's oral argument, the Trump Administration has not already put its own, adequate vetting in place, much less that it needs more time to do so.

D. The Public Record Of Government Delays Further Belies Any National Security Justification.

The start-and-stop timing surrounding the Amended Order's rollout further belies its "national security" justification. Discussing the Original Order, President Trump stated that he was told by advisors that "you can't do [a one-month delay] because then people are gonna pour in before the toughness," so he ordered that the ban be effective immediately. E.R. 151, n.33 (citing Kevin Liptak, *Trump: I wanted month delay before travel ban, was told no*, CNN Politics (Feb. 9,

2017), *available at* https://goo.gl/EOez3k). On January 30, 2017, President Trump stated on Twitter: "If the ban were announced with a one week notice, the 'bad' would rush into our country during that week." E.R. 151, n.31 (citing Donald J. Trump (@realDonaldTrump), Twitter (Jan. 30, 2017, 5:31 AM ET), *available at* https://goo.gl/FAEDTd).

When the Western District of Washington restrained enforcement of the Original Order on February 3, 2017 ("Washington TRO"), President Trump's tweets over the next two days stated first that "very bad and dangerous people may be pouring into our country" and, by a day later, that they actually were "pouring in."

> Feb 4, 2017 04:44:49 PM Because the ban was lifted by a judge, *many very bad and dangerous people may be pouring into our country*. A terrible decision
>
> Feb 5, 2017 03:39:05 PM Just cannot believe a judge would put our country in such peril. *If something happens blame him and court system. People pouring in. Bad!*

Hawaii, ECF No. 201-6 (Donald J. Trump (@realDonaldTrump), Twitter (Feb. 4, 2017, 4:49 PM ET), *available at* http://bit.ly/2ojFoX3; Donald J. Trump (@realDonaldTrump), Twitter (Feb. 5, 2017, 3:39 PM ET), *available at* http://bit.ly/2ojCwta).

Despite the President's rhetoric, this Administration's delays further contradict any argument that the objective of the travel ban is to keep

"very bad and dangerous people" from "pouring in." From February 9, 2017, when this Court denied a stay of the Washington TRO, until at least May 15, 2017—*95 days and counting*—the Government itself first delayed the Amended Order and then agreed to delays of its implementation.

It took until March 16, 2017 for the Administration to roll out and make effective what the President himself has described as a mere "watered down version of the first one." *Supra*, at 6. Moreover, because President Trump's February 28, 2017 speech to Congress was well received in the press, the Administration purposefully delayed the issuance of the Amended Order from March 1, 2017, to March 6, 2017. E.R. 157 n.52 (citing Laura Jarrett, Ariane de Vogue & Jeremy Diamond, *Trump delays new travel ban after well-reviewed speech*, CNN (Mar. 1, 2017 6:01 AM ET), https://goo.gl/McqMm5). If national security were a basis for the Amended Order, its implementation would not have come second to favorable media coverage.

The Government also never sought a stay of the March 15, 2017 order of the District Court for the District of Hawaii that restrained Sections 2 and 6 of the Amended Order. And now the Government has agreed to a briefing schedule pursuant to which it will not be until May 15, 2017 that the Ninth Circuit will hear oral argument on the Government's motion to stay and the Government's appeal of the District of Hawaii's preliminary injunction.

Hawaii v. Trump, CV. No. 17-15589 (9th Cir. Apr. 4, 2017), ECF No. 18. The Government's agreement to this pace confirms that it considers its own, current vetting procedures to be fully adequate.

II. ABSENT THE AMENDED ORDER'S PRETEXT, WHAT UNAVOIDABLY REMAINS IS PREJUDICE.

Unlike President Trump, the Government's briefs have avoided citing the cases upholding the World War II internment of Japanese Americans and Japanese nationals residing in the United States as precedent for the Original or Amended Orders. [4] Even the majority opinion in *Korematsu v. United States*, 323 U.S. 214 (1944), would provide no support as, among other reasons, the United States is not at war with the six countries named in the travel ban. *See id.* at 217-18 (relying on "the war power of Congress and the executive").

Moreover, *Korematsu* relied on *Hirabayashi v. United States*, 320 U.S. 81 (1943), where the majority had stated that "[o]ur investigation" of "*all* the relevant circumstances *preceding* and attending" the internment "afforded a

[4] Then-Candidate Trump supported his proposed travel ban by citing the World War II internment, telling reporters, "[Roosevelt] did the same thing." E.R. 145 n.15 (citing Jenna Johnson, *Donald Trump says he is not bothered by comparisons to Hitler*, Washington Post (Dec. 8, 2015), https://goo.gl/6G0oH7). Taking the wrong page from history again, President Trump's recent assertion that Muslims do not assimilate in Western societies may presage a purported justification for a permanent travel ban. *See* Chris Cillizza, *Donald Trump's explanation of his wire-tapping tweets will shock and amaze you*, Washington Post (Mar. 16, 2017), *available at* http://wapo.st/2o0QXzA. Similar assertions about non-assimilation were made to justify the World War II internment. *See Hirabayashi v. United States*, 320 U.S. 81, 96 (1943).

reasonable basis" of wartime necessity. *Id.* at 101 (emphasis added).[5] Thus, even *Hirabayashi* contradicts the Government's "blinders" argument under which, because the Government invokes national security, courts would have to ignore the public record even if President Trump gave a speech, waved the Amended Order, and declared: "This is the Muslim ban I promised."

The Government's "blinders" argument also contradicts the controlling concurrence of Justice Kennedy, joined by Justice Alito, in *Kerry v. Din* that looked "beyond" the consular officer's official decision, to evidence that the particular visa applicant "worked for the Taliban government, which . . . provides at least a factual connection to terrorist activity." 135 S. Ct. 2128, 2141 (2015). That concurrence also stated that courts properly look beyond the stated reason for the denial of a visa when there is "an affirmative showing of bad faith." *Id*. Public statements of religious prejudice show bad faith of the worst kind.

In contrast, there was no *public* statement contradicting an official explanation in any case relied on by Appellants. The visa applicant in *Kleindienst v. Mandel*, 408 U.S. 753, 758 (1972), did not rely on publicly-stated reasons different from those offered by the sole decision maker, the consular official. The Government's other citations are similarly inapposite. *See Fiallo v. Bell*, 430 U.S.

[5] The Government cites *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), which in turn relies in part on *Korematsu* and *Hirabayashi*. *See* 342 U.S. at 589 n.16, 591 n.17.

787, 795 n.6 (1977) ("This is not to say . . . that the Government's power in this area [of immigration] is never subject to judicial review."); *Taniguchi v. Schultz*, 303 F.3d 950, 957-58 (9th Cir. 2002) (finding "INS has advanced a rational explanation" for not allowing deportation waivers for lawful permanent residents convicted of aggravated felonies). As the District Court held, no precedent requires the Court to "crawl into a corner, pull the shutters closed, and pretend it has not seen what it has." *Hawaii*, at *17 (footnote and citation omitted).

No court should add itself to the discredited majority in *Korematsu* by ignoring religious and ethnic prejudice because the Executive acted under the guise of national security. *See Hirabayashi v. United States*, 828 F.2d 591, 593 (9th Cir. 1987) ("The *Hirabayashi* and *Korematsu* decisions have never occupied an honored place in our history."). As Judge Wilkinson has stated, *Korematsu* is "roundly and properly discredited." *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (concurring in denial of rehearing), *vacated on other grounds*, 542 U.S. 507 (2004).

Every indication is that a broad majority of the Supreme Court would not countenance another *Korematsu*. Justices Ginsburg and Breyer have written this explicitly. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting) (*Korematsu* "yielded a pass for an odious, gravely injurious racial classification[.] A *Korematsu*-type classification . . . will never

again survive scrutiny: such a classification, history and precedent instruct, properly ranks as prohibited."); Stephen Breyer, *Making Our Democracy Work: A Judge's View* (Knopf, 2010) (*Korematsu* "has been so thoroughly discredited, that it is hard to conceive of any future court referring to it favorably or relying on it."). Chief Justice Roberts testified that if a case "like" *Korematsu* came before the Court, "I would be surprised if there were any arguments that could support it." *U.S. Senate Judiciary Committee Holds A Hearing On The Nomination Of John Roberts To Be Chief Justice Of The Supreme Court*, 109th Cong. (2005), 2005 WL 2214702, at *22. Justice Alito testified that the "Japanese internment cases . . . were one of the great constitutional tragedies that our country has experienced . . . ." *U.S. Senate Judiciary Committee Holds A Hearing On The Nomination Of Judge Samuel Alito To The U.S. Supreme Court*, 109th Cong. (2006), 2006 WL 45940, at *150-51. Justice Sotomayor testified that *Korematsu* "was wrongly decided." *Senate Committee On The Judiciary Holds A Hearing On The Nomination Of Judge Sonia Sotomayor To Be An Associate Justice Of The U.S. Supreme Court*, 111th Cong. (2009), 2009 WL 2027303, at *79. Justice Kagan gave *Korematsu* as *the* example of a "poorly reasoned" Supreme Court decision. *Responses to Supplemental Questions from Senators Jeff Sessions, Orrin Hatch, Charles Grassley, Jon Kyl, Lindsey Graham, John Cornyn, and Tom Coburn*, *available at* http://bit.ly/2oI0aAf. When Justice Gorsuch was asked whether

Korematsu has any precedential value in any case that may come before the Supreme Court, he testified, "no." Senator Mazie K. Hirono, *Questions for the Record following Hearing on March 20-23, 2017 entitled: "On the Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States*," Senate Judiciary Committee (Mar. 20-23, 2017), *available at* http://bit.ly/2pmtWHD.

Perhaps most telling, Justice Kennedy has made available on the Ninth Circuit website a "Reading List of Justice Anthony M. Kennedy," *available at* www.ca9.uscourts.gov, that includes the *dissent* of Justice Murphy in *Korematsu* as what the website describes as an example of "key principles that are integral to our nation's DNA." The core of Justice Murphy's dissent is: "Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support." *Korematsu*, 323 U.S. at 234. Justice Murphy stated that even claims by the Executive regarding military necessity "must [be] subject" to the "judicial process of having . . . reasonableness determined." *Id.* That reasonable "relation" was "lacking" because the internment order simply "assum[ed] that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy." *Id*. at 235. However, no "reason, logic or experience could be marshalled in support of such an assumption." *Id*.

What unavoidably remained, Justice Murphy explained, as the underlying reasons for the internment were "an accumulation of much of the misinformation, half-truths, and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the most foremost advocates of the evacuation." *Id*. at 239. Justice Murphy explained that even a "military judgment" in wartime that was "based upon such racial and sociological considerations is not entitled to the great weight" ordinarily given to military assessments. *Id*. at 239-40. As Justice Murphy concluded:

> Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States.

Id. at 242.[6]

The Government likewise has provided no "reason, logic or experience," *id.* at 235, in support of the Amended Order's assumption that nationals from the six countries and refugees may possess some inherent tendency to commit terrorism in the United States. Instead, President Trump said in his campaign, "Islam hates us," E.R. 57 (quoting SAC ¶ 41 (quoting Anderson Cooper

[6] In the highest tradition of the bench, Justice Murphy ignored partisan and personal loyalties. President Roosevelt had appointed Justice Murphy three times: as Governor General of the Philippines, Attorney General, and Justice.

360 Degrees: Exclusive Interview With Donald Trump (CNN television broadcast Mar. 9, 2016, 8:00 PM ET), transcript *available at* https://goo.gl/y7s2kQ)), and the White House Press Secretary trumpets that the Amended Order "deliver[s] on" one of President Trump's "most significant campaign promises: protecting the country against radical *Islamic* terrorism." *Supra,* at 6 (emphasis added). That is religious prejudice and a public appeal to religious prejudice. Religious prejudice is not national security. Religious prejudice is unconstitutional.

CONCLUSION

This Court should affirm the preliminary injunction.

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Date: 4/20/2017

("s/" plus typed name is acceptable for electronically-filed documents)

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CERTIFICATE OF SERVICE

I certify that on this 20th day of April 2017, the foregoing brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

Dated: April 20, 2017

/s/ Richard D. Bernstein

Richard D. Bernstein
WILLKIE FARR & GALLAGHER LLP

No. 17-15589

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAII, et al.

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, et al.

Defendants-Appellants

On Appeal from an Order of the United States
District Court for the District of Hawaii

United States District Judge Derrick K. Watson
Case No. 1:17-cv-00050-DKW-KSC

ADDENDUM OF SUPPLEMENTAL MATERIALS CITED IN BRIEF OF *AMICUS CURIAE* T.A., A U.S. CITIZEN OF YEMENI DESCENT, IN SUPPORT OF APPELLEES, AFFIRMANCE OF THE PRELIMINARY INJUNCTION, AND DENIAL OF THE GOVERNMENT'S MOTION FOR A STAY

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April 20, 2017

TABLE OF CONTENTS

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Reference: A) 17 STATE 24324
B) 17 STATE 24800
Subject: SUPERSEDING 17 STATE 24324: IMPLEMENTING IMMEDIATE HEIGHTENED
SCREENING AND VETTING OF VISA APPLICATIONS
1. (SBU) THIS IS AN ACTION REQUEST. This guidance supersedes that provided to the field field in REFTEL A.

2. (U) Simultaneous with the release of Executive Order 13780 on Protecting the Nation from Terrorist Attacks by Foreign Nationals (E.O.) on March 6, 2017, the President signed a Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security. Courts have temporarily barred the Department from enforcing section 2 of the E.O., which relates to the suspension of entry to the United States and the issuance of visas for nationals of designated countries, as well as section 6, which relates to the Refugee Admissions Program. This cable provides guidance for implementing section 2 of the Presidential Memorandum, which states: "The Secretary of State and the Secretary of Homeland Security, in consultation with the Attorney General, shall, as permitted by law, implement protocols and procedures as soon as practicable that in their judgment will enhance the screening and vetting of applications for visas and all other immigration benefits, so as to increase the safety and security of the American people. These additional protocols and procedures should focus on:
(a) preventing the entry into the United States of foreign nationals who may aid, support, or commit violent, criminal, or terrorist acts; and
(b) ensuring the proper collection of all information necessary to rigorously evaluate all grounds of inadmissibility or deportability, or grounds for the denial of other immigration benefits."

3. (U) The President also underscored: "[T]his Nation cannot delay the immediate implementation of additional heightened screening and vetting protocols and procedures for issuing visas to ensure that we strengthen the safety and security of our country. Moreover, because it is my constitutional duty to 'take Care that the Laws be faithfully executed,' the executive branch is committed to ensuring that all laws related to entry into the United States are enforced rigorously and consistently."

4. (SBU) The E.O. and Presidential Memorandum highlight the critical importance of maintaining extra vigilance in the conduct of our work and continuing to increase scrutiny of visa applicants for potential security and non-security related ineligibilities. Consular officers should not hesitate to refuse any case presenting security concerns under §221(g) of the Immigration and Nationality Act (INA) in order to

or issue any other refusals or take other precautionary actions pursuant to any applicable ground of inadmissibility under the INA. All officers should remember that all visa decisions are national security decisions. A consular officer should refuse under §214(b) of the INA any nonimmigrant visa applicant whom the consular officer believes may fail to abide by the requirements of the visa category in question.

5. (SBU) As part of our ongoing efforts to refine and improve visa applicant vetting, to supplement the initiatives set out in the E.O. (other than section 2) and the concepts undergirding the Presidential Memoranda, the Department instructs posts to implement immediately the following guidance. These are preliminary measures. Additional screening measures will be introduced based on the conclusions of the interagency working groups mandated by the E.O, acting in accordance with applicable court orders. (U) Increased Screening Worldwide of Certain Visa Populations

6. (SBU) If they have not already done so in response to reftel A, Consular Chiefs must immediately convene post's law enforcement and intelligence community partners under the auspices of existing Visa Viper or Law Enforcement Working Groups, as appropriate. These working groups will develop a list of criteria identifying sets of post applicant populations warranting increased scrutiny.

7. (SBU) Once posts have documented these population sets, posts are required to direct adjudicating consular officers to attempt to identify individual applicants that fall within the population set during the course of a consular visa interview. If the applicant is otherwise eligible for a visa (including overcoming INA 214(b) for nonimmigrant visa applicants), the interviewing consular officer should consider sending a discretionary Donkey Security Advisory Opinion (SAO) request.

8. (SBU) In conducting visa interviews, consular officers must disregard the guidance in 17 STATE 24324, to the extent the guidance sets out specific questions to ask of applicants, unless and until notified by septel that the Department has received approval from the Office of Management and Budget (OMB) for those specific questions. Until that time, consular officers should, as always, ask additional questions as necessary to understand the applicant's answers on application forms, should thoroughly pursue any concerns that may arise during the interview, and should provide all relevant information in case notes or, when an SAO is warranted, in the "Additional Information Optional" field.

9. (SBU) Until the Department receives OMB approval for asking specific questions the Department would provide, officers should continue to follow all existing SAO guidance as outlined in 9 FAM 304.2, Security Advisory Opinions (SAO), for Donkey, Bear, Mantis, and Merlin/Merlin 92 SAOs based on IACT/PATRIOT Red, CLASS Hits, TAL, or Officer Discretion, and the country-specific Policy SAO guidance in 9 FAM 304.5, Special Clearance and Issuance Procedures, among other sections. (SBU) Mandatory social media check for applicants present in a territory at the time it was controlled by ISIS

10. (SBU) If post determines the applicant may have ties to ISIS or other terrorist organizations or has ever been present in an ISIS-controlled territory, post must/must refer the applicant to the Fraud Prevention Unit for a mandatory social media review, as described in more detail in 7-FAH-1 H-943.5-2. Post should scan the results of this review into the NIV case for consideration during the SAO process. Details on complying with this requirement will be provided via septel. If any post's Fraud Prevention Unit believes post has such a case, the Fraud Prevention Manager can contact post's CA/FPP and CA/VO/SAC liaison officers with any further questions. (SBU) Mandatory Donkey SAO for Iraqi nationals with presence in territory at the time it was controlled by ISIS

11. (SBU) While the E.O. exempts nationals of Iraq from the travel suspension provisions of Section 2, the Presidential Memorandum and Sections 1(g) and Section 4 of the E.O. contemplate additional screening for Iraqi nationals in addition to the robust vetting already in place.

12. (SBU) Effective immediately and until further notice, when adjudicating an application from

whether the applicant was ever present in a territory at the time it was controlled by ISIS. If so, post must submit a Donkey Security Advisory Opinion (SAO) for these applicants, except those applying for an A/G/C-2/C-3/NATO visa.

(SBU) Interview Guidelines

13. (SBU) In order to ensure that proper focus is given to each application, posts should generally not schedule more than 120 visa interviews per consular adjudicator/per day. Please that limiting scheduling may cause interview appointment backlogs to rise.

14. (U) Minimize considered.

Signature: Tillerson

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I certify that on this 20th day of April 2017, the foregoing addendum was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

Dated: April 20, 2017

/s/ Richard D. Bernstein
Richard D. Bernstein
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