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 the United States District Court
for the District of Hawaii, No. 1:17-cv-00050-DKW-KSC
District Judge Derrick K. Watson

BRIEF OF INTERNATIONAL LAW SCHOLARS AND NONGOVERNMENTAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *amici curiae* certify that they have no parent corporations or any publicly held corporations owning 10% or more of their stock.

DATED this 20th day of April, 2017.

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I. INTEREST OF *AMICI CURIAE*[1]

The individual *amici* whose views are presented here are international law scholars specializing in public international law and international human rights law. They include members of the International Human Rights Committee of the International Law Association, American Branch[2] as well as university professors and practicing lawyers with expertise in these subjects. *Amici* also include nongovernmental organizations with expertise in civil rights law, immigration law, or international human rights law. *Amici* submit this brief to vindicate the public interest in ensuring a proper understanding and application of the international human rights law relevant to this case. The nongovernmental organizations and individual scholars are listed in the Appendix.

Pursuant to Federal Rule of Appellate Procedure 29(a), *amici* submit this brief without an accompanying motion for leave to file or leave of court because all parties have consented to its filing.

II. INTRODUCTION

The purpose of this brief is to bring to the Court's attention U.S. treaty provisions and customary international law principles that bear on the legality of

[1]No counsel for a party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

[2] This brief represents the opinion of the individual Committee member signatories, but not necessarily that of the International Law Association ("ILA") or the ILA American Branch.

Executive Order 13780 of March 6, 2017 ("EO"), which replaces the now-rescinded EO dated January 27, 2017.

International law, which includes treaties ratified by the United States as well as customary international law, is part of U.S. law and must be faithfully executed by the President and enforced by U.S. courts except when clearly inconsistent with the U.S. Constitution or subsequent acts of Congress. The United States is a party to and bound by several international human rights treaties relevant to the subject matter of the EO. In assessing the legality of the EO, the Court should be cognizant of those treaty obligations, and of customary international law, which should influence constructions of the U.S. Constitution and statutes that prohibit discrimination based on religion or national origin.

In addition, the Immigration and Nationality Act and other statutes must be read in harmony with these international legal obligations pursuant to the Supremacy Clause of the Constitution and long established principles of statutory construction requiring acts of Congress to be interpreted in a manner consistent with international law, whenever such a construction is reasonably possible. In this case, the international law obligations described below reinforce

interpretations of those statutes forbidding discrimination of the type threatened by Sections 2 and 11 of the EO.[3]

III. ARGUMENT

A. International Law Is Relevant to Assessing the Legality of the Executive Order.

International law is relevant to this case because the U.S. Constitution makes treaties part of U.S. law. Customary international law is also part of U.S. law and is enforceable by U.S. courts. Under the Supremacy Clause of the Constitution, "treaties made . . . under the authority of the United States, shall be the supreme law of the land; and the judges of every state shall be bound thereby."[4] Although the Constitution does not require legislation prior to treaties taking legal effect, the Supreme Court distinguishes between self-executing and non-self-executing treaties.[5] The Senate or the President has declared that the relevant human rights treaties to which the United States is a party are non-self-executing.[6] Nevertheless, by ratifying those treaties, the United States bound itself to provide judicial or other remedies for violations of treaty obligations.[7] Thus, even if the treaty provisions themselves are not directly enforceable in U.S. courts, the rights they

[3] The relevant provisions of the EO, the Constitution, and treaties and international declarations are set forth below in the Addendum to this brief.
[4] U.S. Const. art. VI, cl. 2.
[5] *See* Restatement (Third) of Foreign Relations Law § 111(3)–(4) (Am. Law Inst. 1987).
[6] *See, e.g.*, 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992) (International Covenant on Civil and Political Rights).
[7] *See, e.g.*, International Covenant on Civil and Political Rights art. 2(2), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter "CCPR"].

grant should be protected by courts through their interpretation of constitutional provisions and statutes addressing the same or similar subject matter.

This is consistent with the positions taken by both the Executive Branch and Congress in those cases in which Congress has not passed implementing legislation.[8] When submitting human rights treaties to the Senate for its advice and consent, both Presidents George H.W. Bush and William Clinton assured the Senate that the United States could and would fulfill its treaty commitments by applying existing federal constitutional and statutory law.[9] Courts generally construe federal constitutional and statutory law to be consistent with human rights treaties in part because the Senate has relied on such assurances as a basis for its

[8] *See, e.g.*, Rep. of the Comm. Against Torture, ¶¶ 58–60, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000) ("Where domestic law already makes adequate provision for the requirements of the treaty and is sufficient to enable the United States to meet its international obligations, the United States does not generally believe it necessary to adopt implementing legislation.").

[9] For example, during Senate hearings on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), June 26, 1987, 1465 U.N.T.S. 113, the State Department Legal Advisor told the Senate: "Any Public official in the United States, at any level of government, who inflicts torture . . . would be subject to an effective system of control and punishment in the U.S. legal system." Hearing Before the S. Comm. on Foreign Relations, 101st Cong. 8 (1990). Similarly, with respect to G.A. Res. 2106 (XX), annex, International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") (Dec. 21, 1965), the Clinton Administration told the Senate: "As was the case with the prior treaties, existing U.S. law provides extensive protections and remedies sufficient to satisfy the requirements of the present Convention." S. Comm. on Foreign Relations, Report on International Convention on the Elimination of All Forms of Racial Discrimination, S. Exec. Rep. No. 103-29, at 25–26 (1994).

consent to ratification.[10] The United States acknowledged this principle in its comments to the U.N. Committee Against Torture: "Even where a treaty is 'non-self-executing', courts may nonetheless take notice of the obligations of the United States thereunder in an appropriate case and may refer to the principles and objectives thereof, as well as to the stated policy reasons for ratification."[11] "Taking notice" of treaty obligations comports with a core principle of statutory construction announced by the Supreme Court in *Murray v. The Schooner Charming Betsy*: "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[12] That doctrine has been consistently and recently reaffirmed by the Supreme Court.[13]

Moreover, in *Filartiga v. Pena-Irala*, the U.S. Court of Appeals for the Second Circuit observed that a treaty that is not self-executing may provide evidence of customary international law.[14] Customary international law must be enforced in U.S. courts even in the absence of implementing legislation, regardless of whether customary rules appear in a treaty.[15] In *The Paquete Habana*, the

[10] *See, e.g., Immigration & Naturalization Serv. v. Stevic*, 467 U.S. 407, 426 (1984).
[11] Rep. of the Comm. Against Torture, *supra* note 8, ¶ 57 (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993)).
[12] 6 U.S. (2 Cranch) 64, 118 (1804); *accord Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801).
[13] *See, e.g., F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).
[14] 630 F.2d 876, 882 n.9 (2d Cir. 1980).
[15] Restatement (Third) of Foreign Relations Law § 111(3) (Am. Law Inst. 1987).

Supreme Court held that customary international law "is part of our law" and directly enforceable in courts when no conflicting treaty, legislative act, or judicial decision controls.[16] As discussed below, several human rights treaty rules applicable in this case are also customary international law.

The President is also obligated to respect international law pursuant to his constitutional duty to faithfully execute the law.[17] Because Article VI of the Constitution makes treaties the supreme law of the land, the President is constitutionally required to comply with U.S. treaty obligations as well as with customary international law. This was the intent of the Framers.[18] Courts therefore have a duty to restrain federal executive action that conflicts with a duly ratified treaty. As the Supreme Court wrote in ordering the President to restore a French merchant ship to its owner pursuant to a treaty obligation: "The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted."[19]

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[16] 175 U.S. 677, 700 (1900); *see also Filartiga*, 630 F.2d at 886 ("Appellees . . . advance the proposition that the law of nations forms a part of the laws of the United States only to the extent that Congress has acted to define it. This extravagant claim is amply refuted by the numerous decisions applying rules of international law uncodified by any act of Congress.").

[17] *See* U.S. Const. art. II, § 3.

[18] Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 33–43 (Harold C. Syrett et al. eds. 1969).

[19] *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801).

Even if the President were not directly bound by international law, however, he is still obligated to comply with the Constitution itself and all applicable legislation enacted by Congress within its authority, which (as noted) must be interpreted in a manner consistent with international law whenever possible.

The following sections identify the treaties and customary international law relevant to the legality of the EO.

B. International Law Regarding Discrimination on the Basis of Religion and National Origin

1. The International Covenant on Civil and Political Rights

Discrimination based on religion or national origin is prohibited by the International Covenant on Civil and Political Rights ("CCPR"). The United States ratified the CCPR in 1992.[20]

Article 2 of the CCPR states in relevant part:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, . . . religion, . . . national or social origin, . . . or other status.
> 3. Each State Party to the present Covenant undertakes:
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other

[20] 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992).

competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

The United Nations Human Rights Committee ("HRC") is charged by the CCPR to monitor implementation by state parties and to issue guidance on its proper interpretation. The HRC interprets article 2 to prohibit "any distinction, exclusion, restriction or preference" based on a prohibited ground, and which has "the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms" protected by the treaty.[21] To justify a derogation from the nondiscrimination (or any other human rights) duty, a measure must pursue a legitimate aim and be proportionate to that aim.[22] A "proportionate" measure is one effective at achieving the aim and narrowly tailored (or "necessary") to it.[23]

The substantive rights guaranteed by the CCPR, which must be protected without discrimination based on religion or national origin under article 2, include the protection of the family. Article 23 provides in relevant part: "The family is the natural and fundamental group unit of society and is entitled to protection by

[21] Human Rights Comm., General Comment No. 18, ¶ 6, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994).
[22] Comm. on the Elimination of Racial Discrimination, General Recommendation 30: Discrimination against non-citizens, U.N. Doc. CERD/C/64/Misc.11/rev.3, at 2 (2004).
[23] *See* AARON XAVIER FELLMETH, *Paradigms of International Human Rights Law* 119–21 (2016).

society and the State."[24] The HRC has interpreted this right to include living together, which in turn obligates the state to adopt appropriate measures "to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons."[25]

Restrictions on travel and entry caused by the EO that impose disparate and unreasonable burdens on the exercise of this right violate CCPR article 2. The HRC has explained that, although the CCPR does not generally

> recognize the right of aliens to enter or reside in the territory of a State party . . . , in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.[26]

Thus, the right of entry is not beyond the scope of the CCPR. On the contrary, the CCPR's nondiscrimination principles and protections for family life should be considered by courts in interpreting government measures affecting family unification. This treaty-based protection for family life is consistent with Supreme Court jurisprudence respecting the role of due process of law in governmental decisions affecting family unity.[27]

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[24] CCPR, *supra* note 7, art. 23(1).
[25] Human Rights Comm., *supra* note 21, General Comment No. 19, ¶ 5.
[26] *Id*., General Comment No. 15, ¶ 5.
[27] *See Landon v. Plasencia*, 459 U.S. 21, 34, 37 (1982); *Kerry v. Din*, __ U.S. __, 135 S. Ct. 2128, 2140–41 (2015) (Kennedy, J., concurring).

More generally, article 26 of the CCPR prohibits discrimination in any government measure, regardless of whether the measure violates a Covenant right:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

As interpreted by the HRC and consistent with its wording, this provision "prohibits discrimination in law or in fact in *any field* regulated" by the government.[28] Notably, unlike CCPR article 2, the equal protection provisions of CCPR article 26 lack article 2's limitation to "all individuals within [the state party's] territory and subject to its jurisdiction."

The nondiscrimination provisions of the CCPR are also customary international law binding on the United States, forming part of U.S. law unless contrary to the Constitution or a statute. The Universal Declaration of Human Rights, which the United States approved in 1948, mandates nondiscrimination in religion and national origin, equal protection of the law, and protection from arbitrary interference in family life.[29] The American Declaration of the Rights and Duties of Man, which the United States approved when it signed and ratified the

[28] Human Rights Comm., *supra* note 21, General Comment No. 18, ¶ 12 (emphasis added).
[29] G.A. Res. 217 A (III), Universal Declaration of Human Rights arts. 2, 7, 12 (Dec. 10, 1948).

Charter of the Organization of American States the same year, has similar provisions in articles 6 and 17.[30] These nondiscrimination principles and the right to family unity have become sufficiently widespread and accepted by the international community that they have entered into customary international law in the present day.[31]

2. The International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") also bars discrimination based on national origin. The United States has been a party to the CERD since 1994.[32] Under article 2, paragraph (1)(a), each state party commits to refraining from and prohibiting all forms of racial discrimination, and each further undertakes "to engage in no act or practice of racial discrimination . . . and to ensure that all public authorities and public institutions, national or local, shall act in conformity with this obligation." CERD defines "racial discrimination" to include distinctions and restrictions based on national origin.[33] With regard to immigration practices, CERD makes clear that states are free to adopt only such "nationality, citizenship or naturalization"

[30] O.A.S. Res. XXX (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/I.4 rev. 13, at 13 (2010).
[31] *See* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 329 (1995/96).
[32] *See* 140 Cong. Rec. S7634-02 (daily ed. June 24, 1994).
[33] CERD, *supra* note 9, art. 2(1)(a).

policies that "do not discriminate against any particular nationality."[34] Like the nondiscrimination provisions of CCPR article 26, CERD article 2 does not limit its application to citizens or resident noncitizens. While CERD does not speak specifically to restrictions on entry of nonresident aliens, the general language of CERD expresses a clear intention to eliminate discrimination based on race or national origin from all areas of government activity: "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms . . . without distinction as to race, colour, or national or ethnic origin . . . ."[35]

Article 4 of CERD further provides that state parties "[s]hall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination," which (as noted) includes discrimination based on national origin. The Committee on the Elimination of Racial Discrimination, the body of independent experts appointed to monitor CERD's implementation, interprets article 4 to require states to combat speech stigmatizing or stereotyping non-citizens generally, immigrants, refugees, and asylum seekers,[36] with statements by high-ranking officials causing "particular concern."[37] In *TBB-Turkish Union in Berlin/Brandenburg v. Germany*, for example, the Committee specifically

[34] *Id.* art. 1(3).
[35] *Id.* art. 5.
[36] Comm. on the Elimination of Racial Discrimination, General Recommendation No. 35: Combating Racist Hate Speech, ¶ 6, U.N. Doc. CERD/C/GC/35 (2013).
[37] *Id.* ¶ 22.

determined that Germany violated the Convention when it failed to discipline or punish a minor government official who had *inter alia* drawn attention to low employment rates of Turkish and Arab populations in Germany, suggested their unwillingness to integrate into German society, and proposed that their immigration should be discouraged.[38] These statements, the Committee determined, implied "generalized negative characteristics of the Turkish population" and incited racial discrimination.[39]

The legality of the EO in this case, and the proper interpretation of the statutes and constitutional provisions cited by the parties, should be assessed with those proscriptions in mind. Those international law principles require courts to reject any attempt by the President to define classes based on national origin or religion, and then to impose on those classes disparate treatment, except to the extent necessary to achieve a legitimate government purpose.

C. Relevant Provisions of the Executive Order

Section 2 categorically suspends immigration from six specified countries—Iran, Libya, Somalia, Sudan, Syria, and Yemen, and imposes special requirements on immigrants from Iraq. Section 2(a), moreover, authorizes the Secretary of Homeland Security to demand "certain information" from "particular countries even if it is not needed from every country."

[38] Comm. on the Elimination of Racial Discrimination, Commc'n No. 48/2010, U.N. Doc. CERD/C/82/D/48/2010 (2013).
[39] *Id.* ¶ 12.6.

The EO thus makes an explicit distinction based on national origin that, unless necessary and narrowly tailored to achieve a legitimate government aim, would violate U.S. obligations under international law. In effect, the EO also makes a distinction based on religion, as Appellees have argued. Notably, every one of the designated countries has a population that is overwhelmingly Muslim,[40] and the EO does not suspend immigration from any state with a non-Muslim majority.

International law is also relevant to Section 11 of the EO, which requires the Secretary of Homeland Security to "collect and make publicly available" certain information relating *inter alia* to convictions of terrorism-related offenses, government charges of terrorism, and "gender-based violence against women" by foreign nationals. The EO requires no publication of similar information relating to U.S. nationals. By mandating that the Secretary publish pejorative information about noncitizens without publishing comparable information about U.S. citizens, Section 11 makes a suspect distinction based on national origin. While Section 11 has not been challenged specifically by the Appellees, it may bear on the intent to discriminate, because the decision to publish derogatory information about noncitizens alone is stigmatizing, and appears to be motivated by a desire to

[40] *See* Central Intelligence Agency, The World Factbook, https://www.cia.gov/library/publications/resources/the-world-factbook/index.html (last visited Apr. 6, 2017).

characterize noncitizens as more prone to terrorism or gender-based violence than U.S. citizens. Apart from what it may indicate with respect to intent, a measure designed to stigmatize noncitizens cannot be proportionate and thus violates article 26 of the CCPR and articles 2 and 4 of the CERD.

IV. CONCLUSION

For the foregoing reasons, *amici* request that the Court consider U.S. obligations under international law, which forms part of U.S. law, in evaluating the legality of the EO.

RESPECTFULLY SUBMITTED this 20th day of April, 2017.

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ADDENDUM

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I. EXECUTIVE ORDER 13780: PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES

A. Section 2. Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period.

(a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat. The Secretary of Homeland Security may conclude that certain information is needed from particular countries even if it is not needed from every country.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the worldwide review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed from each country for adjudications and a list of countries that do not provide adequate information, within 20 days of the effective date of this order. The Secretary of Homeland Security shall provide a copy of the report to the Secretary of State, the Attorney General, and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

(d) Upon submission of the report described in subsection (b) of this section regarding the information needed from each country for adjudications, the Secretary of State shall request that all foreign governments that do not supply such information regarding their nationals begin providing it within 50 days of notification.

(e) After the period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, shall submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means. The Secretary of State, the Attorney General, or the Secretary of Homeland Security may also submit to the President the names of additional countries for which any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States.

(f) At any point after the submission of the list described in subsection (e) of this section, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, may submit to the President the names of any additional countries recommended for similar treatment, as well as the names of any countries that they recommend should be removed from the scope of a proclamation described in subsection (e) of this section.

(g) The Secretary of State and the Secretary of Homeland Security shall submit to the President a joint report on the progress in implementing this order within 60 days of the effective date of this order, a second report within 90 days of the effective date of this order, a third report within 120 days of the effective date of this order, and a fourth report within 150 days of the effective date of this order.

B. Section 11. Transparency and Data Collection.

(a) To be more transparent with the American people and to implement more effectively policies and practices that serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General, shall, consistent with applicable law and national security, collect and make publicly available the following information:

(i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation with or provision of material support to a terrorism-related organization, or any other national-security-related reasons;

(ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and who have engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States;

(iii) information regarding the number and types of acts of gender-based violence against women, including so-called "honor killings," in the United States by foreign nationals; and

(iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security or the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

(b) The Secretary of Homeland Security shall release the initial report under subsection (a) of this section within 180 days of the effective date of this order and shall include information for the period from September 11, 2001, until the date of the initial report. Subsequent reports shall be issued every 180 days thereafter and reflect the period since the previous report.

II. UNITED STATES CONSTITUTION

A. Article II § 3. Messages; Convene and Adjourn Congress; Receive Ambassadors; Execute Laws; Commission Officers.

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he

shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

B. Article VI, Cl. 2. Supreme Law of Land.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

III. RELEVANT TREATIES

A. International Convention on the Elimination of All Forms of Racial Discrimination

1. Article 2

(1) States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

2. Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination

and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

3. Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution;

(c) Political rights, in particular the rights to participate in elections to vote and to stand for election on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

(ii) The right to form and join trade unions;

(iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks.

B. International Covenant on Civil and Political Rights

1. Article 2

(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(2) Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

(3) Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

2. Article 23

(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

3. Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex,

language, religion, political or other opinion, national or social origin, property, birth or other status.

IV. RELEVANT INTERNATIONAL DECLARATIONS

A. Universal Declaration of Human Rights

1. Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

2. Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

3. Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

B. American Declaration of the Rights and Duties of Man

1. Article 6

Every person has the right to establish a family, the basic element of society, and to receive protection therefore.

2. Article 17

Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.

APPENDIX

The *amici* are nongovernmental organizations and legal scholars specializing in public international law and international human rights law. They have substantial expertise in issues directly affecting the outcome of this case. These *amici* are identified below.

Organizations

Amnesty International Limited

Human Rights Advocates

Human Rights & Gender Justice Clinic, City University of New York School of Law

International Association of Democratic Lawyers

International Center for Advocates Against Discrimination

International Justice Project

International Justice Resource Center

Legal Aid Society (New York)

MADRE

National Law Center on Homelessness & Poverty

National Lawyers Guild

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T'ruah: The Rabbinic Call for Human Rights

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-15589

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

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Signature of Attorney or Unrepresented Litigant: s/ Joseph M. McMillan

Date: Apr 20, 2017

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

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 20, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct.

DATED this 20th day of April, 2017.

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