No. 17-15589

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

STATE OF HAWAII, *ET AL*

Plaintiffs-Appellees,

v.

PRESIDENT DONALD J. TRUMP, *ET AL*

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR HAWAII (17-CV-00050)
DISTRICT COURT JUDGE DERRICK K. WATSON

RAISING POLITICAL QUESTION NONJUSTICIABILITY, *AMICUS CURIAE* BRIEF FROM PROFESSOR VICTOR WILLIAMS, OF THE AMERICA FIRST LAWYERS ASSOCATION, IN SUPPORT OF PRESIDENT DONALD J. TRUMP, *ET AL* URGING REVERSAL WITH IMMEDIATE DISMISSAL

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CERTIFICATE AS TO PARTIES & RELATED CASES

A. Parties and Amici**.** All parties, interveners, and amici appearing in this Court are listed in party briefing except that this brief is filed on behalf of Professor Victor Williams in support of Defendants-Appellants.

B. Related Cases. Other related cases of which *Amicus* is aware are referenced in the briefing offered by parties.

Dated: April 21, 2017

/s/Victor Williams

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CERTIFICATE OF AUTHORSHIP, FINANCIAL CONTRIBUTION, AND RULE 32-1 FORMAT COMPLIANCE

This brief is offered by Professor Victor Williams as a *pro se* individual. Institutional affiliation is offered only for informational purposes. It is presented in 14 point, New Times Roman font totaling 6795 words in compliance with Ninth Circuit Rule 32-1. No party's counsel authored this brief in whole or in part, and no party, nor other person, contributed money intended to fund the preparation or submission of this brief.

Dated: April 21, 2017

/s/Victor Williams

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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY OF *AMICUS*

In attached Consent Motion, Professor Victor Williams appeals to the Court's broad discretion to allow this *amicus curiae* filing. *Amicus* avers his significant interest in this case and suggests that the proffered brief will be of unique assistance to the Court. Professor Victor Williams is a Washington, D.C. attorney and law professor with over twenty years' experience -- formerly affiliated as fulltime faculty with both the Catholic University of America's Columbus School of Law and the City University of New York's John Jay College of Criminal Justice. Professor Williams has particular knowledge and expertise regarding the text, history, and interpretation of Article II and Article III of the U.S. Constitution with many scholarly and popular publications. He earned his J.D. from the University of California-Hastings College of the Law. After completing an externship with both Ninth Circuit Judge Joseph Sneed and Eleventh Circuit Judge Gerald Bard Tjoflat and a two-year clerkship with Judge William Brevard Hand of the Southern District of Alabama, Williams did advanced training in federal jurisdiction and international law (LL.M.) from Columbia University's School of Law and in economic analysis of the law (LL.M.) from George Mason University's Antonin Scalia School of Law.

In past, Professor Victor Williams has been granted leave to file *amicus curiae* briefs in other lower courts as well as by the U.S. Supreme Court. Professor Williams has published scholarship and commentary that offered strong support for the constitutional discretion and appointment prerogatives of the past four presidents (without regard to their party affiliation). Professor Williams zealously advocated for timely Senate confirmation of the judicial and executive nominees of both George W. Bush and Barack Obama.

Although these past presidents often pursued policy ends at odds with Professor Williams' personal policy preferences, he continued to defend their constitutional authority in federal appointments.

But now, Professor Williams acknowledges that his ultimate policy preference to always "put America first" is clearly reflected in President Trump's agenda and early actions. Williams was an early primary supporter of candidate Donald Trump. In spring 2016, Williams launched a widely-reported legal action, after obtaining "competitor candidate standing" as a write-in candidate in several late primary states, to challenge the ballot eligibility of (naturally-born Canadian) Ted Cruz. (www.victorwilliamsforpresident.com). *See e.g., Debra Weiss, Law Prof a Write-In GOP Candidate to Challenge Ted Cruz Eligibility*, ABA JOURNAL, April 11, 2016, and Pete Williams, *Law Professor Challenges Cruz on Citizenship, Candidacy*, NBC NEWS, April 11, 2016.

After Senator Cruz withdrew from the GOP primary, Professor Williams also withdrew from the primary race, formerly endorsed Donald Trump, and founded Super PAC (GOP Lawyers), rallying Lawyers and Law Professors (www.goplawyers.com) to support Donald Trump in the general election. *See* Victor Williams, *Trump Will Bring Return to Rule of Law and Economic Growth*, THE HILL, Nov. 6, 2016, Victor Williams, *Law Professor Now Proudly in Basket of Deplorables*, THE HILL, Sept. 20, 2016, and *Inside the Beltway: 'Lawyers for Trump' Founded"* WASH. TIMES, July 4, 2016.

The campaign group has now transformed into the "America First Lawyers Association" (www.americafirstlawyers.com) which Professor Williams chairs, to advance the Trump administration's "America first" nominations, policies, and programs. *See e.g*. Victor Williams, *D.C. Law Professor Makes Case for Sessions' Senate Confirmation*, STREET INSIDER, Jan. 9, 2017. *See also*, "Madison, Hamilton, & Scalia: Original–Not Nuclear–End to Gorsuch Filibuster," The HILL, April 6, 2017, http://thehill.com/blogs/congress-blog/politics/327504-madison-hamilton-and-scalia-original-not-nuclear-option-to-end.

Professor Williams sincerely believes that "Making America Great Again" while also "Putting America First" will enable a stronger USA to again help make the entire world more just and peaceful.

Amicus submits that the proffered brief will make a valuable contribution to the existing briefing in this case as it presents a targeted theory asserting that the claims against the president's travel freeze raise a nonjusticiable political question – thus this Court does not have subject matter jurisdiction.

Submitted on April 21, 2017

_____
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ARGUMENT

The instant action presents a nonjusticiable political question: "The conduct of the foreign relations of our Government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Baker v. Carr*, 369 U.S. 186, 211 n. 31 (1962). Our new president is shifting foreign policy and increasing national security as he reorients this nation's prolonged war with terrorists. The travel freeze is implemented as one constant in his interrelated calculus. The judiciary cannot competently second-guess such policy decisions. The Court does not have the institutional capacity, classified information, or "manageable standards to channel any judicial inquiry into these matters." *El-Shifa v. United States, 607 F.3d* 836, 843 (D.C. Cir. 2010) (*en banc*).

In 2007, Justice Andrew Horowitz then-of- the Arizona Supreme Court explained: "The federal political question doctrine flows from the basic principle of separation of powers and recognizes that some decisions are entrusted under the federal constitution to branches of government other than the judiciary. Arizona courts refrain from addressing political questions for the same reasons. "*Kromko v.*

Arizona Board of Regents, 216 Ariz. 190, 165 P.3d 168 (2007) (citing *Baker* , 369 U.S. at 210-11). This abstention doctrine is thus well-recognized as fundamental to the separation of powers by both state and federal courts. When asked to answer a political question, this Circuit has ruled that a district court does not have subject matter jurisdiction. *Corrie v. Caterpillar, Inc*., 503 F.3d 974 (9th Cir. 2007).

The instant case focuses on the new president's decision to implement a significant shift in American foreign policy and national security – with the travel freeze as one central aspect. The Plaintiff-Appellees and their numerous *amici*, who state passionately strong disagreement with President Trump's foreign policy shift and increased national security efforts, actually reinforce the core point of this brief's abstention argument. *See Amicus Brief of Former National Security Officers* (including signatories such as Susan Rice, Samantha Powers, Jake Sullivan, and Janet Napolitano). Our new president rejects the failed foreign policies and weak security determinations of such establishment elites. Plaintiff-Appellants and their *amici* also ask the Court to delve into the records of the 2016 presidential campaign to search for evidence of Donald Trump's alleged religious bias in setting such new policy. In a democratic Republic, elections matter. In our constitutional Republic, elected political officers -- not unelected judges, former bureaucrats, or gaggles of law professors –formulate foreign policy and shift war

strategy. As will be shown below, the travel freeze serves a key role in the President Trump's shift in foreign policy, national security, and war strategy.

Seventh Circuit Judge Richard Posner artfully explains that the abstention "doctrine identifies a class of questions that either are not amenable to judicial resolution because the relevant considerations are beyond the courts' capacity to gather and weigh, or have been committed by the Constitution to the exclusive, unreviewable discretion of the executive and/or legislative — the so-called 'political' — branches of the federal government." *Miami Nation of Indians v. Department of Interior*, 255 F.3d 342, 346 (7th Cir. 2001). Judge Posner notes that the second branch of the doctrine "is based on the extreme sensitivity of the conduct of foreign affairs, judicial ignorance of those affairs, and the long tradition of regarding their conduct as an executive prerogative because it depends on speed, secrecy, freedom from the constraint of rules — and the unjudicial mindset." *Id* at 347 (citations omitted). Yet, equally applicable to the instant analysis is:

> [T]he first branch, which focuses on the nature of the questions that the court would have to answer — which asks whether the answers would be ones a federal court could give without ceasing to be a court, ones within the cognitive competence, as distinct from the authority, of federal judges — is engaged by such a dispute.

Id.

Before proceeding further, *Amicus* must acknowledge the emotionally-compelling narratives at issue in the instant action and related cases throughout the nation. The foreign-soil aliens seeking entry onto American soil come from nations beset with evil oppression, state-sponsored terrorism, horrendously violent disorder, and religious civil wars. These people of all ages, religions, and nationalities suffer horrors President Trump recently described as those which "no child of God should suffer." More than adequate reasons are presented to explain the aliens' desired entry onto America soil; often involving their very survival or hopeful reunion with their loved ones. Yet, these foreign-soil aliens complain about a 90-day travel freeze and demand immediate entry into America as our nation continues to defend against a war waged by radical terrorists many of whom come from those very nations, and as America takes military action in those nations and in the broader region. Three of the six listed nations have long-been determined to be state sponsors of terrorism.

Although no salve for their tragic suffering, William Tecumseh Sherman's missive sadly applies to this Court's analysis : "I am sick and tired of war. Its glory is all moonshine….War is hell." Nan Levinson, WAR IS NOT A GAME: THE NEW ANTIWAR SOLDIERS AND THE MOVEMENT THEY CREATED 13 (Rutgers 2014).

The alternative thesis presented by this *amicus curiae* brief is that the travel freeze is not a matter of ordinary immigration procedure or immigration law enforcement subject to statutory analysis.[1] Thus, Plaintiffs-Appellees may not

[1]It bears noting that just weeks after Sally Yates agreed to serve as Trump's Acting Attorney General, she publically ordered Main Justice lawyers and all her federal prosecutors not to enforce the president's orders. Senate Judiciary Chair Charles Grassley was not alone in describing General Yates' action as nothing less than partisan and elitist "sabotage." Others explain her actions as a manifestation of *Trump Derangement Syndrome*. A purpose of this alternative *amicus curiae* argument is to promote the abstention doctrine's "finality" value so as to discourage future meritless litigation in an age when such a large percentage of the establishment elite, particularly those comprising the litigation bar and legal academy, appears to suffer from *Trump Derangement Syndrome*. *See Nixon v. United States*, 938 F.2d 239, 245-46 (D.C. Cir. 1991). *See* also Victor Williams, *Travel Ban Challenges Present a Non-Reviewable Political Question*, JURIST - FORUM, Feb.15, 2017, http://jurist.org/forum/2017/02/Victor-Williams-travel-ban.php

To their great credit, many of those same career lawyers, who were ordered not to defend the Executive's policies by General Yates, have gone on to zealously defend the travel freeze. Substantial credit must also go the new Attorney General Jeff Sessions. *See Sarcour v. Donald J. Trump* (17-cv-120, E.D. Va; 3/24/17). It must also be noted, however, that the Senate has yet to confirm, or even hold confirmation hearings for, President Donald Trump's Solicitor General nominee Noel Francisco. President Trump's political adversaries clearly seek to take advantage of his understaffed Justice Department during these early days.

Meanwhile, the upper chamber continues its long and troubled practice of holding *pro forma* sessions (every three days) during Senate recesses – scheduling shenanigans intended to prevent the Executive's rightful exercise of Article II, Section 2, Clause 3 recess appointment authority. *See generally*, Victor Williams, *NLRB v. Noel Canning Tests the Limits of Judicial Memory: Leon Higginbotham, Spottswood Robinson, and David Rabinovitz 'Rendered Illegitimate'*, 6 HOUSTON L. REV, (HLRE: OFF THE RECORD) 107 (2015). Available at SSRN: https://ssrn.com/abstract=2642248 or http://dx.doi.org/10.2139/ssrn.2642248

clear the political question bar simply by recasting their challenge in terms of immigration law and procedure. *See Aktepe v. United States*: 705 F.3d 1400 (11th Cir. 1997). Neither can Plaintiffs-Appellees jump the abstention barrier by specious assertions of due process, equal protection, or religious discrimination. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). Neither do unsupportable, tangent claims – coming from American businesses, sovereign States, or universities with a seeming unlimited greed for tuition dollars -- grant the lower court subject matter jurisdiction. The specific issue comes back to policy regarding foreign-soil aliens.

Following *Harisiades v. Shaughnessy*, this Court must honor the choice of a majority of the States'electors in "maintenance of a republican form of government" to acknowledge that it is the new president who has responsibilities to calculate war strategy and related foreign policy – not the unelected judiciary. 342 U.S. 580, 588-89 (1952). *See* U.S. Const. amend. XII, § 1. In this Circuit (and in courts across our nation), the federal judiciary is being drawn into the densest and most ugly of modern "political thickets" regarding Donald Trump's election and governance. As noted above, finality is needed to respond to and end this attempted political seduction of the judiciary. D.C. Circuit Judge Stephen Williams long-ago taught that "finality" is one the political question doctrine's great virtues: "Although the primary reason for invoking the political question

doctrine in our case is the textual commitment…the need for finality also demands it." *Nixon v. United States*, 938 F.2d 239, 245-46 (D.C. Cir. 1991).

The Supreme Court has explained that a nonjusticiability finding is required where the judiciary "is particularly ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.'" *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)(quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981))). It is important to remember that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

Well before the president's decision to militarily respond to Syria's shocking use chemical weapons to terrorize his own citizens, the nascent Trump administration had reoriented military actions in Syria, Somalia, Yemen, and other of the listed nations of the travel freeze. *See* Rebecca Khee, *Trump Gives Military More Authority to Launch Somalia Strikes*, THE HILL, March 30, 2017. President Trump has doubled the number of U.S. troops actively fighting in Syria and escalating military action in other neighboring areas. *See* Lolita C. Baldour, *With Trump Approval, Pentagon Expands Warfighting Authority*, ASSOCIATED PRESS,

April 1, 2017. And the new president is currently negotiating and recasting broader foreign policy agreements so as to more actively support Saudi Arabia in a series of escalated military actions in Yemen and other listed nations. *See* Rebecca Khee, *Trump Signals Deeper US Involvement in Yemen*, THE HILL, April 1, 2017.

The Court will find no judicially manageable standards by which it can endeavor to assess our newly- elected president's interpretation of classified and military intelligence and his resulting decision -- based on that intelligence -- to set a 90-day freeze policy regarding entry of aliens from listed nations. In accessing that increasingly violent region of the world, this Court does not have better institutional ability, or better military strategy, or better classified information than does the Executive Branch. This Court is not able to *ex ante* predict the costs or consequences of judicial interference in such policy determinations.

In implementing the travel freeze, President Trump acts within his *inherent and exclusive* Article II authorities during a time of war. The president acts within a context on that the Supreme Court explicitly recognizes as "inherent in [the nation's] sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers –- a power to be exercised exclusively by the political branches of government." *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972)(quotation marks omitted).

The president's calculus that led to the 90-day travel freeze also includes policy factors related to short and long-term foreign relations: "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative - 'the political' – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). These foreign policy objectives of the freeze are deeply layered – with only some patent. But obviously, with the travel freeze, the new president sends a strong signal to all nations of a fundamental policy shift.

Just as prior presidents have used their Inaugural Addresses to announce foreign policy recalculations to friends and foe alike, President Trump formally announced an "America first" foreign policy shift. And the soon announced travel freeze specifically cues our NATO allies to reconsider their own porous national borders. European nations' irresponsible failure to effectively maintain their own sovereign borders has led to deadly terrorist acts and generally violent public spaces. Alien terrorists and would-be terrorist thugs who have been naively welcomed into Europe now stand in allies' airports only a seven-hour direct flight away from the United States. Our European allies are not immune from being added to the travel freeze list.

The freeze also directly confronts and disrupts expectations of wealthy monarchs and potentates of the Middle East.[2] Those oil-rich kingdoms have long expected, and some still demand that, America assume responsibility -- pay any price, bear any burden -- to deal with their own region's hellish disorder.

Indeed all nations of the world -- including our allies in Europe and our "frenemies" in the Middle East -- have been given explicit notice that at any point in future, the travel freeze list may be expanded to include "the names of any additional countries recommended for similar treatment, as well as [to contract to remove] the names of any countries that … should be removed from the scope of a proclamation." Exec. Order No. 13780 (March 6, 2017).[3] While litigation that only touches on foreign affairs might not present a political question, litigation which directly challenges Executive Branch foreign policy and war strategy, does:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex and involve

[2] "Making America Great Again" while putting "America First" expresses the truth that only a strong USA will again be a force to demand justice and promote peace across the entire world. *Amicus* hopes that the travel freeze is the beginning of an even more disruptive application of an "America first" version of "smart power" foreign policy theories; a disruptive move appropriate to the unusual, prolonged war. (For a traditional articulation of smart power theory, *see* Joseph R. Nye: *Get Smart: Combining Hard and Soft Power* 88 FOREIGN AFFAIRS 160 (2009)).

[3] Indeed, Iraq was able to reform its vetting cooperation so as not to be included in the March 6, 2017 list.

> large elements of prophecy. . . . They are decisions of a kind for which the Judiciary has neither the aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); *accord Haig v. Agee*, 453 U.S. 280, 292 (1981). As noted above, President Trump actively prosecutes the war on terror with direct military actions in the targeted region of the freeze list while he reorients bilateral policy negotiations with other nations regarding the global terror threat. The travel freeze determination is a key constant in that broader policy and war strategy calculus.

In 2010, the *en banc* D.C. Circuit invoked the political-question doctrine to bring finality to a decade of litigation resulting from President Bill Clinton having described a Sudanese industrial enterprise, owned by wealthy Muslims, as being connected to "radical terrorists" before -- and after – destroying it with air strikes. In credit to Bill Clinton's legacy: The 1996 action was an early blow against radical Islam, against Osama bin Ladin, and against the Al Quada network. In a decade of resulting litigation seeking monetary damages and other relief for the actual destruction of the plant, the Muslim factory owners (including Salh El Din Ahmed Mohammed Idris) also claimed that President Clinton and other senior administration officials "defamed" them only because of the factory owners' Muslim faith and Muslim identity.

Bring finality after the decade of repeated litigation with a political-question determination, the *en banc* D.C. Circuit ruled: "The conclusion that the strategic choices directing the nation's foreign affairs are constitutionally committed to the political branches reflects the institutional limitations of the judiciary and the lack of manageable standards to channel any judicial inquiry into these matters. We must decline to reconsider what are essentially policy choices." *El-Shifa, 607 F.3d* 836, 842-43 (D.C. Cir. 2010) (*en banc*). The *en banc* D.C. Circuit was resolute: "Courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security." *Id.* at 840. The D.C. Circuit certainly never searched the political campaign records of repeated gubernatorial candidate and twice presidential candidate, Bill Clinton – attempting to find anti-Muslim or anti-foreigner statements or inclinations. (It never searched for Bill Clintons' statements regarding the Cuban boat lift refugees whose riotous final destination was Fort Chaffee, Arkansas.)

In its 2016 *Mobarez v. Kerry* ruling, the District Court for the District of Columbia underscored *El Shifa* to explain that it could not review a statutory claim resulting from Barack Obama's closure of the U.S. Embassy in Yemen. When closing the embassy, President Obama refused to facilitate the exit and safe travels of American citizens from the horrific conditions in Yemen back to American soil. The court refused to reach the plaintiffs' requested statutory interpretation and

(Administrative Procedure Act ("APA") analysis that supported their right to such travel assistance. The court explained that such statutory interpretation, inquiry, and analysis would have required the court to answer a political question:

> But the question that Plaintiffs' APA claim poses is not just what these provisions mean; it is also whether, if they mean what Plaintiffs say they mean, the Executive has violated the mandate that these provisions establish, and it is that aspect of the court's inquiry that would necessarily require the court to answer a non-justiciable political question.

Mobarez v. Kerry, Civil Action No. 2015-0516 (D.D.C. 2016). The court would not second-guess the president's hard decision not to honor the statute so as to help America's own citizen travel back to America. *Id.*

Notwithstanding the compelling emotional claims of American citizens, many whom were Muslim in faith practice, the court refused to review the case. The ruling acknowledged that the court did not have the institutional competence or critical information needed for such second-guessing of President Obama's decision. Similarly, in the instant case, the president has determined that the horrifically chaotic conditions existing in Yemen, Syria, and other listed nations are such that his administration must freeze travel into the United States by aliens from those nations.

Just as the judiciary could not second-guess President Obama's refusal to provide for embassy evacuations of American citizens out of Yemen, neither

should it second-guess President Trump's decision to freeze the embassy/consular processing of visa applications for, or the actual entry of, foreign-soil aliens from Yemen and other of the listed nations.

Importantly, in *Mobarez*, the D.C. District Court used *Zivotofsky v. Clinton I*, 132 S.Ct. 1421 (2012), to explain why political-question abstention, notwithstanding the American-citizen plaintiffs' reliance on a federal statute, executive order, and memorandum of understanding, was absolutely required:

> When deciding the claim merely requires the court to engage in garden-variety statutory analysis and constitutional reasoning, [the court] has authority to do so (i.e., the claim is justiciable), but a claim that goes beyond those classically judicial functions to request that a court override discretionary foreign-policy decisions that the political branches have made—however framed—falls within the heartland of the political-question doctrine. …

Id. In *Zivotofsky v. Clinton I*, the Supreme Court was discretely tasked with determining a federal statute's constitutionality and the resulting ruling provides helpful contrast as to the contours of the abstention requirement. 132 S. Ct. 1421 (2012).

Unlike the instant case, the *Zivotosky* Court did not need to determine whether there were judicially determinable and manageable standards for an interpretation, analysis, and application of the relevant statute. Its neutral determination was discrete as to a challenged statute's constitutionality.

Indeed to make it clear that *Zivotofsky* was decided in a narrow context, Associate Justice Sonia Sotomayor, in concurrence, reiterated all six *Baker* factors and emphasized the importance of political-question abstention to the separation of powers. *Id* at 1431-6 (2012). And Associate Justice Steve Breyer wrote to warn that allowing judicial review in a broader foreign policy context might in future pose a "serious risk" of "embarrassment, show lack of respect for the other branches, and potentially disrupt sound foreign policy decision making." *Id* at 1437. Justice Breyer urged careful consideration of the abstention option in foreign policy matters involving the Middle East where seemingly ordinary statutory or administrative matters can have far reaching implications:

> Political reactions in that region can prove uncertain. And in that context it may well turn out that resolution of the constitutional argument will require a court to decide how far the statute, in practice, reaches beyond the purely administrative, determining not only whether but also the extent to which enforcement will interfere with the president's ability to make significant recognition-related foreign policy decisions.

Id. at 1429-30.

The instant case requires far more inquiry than a straightforward determination of a statute's constitutionality, as was the case in *Zivotofsky*. Rather, the Plaintiffs-Appellees' claims require this Court to inquire, exam and ultimately second-guess the Executive Branch's complicated foreign policy and national security calculus. In *Mobarez*, the trial court emphasized a correct understanding

of *Zivotofsky's* contrast to cases such as the instant one. *Mobarez v. Kerry* Civil Action No. 2015-0516 (D.D.C. 2016).[4] Other courts have recently made similar nonjusticiability determinations by contrasting the narrow context of the *Zivotosky* ruling. *See Ctr. for Biological Diversity v. Hagel*, 80 F. Supp. 991, 1011 (N.D. Cal. 2016) and *Alaska v. Kerry*, 972 F. Supp. 1111 (D. Alaska 2013).

Providing the Executive with discretion and energy for national security and foreign relations was a fundamental reason for the 1787 Convention that led to replacement of the dysfunctional Articles of Confederation. Consider Alexander Hamilton's argument for ratification of our second Constitution in FEDERALIST 23 as to this -- the political branches most fundamental duties of protecting citizens: "These powers ought to exist without limitation….The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed." Alexander Hamilton, "*No. 23: The Necessity of a Government as Energetic as the*

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[4]And consider also the District Court for the District of Columbia's political question determination, made earlier in 2016, in the context of Yemen nationals who asserted a directly-relevant federal tort claim statute to seek relief from injuries that resulted from American security actions in Yemen: "If plaintiffs' claims, 'regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security,' then they must be dismissed." *Jaber v. United States*, No. 15-0840, 2016 WL 706183, at *4 (D.D.C. Feb. 22, 2016) (quoting *El-Shifa*, 836, 841 (D.C. Cir. 2010) (*en banc*).

One Proposed to the Preservation of the Union," in Clinton Rossiter, ed., *The Federalist Papers* 148-153 (New York: Mentor, 1999).

The traditional beginning point for a discussion of political question understandings begins with U.S. Chief Justice John Marshall providing early guidance as to the "rule of law to guide the court in the exercise of its jurisdiction." Marshall offered this political question description: "By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Marbury v. Madison*, 5 U.S. 137, 165 (1803).

However, three years before, Representative John Marshall, in 1800, warned his U.S. House colleagues quite zealously that the political branches would be "swallowed-up by the judiciary" without such judicial self-restraint. *See* Speech of the Honorable John Marshall (Mar. 7, 1800), 18 U.S. app. note I, at 16-17 (1820) (cited by *The Political Question Doctrine and the Supreme Court of the United States* (Nada Mourtada-Sabbah and Bruce E. Cain, eds.) 25 n. 10) 2007). On the very same day, Representative Marshall articulated his "sole organ" power of the Executive in foreign relations thesis.

Fast forward to the modern case of *Baker v. Carr* to find the Supreme Court identifying six independent characteristics "[p]rominent on the surface of any case held to involve a political question." To remind, they are:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). As the D.C. Circuit has written, only one *Baker* criteria need manifest for an abstention determination. *Snider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005). Not one, not two, but all six *Baker* characteristics are present in this Court's consideration of the Plaintiff-Appellee's claims. The first two criteria, often interrelated, textual commitment and manageable standards are patently obvious here.[5] However, the later four *Baker* factors are also obviously implicated in the travel freeze litigation. It will be with little or no "respect" shown to a coordinate political branch if the Court devolves

[5] "[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Nixon v. United States*, 506 U.S. 224, 228-29 (2003).

into the Plaintiffs-Appellees assertion that the president's motivation for the freeze stems from religious bigotry. Alice-in-Wonderland trips through the presidential candidate's campaign statements attempting to glean proof of religious bigotry speaks volumes about purposeful disrespect.[6]

And the federal judiciary has not yet allowed an "adherence" to the president's political decision already made. The Court's review of the merits of these challenges also threatens political and practical chaos. This Court will add to the "multifarious pronouncements" of courts across the nation regarding the travel freeze. Although both the president and the judiciary will suffer "embarrassment" from such a merits review and ultimate intervention, it is the American people who will suffer a greater danger of terrorist harm. And, the American people's long asserted claims of self-governance are cast into doubt if their newly-elected president is restricted from doing exactly what he promised to during 2016 election – formulate policies and foreign soil alien-vetting practices that will better protect American citizens during this time of war.

[6] Judicial review of other travel freeze challenges in this Circuit resulted in disrespectful judicial commentary about Donald Trump and needless judicial criticism of President Trump's public comments. This disrespectful dicta also came from those judges in dissent who sided with the government's statutory argument. Judicial compulsion for disrespectful engagement examples just one harm resulting when judges allow themselves to be drawn into the ugly political thicket. *See Washington State v. Trump,* 847 F.3d 1151 (9th Cir. 2017).

Judicial interference with President Trump's policy decision regarding the travel freeze is certainly creating doubts among the international community as to the resolve of the United States to adhere to this position. It is undercutting the presidents' negotiations and interactions with all nations – particularly those dedicated to harming America. *See generally, Lowry v. Regan*, 676 F. Supp. 333, 340 (D.D.C. 1987). *See also, Smith v. Reagan*, 844 F.2d 195, 199 (4th Cir. 1988).

Subsequent to *Baker*, the Supreme Court in *Nixon v. United States*, 506 U.S. 224 (1993) applied these *Baker* factors by instructing that the political question analysis begins by "determin[ing] whether and to what extent the issue is textually committed." 506 U.S. at 228. The Supreme Court rejected, as nonjusticiable, a debenched federal judge's challenge to the Senate's exercise of its Article I, § 3, Clause 6 "sole" duty to "try" all impeachments. The Court refused to review a procedurally problematic Senate impeachment trial process in which an "evidence committee" of only 12 senators heard testimony while 88 senators avoided jury duty. Just as the Supreme Court did in *Nixon*, this Court should readily determine that "there is no separate provision of the Constitution" that could be rationally argued to conflict with the President's textual authority to utilize his war powers to implement the travel freeze. Foreign-soil aliens do have Fifth or First Amendment rights (and they cannot bootstrap such rights from their alleged or actual contacts with American citizens and resident aliens). As Chief

Justice William Rehnquist wrote: "Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). *See also, Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 104 F.3d 1349, 1354 (D.C. Cir. 1997) and *Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990).

It bears reemphasis that the travel freeze does not apply to aliens presently residing in America, unlike the alien residents at issue in *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). And the instant action does not involve aliens having been involuntarily taken to, and/or subject to prolonged detention on, American soil or on foreign soil over which America has "plenary or exclusive jurisdiction." *Rasul v. Bush*, 542 U.S. 446 (2004). Quite the opposite in factual context, the complaints stem from foreign-soil aliens not being allowed immediate entry onto America's soil. The Guantanamo Bay cases are *not* supportive of the Court's subject matter jurisdiction in this matter. *See Boumediene v. Bush*, 53 US 723 (2008).

Conditions are such in nations presently subject to the travel freeze that there must be a fulsome assessment of the prior administration's vetting procedures by the new president: "[T]he risk of erroneously permitting entry of a national of one

of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." Exec. Order No. 13780 (March 6, 2016). For transparency, the president's Executive Order details some of the hellish conditions existing in each of those listed nations – conditions which require the initial 90-day freeze. However, the Executive Branch should not have had to so do to avoid judicial interference in its tactical calculus:

> The Executive should not have to disclose its "real" reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on that country's nationals—and even it if did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.

Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471,491 (1999).

Finally *Goldwater v. Carter* is example of the Supreme Court's most efficient political question determination. 444 U.S. 996 (1979). The Supreme Court rejected senators' attempt to interfere with an exclusive Executive authority to conduct foreign policy by abrogating a treaty previously Senate ratified. Without oral argument and without merits briefing, the high court announced: "The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the complaint." *Id.*

Despite the judge-centric consciousness so predominant at bar and in the legal academy, perhaps less "domesticated" abstention advocacy is needed to counsel the judiciary's self-restraint in this important and highly public matter; "something greatly more flexible, something of prudence, not construction and not principle." The purest prudential strain of nonjusticiability still incubates in Alexander Bickel's THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS. Professor Bickel described political questions as those issues which ask the courts to evaluate policy and choose between outcomes – functions which the judiciary as an institution is functionally incompetent to carry out.

In unmatched written aesthetic, Alexander Bickel offered a foundation instead of *Baker*-like criteria:

> In a mature democracy, choices such as this must be made by the executive…Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.

Alexander Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (Yale 1986).

When considering the myriad ways that harm could result from judicial interference in the president's foreign policy, national security, and war strategy, it is disturbingly prescient that Professor Bickel addressed *"the anxiety, not so much that the judicial judgment will be ignored but that it should but will not be.*"

And certainly today, our unelected judiciary, which has "no earth to draw strength from," would be wise to stay out of the worsening mud-fight being waged by ideological elites against Donald Trump. Again, the late Yale University law professor's prudential poetry directly conflicts with our age's judge-centric compulsions. All the more reason for this Court's deep consideration of its truth.

Just as this argument began, it should end by again acknowledging that one can hardly bear to read many of the tragic narratives of aliens' hurt, fear, and family separation as relayed in the travel freeze litigation across America. Sadly, General Sherman remains right – "war is hell."

As our new president re-orients national security, war prosecution, and foreign policy, while the hellish states of violent disorder only worsen in the listed nations, our federal judiciary has its own high duty to perform -- abstention.

April 21, 2017

/s/Victor Williams, *pro se*

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2017, the brief with relevant consent motion was filed with the Clerk of this Court using the commercial carrier (as *pro se* prospective *Amicus* is not a registered ECF user) and served on parties registered to their ECF accounts.

/s/Victor Williams

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