No. 17-16426

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAII, et al.,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States, 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 FORMER NATIONAL SECURITY OFFICIALS AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTEREST OF *AMICI CURIAE*[*]

Amici curiae are former national security, foreign policy, intelligence, and other public officials who have worked on security matters at the most senior levels of the United States government in the administrations of Presidents from both major political parties.[1] Amici have collectively devoted decades to combatting the various terrorist threats that the United States faces in an increasingly dangerous and dynamic world.

A significant number of amici were current on active intelligence regarding credible terrorist threat streams directed against the United States as recently as one week before the issuance of the initial January 27, 2017 Executive Order on "Protecting the Nation from Foreign Terrorist Entry into the United States" ("January 27 Executive Order"), and one was current as recently as early March 2017, around the time of the issuance of the revised March 6, 2017 Executive Order bearing the same name ("March 6 Executive Order").

[*] Pursuant to Federal Rule of Appellate Procedure 27(a)(4)(E), counsel for amici certify that: (i) no party's counsel authored this brief in whole or in part; (ii) no party or party's counsel contributed money intended to fund the preparation or submission of this brief; and (iii) no person, other than amici and their counsel, contributed money intended to fund the preparation or submission of this brief. This brief is filed with consent of all parties.

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

ARGUMENT

Amici write briefly to offer their views on three points. First, the Government's position on the appropriate interpretation of the Supreme Court's June 26, 2017 per curiam stay decision ("June 26 per curiam decision") and July 19, 2017 summary order ("July 19 summary order") does not advance the national security or foreign policy interests of the United States. Second, the Government's position in fact would damage the national security and foreign policy interests of the United States. Third, the Government's position is at odds with the reality of refugee resettlement.

First, the Government's narrow reading of the Supreme Court June 26 per curiam decision and July 19 summary order does not serve any national security or foreign policy interest. This many months into these proceedings, the Government still cannot offer a single national security or foreign policy rationale for the Executive Orders. And in its papers filed with this Court, the Government has not cited a single national security rationale for its narrow interpretation of the Supreme Court's instructions.

To be sure, the Government's position is *about* the United States' national security and foreign policy interests, inasmuch as this is a case about travel and visas. But the Government cannot explain how its position is *necessary* or even has a *rational connection* to the United States' national security and foreign policy

interests. To take just one example, the Government does not even try to offer a national security reason for why grandparents should be subjected to the ban when other close family members—or even paid au pairs—are not. Amici respectfully submit that the Government's inability to offer any national security rationale at all for its interpretation undermines the claim of irreparable harm that the Government must demonstrate to sustain its interpretation.

Through the years, national security-based immigration restrictions have: (1) responded to specific, credible threats based on individualized information, (2) rested on the best available intelligence, and (3) been subject to thorough interagency legal and policy review. Neither the January 27 Executive Order or the March 6 Executive Order rest on such tailored grounds, but rather, (1) are generalized entry bans, (2) are not supported by any new intelligence that the Government has cited or of which amici are aware, and (3) were not vetted through the sort of careful interagency legal and policy review that would compel judicial deference.

The Government's cramped reading of the Supreme Court's rulings now compounds the error in the January 27 and March 6 Executive Orders, directing the focus even further afield from the national security issues that should be at the core of the inquiry. The Government's insistence on drawing arbitrary lines between grandparent and brother, or between a refugee with a formal connection to

a resettlement agency and a lecturer with a formal connection to an American audience, is not based on any meaningful assessment of a national security threat. Instead, the Government layers new *subject-matter* categories on top of earlier *country-based* categories, all of which distinguish poorly between those individuals who do and do not present an actual threat to our nation. Whether a particular individual seeking entry presents a threat to national security depends on what he has actually done or threatened to do, not on the kind of familial or institutional relationship he may have with someone inside the United States.

The Government initially argued that a suspension of admissions from six countries was necessary to protect the country and to free resources for a review of admission procedures. The Government now seeks to bar a subset of the original group for a shorter period. As the travel ban has evolved, the connection of this narrower ban to any meaningful national security concerns has become attenuated to the vanishing point.

Second, amici believe that the Government's narrow interpretation of the Supreme Court's instructions in fact would do harm to the security and foreign policy interests of the United States. As amici have explained elsewhere,[2] the Government's reliance on generalized bans on travelers and refugees without an

[2] *See Br. of Amici Curiae Former National Security Officials in Opposition to the Applications for a Stay*, Nos. 16-1436, 16A1191, June 12, 2017, at 12-15.

individualized assessment of security threat is counterproductive from a security perspective. This generalized approach is likely to: endanger U.S. troops in the field, by barring many foreigners who have assisted our troops at great risk to their own lives; disrupt essential counterterrorism, intelligence, and other security partnerships with countries that are critical to our country's efforts to address the threat posed by terrorist groups such as IS; feed IS's propaganda narrative, while hindering law enforcement efforts to fight homegrown terrorism by alienating Muslim-American communities; cause serious humanitarian harm; and result in economic damage to the United States, including in ways that affect strategic economic sectors such as defense, technology and medicine.

The Government's narrow interpretation of the Supreme Court's instructions suffers from these same flaws. The Government would exclude from the United States any number of individuals with bona fide relationships with this country who create no security risk and would benefit the nation, simply because they are uncles rather than brothers, or have formed a relationship with one entity in the United States rather than another. This approach is at odds with the nation's contextualized and individualized approach to screening travel to the United

States.[3] It also imposes an arbitrary travel ban upon countless individuals in ways that could do real harm to the United States' national security or foreign policy interests.

Third, amici include a number of officials who have held for extended periods of time the most senior responsibility within the U.S. Government for overseeing the refugee resettlement process. Amici submit that in several respects, the Government's position entirely misunderstands the realities of—and the national security protections provided by—the existing process.

Refugees already receive the most thorough vetting of any travelers to the United States, and that vetting process is constantly reviewed and tightened as the situations demand. Refugee candidates are vetted recurrently throughout the resettlement process, as "pending applications continue to be checked against terrorist databases, to ensure new, relevant terrorism information has not come to light."[4] By the time refugees referred by the United Nations High Commissioner for Refugees ("UNHCR") are approved for resettlement in the United States, they have been reviewed not only by UNHCR but also by the National Counterterrorism Center, the Federal Bureau of Investigation, the Department of

[3] The Government in its brief relies principally on precedents involving not *travel* into the United States but *immigration* into the United States, a very different set of laws and processes that raise a host of different concerns.

[4] Amy Pope, *The Screening Process for Refugee Entry into the United States* (Nov. 20, 2015).

Homeland Security, the Department of Defense, the Department of State and the U.S. intelligence community.[5] Under current vetting procedures, refugees often wait eighteen to twenty-four months to be cleared for entry into the United States; fewer than one percent were settled in any single country in 2015. And because refugees do not decide if, where and when they will be resettled, the odds that any terrorist posing as a refugee will be resettled in the United States are vanishingly small.

As a result of all of these protections, from 1975 to the end of 2015, over three million refugees have been admitted to the United States. Despite the vast number of admitted refugees, no refugee has killed an American in a terrorist attack in the United States since the modern refugee vetting system began in 1980.[6] More than 18,000 Syrian refugees were resettled in the United States between

[5] For Syrian applicants, the Department of Homeland Security recently added a layer of enhanced review that involves collaboration between the Refugee, Asylum, and International Operations Directorate and the Fraud Detection and National Security Directorate. Among other measures, this review provided additional, intelligence-driven support to refugee adjudicators that U.S. officials could then use to more precisely question refugees during their security interviews. *See* U.S. Dep't of State, *The Refugee Processing and Screening System*, *https://www.state.gov/documents/organization/266671.pdf;* Andorra Bruno, *Syrian Refugee Admissions and Resettlement in the United States: In Brief,* Cong. Research Serv., 4-5 (Sept. 16, 2016).

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

October 1, 2011 and December 31, 2016, and we are unaware of a single one who has been detained due to a connection with terror.[7]

The Government now insists that the "bona fide relationship" requirement must be superimposed on these detailed existing vetting procedures to block even those with formal assurances from a U.S. based resettlement agency from entering the country. But this claim ignores the reality that *all* refugees in the U.S. Refugee Admissions Program develop close bona fide relationships with U.S.-based entities by virtue of the refugee process, and in some cases well before a formal assurance of admittance is provided. The decision to admit individual refugees, once they are screened, depends on the U.S. Government's assessment that an agency in the U.S. is prepared to handle the particularized and often unique cultural, medical and familial needs of individual refugees. This is a careful process of matching individuals to resources before a refugee is admitted. It is that process—conducted before admission and in order to proceed to admission—that creates the bona fide relationship called for by the Supreme Court's June 26 per curiam order.

The relationship between refugees who have received formal assurances from resettlement agencies and U.S. persons and entities is *personal and direct*. That relationship has become intense and close by the time a refugee has advanced

[7] Migration Policy Institute, *Syrian Refugees in the United States* (January 12, 2017).

to the formal assurance stage in the process. The relationship is *formal, documented, and formed in the ordinary course* of the existing refugee process. And such a relationship exists only for a *subset* of many refugees who might wish to come to this country. By the time refugees have made their way through this intensive vetting process, and have been formally admitted here, they have necessarily acquired the requisite bona fide relationship with the United States.

Simply put, over the years, the United States has developed a system that is an exemplar for establishing a bona fide relationship between U.S. entities and a foreign national seeking admission as a refugee. To be sure, the U.S. Government serves as an intermediary for part of that relationship; but if anything, that only makes the relationship stronger and more robust, leads to far greater security assurances, and avoids even the slightest of risks that the relationship is facile, fraudulent, or structured to avoid the scrutiny of the U.S. government. The current refugee resettlement system comes far closer to the spirit of this Court's June 26 per curiam order than the Government's arbitrary imposition of new and unwarranted requirements on that process.

Finally, it should be clear to all that at bottom, the refugee resettlement program is a humanitarian assistance program. It was not set up to benefit relatives of Americans citizens or residents, nor to serve the employment or educational needs of American companies or institutions. It was instead established to further

the noble and historical American tradition of aiding people fleeing persecution. Of course, this includes people with relatives and other prior connections to the United States, but it also includes people who, before having their case considered, have had little, if any, contacts with the United States and its citizens. Whatever the Government's rationale may be for seeking to exclude refugees who have secured formal assurances from a U.S.-based resettlement agency, that rationale cannot plausibly rest on national security imperatives.

CONCLUSION

For the foregoing reasons, the Court should deny the defendants-appellants' motion.

Respectfully Submitted,

Dated August 3, 2017

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[*] We are grateful to Phil Spector, Danieli Evans, Clare Ryan, and the student members of the Yale Law School Rule of Law Clinic—Benjamin Alter, Colleen Culbertson, Idriss Fofana, Alexandra Mahler-Haug, Abigail Olson, Aisha Saad, Mitzi Steiner, Aleksandr Sverdlik, Beatrice Walton, Emily Wanger, Zoe Weinberg, Tianyi Xin, and Nathaniel Zelinsky—for their contributions to this submission. Yale Law School's Rule of Law Clinic is organized separately from the school's Jerome N. Frank Legal Services Organization, one of the counsel for Petitioners in a separate challenge to the initial executive order. The views expressed by Yale Law School's legal clinics are not necessarily those of the Yale Law School.

APPENDIX: LIST OF *AMICI*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17. Phil Gordon served as Special Assistant to the President and White House Coordinator for the Middle East, North Africa and the Gulf from 2013 to 2015, and Assistant Secretary of State for European and Eurasian Affairs from 2009 to 2013.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

38. Jeff Smith served as General Counsel of the Central Intelligence Agency from 1995 to 1995. Previously, he served as General Counsel of the Senate Armed Services Committee.

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

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

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

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 2,191 words excluding the parts exempted by Fed. R. App. P. 32(f). This Motion complies with the typeface and the type style requirements of Fed. R. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

Dated August 3, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2017, I electronically filed the foregoing with the Clerk of the court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I certify that I am a registered CM/ECF user and that all parties have registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated August 3, 2017

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