UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
SOUTHERN DIVISION

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, et al.,	:	
***Plaintiffs*,**	:	**Civil Action No.: 8:17-CV-00361-TDC**
v.	:	
DONALD TRUMP, in his official capacity as President of the United States, et al.,	:	
***Defendants*.**	:	

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
IN SUPPORT OF PLAINTIFFS

Amicus curiae, Harvard Immigration and Refugee Clinical Program (HIRC), respectfully moves this Court for leave to file the attached Brief of Amicus Curiae in support of the Plaintiffs IRAP, et al. For over thirty years, HIRC, in partnership with Greater Boston Legal Services, has focused on the direct representation of individuals applying for U.S. asylum and related protections, as well as on the representation of individuals who seek avoidance of forced removal in immigration proceedings. With the help of law school students, HIRC represents victims of human rights abuses from all over the world, including from countries affected by the January 27, 2017 Executive Order that is at issue in this case. Executive Order 13769, *Protecting the Nation from Foreign Terrorist Entry into the United States*, 82 Fed. Reg. 8977 (Feb. 1, 2017).

Accordingly, HIRC and its clients have a direct interest in the outcome of the above-referenced case. In light of HIRC's familiarity and experience with refugee law and the legislative history of the Immigration and Nationality Act, the proposed *amicus* brief focuses on refugee law and legislative history, as well as on issues of statutory interpretation and the

interplay between INA § 212(f)—the authority on which much of the Executive Order relies—and other provisions of the INA.

"The decision to grant leave to proceed as *amici* at the trial court level is discretionary." *Bryant v. Better Bus. Bureau of Greater Maryland, Inc.*, 923 F. Supp. 720, 728 (D. Md. 1996). "The aid of *amici curiae* has been allowed at the trial level where they provide helpful analysis of the law, they have a special interest in the subject matter of the suit, or existing counsel is in need of assistance." *Id.* (recognizing that *amici* "represent large constituencies of individuals which have a vested interest in how the provisions of the [law at stake] are construed and applied," "have not enlarged the issues presented by the parties," and "can be useful in resolving the issues presented by the parties.") (internal citations omitted); *see also Am. Humanist Ass'n v. Maryland-Nat'l Capital Park & Planning Comm'n*, 303 F.R.D. 266, 269 (D. Md. 2014) (allowing *amicus* brief where "[p]rospective [a]mici have demonstrated a special interest in the outcome of the suit").

Counsel for Plaintiffs has indicated to the undersigned counsel that the Plaintiffs consent to the filing of an amicus brief in this matter. Counsel for the Defendant has indicated to the undersigned counsel that the United States takes no position on the request by HIRC to file an amicus brief in this matter.

For the foregoing reasons, we respectfully request the Court's permission to file an *amicus* brief in the aforementioned matter.

Respectfully submitted,

/s/

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Dated: March 2, 2017

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2017, I caused a PDF version of the foregoing 'Motion for Leave to File Brief as Amicus Curiae in Support of Plaintiffs' to be electronically transmitted via the Court's CM/ECF system for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

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BRIEF FOR *AMICUS CURIAE* HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM IN SUPPORT OF PLAINTIFFS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Harvard Immigration and Refugee Clinical Program (HIRC) is a clinical program at Harvard Law School that is dedicated to the representation of individuals applying for U.S. asylum and related protections, as well as the representation of individuals who have survived domestic violence and other crimes and are seeking avoidance of forced removal in immigration proceedings. Founded in 1984 by Clinical Professor Deborah Anker, HIRC's clients include victims of human rights abuses applying for U.S. refugee protection from all over the world, including from the countries referenced in the President's January 27, 2017 Executive Order at issue in this litigation. Executive Order 13769, *Protecting the Nation from Foreign Terrorist Entry into the United States*, 82 Fed. Reg. 8977 (Feb. 1, 2017) ("Executive Order"). Accordingly, HIRC and its clients have a direct interest in the outcome of this action and respectfully submit this brief in support of Plaintiffs.

PRELIMINARY STATEMENT

President Donald Trump signed a sweeping Executive Order on January 27, 2017 that exceeds presidential authority. Section 5(d) impermissibly attempts to limit the number of refugees admitted in fiscal year 2017 to 50,000. Multiple courts have enjoined other aspects of the Executive Order, given the serious constitutional and statutory questions raised by its overbroad pronouncements. *See, e.g.*, *State of Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017); *Aziz v. Donald Trump*, No. 17-116, slip op. at *17 (E.D. Va. Feb. 13, 2017).

The Executive Order's language is in direct contravention of the plain terms of the Refugee Act of 1980 ("Refugee Act" or "Act"). The Refugee Act, which incorporated U.S. obligations under the Refugee Convention into U.S. law, mandates that the President "*shall . . . before the beginning of the fiscal year* and *after appropriate consultation*" determine the number

of refugees to be admitted to the United States. 8 U.S.C. § 1157(a)(2) (emphasis added). INA § 212(f) does not grant the President the power to lower the number in the middle of the fiscal year, simply by citing national security concerns. Indeed, Congress passed the Refugee Act to establish a structured and systematic mechanism for refugee admissions and to eliminate the prior ad hoc approach to refugee resettlement. Furthermore, § 212(f) of the Immigration and Nationality Act ("INA") does not grant the President the far-reaching authority implicated by the Executive Order.

Accordingly, we respectfully request that this Court enjoin the Executive Order's limiting of the annual number of refugees who may be admitted to 50,000 for the following reasons:

First, INA § 207 requires that the President, in consultation with Congress, set the number of refugees before the beginning of every fiscal year. The Executive Order conflicts with the plain language of INA § 207 and the legislative history of the Refugee Act because it attempts to re-set the number, without consultation with Congress, in the middle of the fiscal year.

Second, although the INA permits the President, in consultation with Congress, to raise the number of refugees in the middle of a fiscal year to respond to a humanitarian crisis, it does not permit him to lower the number in the middle of the fiscal year.

Third, INA § 212(f) does not grant the President the power to override this statutory scheme. The Executive Order attempts to exercise the general power under INA § 212(f) in a manner that conflicts with other provisions of the INA that specifically circumscribe the President's power**,** including INA § 207. Under well-settled canons of statutory interpretation, however, different parts of a statute cannot be read to conflict with one another, and both the "later in time" and "specific over general" canons of statutory interpretation dictate that INA §

207 takes precedence over INA § 212(f).

ARGUMENT

I. THE PRESIDENT MUST CONSULT WITH CONGRESS TO DETERMINE THE NUMBER OF REFUGEES WHO MAY BE ADMITTED PRIOR TO THE START OF THE FISCAL YEAR.

President Trump's unilateral reduction of the number of refugees to be admitted in fiscal year 2017 violates the statutory text of INA § 207, is inconsistent with the Refugee Act's legislative intent, and disregards the practice that has been followed since the Act's passage. It does so in two ways: by decreasing the number of refugees to be admitted in the middle, as opposed to the beginning, of the fiscal year, and by doing so without first consulting Congress.

The statutory text of INA § 207 requires that admissions be set prior to the beginning of the fiscal year in consultation with Congress: "Except as provided in subsection (b), the number of refugees who may be admitted under this section in any fiscal year . . . *shall* be such number as the President determines, *before the beginning of the fiscal year* and *after appropriate consultation*." 8 U.S.C. § 1157(a)(2) (emphasis added). Subsection (b), which addresses refugee admissions in emergency situations, further states that "such admissions shall be allocated among refugees of special humanitarian concern . . . in accordance with a determination made by the President *after* the appropriate consultation provided under this subsection." 8 U.S.C. § 1157(b) (emphasis added).

This consultation requirement is reiterated in subsection (d) entitled, "Oversight reporting and consultation requirements," which mandates a hearing to review the President's proposal under either subsection (a) or (b), "unless public disclosure of the details of the proposal would jeopardize the lives or safety of individuals." 8 U.S.C. § 1157(d)(3)(B). Furthermore, subsection (e) sets forth an extensive definition of "appropriate consultation," including a detailed list of

information to "be provided at least two weeks in advance" of discussions "of designated representatives of the President" with members of Congress. 8 U.S.C. § 1157(e).

Where, as here, the statutory text is unambiguous, the plain language of the statute must determine its meaning. *Tankersley v. Almand*, 837 F.3d 390, 395 (4th Cir. 2016) ("When the words of a statute are unambiguous, then . . . judicial inquiry is complete.") (internal citations and quotation marks omitted). President Obama, in consultation with Congress, set the number at 110,000 refugees prior to the start of fiscal year 2017, and the plain language of the statute does not allow President Trump to override that determination unilaterally.

The legislative history of the Refugee Act supports this same conclusion. The Act sets forth "a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern." The Refugee Act of 1980, Pub. L. No. 96-212 101(b), 94 Stat. 102, 102 (1980). Prior to the Refugee Act, geographical and ideological preferences governed refugee admissions to the United States. *See* Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 11 (1981) (describing the history of the 1965 amendments to the INA, which defined a refugee as a person from a communist or communist-dominated country, or a country in the Middle East). The Refugee Act eliminated the ideological definition of refugee and replaced it with a new definition, which "no longer applies only to refugees 'from communism' or certain areas of the Middle East; it now applies to all who meet the test of the United Nations Convention and Protocol." Edward M. Kennedy, *Refugee Act of 1980*, 15 Int'l Migration Rev. 141, 142–43 (1981) (explaining that the Act "gave new statutory authority to the [U.S.'s] longstanding commitment to human rights and its traditional humanitarian concern for the plight of refugees around the world").

The purpose of the Refugee Act was to reform the prior ad hoc and discriminatory approach to U.S. refugee admissions and to promote a more structured, equitable, and neutral decision-making process. *See* H.R. Rep. No. 96-781, at 1 (1980) (Conf. Rep.) (noting that the Refugee Act aimed to "establish a more uniform basis for the provision of assistance to refugees"); S. Rep. No. 96-590, at 1 (1980) (Conf. Rep.) (same); *see also* S. Rep. No. 96-2, at 3757 (1980) ("Contrary to current law, the consultation process is now specifically outlined in the statute, ending the current parole process which is merely governed by custom and practice.") (statement of Sen. Kennedy). In doing so, the Refugee Act brought the U.S. "definition of 'refugee' into conformity with the United Nations Convention and Protocol Relating to the Status of Refugees and . . . g[a]ve 'statutory meaning to our national commitment to human rights and humanitarian concerns.'" *Matter of S-P-*, 21 I. & N. Dec. 486, 492 (B.I.A. 1996) (quoting S. Rep. No. 256, 96th Cong., 2d Sess. 1, 4, reprinted in 1980 U.S.C.C.A.N. 141, 144); *see also INS v. Cardozo-Fonseca*, 480 U.S. 421, 435–38 (1987).

The legislative history further demonstrates that Congress took steps to ensure it had "ample control over refugee admissions." H.R. Rep. No. 96-2, at 4500 (1980) (statement of Rep. Holtzman). As the Conference Report indicates, the legislation provided Congress with "much greater and more explicit power than it has had before with regard to the numbers and nature of refugees to be admitted to this country." *Id*. at 4501; *see also* H.R. Rep. No. 96-1, at 35814 (1979) ("The committee was extremely concerned about assuring that Congress has a proper and substantial role in refugee admissions, given our plenary power over immigration. . . . The bill now provides that consultation means discussions in person by designated Cabinet-level representatives of the President with Judiciary Committee members to review the refugee situation or emergency refugee situation, to project the extent of possible U.S. participation, and

to discuss the reasons for believing the proposed admission of refugees is justified by humanitarian concerns.") (statement of Rep. Holtzman).

Indeed, in the discussions leading up to the adoption of the Refugee Act, the consultative process was described as "a give-and-take on both sides" and as "a joint decision." *Admissions of Refugees into the United States: Hearings before the Subcomm. on Immigr., Refugees, and Int'l Law of the Comm. on the Judiciary H.R.*, 95th Cong. 71 (1977) (statement of John W. DeWitt, Deputy Administrator, Bureau of Security and Consular Aff., Sec'y of State); *see also id.* at 59 ("I am deeply concerned that, under current law and procedures, Congress has surrendered—to a great extent—its authority to regulate the flow of refugees to this country. Our bill represents an attempt to restore this authority and, at the same time, to establish a proper balance between the executive and the legislative branches of Government in establishing the appropriate procedures governing their admission.") (statement of Rep. Eilberg). President Carter's signing statement emphasized that the "new admissions policy . . . will permit fair and equitable treatment of refugees in the United States, regardless of their country of origin" and "will also ensure thorough consideration of admissions questions by both the Congress and the administration." *Refugee Act of 1980: Presidential Statement on Signing S. 643 into Law*, Pub. Papers of Jimmy Carter: 1980–81, at 503 (Mar. 18, 1980).

President Trump's attempt to reduce the refugee ceiling without consulting Congress violates the robust procedures set forth by statute and well-established practice. *See, e.g.*, U.S. Dep't of State, U.S. Dep't of Homeland Sec., U.S. Dep't of Health and Human Serv., *Proposed Refugee Admissions for Fiscal Year 2016: Report to Congress* (2016). Nowhere in the statute does it provide the President with unilateral power to lower the annual number of refugees who may be admitted. Indeed, the only explicit and established exception to the procedure is in the

case of emergency refugee situations, with a special provision allowing for mid-year Executive-Congressional consultations to admit more refugees when justified by "grave humanitarian concerns." 8 U.S.C. § 1157(b).

II. THE TEXT OF INA § 207 DOES NOT GRANT THE PRESIDENT THE POWER TO LOWER THE REFUGEE CEILING IN THE MIDDLE OF THE FISCAL YEAR.

President Trump's unilateral reduction of the refugee ceiling for fiscal year 2017 violates the INA's plain text and the procedural limitations on executive authority over refugee admissions set forth in INA § 207(b), as well as the Refugee Act's legislative intent.

As set forth above, the text of INA § 207 is unambiguous about the limits on the President's power to determine the number of refugees to be admitted to the United States: this determination must be made "*before the beginning of each fiscal year* and *after appropriate consultation*" with Congress. 8 U.S.C. § 1157(a)(2) (emphasis added). The only exception to this annual practice is codified in INA § 207(b), which grants the President, in consultation with Congress, the power to "fix" a number of refugees to be admitted separately from the predetermined ceiling to address urgent humanitarian concerns.[1] 8 U.S.C. § 1157(b). Section 207(d)(3)(B) further explains that this exception may be exercised only to *increase* the number of refugee admissions in the case of an unforeseen humanitarian situation.[2] 8 U.S.C.

[1] The full text of INA § 207(b) reads: "If the President determines, *after appropriate consultation*, that (1) an unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest, and (3) the admission to the United States of these refugees cannot be accomplished under subsection (a) of this section, *the President may fix a number of refugees to be admitted to the United States during the succeeding period (not to exceed twelve months) in response to the emergency refugee situation* and such admissions shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after the appropriate consultation provided under this subsection." 8 U.S.C. § 1157(b) (emphasis added).

[2] The full text of INA § 207(d)(3)(B) reads: "*After the President initiates appropriate consultation* prior to making a determination, under subsection (b) of this section, that *the number of refugee admissions should be increased* because of an unforeseen emergency refugee situation, to the extent that time and the nature of the emergency

(cont'd)

§ 1157(d)(3)(B). As noted, a hearing on the proposal to increase admissions is also required, unless public disclosure would threaten the lives or safety of individuals. *Id.*

The Executive Order's text contravenes well-settled canons of statutory construction. Under the principle of *expressio unius*, the statute's silence regarding the President's power to lower the number in the middle of a fiscal year is evidence of the fact that Congress did not grant this power to the President. If the legislature had intended otherwise, it would have included this power in the text of the statute. Instead, INA § 207 only affords the President two distinct forms of authority regarding refugee admissions in consultation with Congress: (a) determining the number of refugees who may be admitted prior to the start of the fiscal year, and (b) fixing an additional number of refugees to be admitted during an "unforeseen emergency refugee situation." 8 U.S.C. § 1157(a), (b). In addition, where, as here, "Congress explicitly enumerates certain exceptions . . ., additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980)).

As detailed above, the Refugee Act's legislative history supports this reading of the statute. The Conference Report and statements by members of the House and Senate repeatedly emphasized the humanitarian purpose of the refugee admissions process, reflecting Congress's intent only to allow for the increase, not the decrease, of the number of refugees, as emergencies and additional needs arose. *See, e.g.*, S. Rep. No. 96-2, at 3758, 3756 (1980) ("[The bill] deals with one of the oldest and most important themes in our Nation's history—welcoming homeless refugees to our shores." "This Act gives statutory meaning to our national commitment to human

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refugee situation permit, a hearing to review the proposal to increase refugee admissions shall be held unless public disclosure of the details of the proposal would jeopardize the lives or safety of individuals." 8 U.S.C. § 1157(d) (emphasis added).

rights and humanitarian concerns—which are not now reflected in our immigration laws.") (statement of Sen. Kennedy); Catherine McHugh, Cong. Research Serv., 1B77120, *Refugees in the U.S. Laws, Programs, and Proposals* 1 (1979) ("Emphasis is placed on the development of a policy which would have a permanent statutory basis, but which would be flexible enough to be responsive to unforeseen emergency refugee situations."). As a result of these discussions, the final Act built in the procedure for additional admittances to meet "emergency [refugee] situations." S. Rep. No. 96-2, at 3757 (1980) (statement of Sen. Kennedy).[3] By contrast, there is no evidence of Congressional intent to authorize a mid-year reduction.

III. INA § 212(f) DOES NOT GRANT THE PRESIDENT THE POWER TO LOWER THE ANNUAL NUMBER OF REFUGEES IN THE MIDDLE OF THE YEAR.

The Executive Order invokes as the sole basis for its authority INA § 212(f), which permits the President to "suspend the entry of all aliens or any class of aliens" upon a finding that "the entry of any aliens or any class of aliens into the United States would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). Section 212(f) does not, however, grant the President the far-reaching authority the Executive Order suggests with regard to refugee admissions. INA § 212(f) cannot be interpreted to conflict with INA § 207, because INA § 207 was enacted later than INA § 212(f) and specifically controls refugee admissions.

Following the well-settled "later in time" and "specific over general" canons of statutory interpretation, INA § 207 should be given primacy over INA § 212(f). First, INA § 207 was enacted many years after INA § 212(f). Section 212(f) appeared as INA § 212(e) in the Immigration and Nationality Act of 1952. Immigration and Nationality Act, 66 Pub. L. No. 66-

[3] For example, President Bill Clinton invoked INA § 207(b) to increase refugee admissions in response to a humanitarian crisis in Europe. *See* Memorandum on Additional Refugee Admissions, 35 Weekly Comp. Pres. Doc. 1634 (Aug. 12, 1999) (citing INA § 207(b) as the basis for raising admissions for fiscal year 1999 from 78,000 to 91,000 in response to the need to resettle Kosovar refugees due to an "unforeseen refugee emergency" in Europe).

414, 66 Stat. 163 (1952). Twenty-eight years later, Congress enacted INA § 207 with the passage of the Refugee Act. The Refugee Act of 1980, 96 Pub. L. No. 96-212, 94 Stat. 102 (1980). As such, INA § 207 limits any applicability the older section may have with respect to refugee admissions. *U.S. v. Estate of Romani*, 523 U.S. 517, 518 (1998) ("[A] specific policy embodied in a later federal statute should control interpretation of the older federal priority statute, despite that law's literal, unconditional text and the fact that it had not been expressly amended by the later."); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (quoting *U.S. v. Fausto*, 484 U.S. 439, 453 (1988) ("The classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.") (internal quotation marks omitted)).

Second, the U.S. Supreme Court has made clear that, "[s]pecific terms prevail over the general." *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) ("However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." (internal citation and quotation marks omitted)). Section 212(f) grants the President general authority to suspend entry to the United States when such entry would be "detrimental to the interests of the United States." 8 U.S.C. § 1182(f). Conversely, INA § 207 specifically addresses the question of determining the number of refugees to be admitted in a given fiscal year and provides a detailed framework for the administration of the refugee admission process. 8 U.S.C. § 1157.

In particular, INA § 207(e) provides an extensive description of the "appropriate consultation" process, defining it as in-person discussions "by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate

and of the House of Representatives" to review the refugee situation and project the level of U.S. participation in resettlement efforts. 8 U.S.C. § 1157(e). At least two weeks prior to these discussions, the President is required to provide information to Congress, to the extent possible, regarding the numbers and regional allocation of refugees, conditions in refugees' countries of origin, plans for resettlement and movement of refugees as well as estimated costs, the socio-economic and demographic impact of resettlement, the scope of refugee resettlement efforts internationally, and the impact of U.S. resettlement efforts on U.S. foreign policy interests. 8 U.S.C. § 1157(e). Given these detailed and specific, more recently enacted provisions, the President's general authority under INA § 212(f) cannot be interpreted to conflict with INA § 207.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully request that the Court enjoin § 5(d) of the Executive Order.

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2017 I caused a PDF version of the foregoing BRIEF FOR *AMICUS CURIAE* HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM IN SUPPORT OF THE PLAINTIFFS to be electronically transmitted via the Court's CM/ECF system for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

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