No. 17-1351

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *et al.*
Defendants-Appellants

On Appeal from an Order of the United States District Court
for the District of Maryland (Chuang, J.)
Civil Action No. TDC-17-0361

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

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STATEMENT OF INTEREST

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

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

[1] This brief is being filed pursuant to this Court's April 3, 2017 Docket Correction Notice. The brief uses T.A.'s initials to reduce the risk of potential reprisals to T.A. or his family members. *Doe v. Pub. Citizen*, 749 F.3d 246, 273 (4th Cir. 2014) (pseudonym appropriate, even for a party, where "identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent non-parties"). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to its preparation or submission. All parties consent to the filing of this brief.

apply for "[c]ase by case" waivers under Section 3 of the Amended Order, Section 16(c) provides that nothing in the Amended Order provides any "enforceable" right, "substantive or procedural." 82 Fed. Reg. 13209 (Amended Order) at § 16(c). The Amended Order does not even provide for any *un*enforceable opportunity to be heard as to any purported reason to deny entry, any timing for or notification of a denial, much less any reason, or any ability to appeal a denial.

INTRODUCTION

This brief focuses on one issue: the Government's failure even to address whether the travel ban is justified by national security despite this Administration's *own, current* enhanced vetting. Any such assertion would not pass even rational basis scrutiny.

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

inexplicably narrow in comparison to its stated purpose. The ban applies to every national of the six countries but, at the same time, does not include any national of the many other countries whose citizens previously committed deadly terrorist attacks against the United States, including 9/11.

Second, the Executive Order entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States" issued on January 27, 2017 (the "Original Order" or the "Original Executive Order") asserted the travel ban was needed while the Administration conducted a 90-day review of vetting procedures. By May 8, 2017, when this Court holds oral argument in this appeal, that review will have been going on for *101 days*. Yet the Amended Order would continue the ban until at least June 14, 2017, even though that review has produced no evidence to support it. There is no evidence of a correlation between the adequacy of another country's vetting procedures and the likelihood that, *after U.S. vetting*, one of the other countries' nationals granted a visa by the U.S. will commit a terrorist attack here. And *this* Administration has introduced, and will continue to introduce, its own additional vetting procedures by United States officials that remedy any screening deficiencies for nationals of the six countries.

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

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

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

FACTUAL BACKGROUND

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

The decision below, and Judge Brinkema's earlier decision, demonstrates President Trump's repeated campaign promises for a "shutdown of Muslims entering the United States." *Aziz v. Trump*, No. 1:17-cv-116, 2017 WL 580855, at *4 (E.D. Va. Feb. 13, 2017); *Int'l Refugee Assistance Project v. Trump*, No. TDC-17-0361, 2017 WL 1018235 (D. Md. Mar. 15, 2017), ECF No. 149, at *8

("*IRAP*") (both citing Press Release, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), available at J.R.[2] 85).

These decisions also document the President's campaign admission that the ban would be dressed up in different clothes: "I'm talking territory instead of Muslim." *See* J.R. 220 (Transcript, *Meet the Press* (July 24, 2016)). Likewise, Mr. Trump admitted: "The Muslim ban . . . has morphed into a[n] extreme vetting from certain areas of the world." Selected excerpts from the American Presidency Project, *Presidential Debates: Presidential Debate at Washington University in St. Louis, Missouri* (Oct. 9, 2016), *available at* http://bit.ly/2dG4DN1.

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

The words and actions of the President *as President*, as well as those of his official White House Press Secretary, demonstrate that public fulfillment of these anti-Muslim campaign promises *remains* the purpose of the Amended Order. President Trump unveiled the Original Order on January 27, 2017. *See* 82 Fed. Reg. 8977 (Jan. 27, 2017). Section 5(b) of the Original Order directed the Secretaries of State and Homeland Security, "[u]pon resumption of USRAP admissions," to "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a

[2] Citations to "J.R." refer to pages of the Joint Record filed below, available at Case No. 17-cv-00361, ECF No. 95.

minority religion in the individual's country of nationality." *Id*. § 5(b). President Trump, in a January 27, 2017 interview with the Christian Broadcasting Network, stated that under his Original Order, "Christians" would be given priority over "Muslim[s]" in refugee admissions. *See* J.R. 200-01 (*Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority as Refugees*, Christian Broadcasting Network (Jan. 27, 2017)).

On March 6, 2017, President Trump issued the Amended Order. 82 Fed. Reg. 13209. The next day, the White House Press Secretary, in *prepared* remarks made before taking questions from reporters, heralded the Amended Order as the fulfillment of President Trump's campaign promises: "President Trump yesterday *continue[d]* to *deliver on* . . . his *most significant campaign promises*: protecting the country against radical *Islamic* terrorism." Press Briefing by Press Secretary Sean Spicer (Mar. 7, 2017), *available at* http://bit.ly/2mW39oB, Ex. 2 (emphasis added).[3] Thus, the Amended Order remains inextricably linked to the President's campaign promises.

Indeed, on March 15, 2017, President Trump stated at a campaign-style rally not only that the Amended Order was a "watered-down version of the first order," but also that both Orders were justified by "radical *Islamic*" terrorism.

[3] References to "Ex.__" refer to exhibits included in the proposed addendum attached to *Amicus*'s Motion for Leave to File Addendum to Corrected Brief of *Amicus Curiae* T.A., which is being filed concurrently with this corrected brief.

Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak'*, Time (Mar. 16, 2017), *available at* http://ti.me/2o09ixe (emphasis added).

C. T.A.

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

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

D. The District Court Ruling.

On March 15, 2017, the District Court issued an injunction barring enforcement of Section 2(c) of the Amended Order. *See IRAP*, ECF No. 149, at *43. The District Court found that "the record provides strong indications that the national security purpose is not the primary purpose for the travel ban." *Id.* at *35-*37. In determining that the "balance of the equities and the public interest favor

the issuance of an injunction," Judge Theodore D. Chuang found that the Government had "not shown, or even asserted, that national security cannot be maintained without an unprecedented six-country travel ban." *Id.* at *40.

ARGUMENT

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

The cases cited by the District Court and the Ninth Circuit prudently demonstrate that under our rule of law, when constitutional limitations are at stake, the judiciary examines the Executive's invocation of national security. *See id.* at *37; *see also Washington v. Trump*, 847 F.3d 1151, 1161-62 (9th Cir. 2017) (citing Supreme Court cases). Indeed, "[d]eference does not mean abdication" of the judiciary's "ultimate responsibility to decide the constitutional question." *Rostker v. Goldberg*, 453 U.S. 57, 67, 70 (1981). History is replete with many scares, terrors, and pogroms that were enabled because a country's judiciary lacked either the authority or the resolve to perform such a constitutional role. In our system, the invocation of national security does not create a no-go zone for the Constitution. *See id.* at 67 ("None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs.").

Review of the national security assertion is pertinent here. First, under the Establishment Clause, such a review shows that, even *assuming* the national security assertion were genuine, that reason would be, at most, "secondary

to a religious objective" of banning the entry of Muslims, as President Trump promised in his campaign. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 864 (2005). The plain, undebatable *public* record of the President's own statements debunks that national security is the primary objective of the Amended Order. There is thus no need for "judicial psychoanalysis." *Id.* at 862. This is because it is equally unconstitutional under the Establishment Clause, whether the primary objective of a government action is religious prejudice, or an opportunistic, public appeal to religious prejudice. *Cf. Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) (finding "violation" where "primary purpose" was "to *endorse* a particular religious doctrine") (emphasis added).

Nor does reliance on the *public* record here open the door to routine legal challenges to visa denials. By definition, reliance on a *public* statement is the opposite of attempting to discover a *secret* reason. Here, the public statements of the President and his official Press Secretary by themselves establish religious animus. *Supra,* at 5-6. Likewise, reliance on the President's campaign statements is warranted here by the unique statement of the White House Press Secretary on March 7, 2017 that the *Amended Order* "*deliver[s]* on his [the President's] most significant *campaign promises*: protecting the country against radical *Islamic* terrorism. *Supra*, at 6 (emphasis added).

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

A. The Government Does Not Even Assert That Its Own, Current Vetting For Nationals From The Six Countries May Be Inadequate.

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

As the District Court in Hawaii correctly found, however, in preliminarily enjoining Sections 2 and 6 of the Amended Order, "the record here" is "full of religious animus, invective and *obvious pretext*." *Hawaii v. Trump*, CV.

No. 17-00050 DKW-KSC, 2017 WL 1167383 (D. Haw. Mar. 29, 2017), ECF No. 270, at *17 ("*Hawaii*") (emphasis added). For example, the Government relies upon the suspension that began in 2015-16 of the visa waiver program for these six countries as purported support for the travel ban. *See* Govt. Brief at 2, 5-6. But experience following the visa waiver suspension negates any purported need for a travel ban. The visa waiver suspension required nationals of the six countries "to go through the full vetting of the regular visa process, which includes an in-person interview at a U.S. embassy or consulate." Karoun Demirjian and Jerry Markon, *Obama administration rolls out new visa waiver program rules in wake of terror attacks*, Washington Post (Jan. 21, 2016); U.S. Customs and Border Protection, *Visa Waiver Program Improvement and Terrorist Travel Prevention Act Frequently Asked Questions* (Nov. 28, 2016), *available at* http://bit.ly/1Tz4wRn. Since the visa waiver suspension, there has been *no actual or attempted terrorist attack* in this country by any national of any of the six countries.

Thus, a letter to President Trump from more than 130 generals and national security experts from across the political spectrum—including two former Secretaries of the Department of Homeland Security—stands unrebutted. That letter explains that the United States has been able to "implement any necessary [vetting] enhancements without a counterproductive ban or suspension on entry of

nationals of particular countries or religions." Nat'l Security Experts' March 10, 2017 Letter to President Trump, available at http://bit.ly/2oYlgLf.

Most important, *this* Administration already has reviewed and enhanced vetting procedures. Since March 17, 2017, the State Department has engaged in enhanced visa screening by requiring longer interviews, more detailed questions by consular officials, and a "mandatory social media review" by the "Fraud Prevention Unit" if an "applicant may have ties to ISIS or other terrorist organizations or has ever been present in an ISIS-controlled territory." State Dep't Cable 25814, ¶¶ 8, 10, 13, *available at* http://bit.ly/2o0wBqt, Ex. 1.

These enhanced vetting procedures cement Plaintiffs' likelihood of success in a final decision on the merits. The Supreme Court has held that the focus of the merits inquiry for a preliminary injunction cannot be "distinguished" from the merits inquiry for "a permanent injunction after a trial on the merits." *Amoco Prod. Co. v. Vill.of Gambell*, 480 U.S. 531, 546 n.12 (1987). "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Id.*

Paragraph 2(c) of the Amended Order states that the temporary travel ban would "ensure that adequate standards are established to prevent infiltration by foreign terrorists." 82 Fed. Reg. 13209 (Amended Order) at § 2(c). Not even the

Administration has asserted that its *own* vetting procedures may be *currently* inadequate for nationals of the six countries, much less that they still may remain inadequate when a final decision is rendered. Because the Government has not asserted a national security justification for why the Amended Order's travel ban *remains* appropriate, there is nothing to which a court could or should defer in a final decision on the merits. Rather, that the Administration nonetheless stubbornly continues to pursue its travel ban confirms that the real reason for the ban has always been fulfilling the President's campaign appeals to religious prejudice.

Even *before* the State Department enhancements, a DHS draft report, made public on February 25, 2017, concluded that being a national of any of these six countries is an "unlikely indicator" of terrorism threats against the United States. DHS Report, *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States*, *available at* http://bit.ly/2mh0GVh. Moreover, a second DHS report, dated March 1, 2017, concludes that "most foreign-born, U.S.-based violent extremists [are] likely radicalized several years *after* their entry to the United States." J.R. 164-70 (DHS Report, *Most Foreign-born, US-based Violent Extremists Radicalized after Entering Homeland; Opportunities for Tailored CVE Programs Exist* (March 1, 2017)) (emphasis added). Thus, the lack of "extreme vetting" before entry could not have contributed to their attacks.

Conversely, although the Original and Amended Orders cite the attacks of September 11, 2001, the Orders imposed no restrictions on travelers from the countries whose nationals carried out those attacks (Egypt, Lebanon, Saudi Arabia, and the United Arab Emirates). Internal FBI data likewise "undermine a key premise of the travel ban," because the data show that the vast majority of foreign nationals who have posed risk to the United States have hailed from "countries unaffected" by the Amended Order. *See* Devlin Barrett, *Internal Trump Administration Data Undercuts Travel Ban*, Washington Post (Mar. 16, 2017), *available at* http://wapo.st/2nVszOX. In fact, a "significant amount of internal government data" demonstrates the Amended Order "is not likely to be effective in curbing the threat of terrorism in the United States." *Id.* In reality, as nearly a dozen high-ranking national security and intelligence officials have declared under oath, these Orders "ultimately undermin[e] the national security of the United States, rather than making us safer." *See* J.R. 403 (Decl. Nat'l Security Advisors) (concluding there is no national security purpose for an entry ban).

The only two examples of individual terrorists cited in the Amended Order merely serve to highlight the irrational inconsistencies in the Amended Order. The Amended Order would have prevented neither example. First, the Amended Order points to a "January 2013 . . . [incident in which] two *Iraqi* nationals admitted to the United States as refugees in 2009 were sentenced to 40

years and to life in prison, respectively, for multiple terrorism-related offenses." *Id.* (emphasis added). But Iraq was removed from the list of banned countries in the Amended Order. *Id.* at § 1(f).

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

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

The Administration's vetting justification further demonstrates the irrationality of the travel ban. First, the Amended Order does not even purport to demonstrate any correlation between (a) the adequacy of a country's vetting procedures and (b) the likelihood a national of that country who is granted a visa

after screening using current U.S. vetting procedures would nonetheless commit a terrorist attack within the United States.

Second, vetting concerns cannot explain the Amended Order's irrational distinction between where a foreign national was born and where that foreign national lives, works, and would be vetted. For example, a doctor who is a Sudanese national who lives, works, and would be vetted by a U.S. consular official in Saudi Arabia would be banned. Jane Morice, *Two Cleveland Clinic doctors vacationing in Iran detained in New York, then released*, Cleveland.com (Jan. 29, 2017), *available at* http://bit.ly/2orexbJ. But a Saudi national of any background who lives and works in, and would be vetted in, Sudan is not.

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

Third, the Amended Order also does not explain why, *if* the Administration remains unsatisfied with both the six countries' *and* this Administration's current vetting procedures, the Administration cannot engage in

additional screening. To the contrary, the Amended Order removed Iraq from the travel ban list, and instead imposed additional U.S. screening procedures for Iraqi nationals. 82 Fed. Reg. 13209 (Amended Order) at § 4 (stating that Iraqi applications will be subject "to thorough review, including, as appropriate, consultation with a designee of the Secretary of Defense and use of the additional information that has been obtained in the context of the close U.S.-Iraqi security partnership . . . ."). Indeed, the Departments of both Homeland Security and State are considering additional screening procedures for all visa applicants. Laura Meckler, *U.S. Crafts Extreme Vetting Methods --- Changes considered could require visitors to reveal passwords*, Wall Street Journal (Apr. 5, 2017). The Amended Order offers no reason why additional vetting by this Administration would not remedy any remaining deficiencies in the vetting procedures for nationals of the remaining six countries on the travel ban list.

C. The Amended Order's Unexplained Extension Of The Travel Ban Beyond April 27, 2017 Further Suggests National Security Is A Pretext.

The Amended Order extends the travel ban until at least June 14, 2017 but does not explain why. The January 27, 2017 Original Order declared its entry ban was necessary to "reduce investigative burdens on relevant agencies during the review period" regarding vetting procedures. 82 Fed. Reg. 8977 (Original Order) at § 3(c). Accordingly, the Original Order suspended travel from the seven listed

countries for 90 days, through *April 27, 2017*, ostensibly to facilitate such review. *Id*. § 3(c). That 90-day period ends 11 days *before* this Court's oral argument.

Yet, the March 6, 2017 Amended Order, issued 38 days after the Original Order, delayed its new effective date *another* 10 days and called for an *additional* 90-day review and entry ban—*until June 14, 2017*. *Compare* 82 Fed. Reg. 13209 (Amended Order) at §§ 2(c), 14, *with* 82 Fed. Reg. 8977 (Original Order) at § 3(c). The Amended Order does not even try to explain why a ban is necessary after April 27, 2017. Instead, the Amended Order suggests that the ban may well continue indefinitely beyond June 14, 2017 until the vetting review is "completed." 82 Fed. Reg. 13209 (Amended Order) at § 2(c).

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

Curiously, the conclusory March 6, 2017 letter from the Attorney General and Secretary of DHS cited by the Government does not even purport to

request or justify the 48-day extension of the vetting review and travel ban. *See IRAP*, ECF No. 149, at *8. Nor was that letter joined by the three current senior national security officials with the most experience—namely, FBI Director James Comey, NSA Director Admiral Michael Rogers, and National Security Advisor H.R. McMaster. Moreover, the letter does not contradict the President's admission that the Amended Order is merely a "watered-down version of the first order." *Supra*, at 6. The Original Order was issued *without* consulting "senior national security officials." *Aziz,* 2017 WL 580855, at *9. All this provides yet more evidence that national security has been a pretext for the travel ban.

D. The Public Record Of Government Delays Belies Any National Security Justification, Much Less The Irreparable Harm Required For A Stay.

The timing surrounding the Amended Order's rollout further belie its "national security" justification. Discussing the Original Executive Order, President Trump stated that, when he was told by advisors that "you can't do [a one-month delay] because then people are gonna pour in before the toughness," he ordered that the ban be effective immediately. Kevin Liptak, *Trump: I wanted month delay before travel ban, was told no*, CNN Politics (Feb. 9, 2017), *available at* http://cnn.it/2k4OhOJ. On January 30, 2017, President Trump explained on Twitter: "If the ban were announced with a one week notice, the 'bad' would rush

into our country during that week." Donald J. Trump (@realDonaldTrump), Twitter (Jan. 30, 2017, 5:31 AM ET), *available at* http://bit.ly/2okbtwc.

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

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

Donald J. Trump (@realDonaldTrump), Twitter (Feb. 4, 2017, 4:49 PM ET), *available at* http://bit.ly/2ojFoX3; Donald J. Trump (@realDonaldTrump), Twitter (Feb. 5, 2017, 3:39 PM ET), *available at* http://bit.ly/2ojCwta.

Despite the President's rhetoric, his Administration's delays further belie any argument that "very bad and dangerous people" are "pouring in" because the travel ban has been enjoined. From at least February 9, 2017, when the Ninth Circuit denied a stay of the Washington TRO, until at least May 15, 2017—*95 days and counting*—the Government itself first delayed the Amended Order and then agreed to delays of its implementation.

It took until March 16, 2017 for the Administration to roll out and make effective what the President himself has described as a mere "watered down version of the first one." *Supra* at 6-7. Moreover, because President Trump's February 28, 2017 speech to Congress was well received in the press, the Administration purposefully delayed the issuance of the Amended Order from March 1, 2017, to March 6, 2017. J.R. 274-78, Laura Jarrett, Ariane de Vogue & Jeremy Diamond, *Trump delays new travel ban after well-reviewed speech*, CNN (Mar. 1, 2017 6:01 AM ET)). If national security were a basis for the Amended Order, its implementation would not have come second to favorable media coverage.

The Government also never sought a stay of the March 15, 2017 order of the District Court for the District of Hawaii that restrained Sections 2 and 6 of the Amended Order nationwide. And now the Government has agreed to a briefing schedule pursuant to which it will not be until May 15, 2017 that a Ninth Circuit panel will hear oral argument on the Government's motion to stay and the Government's appeal of the District of Hawaii's preliminary injunction. *Hawaii v. Trump*, CV. No. 17-15589 (9th Cir. Apr. 4, 2017), ECF No. 18.

This last Government acquiescence strongly supports denying the Government's Motion for a Stay of the District of Maryland's preliminary injunction during the expedited appeal in this Court. To obtain a stay from this

Court, the Government must show that it "is likely to suffer irreparable harm before a decision on the merits can be rendered" by this Court on the Government's expedited appeal. 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.1, p. 139 (2d ed. 1995). This would require the Government to show that (a) even though the Ninth Circuit will hold argument a week *after* this Court, the Ninth Circuit likely will reverse or stay the portion of the District of Hawaii's preliminary injunction addressing Section 2(c) *before* this Court renders its decision on the expedited appeal, *and* (b) irreparable harm is likely during any such short gap. The Government does not even attempt either showing. *See Washington v. Trump*, 847 F. 3d at 1168 (There was no irreparable injury because Government had not shown "an urgent need for the Executive Order to be immediately reinstated.").

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

Unlike President Trump, the Government's briefs prudently have avoided citing the World War II internment of Japanese Americans and Japanese nationals residing in the United States as precedent for the Original or Amended Orders.[4] Even the majority opinion in *Korematsu v. United States*, 323 U.S. 214

[4] Then-Candidate Trump supported his proposed ban by citing the World War II internment, telling reporters, "[Roosevelt] did the same thing." J.R. 252-53 (Jenna Johnson, *Donald Trump says he is not bothered by comparisons to Hitler*, Washington Post (Dec. 8, 2015)). Taking the wrong page from history again,

(1944), would provide no support as, among other reasons, the United States is not at war with the six countries named in the travel ban. *See id.* at 217-18 (relying on "the war power of Congress and the executive"); *cf. id.* at 219 ("Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand refugees requested repatriation to Japan.").

Moreover, *Korematsu* relied on *Hirabayashi v. United States*, 320 U.S. 81 (1943), where the majority had stated that "[o]ur investigation" of "*all* the relevant circumstances *preceding* and attending" the internment "afforded a reasonable basis" of wartime necessity. *Id.* at 101 (emphasis added). Thus, even *Hirabayashi* contradicts the Government's "blinders" argument under which, because the Government invokes national security, courts would have to ignore the public record even if President Trump gave a speech, waived the Amended Order, and declared: "This is the Muslim ban I promised."

The Government's "blinders" argument also contradicts the controlling concurrence of Justice Kennedy, joined by Justice Alito, in *Kerry v. Din* that looked "beyond" the consular officer's official decision, to evidence that

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President Trump's recent assertion that Muslims do not assimilate in Western societies appears to presage a justification for a permanent travel ban. *See* Chris Cillizza, *Donald Trump's explanation of his wire-tapping tweets will shock and amaze you*, Washington Post (Mar. 16, 2017), *available at h*ttp://wapo.st/2o0QXzA. Similar assertions were made to justify the World War II internment. *See Hirabayashi v. United States*, 320 U.S. 81, 96 (1943).

the particular visa applicant "worked for the Taliban government, which . . . provides at least a factual connection to terrorist activity." 135 S. Ct. 2128, 2141 (2015). That concurrence also stated that courts properly look beyond the stated reason for the denial of a visa when there is "an affirmative showing of bad faith." *Id*. A public record of religious prejudice shows bad faith of the worst kind.

In contrast, there was no *public* record contradicting an official explanation in any case relied on by Appellants. The visa applicant in *Kleindienst v. Mandel*, 408 U.S. 753, 758 (1972), did not rely on publicly-stated reasons different from those offered by the sole decision maker, the consular official. The Government's other citations are similarly inapposite. *See Rajah v. Mukasey*, 544 F.3d 427, 438-39 (2d Cir. 2008) (rejecting claim made "without evidence other than that one fact"—*i.e.*, that countries were "predominantly Muslim"—but noting that if there were animus "based on . . . religion, ethnicity, gender, [or] race," courts would provide a "remedy"); *Johnson v. Whitehead*, 647 F.3d 120, 127 (4th Cir. 2011) (noting that "*Fiallo* [*v. Bell*, 430 U.S. 787 (1977)] applied rational basis review to a legal classification based on legitimacy" and finding that 8 U.S.C. § 1432(a)(3) "surely is" rational); *see also Fiallo*, 430 U.S. at 795 n. 6 ("This is not to say . . . that the Government's power in this area [of immigration] is never subject to judicial review."). As the District Court in Hawaii held, no precedent

requires the Court to "crawl into a corner, pull the shutters closed, and pretend it has not seen what it has." *Hawaii*, at *17 (footnote and citation omitted).

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

Every indication is that a majority of the Supreme Court would not countenance another *Korematsu*. Justices Ginsburg and Breyer have written this explicitly. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting) (*Korematsu* "yielded a pass for an odious, gravely injurious racial classification[.] A *Korematsu*-type classification . . . will never again survive scrutiny: such a classification, history and precedent instruct, properly ranks as prohibited."); Stephen Breyer, *Making Our Democracy Work: A Judge's View* (Knopf, 2010) (*Korematsu* "has been so thoroughly discredited, that it is hard to conceive of any future court referring to it favorably or relying on it."). Chief Justice Roberts testified that if a case "like" *Korematsu* came before the

Court, "I would be surprised if there were any arguments that could support it." *U.S. Senate Judiciary Committee Holds A Hearing On The Nomination Of John Roberts To Be Chief Justice Of The Supreme Court*, 109th Cong. (2005), 2005 WL 2214702, at *22. Justice Alito testified that the "Japanese internment cases . . . were one of the great constitutional tragedies that our country has experienced . . . ." *U.S. Senate Judiciary Committee Holds A Hearing On The Nomination Of Judge Samuel Alito To The U.S. Supreme Court*, 109th Cong. (2006), 2006 WL 45940, at *150-151. Justice Sotomayor testified that *Korematsu* "was wrongly decided." *Senate Committee On The Judiciary Holds A Hearing On The Nomination Of Judge Sonia Sotomayor To Be An Associate Justice Of The U.S. Supreme Court*, 111th Cong. (2009), 2009 WL 2027303, at *79. When asked whether *Korematsu* has any precedential value in any case that may come before the Supreme Court, Justice Gorsuch testified, "no." Senator Mazie K. Hirono, *Questions for the Record following Hearing on March 20-23, 2017 entitled: "On the Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States*," Senate Judiciary Committee (Mar. 20-23, 2017), *available at* http://bit.ly/2pmtWHD. And Justice Kennedy has made available on the Ninth Circuit website a "Reading List of Justice Anthony M. Kennedy," *available at* www.ca9.uscourts.gov, that includes the *dissent* of Justice

Murphy in *Korematsu* as what the website describes as an example of "key principles that are integral to our nation's DNA."

The core of Justice Murphy's dissent is: "Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support." *Korematsu*, 323 U.S. at 234. Justice Murphy stated that claims by the Executive regarding military necessity "must [be] subject" to the "judicial process of having . . . reasonableness determined." *Id.* That reasonable "relation" was "lacking" because the internment order simply "assum[ed] that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy." *Id*. at 235. However, no "reason, logic or experience could be marshalled in support of such an assumption." *Id*.

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

weight" ordinarily given to such considerations. *Id*. at 239-40. As Justice Murphy concluded:

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

Id. at 242.

The Government likewise has provided no "reason, logic or experience," *id.* at 235, in support of the Amended Order's assumption that nationals from the six countries may possess some latent tendency to commit terrorism in the United States. Instead, President Trump said in his campaign, "Islam hates us," J.R. 255-57, and the White House Press Secretary trumpets that the Amended Order "deliver[s] on" one of President Trump's "most significant campaign promises: protecting the country against radical *Islamic* terrorism." *Supra,* at 6 (emphasis added). That is religious prejudice and a public appeal to religious prejudice. Prejudice is not national security. Such prejudice is unconstitutional.

CONCLUSION

This Court should affirm the preliminary injunction and deny any stay.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 17-1351 **Caption:** Int'l Refugee Assistance Project, et al. v. Trump, et al.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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