Nos. 16-1436 and 16-1540

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners*,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL., *Respondents.*

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners*,

v.

HAWAIʻI, ET AL., *Respondents.*

On Writ of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF FOR THE FOUNDATION FOR THE CHILDREN OF IRAN AND IRANIAN ALLIANCES ACROSS BORDERS AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus **The Foundation for the Children of Iran (FCI)** is a 501(c)(3) organization that helps arrange healthcare services, including life-saving treatments, for Iranian children and children of Iranian origin. Based in Bloomington, Minnesota, FCI relies on a global network of volunteers to serve the needs of as many children as possible, regardless of race, creed, religious belief, or political affiliation. Essential to FCI's mission is the ability of children residing in Iran and their parents to travel to the United States on non-immigrant visas over the course of several years to obtain the critical medical treatment that they need.

Amicus **Iranian Alliances Across Borders (IAAB)** is a 501(c)(3) organization based in New York City that seeks to strengthen America's Iranian diaspora community through leadership and educational programming that encourages collaboration and solidarity across borders and multiple communities. IAAB includes over a thousand members of Iranian descent or nationality and works by empowering members of the Iranian diaspora community to deepen connections with their new communities while continuing to maintain

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[1] No parties' counsel authored this brief in whole or in part, no party or its counsel contributed money intended to fund preparation or submission of this brief, and no person other than *amici* or their counsel contributed money that was so intended. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(2).

their roots. These activities rely in large part on the ability of IAAB members to travel between the United States and Iran, including on non-immigrant student visas.

The Executive Order at the heart of this case, Executive Order No. 13,780 ("Executive Order" or "Order"), which supersedes a prior version of the same policy, Executive Order No. 13,769 ("the Prior Order"), poses a grave threat to *amici* and their respective missions. Among other things, with certain limited exceptions for government officials, the Order bars any Iranian national (as well as nationals of Libya, Somalia, Sudan, Syria and Yemen, with whom *amici* stand in solidarity)[2] from entering the United States for a period of at least 90 days. *See* Executive Order, § 2(c). Those affected by the Order include Iranian nationals who have previously been allowed to enter the United States on student, work or visitor visas, and who will need to renew or reapply for those visas when their current entry authorizations expire. Many of *amici*'s members and other constituents, as well as their relatives and friends, have found their ability to travel severely curtailed as a result. For some, the consequences of the Order's restrictions could be severe: for the children served by *amicus* FCI, for

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[2] The Prior Order also banned the entry of Iraqi nationals. The current Order does not categorically ban the entry of such persons, but subjects them to "additional scrutiny" when they apply for visas, admission, or other immigration benefits, "including, as appropriate, consultation with a designee of the Secretary of Defense." Executive Order, §§ 1(g), 4.

example, their ability to travel to the United States for life-saving medical care is a matter of life-or-death.

Given both the vital importance of the legal questions presented to their members and other constituents, *amici* have a strong interest in supporting the Respondents and are well-positioned to explain why affirming the rulings of the Fourth and Ninth Circuits is the correct decision. To that end, *amici* have included in this brief not only legal arguments, but also personal stories of Iranians concerning the extensive screening procedures to which they already were subjected before entering the United States, and the harm that these individuals suffered and continue to suffer under the Order.[3]

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[3] For the safety of these individuals and their families, the italicized names used in this brief are pseudonyms. Given the heightened tension surrounding these issues, as well as the reported threats made against individuals associated with these proceedings, *e.g.*, federal judges connected to litigation challenging the current Order and the Prior Order, these individuals are understandably fearful about revealing their identities. *See* Lynn Kawano, *Hawaii Judge Who Blocked Travel Ban Gets Protection Detail*, Hawaii News Now (Mar. 24, 2017), http://www.hawaiinewsnow.com/story/34977777/hawaii-judge-who-blocked-travel-ban-gets-protection-detail-following-threats (last visited Sept. 15, 2017); Evan Perez, *et al.*, *Threats Against Judges in Immigration Ban Cases Leads to Increased Security*, CNN (Feb. 9, 2017), http://www.cnn.com/2017/02/09/politics/judges-threatened-immigration-order (last visited Sept. 15, 2017). These individuals also fear retaliation by Iran's government and its supporters should they be identified publicly as beneficiaries of American charities and organizations such as *amici*.

BACKGROUND

On January 27, 2017, President Trump issued the Prior Order which, *inter alia*, suspended the entry of, and the issuance of visas to, nationals from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen. While purportedly justified by the need to protect Americans, the Prior Order instituted a 90-day ban on the "immigrant and nonimmigrant entry into the United States of aliens from" the seven countries while the Departments of State and Homeland Security as well as U.S. intelligence officials would undertake a "review" of the United States' current visa-application and issuance process. Prior Order, § 3(a)-(c). The Prior Order's enforcement was enjoined by several federal district courts almost as soon as it was issued, as a result of legal challenges brought by various plaintiffs across the country. *See, e.g.*, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017); *Aziz v. Trump*, 234 F. Supp. 3d 724 (E.D. Va. Feb. 13, 2017).

On March 6, 2017, in response to these injunctions, Petitioners issued the current, superseding Order now at issue. The current Order's stated purpose is substantially the same as the Prior Order's: "to protect [United States] citizens from terrorist attacks, including those committed by foreign nationals." Executive Order, § 1(a). And the current Order seeks to achieve that end via means nearly identical to those employed by the Prior Order, *i.e.*, by instituting a 90-day, categorical ban on the entry of foreign nationals from certain designated countries, and suspending the United States' participation in refugee resettlement,

purportedly while the federal government undertakes a review of the "screening and vetting protocols and procedures associated with the visa-issuance process and the United States Refugee Admissions Program." *Id.* §§ 1(a), 2, 6. The current Order singles out for exclusion nationals from the same seven countries as the Prior Order, the only exception being that Iraqi nationals are now subject to special review by the Department of Defense, rather than a categorical entry bar. *Id.* § 4. The categorical bar for nationals from Iran, Libya, Somalia, Sudan, Syria and Yemen remains unchanged. *Id.* § 2(c).

The current Order retreats from the Prior Order in a few respects. For example, the current Order, unlike the Prior Order, expressly does not apply to lawful permanent residents, or to foreign nationals who were authorized to enter the United States when the Prior Order was issued, or to foreign nationals who have valid visas on the effective date of the current Order. *Id.* § 3(a)-(b). The exemptions for those who previously received visas, however, are cold comfort to those who, like many of the individuals whose personal stories are reported below, will need to leave the United States only to return later, *e.g.*, for subsequent surgical treatments. Such persons would be denied entry under the Order when they later seek to reapply for or renew their visas (absent a waiver from the Secretaries of State and Homeland Security, *id.* § 3(c)).

As the following personal stories that have been relayed to *amici* demonstrate, nationals from the countries subject to the Order, including children

seeking medical attention and students from Iran, already must undergo an extensive and lengthy vetting process to obtain visas to enter the United States. *See, e.g.*, *Hawai'i v. Trump*, 859 F.3d 741, 756 (9th Cir. 2017), *cert. granted*, 137 S. Ct. 2080 (2017) (citing FCI and IAAB's brief "describing how an Iranian visa holder was turned away while en route to the United States because of the confusion regarding the contours of [the Prior Order's] scope"); *id.* at 784 ("[FCI and IAAB] … have identified specific harms …. explain[ing] that [the Order] would … curtail children's ability to travel to the United States to obtain life-saving medical care"). The Order nevertheless bars those who have cleared that existing screening process from entry, and has thereby caused tremendous stress and terrible disruption to these individuals and their families.

The Fourth and Ninth Circuits upheld preliminary injunctions against the Order. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017), *cert. granted*, 137 S. Ct. 2080 (2017); *Hawai'i*, 859 F.3d 741. Specifically, the Fourth Circuit held that "the reasonable observer would likely conclude that [the Order's] primary purpose is to exclude persons from the United States on the basis of their religious beliefs," and thus the Order violates the Establishment Clause. *Int'l Refugee Assistance Project*, 857 F.3d at 601, 580-81. The Fourth Circuit declined to reach the parties' statutory arguments. The Ninth Circuit held that the Order exceeded the scope of the authority delegated to the President by Congress, and declined to reach the Establishment Clause question. *Hawai'i*, 859 F.3d at 755, 761. Amici offer the

following personal stories and the arguments that follow in support of affirming the decisions of the Fourth and Ninth Circuits.

I. *Azar* and *Ahmad*

Azar and her husband live in Iran with their teenage daughter and eight-year-old son, *Ahmad*.[4] *Ahmad* suffers from a univentricular heart. *Azar* and *Ahmad* first came to the United States on B-2 visitor visas when *Ahmad* was three-years-old because *Ahmad* required a surgery known as the Fontan procedure, not available in Iran.

Obtaining those visitor visas was a difficult process. First, only *Azar* and *Ahmad* could receive visas, separating the family while *Azar* and *Ahmad* traveled to the United States. In FCI's experience, the United States will grant only one parent (typically the mother) a visa to enter the United States out of fear that, if both parents were granted visas, they would not return to Iran. Therefore, as with all of FCI's beneficiaries, FCI recommended that only the mother and child seek visitor visas.

Second, *Azar* and *Ahmad* were both required to travel to the American embassy in Dubai for an interview because the United States does not maintain an embassy or consulate in Iran. In addition to the documents described *infra* at 17-19,

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[4] As described *supra* note 3, the identities of Iranian nationals have been anonymized using pseudonyms.

Azar also brought, *inter alia*, documentation regarding FCI's financial support of *Azar* and *Ahmad*, which included a place to stay while in the United States, and medical documentation detailing *Ahmad*'s medical condition and the lack of treatment options in Iran. *Azar* was required to return to the embassy four times with additional documentation before she and *Ahmad* were finally issued visas. *Azar* stayed in Dubai for over a month in an effort to obtain a visa for travel to the United States to seek life-saving medical treatment for her sick child.

Ahmad's first surgery in the United States was a success, but it was only the first of a planned series of procedures, as is typical with the Fontan procedure. *Ahmad* required significant post-operative recovery time. *Azar* and *Ahmad* stayed in the United States for four months and then returned to Iran. Four years later, when *Ahmad* was seven-years-old, he was scheduled for his next surgery. Again, *Azar* was required to travel with *Ahmad* to Dubai for an interview. This time, a woman working at the embassy told *Azar* that, because *Azar* was not a resident of Dubai, she could not obtain a visa from the embassy in Dubai. After much uncertainty and anguish, this misunderstanding was resolved and *Azar* was able to obtain visas for herself and *Ahmad*. *Azar* and *Ahmad* traveled again to the United States, where they stayed for three months after *Ahmad*'s surgery.

Ahmad is now eight-years-old. *Azar* and *Ahmad* traveled to the United States a third time in November 2016 for another surgery. *Ahmad* is still in recovery from that surgery.

II. *Banu* and *Basir*

Banu, her husband, daughter and son *Basir* live in Iran. *Basir* was born in late 1998 with a congenital heart defect that resulted in a lack of oxygen in his blood. *Banu* and her husband consulted the best Iranian doctors, but none in Iran could help *Basir* with his life-threatening condition. Their only hope for *Basir*'s survival was in the United States. *Banu* contacted FCI, which assisted *Banu* with the visa-application process.

Banu, her husband and *Basir* traveled to the U.S. Embassy in Turkey for *Banu* and *Basir*'s interviews when *Basir* was still an infant. *Basir* was extremely sick and required constant oxygen and medication during the interview process.

Banu and *Basir* were issued visas and traveled to the United States for *Basir*'s surgery. At 44-days-old, *Basir* was so sick that he was greeted by an ambulance at the airport gate and immediately transported to a hospital. *Basir*'s surgery was successful but his recovery was lengthy. *Banu*'s visa was valid for only three months, and therefore she needed to return to Iran. FCI was able to assist *Banu*'s husband with obtaining a visa so that he could be with *Basir* during the remainder of *Basir*'s recovery.

Basir returned to the United States in 2012 for an additional surgery and recovered well. Today, *Basir* is a student at the best university in Iran. He enjoys playing soccer and is a chess champion. After his 2012 surgery, however, doctors anticipated that

he would need additional surgery in another five to ten years—between 2017 and 2022—and *Basir* is now within that window. He is under the care of doctors in Iran, who consult with U.S. physicians as needed. Although *Basir*'s condition is currently stable, it is difficult to predict when in the next five years he will need his additional surgery. FCI, *Banu* and *Basir* are concerned that the Order could prevent *Basir* from receiving further life-saving surgery should an urgent need arise.

III. Dr. David Overman

Dr. David Overman is Chief of the Division of Cardiovascular Surgery at Children's Hospitals and Clinics of Minnesota and a staff surgeon. His clinical interests include the surgical management of congenital heart disease. He has specific expertise with hypoplastic left heart syndrome and complex neonatal repairs, as well as aortic root disease and the Ross Procedure.

Dr. Overman is Medical Director of Children's HeartLink, a non-governmental organization that builds partnerships between pediatric cardiac programs in the developing world and in North America and Europe. Dr. Overman began working with FCI in early 1999 when he operated on *Basir*. Since then, Dr. Overman has operated on approximately 15 Iranian children brought to the United States by FCI. Some of these children, like *Basir*, require close monitoring and multiple surgeries.

Dr. Overman's role with FCI involves evaluating the medical records of potential beneficiaries to determine whether they may be good candidates for treatment in the United States, performing surgery on these beneficiaries if they do come to the United States, and working remotely with doctors in Iran to monitor their conditions. Dr. Overman is concerned that the Order will interfere with his ability to offer necessary life-saving medical treatment to his patients.

IV. *Dalir*

Dalir is a Ph.D. chemistry student in the Midwestern United States. As with all student visa applicants, *Dalir* was first required to obtain acceptance at an American university. He was accepted in 2015 and immediately applied for an F-1 (student) visa for himself and an F-2 (dependent) visa for his wife. After submitting the necessary applications, photographs and fees, he made an appointment for them to travel to Dubai to be interviewed at the U.S. embassy. At his interview, he presented, *inter alia*, his research plan, statement of purpose, certificate of marriage and bank statements. He and his wife were fingerprinted. Two months later, they received their visas. *Dalir* was pleasantly surprised that they received multiple-entry visas; in *Dalir*'s experience, most Iranian students receive only single-entry visas, which are valid for five years. Because their visas are multiple-entry visas, however, they are valid for only two years.

Dalir and his wife arrived in the United States for the fall semester 2015. By the end of 2016, they had not been to Iran for over one year and missed their families. They decided to return to Iran for the winter holidays. *Dalir* could stay only two weeks due to his academic demands. His wife, not being a student, could stay longer and planned to return to the United States in February. After hearing rumors of a forthcoming travel ban, however, *Dalir* immediately called his wife and rescheduled her return. His wife was in the air, attempting to reunite with her husband, when President Trump signed the Prior Order.

His wife's itinerary took her from Iran to Chicago via Frankfurt. She landed in Frankfurt shortly after the Prior Order was signed. Two hours into her layover, the airline informed her that she would not be allowed to board her flight to Chicago due to the Prior Order and put her on a plane back to Iran.

The next week was extremely difficult for *Dalir* and his wife. Both feared that they would not be able to see one another again unless *Dalir* quit his Ph.D. program. *Dalir*'s worry that he would not be reunited with his wife prevented him from concentrating on his studies. For six days, he desperately followed the news. He was aware of the TRO issued by a federal district court in Boston, but also knew that airlines were not allowing Iranian visa holders to board planes bound for the United States. When *Dalir* learned that Lufthansa was allowing Iranian visa holders to board planes bound for Boston, he immediately called his wife. *Dalir* had

told her to pack her bags and be prepared to leave. It was 2 a.m. in Iran, but he convinced his wife to get to the airport for a 7 am flight. *Dalir* booked her ticket and she immediately left for the Tehran airport. Simultaneously, *Dalir* began a seventeen-hour car ride to Boston.

Dalir arrived in Boston just as his wife's flight was landing. As he waited at the international arrivals area, *Dalir* grew concerned when he did not see his wife for several hours, despite seeing other passengers exit customs. She emerged three hours after landing, following secondary screening.

Dalir and his wife got back into the car and drove another seventeen hours home. The travel ban had significant impacts on *Dalir*'s studies—*e.g.*, he delayed one of his seminars that was scheduled to take place during the six days when he was trying to bring his wife back into the United States. Although *Dalir* and his wife may lawfully remain in the United States until *Dalir* completes his Ph.D. program, they fear that they will be unable to obtain additional visas when their current visas expire, leaving them potentially unable to visit their families for three years.

SUMMARY OF ARGUMENT

This Court should affirm the decisions of the Fourth and Ninth Circuits. For the reasons provided by Respondents (IRAP Resps. 31-42; Hawai'i Resps. 47-60), the Court should apply a more searching standard of review to this case than mere rational basis review. If, however, the Court applies only

rational basis review, it still should hold that the Order violates the Equal Protection Clause because it impermissibly distinguishes on the basis of nationality, which even in the immigration context requires at least a rational basis. The lack of any rational impetus for the Order not only renders it unconstitutional under the Equal Protection and Due Process Clauses, but also lends support to Respondents' Establishment Clause challenge, *Int'l Refugee Assistance Project*, 857 F.3d at 580-81, 601 (finding that the Order violates the Establishment Clause). The United States' existing visa-application process and other screening procedures are already aimed specifically at the problems that the Order purportedly seeks to solve—preventing terrorism inside the United States. As illustrated by the compelling stories above from the *amici*'s members and other constituents, these visa-application procedures are stringent, even for a newborn baby seeking a visa to the United States for life-or-death surgery. The irrationality of the travel ban is confirmed by the list of countries singled out by the Order, which is both under-inclusive and over-inclusive in relation to the national origins of the perpetrators of recent terrorist attacks that allegedly provide the justification for the travel ban.

There are statutory flaws with the travel ban as well, as the Ninth Circuit held below. *Hawai'i*, 859 F.3d at 769-74, 776-82 (holding that the Order exceeds the scope of the President's authority as delegated by Congress). Although the Order relies on 8 U.S.C. § 1182(f) for its authority to exclude *all* nationals of six countries, a holistic reading of that statute refutes that claim. That provision states that

the President may "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants," but does not define "classes of aliens." Another part of the same section defines multiple "classes of aliens"—but none by reference to immutable characteristics such as nationality. 8 U.S.C. § 1182(a). Reading the statute as a whole, 8 U.S.C. § 1182(f) does not permit the President to bar entire nationalities without some individualized consideration of applicants for admission. Because the Order exceeds the proper scope of the President's statutory authority, it cannot stand.

ARGUMENT

I. The Executive Order's Travel Ban Is Irrational.

A. Existing Screening Procedures for Persons from the Six Restricted Countries to Enter the United States Are Robust and Thorough.

Even acknowledging that the political branches of the federal government have comparatively "broad power over naturalization and immigration," *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976), any distinction that the federal government may wish to draw between noncitizens based on national origin still must satisfy at least "rational basis" review. *See, e.g.*, *Ruiz-Diaz v. United States*, 703 F.3d 483, 486-87 (9th Cir. 2012). Because the Order's travel ban operates selectively with respect to only certain foreign nationals, depending on their national origin, it must be supported by at least some

"assurance that the classification at issue bears some fair relationship to a legitimate public purpose." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). The rational basis standard is far from a meaningless rubber stamp on the actions of the political branches. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (striking down a Colorado law that lacked a "rational relationship to a legitimate governmental purpose"); *Jimenez v. Weinberger*, 417 U.S. 628, 636-37 (1974) (striking down provision of the Social Security Act as not rationally connected to provision's asserted purpose); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-36 (1973) (striking down as irrational statute withholding food stamps to households with unrelated members).

Any supposed rational basis for the categorical ban of travel for individuals from the targeted countries is dispelled by the fact that the United States government currently employs stringent standards regarding the admission of most nonimmigrants into the United States. When foreign nationals wish to enter the United States, they first must obtain visas unless they are from one of only 38 visa-waiver countries where a visa is not required for stays of 90 days or less for tourism or business reasons (and even then, only if they are not also a national of Iraq, Iran, Syria or Sudan). U.S. Dep't of State, *Visa Waiver Program*, http://travel.state.gov/content/visas/en/visit/visa-waiver-program.html (last visited Sept. 15, 2017). The process for obtaining a nonimmigrant visa to the United States is lengthy, expensive and difficult—particularly for Iranians. Over 45 percent of Iranian B-visa seekers were denied visas in Fiscal Year

2016.[5] *See* U.S. Dep't of State, *Adjusted Refusal Rate—B-Visas Only By Nationality Fiscal Year 2016*, http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/RefusalRates/FY16.pdf (last visited Sept. 15, 2017).

Applicants for nonimmigrant visas must complete an application, submit photographs, pay an application fee and schedule an interview at a U.S. embassy or consulate. U.S. Dep't of State, *Student Visa*, http://travel.state.gov/content/visas/en/study-exchange/student.html (last visited Sept. 15, 2017) (applicable to F-1 and F-2 visa applicants); U.S. Dep't of State, *Visitor Visa*, http://travel.state.gov/content/visas/en/visit/visitor.html (last visited Sept. 15, 2017) (applicable to B-2 visa applicants, including those seeking medical treatment). The application form itself is lengthy, asking for information such as a list of all of the countries the applicant has entered in the last ten years and all professional, social and charitable organizations to which the applicant has belonged or contributed, or with which the applicant has worked. Applicants seeking visas for medical reasons additionally must submit an invitation letter from the hospital and doctors providing treatment, medical documentation describing the illness (translated) and a letter from a doctor stating the reasons why the planned treatment cannot or should not be performed in Iran or a neighboring country

[5] In FCI's experience, the Department of State denies many Iranian visa seekers' applications for incomplete applications or supporting documentation. *See* 8 U.S.C. § 1201(g).

such as Turkey. Many FCI beneficiaries also require affidavits of support from sponsors if the beneficiaries cannot afford to travel with their own funds, lest the consular official determine their personal financial situation to be insufficient. *See* 22 C.F.R. § 41.31(a)(3). Because the United States does not maintain an embassy or consulate in Iran, Iranian nationals seeking visas to enter the United States must travel to a third country for their interviews. Travel to that third country (for example, the United Arab Emirates), also requires a visa. Applicants must bring significant documentation with them to their visa interviews, including six months of bank statements (translated and officially stamped). Applicants are also fingerprinted during their interviews.

The Order's travel ban fails to satisfy even the most deferential rational basis standard. As alluded to by the personal experiences recounted above, the United States' preexisting visa-application process and other screening procedures that have been in place for quite some time are all "aimed specifically at the problems" that the Order's travel ban purportedly seeks to solve. *Moreno*, 413 U.S. at 536. Indeed, the Order acknowledges that these procedures were already tightened significantly in response to the September 11 attacks. *See* Executive Order, § 1. "The existence of these provisions necessarily casts considerable doubt upon the proposition that the [travel ban] could rationally have been intended to prevent those very same [harms]." *Moreno*, 413 U.S. at 536-37. Put simply, the U.S. government has already addressed its purported concerns set forth in the Order by

adopting and maintaining comprehensive and stringent visa requirements for individuals in the targeted countries.

A law that, like the Order, lacks any rational connection to its asserted aims is more likely to have been motivated by a constitutionally improper purpose, such as "a bare … desire to harm a politically unpopular group." *Id.* at 534; *accord Romer*, 517 U.S. at 634-35 (laws that impose "disadvantage[s] … born of animosity toward the class of persons affected" lack a constitutionally legitimate purpose). An absolute ban for 90 days has no rational basis. The evidence is that the existing procedures are working insofar as adult nationals from these countries have not traveled to the United States and participated in terrorist attacks in the past two decades. *See infra*. In the absence of identified problems with the existing screening process for persons from these countries, the Court should affirm the Fourth and Ninth Circuit's rulings.

B. The List of Countries Singled Out by the Executive Order's Travel Ban Lacks a Rational Connection to the Asserted Reasons for the Ban.

The manner in which the Order's travel ban operates also belies its lack of a rational basis. The Order's stated justification for barring the entry of *all* foreign nationals from Iran, Libya, Somalia, Sudan, Syria and Yemen is the concern that any national from those countries might commit terrorist acts in the United States, perhaps at the behest of terrorist organizations, and the Order points to

"hundreds of [unspecified] persons born abroad [that] have been convicted of terrorism-related crimes in the United States" since 2001 as support. Executive Order, § 1(h). The problem, however, is that those "persons born abroad" and the history of domestic terrorist incidents in the United States since 2001 lend no support to the Order's selective and discriminatory ban. Indeed, the list of countries whose nationals the Order has singled out bears little or no correlation to the places from which those who have attempted or committed terrorist attacks within the United States have hailed over the last 16 years.[6] Furthermore, as described below, the Order and its call for extreme vetting would not have actually prevented any of these attacks, because the handful of nationals from the targeted countries who were involved in terrorist activities had come to the

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[6] Petitioners have argued that Congress and the prior administration identified these six countries as ones presenting "terrorism-related concerns," and that the Order merely adopts that prior determination and enhances the security measures with regard to those countries. But neither Congress nor the prior administration banned nationals from those countries from entering the United States for any period of time, as the Order does. Indeed, a Department of Homeland Security assessment found that "'country of citizenship is unlikely to be a reliable indicator of potential terrorist activity' and that 'few of the impacted countries have terrorist groups that threaten the West.'" *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 561-62 (D. Md.), *aff'd in part, vacated in part by* 857 F.3d 554 (4th Cir. 2017) (discussing report *available at* https://assets.documentcloud.org/documents/3474730/DHS-intelligence-document-on-President-Donald.pdf); *accord Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1127 (D. Haw. 2017) (same).

country as children, and all were either naturalized citizens or lawful permanent residents ("LPRs").

The ban is both selective in whom it targets—only foreign nationals from the six referenced countries—but at the same time sweeping in the burdens it imposes, prohibiting *any* alien from those countries from entering the United States, even minors, and regardless of the grounds on which that entry is sought: for work, for study, for resettlement as a refugee fleeing an active war zone, for medical treatment that is unavailable in their home countries, or for short-term visits with family members residing in the United States. *See Hawai'i*, 859 F.3d at 771-74. Viewing the Order's travel ban in light of the Order's stated reasons for it, the ban's arbitrary harshness presents a second, independent reason why it lacks a rational basis, and confirms that its restrictions can only have been intended to harm an unpopular class of persons, rather than to serve any legitimate security-related aim.

To begin, the Order is *over*-inclusive. *Romer*, 517 U.S. at 632 (laws fail rational basis review where their "sheer breadth is so discontinuous with the reasons offered for it that [they] seem[] inexplicable by anything but animus toward the class [they] affect[]"). There have been only a handful of persons who originally hail from some of the countries the Order singles out who have carried out or attempted to carry out terrorist plots since 9/11—and these acts did not result in fatalities. These include one car-ramming attack carried out in 2006 by an Iranian-

American in Chapel Hill, North Carolina;[7] an unsuccessful plot by a Somali-American who planned to bomb a Christmas tree lighting in Portland, Oregon in 2010;[8] an attack involving multiple stabbings by a Somali-American at a shopping mall in St. Cloud, Minnesota in 2016;[9] and another car-ramming attack carried out by a Somali-American LPR at Ohio State University in 2016.[10]

To put these four individuals in broader perspective, there are approximately 500,000 persons of Iranian ancestry and 130,000 persons of Somali ancestry living in the United States, according to 2011 American Community Survey data.[11] These

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[7] Jessica Rocha, *et al.*, *Suspect Says He Meant to Kill*, CHARLOTTE NEWS & OBSERVER (Mar. 8, 2006), https://web.archive.org/web/20080502132128/http://www.newsobserver.com/102/story/415421.html (last visited Sept. 15, 2017).

[8] *US 'Foils Oregon Bomb Plot'*, ALJAZEERA (Nov. 27, 2010), http://www.aljazeera.com/news/americas/2010/11/201011276471495345 1.html (last visited Sept. 15, 2017).

[9] *FBI Investigates Stabbing That Injured 9 at Minnesota Mall as Possible Act of Terrorism*, CHI. TRIB. (Sept. 18, 2016), http://www.chicagotribune.com/news/nationworld/ct-minnesota-mall-stabbing-20160918-story.html (last visited Sept. 15, 2017).

[10] *Islamic State Group Claims Ohio State University Rampage*, BBC (Nov. 30, 2016), http://www.bbc.com/news/world-us-canada-38151669 (last visited Sept. 15, 2017).

[11] *See* U.S. Census Bureau, *2011 American Community Survey 1-Year Estimates: Total Ancestry Reported* (Dec. 22, 2012), *available at* http://ia601608.us.archive.org/26/items/2011AmericanCommunitySurveyAncestry/2011Acs.pdf (visited Sept. 15, 2017).

incidents also offer no reason whatsoever for the inclusion of the other four countries in the Order's travel ban. Moreover, even with respect to these four incidents, there is no credible basis for believing that the Order's travel ban, sweeping as it is, would have done anything to prevent them. Three of the four incidents—the 2006 car-ramming attack, the 2010 bomb plot, and the 2016 stabbings at a shopping mall—involved naturalized U.S. citizens who immigrated to the United States as young children and lived here for many years before engaging in terrorism.[12] The individual at the center of the other incident also came to the United States as a child—at age 16—and did not carry out his attack until years after arriving.[13] The idea that it is rational to ban toddlers from entering the country out of a speculative fear that they might someday grow up to

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[12] *See* Rocha, *supra* note 7 (reporting that 22-year-old perpetrator was born in Iran but "grew up in the Charlotte area, attending public school for 13 years until he graduated from South Mecklenburg High School in 2001," five years before attack); Colin Miner, *et al.*, *F.B.I. Says Oregon Suspect Planned 'Grand' Attack*, N.Y. TIMES (Nov. 27, 2010), http://www.nytimes.com/2010/11/28/us/28portland.html (last visited Sept. 15, 2017) (reporting that 19-year-old plotter attended middle school and high school in Oregon); Mark Greenblatt & Angela M. Hill, *Expert: Refugee Ban Would Not Have Saved Lives*, SCRIPPS (n.d.), http://www.scripps.com/expert-refugee-ban-would-not-have-saved-lives (reporting that 20-year old perpetrator was "a refugee who came to the United States at two months old and became a U.S. Citizen in 2008").

[13] *See Islamic State Group Claims Ohio State University Rampage*, *supra* note 10 (reporting that 18-year-old perpetrator arrived in the United States two years before the incident, after living for seven years in a refugee camp in Pakistan).

be terrorists is implausible, and offends our most basic principles. *Cf. Miller v. Alabama*, 567 U.S. 460, 470-73 (2012) (recognizing that fundamental differences between juveniles and adults that makes it difficult to predict with confidence how children will behave as they mature). Nor could any "enhanced screening" plausibly determine which young children will grow up to be terrorists.

The Order is also *under*-inclusive—another sign of irrationality that often bespeaks constitutionally impermissible animus toward those few the law actually targets. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (rejecting need to regulate population density of group homes for mentally disabled residents as a justification for a zoning ordinance requiring special permits for such facilities because other types of facilities presenting identical concerns were not subject to similar requirements). There have been twelve persons who have succeeded in carrying out fatal terrorist attacks inside the United States since the September 11, 2001 attacks; not a single one of these attacks was committed by anyone from the six countries identified in the Order.[14] Three of them

[14] *See* Peter Bergen, *et al.*, *In Depth: Terrorism in America After 9/11, Part II: Who are the Terrorists?* NEW AMERICA https://www.newamerica.org/in-depth/terrorism-in-america/who-are-terrorists/ (last visited Sept. 15, 2017).

were of Pakistani heritage.[15] Three more were African Americans who were born here.[16] Another was Egyptian.[17] Two were of Chechen ancestry, born in former Soviet republics, and came to the United States from Russia as children.[18] And one each came from families that originally hailed from Kuwait,

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[15] *See San Bernardino Shooting: Who Were the Attackers?*, BBC (Dec. 11, 2015), http://www.bbc.com/news/world-us-canada-35004024 (visited Sept. 15, 2017); Jennifer Sullivan, *Seattle Jewish Center Shooter Gets Life Sentence*, L.A. TIMES (Jan. 15, 2010), http://articles.latimes.com/2010/jan/15/nation/la-na-seattle-jewish-center15-2010jan15 (last visited Sept. 15, 2017).

[16] *See* Sergio Peçanha & K.K. Rebecca Lai, *The Origins of Jihadist-Inspired Attackers in the U.S.*, N.Y. TIMES (Dec. 8, 2015), http://www.nytimes.com/interactive/2015/11/25/us/us-muslim-extremists-terrorist-attacks.html?_r=0 (last visited Sept. 15, 2017) (Ali Muhammad Brown, Alton Nolen and Abulhakim Mujahid Muhammad).

[17] *See Los Angeles Airport Shooting Kills 3*, CNN (July 5, 2002), http://edition.cnn.com/2002/US/07/04/la.airport.shooting/ (last visited Sept. 15, 2017).

[18] *See* Nina Burleigh, *The Brothers Who Became the Boston Marathon Bombers*, NEWSWEEK (Apr. 6, 2015), http://www.newsweek.com/brothers-who-became-boston-marathon-bombers-319822 (last visited Sept. 15, 2017).

Afghanistan and the Palestinian Territories.[19] Indeed, even the primary example that the Prior Order cited in support of the travel ban—the September 11 attacks, *see* Prior Order, § 1—had no relation to any of the countries on which the ban is focused. The "19 foreign nationals who went on to murder nearly 3,000 Americans," *id.*, came to the United States from Saudi Arabia, Egypt, Lebanon and the United Arab Emirates.[20]

In sum, even under rational basis review, the record of terrorist attacks committed or attempted in the United States since the September 11 attacks offers no basis for singling out the six countries identified in the Order for travel restrictions.[21] Most

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[19] *See Orlando Gay Nightclub Shooting: Who Was Omar Mateen?*, BBC (June 14, 2016), http://www.bbc.com/news/world-us-canada-36513468 (last visited Sept. 15, 2017); Catherine E. Shoichet & Gary Tuchman, *Chattanooga Shooting: 4 Marines Killed, A Dead Suspect and Questions of Motive*, CNN (July 17, 2015), http://edition.cnn.com/2015/07/16/us/tennessee-naval-reserve-shooting (last visited Sept. 15, 2017); James Dao, *Suspect Was 'Mortified' About Deployment*, N.Y. TIMES (Nov. 5, 2009), http://www.nytimes.com/2009/11/06/us/06suspect.html (last visited Sept. 15, 2017).

[20] *September 11th Hijackers Fast Facts*, CNN (Aug. 28, 2017), http://cnn.com/2013/07/27/us/september-11th-hijackers-fast-facts (last visited Sept. 15, 2017).

[21] The Order also cites a case from January 2013 that involved "two Iraqi nationals admitted to the United States as refugees in 2009 [who] were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses." Executive Order, § 1(h). Iraqi nationals are not subject to categorical restrictions under the current Order, and thus this example cannot justify the Order actually before this Court.

of the countries from which foreign terrorist attacks against the United States have originated are not even included on the list; most of the countries that are on the list are ones from which no terrorist threat has come at all in the period following the September 11 attacks. Even acknowledging that a handful of recent attackers or would-be attackers were from these countries, there is no basis to say that any purported "enhanced screening" would have prevented those incidents or others like them because those individuals came here as children. Based on both its under-inclusiveness and over-inclusiveness, the Order's travel ban "appears to … rest on an irrational prejudice against" nationals from the six countries singled out for adverse treatment, which is not a legitimate government interest supplying the requisite rational basis. *Cleburne*, 473 U.S. at 450.

Additionally, the Order fails to mention that the incident did not involve any planned attack on U.S. soil, but rather the provision of material support for such attacks *in Iraq*, and so has little if any connection to the Order's asserted purpose of "protect[ing] the Nation from terrorist activities by foreign nationals admitted to the United States." *See Alex Nowrasteh*, *Trump Justifies Executive Order by Citing Terrorists Who Were Not Planning a Domestic Attack*, CATO INSTITUTE (Mar. 6, 2017), https://www.cato.org/blog/trump-justified-executive-order-citing-terrorists-who-were-not-planning-domestic-attack (last visited Sept. 15, 2017).

III. The President's Statutory Authority Under Section 1182(f) Does Not Justify the Executive Order.

The Ninth Circuit's decision examined the Petitioners' principal statutory basis for the Order's travel ban—8 U.S.C. § 1182(f)—and correctly rejected their reading, which would give the President unbounded authority to discriminate on the basis of nationality in determining admission to the United States. *Hawai'i*, 859 F.3d at 769-74. The Ninth Circuit recognized that § 1182(f) is framed in broad language, authorizing the President to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate" when he finds that "the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States." *Id.* at 770; 8 U.S.C. § 1182(f). However, the President's "authority is not unlimited." *Hawai'i*, 859 F.3d at 770. The Ninth Circuit held that the Order did not present a sufficient finding that entry of the excluded classes would be detrimental to the interests of the United States, as required by § 1182(f). *Id.* That determination was correct and provides a sufficient basis to affirm. Additionally, *amici* seek to shed light on an additional way that the Order exceeds the President's authority: § 1182(f) does not provide the President authority to define a "class" in terms of nationality or any similar immutable characteristic. The phrase "class of aliens" in § 1182(f) is not defined; for the reasons to follow, the phrase "class of aliens" in § 1182(f)

should not be interpreted to include "nationality" as a type of class.

The phrase "class of aliens" in § 1182(f) should be read in light of the same phrase as used elsewhere in the statute, specifically § 1182(a). *See Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) ("[I]dentical words used in different parts of the same act are intended to have the same meaning."). Section 1182(a) defines several specific "classes of aliens ineligible for visas or admission," who are categorically "ineligible to receive visas and ineligible to be admitted to the United States." 8 U.S.C. § 1182(a). None of the "classes of aliens" set forth in § 1182(a) are defined in terms of immutable characteristics, such as nationality; rather, the categories are typically defined by reference to the alien's individual conduct, and in some cases by mutable characteristics (*e.g.*, infection with a communicable disease). *See, e.g.*, *id.* § 1182(a)(1) (health-related grounds), (a)(2) (certain criminal activities or convictions), (a)(1) (communicable diseases), (a)(3) (terrorism, membership in totalitarian parties and related activities), (a)(6) & (9) (prior violations of U.S. immigration laws), (a)(7) (failure to present required documentation). The absence of any "classes" of aliens defined by immutable characteristics in § 1182(a) provides reason to believe that "any class of aliens" in § 1182(f) similarly excludes immutable characteristics such as nationality.

Put another way, the meaning of the phrase "any *class* of aliens" as used in § 1182(f) (emphasis added) should be determined in light of the "company

it keeps" under "familiar" statutory-interpretation principles. *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). And here, the "company" that § 1182(f) keeps—the enumeration of specific "classes of aliens" identified in § 1182(a)—suggests that it was only meant to provide the President with the authority to temporarily exclude additional "classes of aliens" defined by their individual conduct or mutable characteristics, not their immutable characteristics such as nationality. 8 U.S.C. § 1182(f). Nowhere in Section 1182 is there any evidence that would support reading "class" to include an entire nationality.

This conclusion is also supported by the legislative history of the 1952 Immigration and Nationality Act ("INA"), which shows that overturning decades of racial and national-origin discrimination was of principal importance to Congress. *See, e.g.*, H.R. Rep. No. 82-1365, at 28 (1952) (listing as the first of the 1952 INA's "basic and significant changes … [e]liminat[ing] race as a bar to immigration and naturalization"). For example, the Senate Committee on the Judiciary discussed the history of immigration policy in the United States and recommended that Congress adopt a policy that prohibited race-based immigration exclusions. S. Rep. No. 81-1515, at 368-373 (1950). The Committee often used the terms "racial" and "national" interchangeably in its review of historical policies. *Id.* In the section titled "Racial Exclusions," the Committee described those barred by the 1940 Nationality Act as "*racially* ineligible for naturalization and therefore … excluded from

admission." *Id.* at 369 (emphasis added). The 1940 Nationality Act had excluded "Burmese, Japanese, Koreans, Malayans" as undesirable "races" of people, despite the fact that those groups are nationalities. *Id.* The exclusion of those nationalities was overturned by the 1952 INA.

The exclusion of certain nationalities from admission was not unique to the 1940 Nationality Act, but rather began with the exclusion of Chinese laborers in 1882, and was later expanded in the 1917 and 1924 Immigration Acts. *Id.* In all of these acts, the term "race" was used to bar the admission of certain nationalities. For example, the 1882 Chinese Exclusion Act as well as 1917 Act, "excluded certain Asiatics on the basis of *geographical distribution*," which covered "some of the groups considered racially undesirable." *Id.* (emphasis added). Both acts exemplify race-based exclusions that are better classified as national-origin based exclusions.

In particular, the 1917 Immigration Act created what became known as the "barred zone." *Id.* at 54. The barred zone was defined by longitude and latitudinal demarcations but included India, Burma, Siam (now Thailand), the Malay States, parts of Russia, parts of Saudi Arabia, parts of Afghanistan, most of the Polynesian Islands, and all of the East India Islands. *Id.* The barred zone was described in a 1916 Senate Committee on Immigration report as a bill "to reach that large number of aliens, not 'free white persons' or persons of 'African nativity' or 'African decent' … not covered by the Chinese exclusion treaty and laws and the Japanese passport agreement and treaty." S. Rep.

No. 64-352, at 4 (1916). Moreover, the Committee recognized in 1950 that "[t]he purpose of the 'barred zone' provision was primarily to exclude Hindus and make exclusion of Asiatics more complete." S. Rep. No. 81-1515, at 54 (1950). Thus, the Committee recognized that geographical and nationality-based exclusions could embody the underlying purpose of excluding certain religions and races. The 1952 INA was thus principally intended to reverse this history of religious and racial discrimination under the guise of nationality-based discrimination. *See* H.R. Rep. No. 82-1365, at 28 (1952) (listing as the first of the 1952 INA's "basic and significant changes … [e]liminat[ing] race as a bar to immigration and naturalization").

The Order's categorical prohibition on all foreign nationals (other than certain government officials) from certain countries holding valid U.S. visas entering the United States is unprecedented in the history of the clause, and directly undermines what Congress attempted to accomplish with the 1952 INA. Notwithstanding numerous wars, hot and cold, during § 1182(f)'s more than 60-year history, during which § 1182(f) was invoked dozens of times, no other President has purported to bar all aliens of a given nationality holding visas from entering the United States whether as immigrants or non-

immigrants.[22] Instead, suspensions pursuant to § 1182(f) have generally proceeded on the basis of only demonstrated conduct by specific aliens (*e.g.*, committing human rights abuses, supporting terrorism, or participating in anti-democratic coups). *See* Kate M. Manuel, *Executive Authority to Exclude Aliens: In Brief* (Cong. Res. Serv. Jan. 23, 2017), at 1-2 & 6-10 (Table 1). That "contemporaneous and consistent" executive practice suggests that "any class of aliens" means something less than a whole nationality, and that understanding "is entitled to great weight" in construing the statute. *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947); *accord* Norman Singer & Shambie Singer, 2B Sutherland Statutes and Statutory Construction § 49:3 (7th ed. 2016); *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our

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[22] An August 26, 1986 proclamation limited the entry of Cuban immigrants, but included broad categorical exceptions for Cuban nationals applying for admission as immediate relatives, "special immigrants"—which includes numerous categories of immigrants including lawful permanent residents returning from abroad—and "preference immigrants," including those with family-sponsored and employment-based immigrant visas. *See* Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986).

government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.").[23]

Petitioners argue that prior presidents have used § 1182(f) to prevent entry of certain nationals. *See* Pet. 43-44. However, none of these presidential actions sought to ban entire nationalities without broad, categorical exceptions. For example, Executive Orders 12,324 and 12,807, addressed in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), did not exclude Haitian nationals—rather, they directed the Coast Guard to interdict migrants from arriving *by sea* because of the large numbers of migrants arriving by sea into the southeastern United States at that time. In stark contrast to the absolute ban presented here, Haitian nationals seeking to visit or immigrate to the United States through other lawful means were not barred. For similar reasons, the other presidential actions cited by Petitioners fail to support the claim that § 1182(f) grants the president sweeping authority to exclude entire nationalities based on that immutable characteristic alone. Proclamation No. 8693, 76 Fed. Reg. 44,751 (July 27, 2011) (excluding "aliens who

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[23] Even when the President restricts travel from certain countries in response to, *e.g.*, health emergencies, as President Obama did in response to the 2014 Ebola outbreak, the President does so with at least the INA's partial blessing, which grants him authority to exclude aliens on health-related grounds. 8 U.S.C. § 1182(a). However, as the Fourth Circuit held, the current Order is not truly rooted in such legitimate concerns—rather, it is the result of anti-Muslim animus. *Int'l Refugee Assistance Project*, 857 F.3d at 594-97.

are subject to United Nations Security Council travel bans"); Proclamation No. 8342, 74 Fed. Reg. 4093 (Jan. 22, 2009) (suspending entry of senior foreign government officials responsible for failing to combat human trafficking); Proclamation No. 6958, 61 Fed. Reg. 60,007 (Nov. 26, 1996) (restricting entry of certain officials of the Sudanese government and military); Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (June 1, 1992) (see Executive Order 12,807 discussed above); Proclamation No. 5887, 53 Fed. Reg. 43,185 (Oct. 26, 1988) (excluding certain officials of the Nicaraguan government); Proclamation No. 5829, 53 Fed. Reg. 22,289 (June 14, 1988) (suspending "entry into the United States as immigrants and nonimmigrants of Panamanian nationals (and their immediate families), who formulate or implement the policies of Manuel Antonio Noriega and Manuel Solis Palma and who are designated by the Secretary of State"); Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986) (limiting the entry of Cuban immigrants but providing for broad categorical exceptions, *see supra* note 22).

In summary, Congress plainly did not intend to give the President *carte blanche* to prevent entire nationalities of aliens from entering the country. Section 1182(f)'s grant of authority should be construed so as not to create unnecessary tension with the rest of the INA, and thus construed, the Order's travel ban should be invalidated as an action that lies beyond the President's authority. *See Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).

CONCLUSION

This Court should affirm the decisions of the Fourth and Ninth Circuits.

Respectfully submitted.

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