

Nos. 17-2231(L), 17-2232, 17-2233, 17-2240 (Consolidated)

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself and its clients; HIAS, INC., on behalf of itself and its clients; JOHN DOES #1 AND 3; JANE DOE #2; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; ARAB AMERICAN ASSOCIATION OF NEW YORK, on behalf of itself and its clients

Plaintiffs-Appellees,

and ALLAN HAKKY; SAMANEH TAKALOO

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; ELAINE C. DUKE; in her official capacity as Acting Secretary of Homeland Security; REX TILLERSON, in his official capacity as Secretary of State; DANIEL R. COATS, in his official capacity as Director of National Intelligence

Defendants-Appellants.

[Caption continued on inside cover]

**BRIEF OF INTERNATIONAL LAW SCHOLARS AND
NONGOVERNMENTAL ORGANIZATIONS AS *AMICI CURIAE* IN
SUPPORT OF APPELLEES**

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Counsel for Proposed Amici Curiae

No. 17-2231(L)
On Cross-Appeal from the United States District Court for the District of
Maryland, Southern Division
(8:17-cv-00361-TDC)

No. 17-2232
(8:17-cv-02921-TDC)

IRANIAN ALLIANCES ACROSS BORDERS; JANE DOE #1, JANE DOE #2,
JANE DOE #3, JANE DOE #4, JANE DOE #5, JANE DOE #6,
Plaintiffs – Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States;
ELAINE C. DUKE, in her official capacity as Acting Secretary of Homeland
Security; KEVIN K. MCALEENAN, in his official capacity as Acting
Commissioner of U.S. Customs and Border Protection; JAMES MCCAMENT, in
his official capacity as Acting Director of U.S. Citizenship and Immigration
Services; REX TILLERSON; JEFFERSON B. SESSIONS III, in his official
capacity as Attorney General of the United States,
Defendants – Appellants.

No. 17-2233
(1:17-cv-02969-TDC)

EBLAL ZAKZOK; SUMAYA HAMADMAD; FAHED MUQBIL; JOHN DOE
#1; JOHN DOE #2; JOHN DOE #3,
Plaintiffs – Appellees

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 17-2231 Caption: International Refugee Assistance Project v. Donald Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

Amnesty International Limited

(name of party/amicus)

who is Amici Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Amanda R. Callais

Date: 11/17/2017

Counsel for: Amici Curiae

CERTIFICATE OF SERVICE

I certify that on 11/17/2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Victor Williams
AMERICA FIRST LAWYERS ASSOCIATION
5209 Baltimore Ave. Bethesda, MD 20816
Telephone: 301.951.9045

s/ Amanda R. Callais
(signature)

11/17/2017
(date)

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No. 17-2231 Caption: International Refugee Assistance Project v. Donald Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

Human Rights & Gender Justice Clinic, City University of New York School of Law
(name of party/amicus)

who is Amici Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? YES NO
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5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Amanda R. Callais

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U.S. Department of Justice
Civil Division, Appellate Section
950 Pennsylvania Avenue, NW
Washington, DC 20530-0000

s/ Amanda R. Callais
(signature)

11/17/2017
(date)

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No. 17-2231 Caption: International Refugee Assistance Project v. Donald Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

Human Rights Advocates
(name of party/amicus)

who is Amici Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Amanda R. Callais

Date: 11/17/2017

Counsel for: Amici Curiae

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No. 17-2231 Caption: International Refugee Assistance Project v. Donald Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

International Association of Democratic Lawyers
(name of party/amicus)

who is Amici Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
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3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
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5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Amanda R. Callais

Date: 11/17/2017

Counsel for: Amici Curiae

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Washington, DC 20530-0000

s/ Amanda R. Callais
(signature)

11/17/2017
(date)

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No. 17-2231 Caption: International Refugee Assistance Project v. Donald Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

International Justice Project
(name of party/amicus)

who is Amici Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
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No. 17-2231 Caption: International Refugee Assistance Project v. Donald Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

International Justice Resource Center
(name of party/amicus)

who is Amici Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
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No. 17-2231 Caption: International Refugee Assistance Project v. Donald Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

Legal Aid Society (New York)
(name of party/amicus)

who is Amici Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
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Signature: s/ Amanda R. Callais

Date: 11/17/2017

Counsel for: Amici Curiae

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Telephone: 301.951.9045

s/ Amanda R. Callais
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No. 17-2231 Caption: International Refugee Assistance Project v. Donald Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

MADRE
(name of party/amicus)

who is Amici Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

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Signature: s/ Amanda R. Callais

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No. 17-2231 Caption: International Refugee Assistance Project v. Donald Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Law Center on Homelessness & Poverty
(name of party/amicus)

who is Amici Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

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If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Amanda R. Callais

Date: 11/17/2017

Counsel for: Amici Curiae

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Telephone: 301.951.9045

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Pursuant to FRAP 26.1 and Local Rule 26.1,

National Lawyers Guild
(name of party/amicus)

who is Amici Curiae, makes the following disclosure:
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1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

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Signature: s/ Amanda R. Callais

Date: 11/17/2017

Counsel for: Amici Curiae

CERTIFICATE OF SERVICE

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U.S. Department of Justice
Civil Division, Appellate Section
950 Pennsylvania Avenue, NW
Washington, DC 20530-0000

s/ Amanda R. Callais
(signature)

11/17/2017
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 17-2231 Caption: International Refugee Assistance Project v. Donald Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

Secular Communities of Arizona

(name of party/amicus)

who is Amici Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Amanda R. Callais

Date: 11/17/2017

Counsel for: Amici Curiae

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11/17/2017
(date)

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No. 17-2231 Caption: International Refugee Assistance Project v. Donald Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

Truah: The Rabbinic Call for Human Rights
(name of party/amicus)

who is Amici Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
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If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Amanda R. Callais

Date: 11/17/2017

Counsel for: Amici Curiae

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RULE 29 STATEMENT OF INTEREST OF *AMICI CURIAE*¹

The *Amici* are 85 international law scholars and several nongovernmental organizations. *See* Appendix A (listing all individual and organizational *Amici*). The individual *amici* whose views are presented here are international law scholars specializing in public international law and international human rights law. They include members of the International Human Rights Committee of the International Law Association, American Branch,² as well as university professors and practicing lawyers with expertise in these subjects. They have devoted extensive efforts to the study and practice of international law. They research, teach, speak, and publish widely on international law issues, and they routinely advise and practice in matters addressing such issues before American courts. The *Amici* also include nongovernmental organizations with expertise in civil rights law, immigration law, or international human rights law. *Amici* submit this brief to vindicate the public interest in ensuring a proper understanding and application of the international human rights law relevant to this case. As scholars and practitioners in the area, the *Amici* have a strong interest in ensuring that the Court reaches a decision that conforms to the existing body of international law. The

¹No counsel for a party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

Amici support the Plaintiffs-Appellees in this matter and urge affirmance of the decision below.

I. INTRODUCTION

The purpose of this brief is to bring to the Court's attention U.S. treaty provisions and customary international law principles that bear on the legality of the Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats of September 24, 2017 ("Proclamation"), apparently superseding Executive Order 13780 of March 6, 2017 ("EO"), which replaces the now-rescinded Executive Order dated January 27, 2017.

International law, which includes treaties ratified by the United States as well as customary international law, is part of U.S. law and must be faithfully executed by the President and enforced by U.S. courts except when clearly inconsistent with the U.S. Constitution or subsequent acts of Congress. The United States is a party to and bound by several international human rights treaties relevant to the subject matter of the Proclamation. In assessing the legality of the Proclamation, the Court should be cognizant of those treaty obligations, and of customary international law, which should influence constructions of the U.S. Constitution and statutes that prohibit discrimination based on religion or national origin.

In addition, the Immigration and Nationality Act and other statutes must be read in harmony with these international legal obligations pursuant to the Supremacy Clause of the Constitution and long established principles of statutory construction requiring acts of Congress to be interpreted in a manner consistent with international law, whenever such a construction is reasonably possible. In this case, the international law obligations described below reinforce interpretations of those statutes forbidding discrimination of the type threatened by Sections 2 and 11 of the Proclamation.

II. ARGUMENT

A. International Law Is Relevant to Assessing the Legality of the Executive Order

International law is relevant to this case because the U.S. Constitution makes treaties part of U.S. law. Customary international law is also part of U.S. law and is enforceable by U.S. courts. Under the Supremacy Clause of the Constitution, “treaties made . . . under the authority of the United States, shall be the supreme law of the land; and the judges of every state shall be bound thereby.”³ Although the Constitution does not require legislation prior to treaties taking legal effect, the Supreme Court distinguishes between self-executing and non-self-executing treaties.⁴ The Senate or the President has declared that the relevant human rights

³ U.S. Const. art. VI, cl. 2.

⁴ *See* Restatement (Third) of Foreign Relations Law § 111(3)–(4) (Am. Law Inst. 1987).

treaties to which the United States is a party are non-self-executing.⁵ Nevertheless, by ratifying those treaties, the United States has bound itself to provide judicial or other remedies for violations of treaty obligations.⁶ Thus, even if the treaty provisions themselves are not directly enforceable in U.S. courts, the rights they grant should be protected by the courts through their interpretation of constitutional provisions and statutes addressing the same or similar subject matter.

This is consistent with the positions taken by both the Executive Branch and Congress in those cases in which Congress has not passed implementing legislation.⁷ When submitting human rights treaties to the Senate for its advice and consent, both Presidents George H.W. Bush and William Clinton assured the Senate that the United States could and would fulfill its treaty commitments by applying existing federal constitutional and statutory law.⁸ Courts generally

⁵ *See, e.g.*, 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992) (International Covenant on Civil and Political Rights).

⁶ *See, e.g.*, International Covenant on Civil and Political Rights art. 2(2), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter “CCPR”].

⁷ *See, e.g.*, Rep. of the Comm. Against Torture, ¶¶ 58–60, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000) (“Where domestic law already makes adequate provision for the requirements of the treaty and is sufficient to enable the United States to meet its international obligations, the United States does not generally believe it necessary to adopt implementing legislation.”).

⁸ For example, during Senate hearings on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), June 26, 1987, 1465 U.N.T.S. 113, the State Department Legal Advisor told the Senate: “Any Public official in the United States, at any level of government, who inflicts torture . . . would be subject to an effective system of control and punishment in the U.S. legal system.” Hearing Before the S. Comm. on Foreign Relations, 101st

construe federal constitutional and statutory law to be consistent with human rights treaties in part because the Senate has relied on such assurances as a basis for its consent to ratification.⁹ The United States acknowledged this principle in its comments to the U.N. Committee Against Torture: “Even where a treaty is ‘non-self-executing’, courts may nonetheless take notice of the obligations of the United States thereunder in an appropriate case and may refer to the principles and objectives thereof, as well as to the stated policy reasons for ratification.”¹⁰ “Taking notice” of treaty obligations comports with a core principle of statutory construction announced by the Supreme Court in *Murray v. The Schooner Charming Betsy*: “[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”¹¹ That doctrine has been consistently and recently reaffirmed by the Supreme Court.¹²

Cong. 8 (1990). Similarly, with respect to G.A. Res. 2106 (XX), annex, International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) (Dec. 21, 1965), the Clinton Administration told the Senate: “As was the case with the prior treaties, existing U.S. law provides extensive protections and remedies sufficient to satisfy the requirements of the present Convention.” S. Comm. on Foreign Relations, Report on International Convention on the Elimination of All Forms of Racial Discrimination, S. Exec. Rep. No. 103-29, at 25-26 (1994).

⁹ See, e.g., *Immigration & Naturalization Serv. v. Stevic*, 467 U.S. 407, 426 (1984).

¹⁰ Rep. of the Comm. Against Torture, *supra* note 7, ¶ 57 (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993)).

¹¹ 6 U.S. (2 Cranch) 64, 118 (1804); accord *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801).

¹² See, e.g., *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).

Moreover, in *Filartiga v. Pena-Irala*, the U.S. Court of Appeals for the Second Circuit observed that a treaty that is not self-executing may provide evidence of customary international law.¹³ Customary international law must be enforced in U.S. courts even in the absence of implementing legislation, regardless of whether customary rules appear in a treaty.¹⁴ In *The Paquete Habana*, the Supreme Court held that customary international law “is part of our law” and directly enforceable in courts when no conflicting treaty, legislative act, or judicial decision controls.¹⁵ As discussed below, several human rights treaty rules applicable in this case are also customary international law.

The President is also obligated to respect international law pursuant to his constitutional duty faithfully to execute the law.¹⁶ Because Article VI of the Constitution makes treaties the supreme law of the land, the President is constitutionally required to comply with U.S. treaty obligations as well as with customary international law. This was the intent of the Framers.¹⁷ Courts

¹³ 630 F.2d 876, 882 n.9 (2d Cir. 1980).

¹⁴ Restatement (Third) of the Foreign Relations Law § 111(3) (Am. Law Inst. 1987).

¹⁵ 175 U.S. 677, 700 (1900); *see also Filartiga*, 603 F.2d at 886 (“Appellees . . . advance the proposition that the law of nations forms a part of the laws of the United States only to the extent that Congress has acted to define it. This extravagant claim is amply refuted by the numerous decisions applying rules of international law uncodified by any act of Congress.”).

¹⁶ U.S. Const. art. II, § 3.

¹⁷ Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), *reprinted in 15 The Papers of Alexander Hamilton* 33, 33–43 (Harold C. Syrett et al. eds. 1969).

therefore have a duty to restrain federal executive action that conflicts with a duly ratified treaty. As the Supreme Court wrote in ordering the President to restore a French merchant ship to its owner pursuant to a treaty obligation: “The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted.”¹⁸

Even if the President were not directly bound by international law, however, he is still obligated to comply with the Constitution itself and all applicable legislation enacted by Congress within its authority, which (as noted) must be interpreted in a manner consistent with international law whenever possible.

The following sections identify the treaties and customary international law relevant to the legality of the Proclamation.

B. International Law Regarding Discrimination on the Basis of Religion and National Origin

1. The International Covenant on Civil and Political Rights

Discrimination based on religion or national origin is prohibited by the International Covenant on Civil and Political Rights (“CCPR”). The United States ratified the CCPR in 1992.¹⁹

Article 2 of the CCPR states in relevant part:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without

¹⁸ *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801).

¹⁹ 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992).

distinction of any kind, such as race, . . . religion, . . . national or social origin, . . . or other status.

3. Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

The United Nations Human Rights Committee (“HRC”) is charged by the CCPR to monitor implementation by state parties and to issue guidance on its proper interpretation. The HRC interprets article 2 to prohibit “any distinction, exclusion, restriction or preference” based on a prohibited ground, and which has “the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms” protected by the treaty.²⁰ To justify a derogation from the nondiscrimination (or any other human rights) duty, a measure must pursue a legitimate aim and be

²⁰ Human Rights Comm., General Comment No. 18, ¶ 6, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994).

proportionate to that aim.²¹ A “proportionate” measure is one effective at achieving the aim and narrowly tailored (or “necessary”) to it.²²

The substantive rights guaranteed by the CCPR, which must be protected without discrimination based on religion or national origin under article 2, include the protection of the family. Article 23 provides in relevant part: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”²³ The HRC has interpreted this right to include living together, which in turn obligates the state to adopt appropriate measures “to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.”²⁴

Restrictions on travel and entry caused by the Proclamation that impose disparate and unreasonable burdens on the exercise of this right violate CCPR article 2. The HRC has explained that, although the CCPR does not generally

recognize the right of aliens to enter or reside in the territory of a State party . . . , in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.²⁵

²¹ Comm. on the Elimination of Racial Discrimination, General Recommendation 30: Discrimination against non-citizens, U.N. Doc. CERD/C/64/Misc.11/rev.3, at 2 (2004).

²² See Aaron Xavier Fellmeth, *Paradigms of International Human Rights Law* 119–21 (2016).

²³ CCPR, *supra* note 6, art. 23(1).

²⁴ Human Rights Comm., *supra* note 20, General Comment No. 19, ¶ 5.

²⁵ *Id.* at 9, General Comment No. 15, ¶ 5.

Thus, the right of entry is not beyond the scope of the CCPR. On the contrary, the CCPR's nondiscrimination principles and protections for family life should be considered by courts in interpreting government measures affecting family unification. This treaty-based protection for family life is consistent with Supreme Court jurisprudence respecting the role of due process of law in governmental decisions affecting family unity.²⁶

More generally, article 26 of the CCPR prohibits discrimination in any government measure, regardless of whether the measure violates a Covenant right:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

As interpreted by the HRC and consistent with its wording, this provision “prohibits discrimination in law or in fact in *any field* regulated” by the government.²⁷ Notably, unlike CCPR article 2, the equal protection provisions of CCPR article 26 lack article 2's limitation to “all individuals within [the state party's] territory and subject to its jurisdiction.”

²⁶ See *Landon v. Plasencia*, 459 U.S. 21, 34, 37 (1982); *Kerry v. Din*, ___ U.S. ___, 135 S. Ct. 2128, 2140–41 (2015) (Kennedy, J., concurring).

²⁷ Human Rights Comm., *supra* note 20, General Comment No. 18, ¶ 12 (emphasis added).

The nondiscrimination provisions of the CCPR are also customary international law binding on the United States, forming part of U.S. law unless contrary to the Constitution or a statute. The Universal Declaration of Human Rights, which the United States approved in 1948, mandates nondiscrimination in religion and national origin, equal protection of the law, and protection from arbitrary interference in family life.²⁸ The American Declaration of the Rights and Duties of Man, which the United States approved when it signed and ratified the Charter of the Organization of American States the same year, has similar provisions in articles 6 and 17.²⁹ These nondiscrimination principles and the right to family unity have become sufficiently widespread and accepted by the international community that they have entered into customary international law in the present day.³⁰

2. The International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) also bars discrimination based on national origin. The United States has been a party to the CERD since 1994.³¹ Under article 2,

²⁸ G.A. Res. 217 A (III), Universal Declaration of Human Rights arts. 2, 7, 12 (Dec. 10, 1948).

²⁹ O.A.S. Res. XXX (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/I.4 rev. 13, at 13 (2010).

³⁰ *See* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 Ga. J. Int’l & Comp. L. 287, 329 (1995/96).

³¹ *See* 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994).

paragraph (1)(a), each state party commits to refraining from and prohibiting all forms of racial discrimination, and each further undertakes “to engage in no act or practice of racial discrimination . . . and to ensure that all public authorities and public institutions, national or local, shall act in conformity with this obligation.” CERD defines “racial discrimination” to include distinctions and restrictions based on national origin.³² With regard to immigration practices, CERD makes clear that states are free to adopt only such “nationality, citizenship or naturalization” policies that “do not discriminate against any particular nationality.”³³ Like the nondiscrimination provisions of CCPR article 26, CERD article 2 does not limit its application to citizens or resident noncitizens. While CERD does not speak specifically to restrictions on entry of nonresident aliens, the general language of CERD expresses a clear intention to eliminate discrimination based on race or national origin from all areas of government activity: “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms . . . without distinction as to race, colour, or national or ethnic origin”³⁴

Article 4 of CERD further provides that state parties “[s]hall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination,” which (as noted) includes discrimination based on national origin.

³² CERD, *supra* note 8, art. 2(1)(a).

³³ *Id.* art. 2(1)(c).

³⁴ *Id.* art. 5.

The Committee on the Elimination of Racial Discrimination, the body of independent experts appointed to monitor CERD's implementation, interprets article 4 to require states to combat speech stigmatizing or stereotyping non-citizens generally, immigrants, refugees, and asylum seekers,³⁵ with statements by high-ranking officials causing "particular concern."³⁶ In *TBB-Turkish Union in Berlin/Brandenburg v. Germany*, for example, the Committee specifically determined that Germany violated the Convention when it failed to discipline or punish a minor government official who had *inter alia* drawn attention to low employment rates of Turkish and Arab populations in Germany, suggested their unwillingness to integrate into German society, and proposed that their immigration should be discouraged.³⁷ These statements, the Committee determined, implied "generalized negative characteristics of the Turkish population" and incited racial discrimination.³⁸

The legality of the Proclamation in this case, and the proper interpretation of the statutes and constitutional provisions cited by the parties, should be assessed with those proscriptions in mind. Those international law principles require courts to reject any attempt by the President to define classes based on national origin or

³⁵ Comm. on the Elimination of Racial Discrimination, General Recommendation No. 35: Combating Racist Hate Speech, ¶ 6, U.N. Doc. CERD/C/GC/35 (2013).

³⁶ *Id.* ¶ 22.

³⁷ Comm. on the Elimination of Racial Discrimination, Commc'n No. 48/2010, U.N. Doc. CERD/C/82/D/48/2010 (2013).

³⁸ *Id.* ¶ 12.6.

religion, and then to impose on those classes disparate treatment, except to the extent necessary to achieve a legitimate government purpose.

C. Relevant Provisions of the Proclamation

The Proclamation suspends immigration from, and the grant of nonimmigrant visas to, seven countries and to certain government officials of an eighth country, Venezuela. It differs from the second EO primarily by adding Chad, North Korea, and the Venezuelan officials to the ban, removing Sudan from the list of banned countries, and limiting the ban in certain cases to specific classes of visas and not to others. Refugees from some countries, such as Syria, are categorically denied entry visas.

The Proclamation thus makes an explicit distinction based on national origin that, unless necessary and narrowly tailored to achieve a legitimate government aim, would violate U.S. obligations under international law. In effect, the Proclamation also makes a distinction based on religion, as Appellees have argued. Notably, every one of the designated countries, except for North Korea, has a population that is majority Muslim.³⁹ Unlike the previous two EOs, which did not suspend immigration from any state without an overwhelmingly Muslim majority, the Proclamation adds one non-Muslim country and a few (presumably non-Muslim) government officials. The *amici* do not challenge the suspension of visas

³⁹ See Central Intelligence Agency, The World Factbook, <https://www.cia.gov/library/publications/resources/the-world-factbook/index.html> (last visited Apr. 6, 2017).

to certain Venezuelan government officials, because that suspension is not based directly or indirectly on religion, and it appears sufficiently narrowly tailored not to constitute discrimination based on national origin.

D. Legitimate Aim and Proportionality

To comply with U.S. obligations under international law and correlative domestic constitutional and statutory requirements, the Proclamation must pursue a legitimate aim and be proportionate to that aim.

The *amici* concede that the stated aim of the Proclamation—protecting the United States from the entry of terrorists and other public safety threats—is a legitimate one. However, all evidence strongly indicates that the stated aim does not reflect the real aim of the Proclamation. As extensively briefed by the Appellees and other *amici* in this case and its predecessors, the Trump Campaign and, later, the Trump Administration have made clear their intent to issue a blanket ban on the entry of Muslims into the United States. Discriminatory intent based on religion violates U.S. obligations under international law regardless of whether the intent is accompanied by discriminatory effect (which, in this case, it is).

Even if the Proclamation pursues a legitimate aim, it does not use proportionate means. To be proportionate, a measure must be “necessary in a

democratic society,”⁴⁰ meaning that it satisfies three criteria. The measure must: (1) be appropriate to and effective at achieving the aim, (2) be narrowly tailored to achieve the aim so that human rights are infringed no more than strictly necessary, and (3) not unduly burden the exercise of the relevant human rights in relation to the benefit achieved.⁴¹

The Proclamation does not satisfy either of the first two conditions of proportionality. The Proclamation is not appropriate and effective at protecting national security because it is both over inclusive and under inclusive. It is over inclusive because, like the means of the EO, the means in the Proclamation to protect the United States do not correspond to any reasoned basis. As discussed in the briefs of Appellees and other *amici*, none of the countries designated in the Proclamation has a history of exporting terrorists to the United States. Moreover, the Appellants have offered no evidence whatsoever that the purported rationale for the choice of countries, which rests primarily on information sharing and the presence of terrorist groups in the country, actually corresponds to the risk of terrorism by immigrants or visa applicants. The means are under inclusive because none of the countries with the most active history of terrorist immigration to the

⁴⁰ U.N. Human Rights Committee, General Comment No. 27, para. 11, U.N. Doc. No. CCPR/C/21/Rev.1/Add.9 (1999).

⁴¹ Fellmeth, *supra* note 22, at 119-21.

United States, such as Saudi Arabia, the United Arab Emirates, Egypt, and Pakistan,⁴² are included in the Proclamation.

The Proclamation is also not narrowly tailored for its stated aim. It infringes the human right against discrimination of a large class of persons based on two prohibited grounds, national origin and religion, and further threatens the human right to family life of numerous visa applicants, while offering little or no compensating benefit to national security. Enhanced vetting procedures could under some circumstances be a proportionate means for protecting national security; a blanket freeze or ban on immigration based on national origin or religion is flatly disproportionate.

As for North Korea, considering that before the Proclamation, the United States issued only a few dozen entry visas to North Koreans every year,⁴³ and the Appellants have cited no evidence that a North Korean has ever been convicted of terrorism in the United States, the inclusion of North Korea in the proclamation is quite simply arbitrary from the perspective of national origin discrimination.

⁴² See Alex Nowrasteh, *Guide to Trump's Executive Order to Limit Migration for "National Security" Reasons*, Cato Institute: Cato at Liberty, Jan. 26, 2017, at <https://www.cato.org/blog/guide-trumps-executive-order-limit-migration-national-security-reasons>.

⁴³ See U.S. State Dep't, Report of the Visa Office 2016, Table XIV: Immigrant Visas Issued at Foreign Service Posts, Fiscal Years 2007-2016, at <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableXIV.pdf>.

III. CONCLUSION

For the foregoing reasons, *amici* request that the Court consider U.S. obligations under international law, which forms part of U.S. law, in evaluating the legality of the Proclamation.

RESPECTFULLY SUBMITTED this 17th day of November, 2017.

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Human Rights & Gender Justice Clinic, City University of New York School of Law	National Law Center on Homelessness & Poverty
International Association of Democratic Lawyers	National Lawyers Guild
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APPENDIX B
STATUTORY ADDENDUM

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I. EXECUTIVE ORDER 13780: PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES

A. Section 2. Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period.

- (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat. The Secretary of Homeland Security may conclude that certain information is needed from particular countries even if it is not needed from every country.
- (b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the worldwide review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed from each country for adjudications and a list of countries that do not provide adequate information, within 20 days of the effective date of this order. The Secretary of Homeland Security shall provide a copy of the report to the Secretary of State, the Attorney General, and the Director of National Intelligence.
- (c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

- (d) Upon submission of the report described in subsection (b) of this section regarding the information needed from each country for adjudications, the Secretary of State shall request that all foreign governments that do not supply such information regarding their nationals begin providing it within 50 days of notification.
- (e) After the period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, shall submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means. The Secretary of State, the Attorney General, or the Secretary of Homeland Security may also submit to the President the names of additional countries for which any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States.
- (f) At any point after the submission of the list described in subsection (e) of this section, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, may submit to the President the names of any additional countries recommended for similar treatment, as well as the names of any countries that they recommend should be removed from the scope of a proclamation described in subsection (e) of this section.
- (g) The Secretary of State and the Secretary of Homeland Security shall submit to the President a joint report on the progress in implementing this order within 60 days of the effective date of this order, a second report within 90 days of the effective date of this order, a third report within 120 days of the effective date of this order, and a fourth report within 150 days of the effective date of this order.

B. Section 11. Transparency and Data Collection.

- (a) To be more transparent with the American people and to implement more effectively policies and practices that serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General,

shall, consistent with applicable law and national security, collect and make publicly available the following information:

- (i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation with or provision of material support to a terrorism-related organization, or any other national-security-related reasons;
 - (ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and who have engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States;
 - (iii) information regarding the number and types of acts of gender-based violence against women, including so-called “honor killings,” in the United States by foreign nationals; and
 - (iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security or the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.
- (b) The Secretary of Homeland Security shall release the initial report under subsection (a) of this section within 180 days of the effective date of this order and shall include information for the period from September 11, 2001, until the date of the initial report. Subsequent reports shall be issued every 180 days thereafter and reflect the period since the previous report.

II. UNITED STATES CONSTITUTION

A. Article II § 3. Messages; Convene and Adjourn Congress; Receive Ambassadors; Execute Laws; Commission Officers.

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both

Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

B. Article VI. Cl. 2. Supreme Law of Land.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

III. RELEVANT TREATIES

A. International Convention on the Elimination of All Forms of Racial Discrimination

1. Article 2

- (1) States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
 - (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
 - (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
 - (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

2. Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.
 - (iii) The right to housing;

B. International Covenant on Civil and Political Rights

1. Article 2

- (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- (2) Where not already provided for by existing legislative or other measures,

each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

(3) Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

2. Article 23

- (1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

3. Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

IV. RELEVANT INTERNATIONAL DECLARATIONS

A. Universal Declaration of Human Rights

1. Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

2. Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

3. Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

B. American Declaration of the Rights and Duties of Man

1. Article 6

Every person has the right to establish a family, the basic element of society, and to receive protection therefore.

2. Article 17

Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.

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

No. 17-2231 **Caption:** International Refugee Assistance Project v. Trump

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(s) s/ Amanda R. Callais

Party Name Amici Curiae International Law Scholars and Nongovernmental Organizations

Dated: 11/17/2017

CERTIFICATE OF SERVICE

I certify that on November 17, 2017 the forgoing document was served on all parties or their counsel of record through the CM/ECF system if they are registers users or, if they are not, by serving a true and correct copy by First Class U.S. Mail at the address listed below:

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I certify under penalty of perjury that the foregoing is true and correct.

DATED this 17th day of November, 2017.

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