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

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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INTERNATIONAL REFUGEE ASSISTANCE PROJECT, et al.

Plaintiffs-Appellees/Cross-Appellants,

v.

DONALD J. TRUMP, et al.

Defendants-Appellants.

_____

On Appeal from an Order of the United States
District Court for the District of Maryland

_____

United States District Judge Theodore D. Chuang
Nos. 8:17-cv-00361-TDC, 8:17-cv-02921-TDC, 1:17-cv-02969-TDC

BRIEF OF *AMICUS CURIAE* T.A., A U.S. CITIZEN OF YEMENI DESCENT, IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

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WILLKIE FARR & GALLAGHER LLP
Richard D. Bernstein
rbernstein@willkie.com
1875 K Street, N.W.
Washington, D.C. 20006-1238
Telephone: (202) 303-1000
Facsimile: (202) 303-2000

Counsel for Amicus Curiae T.A.

November 9, 2017

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, in his official capacity as Secretary of State; 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; FARED MUQBIL; JOHN DOE #1; JOHN DOE #2; JOHN DOE #3,
Plaintiffs-Appellees,

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T.A.[1] is a United States citizen who was raised in Yemen. T.A. is a Muslim. T.A.'s father and many members of T.A.'s extended family hold Yemeni passports, although they reside in countries not designated by Presidential Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats. 82 FR 45161 (Sept. 24, 2017) ("EO-3"). EO-3 would nonetheless bar them from entering the United States.

SUMMARY OF ARGUMENT

This brief focuses on two issues. Part I addresses the first issue. It demonstrates an additional, narrow basis—drawn from the statutory text—for enjoining EO-3's travel bans. Unlike EO-2's bans, EO-3's bans have neither a time limit nor a link to a finite event. This unlimited duration of EO-3's bans contradicts the words "suspend," "period," and "necessary" in 8 U.S.C. § 1182(f), would render other provisions of the Immigration and Naturalization Act ("INA") practical nullities, and contravenes fundamental norms of separation of powers.

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[1] This amicus brief uses initials, rather than T.A.'s full name, to reduce the risk of potential reprisals to T.A. or his family members. Courts have permitted T.A. and others to use pseudonyms and initials in similar circumstances. *See, e.g.*, *Doe v. Pub. Citizen*, 749 F.3d 246, 273 (4th Cir. 2014) (pseudonym appropriate, even for a party, where "identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent nonparties"). No counsel for any party authored the brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to its preparation or submission. Counsel for Appellants and Appellees have consented to the filing of this *amicus* brief.

The President must propose bans of unlimited duration to Congress, not impose them by executive fiat.

Part II addresses the cross-appeal. Part II demonstrates that, in accord with the texts of the pertinent statutes and the Establishment Clause, the preliminary injunction should enjoin all applications of EO-3's illegal travel bans, including applications to persons who lack a prior U.S. relationship. There are no longer any countering equities to be balanced because the Trump administration dramatically reduced the risks of inadequate information *before* EO-3 was promulgated. The Administration had implemented "extreme vetting," to quote President Trump, that *reduced* visas from the designated countries *55% while all EO-2 bans were completely enjoined*. Tellingly, the Government cannot and does *not* claim that, during the 100 days when all EO-2 travel bans were enjoined, this Administration's "extreme vetting" admitted *with inadequate information* even one person with no prior U.S. relationship from the designated countries.

BACKGROUND

A. EO-3's Bans Have an Unlimited Duration

Unlike the travel bans in EO-2, the bans in EO-3 are of unlimited duration. Not only do EO-3's bans have no end date, no time period is defined by reference to a finite event (*e.g.*, during a declared war).

EO-3 does *not* even provide that, if future reports show that the often nebulous "required" criteria in Section 1(c)(i)-(iii) have been satisfied, any travel ban will end. Indeed, as Section 1(h) admits, eight nations are included in EO-3's bans even though only seven were determined not to satisfy adequately the Section 1(c) criteria. In addition, Section 9(c) renders *everything* in EO-3 *unenforceable* against the Government. Section 9(c) provides that EO-3 "does not . . . create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies or entities, its officers, employees, or agents, or any other person."

B. T.A.

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

T.A.'s father, and some of his aunts, uncles, and cousins—all of whom hold Yemeni passports—fled as refugees from the ongoing Yemeni Civil War and now live in Jordan or other countries not designated by EO-3. Many of T.A.'s extended family members want to travel to the United States to visit T.A. and their extended family. One cousin has a pending visa application. Two others visited the United States during the period when travel bans EO-2 were enjoined and want to return.

ARGUMENT

I. EO-3's Unlimited Bans Violate the INA and Separation of Powers

A. The INA Precludes an Executive Travel Ban of Unlimited Duration Based on a Reason Already Addressed by the INA

EO-3's travel bans indisputably have an unlimited duration. *Supra*, at 2-3. As demonstrated below, that unlimited duration both is precluded by the words of 8 U.S.C. § 1182(f) and improperly renders at least three other provisions of subsection 1182 superfluous.

1. Subsection 1182(f)'s Use of "Suspend," "Period," and "Necessary" Precludes EO-3's Travel Bans of Unlimited Duration

Under certain conditions, 8 U.S.C. § 1182(f) provides that the President may "by *proclamation*, and for such *period* as he shall deem *necessary*, *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." (Emphasis added). The italicized words preclude an entry ban of unlimited duration.

To start, "suspend" means "[t]o interrupt; postpone; defer," as in "[t]o temporarily keep (a person) . . . from exercising a right or privilege." *Black's Law Dictionary* 1675 (10th ed. 2014). "The word 'suspend' connotes a *temporary* deferral." *Hoffman ex rel. N.L.R.B. v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268 (9th Cir. 1976) (emphasis added) (citing *Webster's Third New*

International Dictionary (1966) and *Bouvier's Law Dictionary*, 3d Rev. (1914)); *see also Carrington Gardens Assocs., I v. Cisneros*, 1 F. App'x 239, 242 (4th Cir. 2001) (suspend means "to interrupt, to cause to cease *for a time*; to postpone; to stay, delay, or hinder, to discontinue *temporarily*, but with an expectation or purpose of resumption") (emphasis added) (quoting *Black's Law Dictionary* 1446 (6th ed. 1990)). EO-3's bans of unlimited duration are not temporary, nor do they merely interrupt, postpone, or defer entry.

The natural meaning of "suspend" is supported by subsection 1182(f)'s requirement that the "proclamation" set a "period" for suspension. The singular "period" means a "point, space, or division of time." *Black's Law Dictionary* 893 (2d ed. 1910). As the United States told the Supreme Court in 1930, "the word 'period' connotes a stated interval of time commonly thought in terms of years, months, and days." *United States v. Updike*, 281 U.S. 489, 495 (1930).[2]

This time-limiting meaning of the singular "period" is reinforced by subsection 1182(f)'s requirement that the period be "necessary," rather than "advisable" or the like. Nothing in EO-3 explains how its goals could not have been achieved if its bans were limited to a single, specified interval of time, or even to the time when the criteria in Section 1(c) are not satisfied.

[2] *Updike* itself did not decide the meaning of "period."

EO-3 is not saved by subsection 1182(f)'s authority to "impose on the entry of aliens any restrictions [the President] may deem to be appropriate." Under subsection 1182(f), like suspension of entry, any restrictions on entry must be limited to a singular "period" that is "necessary." Restrictions on entry for an unlimited duration are not limited to a necessary "period."

Moreover, a "restriction" means a "confinement within bounds or limits; a limitation or qualification." *Black's Law Dictionary* 1508 (10th ed. 2014). A ban on entry does not merely set limitations or qualifications on entry. It bans entry entirely. An example of a "limitation or qualification" on entry would be conditioning entry on the potential entrant's permitting his or her mobile phone to be searched. When the INA authorizes barring entry for an unlimited duration, the INA refers not to a "restriction," but rather to rendering an alien "ineligible," 8 U.S.C. § 1182(a), or "inadmissible," *e.g.*, *id.* §§ 1182(a)(1)(A), 1182(2)(A), 1182(2)(B), or to the alien's "exclusion," *e.g.*, § 1182(a)(4)(B)(ii). Subsection 1182(f) uses none of those words.

Finally, most of EO-3's travel bans are also invalid because they violate the timing limit in subection 1182(f) in an additional way. Subsection 1182(f) authorizes the President to use one set of concerns as the basis for a singular "proclamation" suspending travel for a "class of aliens" for a singular "period." A President thus cannot do an end-around that evades subsection

1182(f)'s duration limit by issuing serial bans. Subsection 1182(f)'s use of the singular is very different from other provisions of section 1182 that use plural nouns to authorize multiple actions by the executive branch. *See, e.g.*, 8 U.S.C. §§ 1182(I)(6) (impose "special requirements"), 1182(n)(2)(c)(i)(I) ("impose such other administrative remedies"), and 1182(f)(3)(c)(ii) (same). *Cf. United States v. Hayes*, 555 U.S. 415, 421-22 (2009) (had Congress meant a provision in a comprehensive code to cover multiple items, "it likely would have used the plural …, as it has done in other offense-defining provisions"). EO-3 is therefore invalid at least for nationals of five of EO-3's designated countries—Yemen, Somalia, Iran, Libra, and Syria. This is because nationals from those countries already had been banned by the EO-2 "proclamation" for the "period" from June 26, 2017 to September 24, 2017.

2. If Subsection 1182(f) Authorized EO-3, Then Other Subsections Would Be Rendered Practical Nullities

"Statutory construction . . . is a holistic endeavor." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest*, 484 U.S. 365, 371 (1988) (Scalia, J., for a unanimous Court). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme-because . . . only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Id.* No provision of a statutory scheme should be given an interpretation that "renders [another provision] a practical nullity." *Id.* at 375.

Specifically, when a "comprehensive [statutory] scheme" includes "a general authorization and a more limited, specific authorization," the "terms of the specific authorization must be complied with" to avoid "the superfluity of a specific provision that is swallowed by the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (Scalia, J., for a unanimous court) (citation omitted).

The Government contends that subsection 1182(f) overrides all the specific limits on executive action contained in other provisions of the comprehensive section 1182. This improperly would turn more specific statutory provisions into mere items in a suggestion box that a President could disregard for as long as the President wants.

a. Subsection 1182(a)(3)(B)

This subsection addresses when to ban an alien for an unlimited duration based on whether an alien "is likely to engage after entry in any terrorist activity." 8 U.S.C. § 1182(a)(3)(B)(i)(II). Under subsection 1182(a)(3)(B), a ban based on an association with others who have committed terrorism requires far more than birth in a nation that has some terrorists. Only two associations qualify. First is being "a member of a terrorist organization . . . , unless the alien can demonstrate . . . that *the alien* did not know, and should not reasonably have known, that the organization was a terrorist organization."

Id. § 1182(a)(3)(B)(i)(VI) (emphasis added). The second is being "the spouse or child of an alien who is inadmissible under [§ 1182(a)(3)(B)]," unless activity causing the inadmissibility occurred more than five years ago, the "spouse or child . . . did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under [§ 1182(a)(3)(B)]," *or* "the spouse or child . . . has renounced the activity causing the alien to be found inadmissible." *Id.* §§ 1182(a)(3)(B)(i)(IX), 1182(a)(3)(B)(ii).

EO-3 nullifies three specific limits contained in subsection 1182(a)(3)(B) on a ban of unlimited duration based on association with terrorists. First, birth in a designated country is not a basis to deny entry as such birth neither makes one a member of a terrorist organization nor a spouse or child of an inadmissible alien. Second, EO-3 has no exception based on the potential entrant's personal knowledge or renunciation. Third, as the legislative history confirms, because subsection 1182(a)(3)(B) refers to "the alien" and "an alien," it requires that a travel ban based on potential association with terrorism "must be applied on a case by case basis." H.R. Rep. No. 100-182, at 30 (1988); *c.f.*, *e.g.*, *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 902 (1991) ("[t]he definite article 'the' obviously narrows . . .").

b. Subsection 1182(a)(3)(C)

This subsection provides a narrow authority to exclude "an alien" for an unlimited duration based on "potentially serious adverse foreign policy consequences." EO-3 nullifies three of subsection 1182(a)(3)(C)'s specific limits on foreign policy exclusion. First, subsection 1182(a)(3)(C)(iii) prohibits an exclusion based on "the alien's . . . associations" when such "associations would be lawful within the United States, unless the Secretary of State personally determines that *the* alien's admission would compromise a compelling United States foreign policy interest." (Emphasis added). Being born in one of the designated countries is not an "association that would be unlawful within the United States." Nor does EO-3 even assert that admitting any particular alien "would compromise a compelling United States foreign policy interest." Second, EO-3 contains no determination by the Secretary of State. EO-3 states that the President made the determination, EO-3 § 1(h)(ii) ("I have determined"), § 1(i) (same), adopting in part "recommend[ations]" from the "Secretary of Homeland Security." *Id.* § 1(h). The role of the Secretary of State was no more than "consultation." *Id.* Preamble, § 1(h)(i). Third, § 1182(a)(3)(C)(iv) requires notice from the Secretary of State to four congressional committee chairmen "of the identity of *the* alien and the reasons for the determination." (Emphasis added).

EO-3 contains no notice of "the identity of the alien" or "the reasons" specific to any alien.

c. Subsection 1182(l)(5)

This subsection is incompatible with the Government's interpretation that subsection 1182(f) implicitly allows suspension of all immigrant and nonimmigrant entry of nationals from a country because of security risks. Subsection 1182(l)(5) is important because its official statutory purpose was to bring Guam and the Northern Mariana Islands within the "*uniform* adherence to long-standing fundamental immigration policies *of the United States"* on a number of subjects, including "national security and homeland security issues." Pub L. No. 110-229, § 701(a), 122 Stat. 853 (2008) (emphasis added). Subsection 1182(l)(1) authorizes the Secretary of DHS to admit nonimmmigrant visitors to enter and stay in Guam and the Northern Mariana Islands without meeting the standard visa and passport requirements. *See also* 8 U.S.C. § 1182(a)(7)(B)(i) and (iii). Subsection 1182(l)(5) provides that when the Secretary of DHS determines "that visitors from a country pose a risk to . . . security interests . . . of the United States," the Secretary of DHS may "suspend the admission of *nationals of such country* ***under this subsection***." (Emphasis added).

Subsection 1182(l)(5)'s text is incompatible with the Government's interpretation of subsection 1182(f) for two reasons. First, the limiting words

"under this subsection [1182(l)(5)]" reflect the understanding of Congress that the executive branch may require visas because of security risks, not bar entry of the nationals of a country altogether. Second, subsection 1182(l)(5) uses the critical words "nationals" and "a country." Those are the express, specific words that Congress uses when a provision of section 1182 authorizes executive action based on nationality. Subsection 1182(f) does *not* use those words.[3]

B. Norms of Separation of Powers Are Incompatible with Executive Immigration Bans of Unlimited Duration Based on Reasons Already Addressed More Narrowly by the INA

Under Justice Jackson's formative opinion on separation of powers, when Congress has enacted comprehensive legislation on a subject within its powers, a President may not take "measures incompatible with the *expressed or implied* will of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (emphasis added). This norm of separation of powers is incompatible with an executive decree that sets immigration bans of unlimited duration based on reasons already addressed more narrowly by an INA provision.

[3] For similar reasons, as in the EO-2 cases, 8 U.S.C. § 1185(a)(1) does not provide "an independent basis for the suspension of entry." *Hawaii v. Trump*, 859 F.3d 741, 770 n.10 (9th Cir. 2017), *vacated as moot*, *Trump v. Hawaii*, No. 16-1540, 2017 WL 4782860 (Oct. 24, 2017). Moreover, unlike subsection 1182(f), subsection 1185(a)(1) does not authorize imposing any restrictions on entry by a "*class* of aliens" or use the word "suspend."

As Justice Jackson wrote in *Youngstown Sheet*, 343 U.S. at 641: "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating the new Executive in his image." The Declaration of Independence lists "obstructing the laws for Naturalization of Foreigners" and "refusing to pass [persons] to encourage their migrations hither" as among the acts of "absolute Tyranny" of "the present King of Great Britain." The Declaration of Independence (U.S. 1776). Accordingly, Article I, section 8, clause 4 of the Constitution gives the power to make rules for immigration "exclusively to Congress," *not* to the executive. *Galvan v. Press*, 347 U.S. 522, 531 (1954).

As Madison explained in Federalist No. 47, separation of powers prevents "tyranny" and protects "liberty." THE FEDERALIST NO. 47 (James Madison), ("Federalist") (emphasis added). "Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). As Madison also explained in Federalist No. 10, "[m]en of factious tempers . . . or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people." This was one reason why legislative powers must be

exercised by a sufficiently large "number" of representatives rather than by "the cabals of a few." *Id.*

The fundamental anti-concentration insight of separation of powers applies equally to both foreign and domestic policy. *See Zivotsky ex rel. Zivotsky v. Kerry*, 135 S.Ct. 2076, 2090 (2015) ("The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue."). In particular, as Federalist No. 63 stated, in both foreign and domestic policy, "a well-constructed Senate" with six-year terms serves as a bulwark against lamentable measures proposed by demagogues:

> [T]here are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, *or misled by the artful misrepresentations of interested men*, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?

President Trump invoked separation of powers principles when he stated on September 5, 2017, in another "immigration" context, that a President should not be "able to rewrite or nullify federal laws" by adopting in an executive order an immigration approach that Congress had "rejected." Press Release, The White House Office of the Press Secretary, Statement from President Donald J.

Trump (Sept. 5, 2017), http://bit.ly/2xMl2Zc. But EO-3's unlimited travel bans adopt approaches that specific provisions of 8 U.S.C. § 1182 reject. *See supra*, at 4-12.

Additionally, in 2015, Congress rejected travel bans on nationals of countries designated by EO-3. *See*, *e.g.*, H.R. 3314, 114th Cong., introduced July 29, 2015; S. 2302, 114th Cong., introduced Nov. 18, 2015 (ban on refugees from Libya, Somalia, Syria, and Yemen). Instead, Congress enacted the Visa Waiver Program Act ("VWPA"), Pub. L. 114-113, dir. O, tit. II, § 203, 129 stat. 2242, codified in 8 U.S.C. § 1187(a)(12).

The House had initially passed the American Security Against Foreign Enemies Act of 2015 ("SAFE Act"). H.R. 4038, 114th Cong. (2015). It would have banned any refugees from Syria or Iraq absent personal certifications by the Secretary of DHS, the FBI Director, and the Director of National Intelligence that the specific refugee was not a security threat. *Id.* at § 2(a). In practice, the SAFE Act would have operated as a ban. *See* Evan Perez, *First on CNN: FBI Director James Comey balks at refugee legislation*, CNN (Nov. 19, 2015), http://cnn.it/1Ngw5ik.

Fulfilling the moderating role envisioned by Federalist No. 63, *supra* at 14, the Senate did not pass the SAFE Act, as a cloture vote failed. *See* H.R. 4038, 114th Cong. (2015): American Security Against Foreign Enemies Act

of 2015, http://bit.ly/2w3XhK7. This illustrates how Justice Kennedy has said separation of powers works: "The Framers of the Constitution could not command statesmanship. They could simply provide structures from which it might emerge." *Clinton v. City of New York*, 524 U.S. 417, 452-53 (1998) (Kennedy, J., concurring).

Having rejected travel bans, both houses of Congress addressed "Terrorist Travel Prevention" by enacting the compromise VWPA by large margins. *See* Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, H.R. 158, 114th Cong. (2015). Like 8 U.S.C. § 1182(l)(5), *supra* at 10-12, the VWPA requires visas for nationals of the designated countries but does *not* ban travel altogether. Under the VWPA, nationals of the designated countries "go through the full vetting of the *regular* visa process, which includes *an in-person interview at a U.S. embassy or consulate*." Karoun Demirjian & Jerry Markon, *Obama administration rolls out new visa waiver program rules in wake of terror attacks*, Wash. Post (Jan. 21, 2016), http://wapo.st/2sERVn1 (emphasis added); U.S. Customs and Border Protection, *Visa Waiver Program Improvement and Terrorist Travel Prevention Act Frequently Asked Questions* (June 19, 2017, 10:55), http://bit.ly/1Tz4wRn. As the Ninth Circuit previously held, even EO-2's temporary bans operated to nullify the VWPA. *See Hawaii v. Trump*, 859 F.3d 741 at 773-74 (9th Cir. 2017).

EO-3's bans of unlimited duration are more of an assault on separation of powers than were EO-2's bans. A single, temporary ban could give a president an opportunity to persuade Congress to change the INA. But EO-3 cuts Congress out of the picture. Indeed, although President Trump has been in office nearly ten months, he has not proposed any travel ban to Congress.

The prospect that a president might not persuade Congress is an essential part of the design of separation of powers. Justice Jackson wrote: "The tendency is strong to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic." *Youngstown Sheet*, 343 U.S. at 643. The framers "knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation." *Id.* at 650. As the chief Nuremburg prosecutor, Justice Jackson knew better than most that history was littered with republics that gave way to executive autocracy in response to assertions of national security. *See id.* at 651 (citing, *inter alia*, the Weimar Republic). The lesson is that "emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them." *Id.* at 652. Thus, the "law" made in response to emergencies must "be made by parliamentary deliberations"—that is, by Congress. *Id.* at 655.

Interpreting 8 U.S.C. § 1182(f) to enable executive decrees that ban travel for an unlimited duration, or serially, based on reasons already addressed more narrowly by more specific subsections in 8 U.S.C. § 1182, *supra, at* 4-12, would not, in Justice Jackson's words, "plunge us straightaway into dictatorship, but it is at least a step in that wrong direction." *Id.* at 653. Our separated powers "may be destined to pass away. But it is the duty of the Court to be the last, not first, to give them up." *Id.* at 655.

II. Cross-Appeal: The Preliminary Injunction Should Not Exclude Potential Entrants Who Lack a Prior U.S. Relationship

The District Court erred in excluding from injunctive relief EO-3's bans against foreign nationals who lack a prior bona fide relationship with a person or entity in the United States (hereinafter, "a Prior U.S. Relationship"). This exclusion is contrary to principles of standing and the merits, and unwarranted by the balance of the equities. EO-3 does not present a case where splitting the baby is a Solomonic decision.

A. Facial Invalidation of EO-3's Travel Bans Warrants a Complete Injunction Against Those Bans

First, as the District Court held, the Plaintiffs-Appellees/Cross-Appellants have standing to obtain a judicial ruling that the President lacked authority for the bans in EO-3. An injunction based on lack of authority for an executive rule enjoins the unauthorized rule, not merely some applications of the

unauthorized rule. *See Util. Air Regulatory Grp. v. E.P.A.*, 134 S.Ct. 2427, 2449 (2014).

Second, when considering the merits at the preliminary injunction stage, a court projects what the final judgment likely will provide. *See Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 546 n.12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.") (citations omitted). A final merits decision would invalidate the bans in EO-3 as to aliens with and without a Prior U.S. Relationship.

The plain meaning of the limits in the pertinent INA subsections precludes reading into them exceptions for aliens without a Prior U.S. Relationship. 8 U.S.C. § 1182(f) prescribes conditions that limit the President's authority to ban "the entry of *any* aliens or *any* class of aliens . . . ." 8 U.S.C. § 1182(a)(3)(C) sets limitations that apply to every executive branch exclusion of "an alien" on "foreign policy" grounds. 8 U.S.C. § 1182(a)(3)(B) likewise sets conditions for excluding "*[a]ny* alien" based on potential terrorism. (Emphasis added). 8 U.S.C. § 1182(a)(1)(A) prescribes that "*no person* shall . . . be discriminated against" based on nationality with four express, and here-inapplicable, statutory exceptions. *Id.* (emphasis added). The lack of a Prior U.S.

Relationship is *not* an exception to any subsection of section 1182 that EO-3 transgresses.

Likewise, the express limits imposed by the Establishment Clause also apply to a government-wide order issued in the United States to deny entry to foreigners, including those without a Prior U.S. Relationship. The Establishment Clause provides: "Congress shall make *no law* respecting *an* establishment of religion . . . ." U.S. CONST. Amend. I (emphasis added). That Clause therefore applies to any law, without any exception permitting religious discrimination toward those who lack a Prior U.S. Relationship.

The reasoning of *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), supports this conclusion. *Verdugo-Urquidez* held that the reach of the Fourth Amendment was circumscribed by its use of the term "the right of the people." *Id.* at 265. The Court emphasized, however, that "in some cases, provisions [without that term] extend beyond the citizenry." *Id.* at 269.

Justice Kennedy's concurrence, which was necessary for the majority, is even more supportive. Justice Kennedy emphasized that in general "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic." *Id.* at 277.

Unlike the Fourth Amendment, the First Amendment's Establishment Clause is not circumscribed by the term "the right of the people." This omission is

particularly meaningful as, in sharp contrast to the Establishment Clause, the First Amendment's protection of peaceful assembly extends only to "the right of the people." Because the Establishment Clause uses the universal term "no law" without any limitation, the Establishment Clause applies to the entry suspensions in EO-3 for persons without a Prior U.S. Relationship.

Indeed, were this Court to create an exception for those without a Prior U.S. Relationship from the limits in the INA and the Establishment Clause, the cure would be worse than the disease. For example, any President could permit entry only by foreigners who were Christians, unless a non-Christian had a Prior U.S. Relationship.

B. The Balance of Equities Has Changed Because This Administration's "Extreme Vetting" Substantially Reduced Any Information Risk *Without* a Travel Ban

Neither of the interests asserted by the Government—foreign leverage and information imperfections—warrants limiting the preliminary injunction based on the balance of the equities. EO-3's use of unlimited bans as leverage on foreign governments is not only invalid, *supra*, at 4-18, it has no place in the balance of equities. Such leverage is sought for the long term and not in response to any emergency. Thus, any such leverage would have the same effect whether it begins now or after this case has been promptly adjudicated.

When the Supreme Court balanced the equities to stay the portions of preliminary injunctions against EO-2's bans that applied to aliens without a Prior U.S. Relationship, the Court relied on the national security rationale asserted for the now-expired bans in EO-2. EO-2's stated rationale was to pause what it called the "*unrestricted entry* into the United States of nationals" of the six designated countries. EO-2 § 2(c) (emphasis added). The Government represented to the Supreme Court in its stay application that the reason for the "short" and "temporary" travel ban in EO-2 was to allow this Administration to establish its own "current screening and vetting procedures [that] are *adequate* to detect terrorists seeking to infiltrate this Nation." Application for a Stay at 8, 30, *Trump v. Int'l Refugee Assistance Project*, No. 16-1436 (June 1, 2017) (emphasis added). Based on this rationale, the Supreme Court allowed EO-2's temporary pause to be applied to aliens without a Prior U.S. Relationship pending Supreme Court review. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017).

EO-2's rationale for a temporary pause, however, is not the rationale for EO-3. To start, EO-2's rationale was fulfilled well before EO-3 was promulgated. By June 2017, this Administration had implemented its own not just adequate but *extreme* vetting for all potential entrants, including nationals of the countries designated in EO-2 or EO-3.

For example, on March 17, 2017, the State Department adopted enhanced visa screening by requiring longer interviews, more detailed questions by consular officials, and a "mandatory social media review" by the "Fraud Prevention Unit" if an "applicant may have ties to ISIS or other terrorist organizations or has ever been present in an ISIS-controlled territory . . . ." State Dep't Cable 25814 ¶¶ 8, 10, 13, *available at* http://bit.ly/2o0wBqt. On April 27, 2017, the Administration issued a new rule that adds a question to the Electronic Visa Update System, asking for information associated with an applicant's "online presence," meaning information related to his or her "Provider/Platform," "social media identifier," and "contact information." 82 Fed. Reg. 19380 (Apr. 27, 2017). On June 1, 2017, the State Department promulgated a new supplemental questionnaire for visa applicants that asks applicants to list (1) every place they have lived, worked, and traveled internationally—including how such travel was funded—for the past fifteen years; (2) every passport they have ever held; (3) names and birth dates of all siblings, children, spouses, and partners; and (4) every social media handle, phone number, and e-mail address they have used for the past five years. U.S. Dep't of State, Supplemental Questions for Visa Applicants (2017), http://bit.ly/2wzoatR. In addition, during the first six months of the 2017 fiscal year, searches of electronic devices of international travelers arriving at U.S. airports increased 36.5%. U.S. Customs and Border Prot., CBP

Releases Statistics on Electronic Device Searches (Apr. 11, 2017), http://bit.ly/2oyyLAu.

As a result, well before EO-3, President Trump himself established that his Administration had substantially improved vetting and screening *while all* EO-2 travel bans were *fully* enjoined from March 16, 2017, to June 24, 2017. On April 29, 2017, President Trump wrote that his Administration was "substantially improv[ing] vetting and screening." *See* Donald J. Trump, *President Trump: In my first 100 days, I kept my promise to Americans*, Wash. Post (Apr. 29, 2017), http://wapo.st/2s7BmUg. On June 5, 2017, although the President disparaged the full injunctions against the EO-2 "Travel Ban," President Trump admitted: "*In any event we are* EXTREME VETTING people coming into the U.S. in order to help keep our country safe." Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 3:37 a.m. and 3:44 a.m.), http://bit.ly/2hGHz2Z and http://bit.ly/2rtbEIK and (emphasis added; capitalization in original).

State Department data shows the impact of this Administration's extreme vetting of nationals of the countries designated by EO-2. Comparing April 2017—when all EO-2 bans were entirely enjoined—to the 2016 monthly averages, non-immigrant visa issuances by State Department officials were *down* 55% *among the six countries designated by EO-2*. Nahal Toosi and Ted Hesson, *Visas to Muslim-majority countries down 20 percent*, Politico (May 25, 2017,

10:28 p.m. EDT), http://politi.co/2r0XBHQ. The decrease caused by this Administration's "extreme vetting" is especially compelling because even before this Administration, the State Department's visa refusal rate was at least 79 percent higher for nationals of the EO-2 designated countries than for nationals of other countries. Brief of the Cato Institute as *Amicus Curiae* at 9, Nos. 16-1436 and 16-1540 (U.S. Sept. 9, 2017) (citing State Department data).

Faced with the success of the Trump Administration's own "extreme vetting"—*without a travel ban*—in decreasing admissions of nationals from the designated countries, EO-3's rationale moved the goalposts. EO-3 does *not* seek more time to improve U.S. vetting procedures. Instead, the stated rationale for EO-3 is that, regardless of the extreme vetting by U.S. officials, the designated countries could and should provide better information. *See* EO-3 §§ 1(b)-(e).

This new rationale for EO-3 weakens the equities invoked by the Government. Tellingly, the Government *does not claim that, during the 100-day injunction of all of EO-2's bans,* this Administration was forced to admit ***with inadequate information*** *even one person with no Prior U.S. Relationship from the designated countries*. The record thus shows that this Administration's "extreme vetting," without any ban, substantially reduced any potential information risks concerning those without a Prior U.S. Relationship. This is confirmed by EO-3's waiver provision. Under that provision, the Secretaries of State and DHS with

current information are able to determine when, for any national of a designated country, "entry would not pose a threat to the national security or public safety of the United States." EO-3 § 3(c)(i)(B).

Moreover, President Trump has had ten months to propose to Congress amendments to the INA that would limit travel by foreigners who lack a Prior U.S. Relationship. Going to Congress is the process the Constitution envisions. *Supra*, at 16-17. The President has proposed other changes to the INA to Congress. David Nakamura, *Trump, GOP senators introduce bill to slash legal immigration levels*, Wash. Post (Aug. 3, 2017), http://wapo.st/2z4lc1h. But the President has not done so for any travel ban.

Because President Trump has imposed his own "extreme vetting" and has chosen not to propose a travel ban to Congress, the President can no longer argue, as he did on February 5, 2017: "*If* something happens, blame [the judge] and court system." Donald J. Trump (@realDonaldTrump), Twitter (Feb. 5, 2017, 12:39 p.m. EST), http://bit.ly/2ojCwta (emphasis added). For example, the preliminary injunctions against EO-3's travel bans do *not* preclude the President from, as he did on October 31, 2017, "ordering" his Administration "to *step up* our already Extreme Vetting Program." Donald J. Trump (@realDonaldTrump), Twitter (Oct. 31, 2017, 6:26 p.m. EDT) (emphasis added), http://bit.ly/2A6exkS.

Moreover, statutory constraints on travel bans by executive decree would be pointless if the judiciary discarded them because the executive has a different view than does the statute of their proper scope and duration. For example, a different President could invoke national security to ban entry by foreigners who have owned guns, or who have had or are seeking firearms training, because the San Bernardino and Orlando terrorists (who were not nationals of a designated country) used guns. Constitutional constraints would similarly be pointless.

The rule of law, however, rejects using national security as "a ready pretext," *Youngstown Sheet*, 343 U.S. at 650 (Jackson, J., concurring), for discarding legal constraints on executive decrees. Rather, the Supreme Court addressed risks of "terrorism" in *Boumediene v. Bush* and held: "*The laws and Constitution are designed to survive, and remain in force, in extraordinary times*. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." 553 U.S. 723, 798 (2008) (emphasis added).

Federal judges must never surrender the rule of law to executive rhetoric or intimidation. As Hamilton wrote in Federalist No. 78:

> This *independence of the judges* is equally *requisite* to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of *designing men*, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place

> to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government.

(Emphasis added). The Supreme Court's "precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010). "Security subsists, too, in fidelity to freedom's first principles." *Boumediene*, 553 U.S. at 797.

Finally, long before the President received any of the reports mentioned in EO-3, the President linked EO-3's tougher travel bans of unlimited duration to anti-Muslim sentiments. Specifically, President Trump, on June 5, 2017, two days after a London terror attack, tweeted that this attack supported a "much tougher version" of the "TRAVEL BAN." Donald J. Trump (@realDonaldTrump), Twitter (Jun. 5, 2017, 3:37 a.m.), http://bit.ly/2uKjVYU (emphasis added).

By June 5, 2017, however, President Trump surely knew that although the deceased June 3, 2017 London attackers were Muslims, none was a national of a country designated by EO-2 (or EO-3). One was a British national; another was an Italian national; and the third was a national of Morocco who perhaps also had Libyan roots. CBS/AP, *Who were the London attackers? Chef, clerk and*

'suspicious' Italian, CBS News (Jun. 6, 2017 6:46 p.m. EDT), http://cbsn.ws/2g1LWYq.

Thus, the original impetus stated in June 2017 by *President* Trump for *EO-3*'s "much tougher" travel ban was purported risks from Muslims, not information imperfections regarding nationals of the designated countries. There is no equitable reason for the judiciary to countenance anti-Muslim bans, even in part.

CONCLUSION

This Court should affirm the decision of the district court in all respects except that the preliminary injunction should be amended to include barring application of EO-3's travel bans to persons without a Prior U.S. Relationship.

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Respectfully submitted,

Of Counsel:
SHAIMAA M. HUSSEIN
MATTHEW R. DOLLAN
JOHN L. BRENNAN
RAVI CHANDERRAJ
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, N.Y. 10019-6099

RICHARD D. BERNSTEIN
Counsel of Record
Willkie Farr and Gallagher LLP
1875 K Street, N.W.
Washington, D.C. 20006-1238
Telephone: (202) 303-1000
E-Mail: rbernstein@willkie.com

Counsel for Amicus Curiae T.A.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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17-2231 (L), 17-2232
17-2233, 17-2240
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