IN THE

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 & 3; JANE DOE #2; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; ARAB AMERICAN ASSOCIATION OF NEW YORK, on behalf of itself and its clients; YEMENI-AMERICAN MERCHANTS ASSOCIATION; MOHAMAD MASHTA; GRANNAZ AMIRJAMSHIDI; FAKHRI ZIAOLHAGH; SHAPOUR SHIRANI; AFSANEH KHAZAELI; JOHN DOE #4; JOHN DOE #5,

Plaintiffs-Appellees,

—and—

ALLAN HAKKY; SAMANEH TAKALOO; PAUL HARRISON; IBRAHIM AHMED MOHOMED,

Plaintiffs,

—v.—

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE;

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR *AMICUS CURIAE* THE CATO INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

DANIEL BRAUN
PETER JAFFE
FRESHFIELDS BRUCKHAUS
& DERINGER US LLP
700 13th Street, NW, 10th Floor
Washington, DC 20005
(202) 777-4500

DAVID Y. LIVSHIZ
CAMERON C. RUSSELL
KAREN WISWALL
FRESHFIELDS BRUCKHAUS
& DERINGER US LLP
601 Lexington Avenue, 31st Floor
New York, New York 10022
(212) 277-4000

Attorneys for Amicus Curiae

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.

THE AMERICAN CENTER FOR LAW AND JUSTICE; ALABAMA; IMMIGRATION REFORM LAW INSTITUTE; ARKANSAS; FLORIDA; LOUISIANA; OHIO; OKLAHOMA; SOUTH CAROLINA; TEXAS; WEST VIRGINIA,

Amici Supporting Appellant.

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.

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, et al. v. Trump, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Cato Institute
(name of party/amicus)

who is amicus, 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/ Cameron C. Russell Date: 11/17/2017

Counsel for: The Cato Institute

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:

/s/ Cameron C. Russell (signature) 11/17/2017 (date)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Regulations, and Executive Orders and Proclamations

Other Authorities

INTEREST OF THE *AMICUS CURIAE*

The Cato Institute (***Cato***) is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute believes that those values depend on holding government to rigorous standards of evidence and justification for its actions. Toward those ends, Cato conducts conferences, publishes books and studies, and issues the annual Cato *Supreme Court Review*.

The Cato Institute and its scholars have significant experience studying immigration law and policy in the United States. The Cato Institute therefore believes that it can assist the Court by providing evidence relevant to Presidential Proclamation No. 9,645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (the ***Proclamation***) and its ban on the entry of certain foreign nationals (***Entry Ban***).[1]

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or a party contributed money that was intended to fund preparing or submitting this brief. No person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E). The parties have, through counsel, consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The government claims that the current Presidential Proclamation—now the government's third attempt at a ban on the entry of certain categories of persons—will help prevent terrorist attacks in the United States. *Amicus* respectfully disagrees. Cato's original research shows that this justification does not withstand scrutiny.

As a procedural matter, the Court may consider real-world evidence about the Proclamation's stated justifications and effects. Each is part of the prevailing legal tests governing the claims here. Even under the government's view that *Kleindienst v. Mandel*, 408 U.S. 753 (1972), governs this Court's assessment of Plaintiffs' challenges to the Proclamation, a court entertaining an Establishment Clause challenge to an exclusion order should probe whether there is a "bona fide reason" for the exclusion. First Cross-Appeal Br. for Appellants at 40 (quoting *Mandel*, 408 U.S. at 770). The government also agrees that courts should consider whether the government rationally could have believed in the purposes for the exclusion. *See* First Cross-Appeal Br. for Appellants at 41 (citing *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72 (1981)). And to the extent that the Court reaches the substance of the challenges, the threshold inquiries for Establishment Clause, Equal Protection Clause, and Religious Freedom Restoration Act (***RFRA***) challenges to government actions require courts to decide

whether those actions are motivated by a sincere permissible purpose. If government actions fail that threshold inquiry, then prevailing doctrine requires courts to subject the actions to heightened scrutiny, which requires courts to consider evidence about whether the actions are appropriate means to advance the government's interests. In short, the government bears an initial burden of showing that its action reflects a sincerely held, rational, and permissible basis. (*See* Part I.)

Cato's original research belies the government's stated justifications. The Proclamation's Entry Ban denies visas to nationals of six Muslim-majority countries (Chad, Iran, Libya, Somalia, Syria, and Yemen), as well as all nationals of North Korea and some government officials from Venezuela (the ***Designated Countries***). The Proclamation asserts that this Entry Ban is necessary because certain governments fail to share sufficient information to allow consular officials to vet nationals of those countries before entry. The Proclamation also claims that the government arrived at this list by applying certain stated criteria for inclusion and exclusion. Yet consular officers already deny—as the law requires—all applicants that fail to prove their eligibility. And the Proclamation's application of the requirements is facially inconsistent: it fails to apply its stated requirements to the Designated Countries, and ignores dozens of other countries that fail them. Further, the Proclamation's assertion that the failures of the Designated Countries have made their nationals more dangerous than others is also without basis. The

Entry Ban would not have prevented the entry of any terrorism offender since 9/11 (and, of course, the 9/11 hijackers were not nationals of the Designated Countries), and not a single person from these countries has killed anyone in a terrorist attack in the United States in over four decades. They are also much less likely to commit other serious crimes than U.S.-born persons or other foreign nationals.

ARGUMENT

I. THE CATO INSTITUTE'S ORIGINAL IMMIGRATION RESEARCH BEARS ON THE PROCLAMATION'S BASIS, WHICH IS MATERIAL TO KEY LEGAL QUESTIONS IN THIS CASE

The Court should consider evidence of the Proclamation's actual purpose and effects because the legal tests in this case require it. The various plaintiffs in this case challenging the Proclamation under the Establishment Clause, Equal Protection Clause, and RFRA have successfully enjoined the Proclamation.[2] The prevailing doctrines governing these claims and remedies differ, of course, but they share one thing in common: they require courts to consider real-world evidence about some combination of the purposes, operation, or effects of the government actions being challenged.[3]

Even under the government's view that *Mandel* governs this Court's assessment of Plaintiffs' challenges to the Proclamation, that case would require the Court to probe whether there is a "bona fide reason" for the exclusion (First Cross-Appeal Br. for Appellants at 40 (quoting *Mandel*, 408 U.S. at 770)) and to consider whether the government rationally could have believed in the purposes for

---

[2] Although the trial court enjoined the Proclamation based on statutory and Establishment Clause grounds and therefore did not reach equal protection or RFRA arguments, those arguments remain relevant because the Court may affirm the decision below on any ground in the record. *Blackwelder v. Millman*, 522 F.2d 766, 771 (4th Cir. 1975).

[3] The Cato Institute takes no ultimate position on whether the present case triggers the doctrines above, or whether the prevailing doctrinal tests are correct.

the exclusion (*see id.* at 41 (citing *W. & S. Life*, 451 U.S. at 671-72)). Thus, even under that deferential standard of review, the Court still must determine whether the government's stated reason for its action may be credited.

A court applying prevailing Establishment Clause doctrine to a challenged government action must evaluate the authenticity of the government's articulated secular purpose. The Establishment Clause "'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs,'" even in facially neutral laws. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (citations omitted) (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971) and *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.)). Courts applying the prevailing Establishment Clause test therefore must evaluate evidence about whether a government measure is motivated by a "secular purpose" that is "genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cty. v. ACLU*, 545 U.S. 844, 864 (2005). Moreover, courts probe the real purpose of state action by considering the operation of the government action, as "the effect of a law in its real operation is strong evidence of its object." *Church of Lukumi Babalu Aye*, 508 U.S. at 535. And when the "openly available data support[s] a commonsense conclusion that a religious objective permeated the government's action," such action is impermissible. *McCreary Cty.*, 545 U.S. at 863.

Here, the government justifies the Proclamation by asserting the need to "protect [U.S.] citizens from terrorist attacks and other public-safety threats" by detecting "foreign nationals who may commit, aid, or support acts of terrorism, or otherwise pose a safety threat" and preventing "such individuals from entering the United States." Proclamation § 1(a). Cato's research, as set forth below, belies that claim. That evidence therefore bears on the Establishment Clause analysis.

Moreover, the Supreme Court has held that government actions that discriminate among religions require application of strict scrutiny. *Larson v. Valente*, 456 U.S. 228, 246 (1982). Strict scrutiny requires consideration of whether government action furthers a compelling government interest and whether the action is narrowly tailored to that interest. *Id.* at 246-47; *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Critical to the inquiry is whether the government action "visits 'gratuitous restrictions'" that are unwarranted by the government's claimed interest. *Church of Lukumi Babalu Aye*, 508 U.S. at 538 (quoting *McGowan v. Maryland*, 366 U.S. 420, 520 (1961) (opinion of Frankfurter, J.)). Where government action imposes such overinclusive restrictions, "[i]t is not unreasonable to infer, at least when there are no persuasive indications to the contrary, that [such] a law . . . seeks not to effectuate the stated governmental interests," but rather to advance impermissible purposes. *Id.*; *see also Larson*, 456 U.S. at 248 ("Appellants must demonstrate that the

challenged . . . rule is closely fitted to further the interest that it assertedly serves."). On the other hand, when a government action is materially *under*inclusive by failing to restrict activities "that endanger[] [the government's] interests in a similar or greater degree than" those activities that the action does restrict, the government undermines its claim that it is pursuing a compelling interest and raises the specter that the government is using its stated objective to pursue prohibited discrimination. *Church of Lukumi Babalu Aye*, 508 U.S. at 543. To assess whether a government action's purported purpose is genuine, both law and common sense require courts to consider the extent to which the government has failed to take less-restrictive actions that would further its purpose. *See, e.g.*, *id.* at 547 ("[A] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.") (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J. concurring in part and concurring in judgment)); *Florida Star*, 491 U.S. at 540 ("[T]he facial underinclusiveness of [the statute] raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which appellee invokes in support of [the statute]."); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015) (holding a law limiting signage as impermissible under the First Amendment because it left other threats to the town's asserted interests unprohibited).

The evidence presented by Cato in Part II demonstrates a complete disconnect between the stated purpose of the Proclamation and its actual operation and effects, and therefore bears on precisely these issues. In particular, Part II.A shows that the Proclamation is internally inconsistent: the criteria used to designate countries are not those criteria on which it purports to rely. Parts II.B to II.D show that Entry Ban is based on a false premise, would not have prevented the entry into the U.S. of any terrorists since 9/11, and that nationals from the countries affected by the Proclamation have not committed any deadly terrorist acts on U.S. soil.

Similar doctrines apply, with variations not relevant here, to the Equal Protection and RFRA challenges to the Proclamation. *See Adarand Constructors*, 515 U.S. at 227 (as to equal protection under the Fifth Amendment); 42 U.S.C. § 2000bb–1; *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014) (as to RFRA). RFRA governs actions that place burdens on the exercise of religion, 42 U.S.C. § 2000bb–1; the Equal Protection doctrine governs government action that draws distinctions based on suspect classifications such as race, religion, or alienage, *see New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Where such distinctions exist, a court may engage in "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *see also Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985).

If, at the end of its analysis, the Court concludes that the District Court did not abuse its discretion in finding that one or more of the challenges brought against the Proclamation is likely to succeed, then it will need to review the appropriateness of the injunction ordered by the District Court,[4] and that too will require the Court to consider real-world evidence about the Proclamation's purposes and effects. To obtain the injunction, IRAP and its co-plaintiffs had to show, among other things, that enjoining the Proclamation would not harm the public interest—the fourth prong of the test for an injunction. *Newsom ex rel. Newsom*, 354 F.3d at 261. Evidence of whether the Entry Ban reduces the risk of terrorist attack would be directly relevant to the government's argument that the public interest is "significantly impaired by barring effectuation of a judgment of the President that restricting entry for certain nationals of eight countries is warranted to protect the Nation's safety." First Cross-Appeal Br. for Appellants at 3.

[4] In that case, the Court would review for abuse of discretion. *Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 254 (4th Cir. 2003).

II. THE CATO INSTITUTE'S ORIGINAL RESEARCH SUGGESTS THAT THE PROCLAMATION'S RESTRICTIONS ARE INCONSISTENT WITH THE GOVERNMENT'S STATED BASIS FOR THOSE RESTRICTIONS

A. The Proclamation's "Neutral" Criteria Do Not Actually Explain The Government's Selection Of Designated Countries.

The government asserts that the Proclamation safeguards the United States against terrorism by placing entry and immigration restrictions on nationals of certain designated countries. The government's stated basis for designating those countries is a set of "baseline" criteria (the ***Baseline Criteria***) against which the Department of Homeland Security (***DHS***) measured "all foreign governments." Proclamation § 1(d). Countries that fail the Baseline Criteria were supposedly added to the list. The government describes the Baseline Criteria as "neutral criteria against which all nations were assessed." First Cross-Appeal Br. for Appellants at 40. The facts stated in the Proclamation do not support—and to the contrary, affirmatively belie—this stated basis for the Proclamation's restrictions.

According to the Proclamation, the Baseline Criteria were split into three categories:

1. Identity-management information, *i.e.*, "whether the country issues electronic passports embedded with data to enable confirmation of identity [***Criterion 1***], reports lost and stolen passports to appropriate entities [***Criterion 2***], and makes available upon request identity-related

information not included in its passports [***Criterion 3***]." Proclamation § 1(c)(i).

2. National security and public-safety information, *i.e.*, "whether the country makes available, directly or indirectly, known or suspected terrorist and criminal-history information upon request [***Criterion 4***], whether the country provides passport and national-identity document exemplars [***Criterion 5***], and whether the country impedes the United States Government's receipt of information about passengers and crew traveling to the United States [***Criterion 6***]." Proclamation § 1(c)(ii).

3. National security and public-safety risk assessment, *i.e.*, "whether the country is a known or potential terrorist safe haven [***Criterion 7***], whether it is a participant in the Visa Waiver Program [***Criterion 8***] . . . and whether it regularly fails to receive its nationals subject to final orders of removal from the United States [***Criterion 9***]." Proclamation § 1(c)(iii).

These Baseline Criteria, however, do not explain the government's design of the Designated Countries list. The government included countries on the list despite them passing the government's Baseline Criteria. (*See* subpart 1.) On the flip side, the government failed to designate many countries that fail the government's Baseline Criteria. (*See* subpart 2.)

1. The Government Included Countries That, Under Its Stated Criteria, Should Not Have Been Designated.

The government's Baseline Criteria prove too little: they do not explain the inclusion of most countries actually included in the Entry Ban. The criteria cannot, therefore, be considered the real reason for the ban on nationals of those countries.

a) Chad is included on the list in part because "several terrorist groups are active within Chad or in the surrounding region." Proclamation § 2(a)(i). However, the Baseline Criteria do not include "terrorist groups . . . in the surrounding region" as a criterion. Rather, under Criterion 7, a country must be a "known or potential terrorist safe haven." Proclamation § 1(c)(iii). The Department of State acknowledges that Chad is not a terrorist safe haven, nor has it ever been one;[5] yet it is included among the Designated Countries.

b) Iran and Syria are included on the list of Designated Countries in part because they are "the source of significant terrorist threats, and [are] state sponsor[s] of terrorism." Proclamation §§ 2(b), (e). However, no criterion asks whether a county is a "source of significant terrorist threats." In addition, being a state sponsor of terrorism is not a Baseline criterion

[5] U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2016 313-322 (July 2017), https://www.state.gov/documents/organization/272488.pdf (listing terrorist safe havens, but not including Chad) (***Dep't of State,* 2016 Terrorism Report**).

despite being applied to both Iran and Syria. *If* it were a criterion Sudan would be a necessary addition to the list of Designated Countries.[6]

c) The Proclamation faults Libya and Venezuela for not being "fully" cooperative with respect to Criterion 9, concerning accepting deportees from the United States. Proclamation §§ 2(c), (f). However, the reported standard under the Baseline Criteria asks not whether each country is "fully" cooperative, but "whether [each country] *regularly* fails to receive its nationals subject to final orders of removal from the United States." Proclamation § 1(c)(iii) (emphasis added). As of July 2017, neither Libya nor Venezuela were on the Immigration and Customs Enforcement agency's (***ICE***) list of countries that are "recalcitrant" in accepting deportees from the U.S.[7] Of the Designated Countries, ICE only found Iran to be "recalcitrant,"[8] but no Designated Country *including* Iran was deemed a severe enough violator to be included in the sanctions applied by DHS in September 2017 (just days before the Presidential Proclamation) to four other countries for failure to accept U.S.

---

[6] Dep't of State, *2016 Terrorism Report* at 303-06.

[7] Arshad Mohammed & Yeganeh Torbati, *U.S. will not issue some visas in 4 nations in deportation crackdown* (Sept. 20, 2017), https://www.reuters.com/article/legal-us-usa-immigration-visas/u-s-will-not-issue-some-visas-in-4-nations-in-deportation-crackdown-idUSKCN1BO1YR (***Mohammed & Torbati,* Deportation Crackdown**).

[8] *Id.*

deportees.[9] Here too it is inescapable that the Baseline Criteria as described in section 1 of the Proclamation do not provide a basis for the justifications enumerated in section 2.

It is clear, therefore, that based on the Proclamation's own terms, the inclusion of *at least* five of the seven countries that were "inadequate" under the Baseline Criteria (Chad, Iran, Libya, Syria, and Venezuela) are not explained by the standards described in the Proclamation itself.[10]

Indeed, the Proclamation also includes Somalia as a Designated Country despite not being "inadequate" under the Baseline Criteria, and here the government is upfront that the stated criteria do not explain its designs. Proclamation §§ 1(i), 2(h). Although Somalia issues an electronic passport—and therefore passes Criterion 1—the Proclamation includes it as a Designated Country in part because "the United States and many other countries do not recognize" its

---

[9] U.S. DEP'T OF HOMELAND SEC., DHS ANNOUNCES IMPLEMENTATION OF VISA SANCTIONS ON FOUR COUNTRIES (Sept. 13, 2017), https://www.dhs.gov/news/2017/09/13/dhs-announces-implementation-visa-sanctions-four-countries (***Dep't of Homeland Sec.,* Visa Sanctions**).

[10] Although the Proclamation states that the President considered other factors, such as "each country's capacity, ability, and willingness to cooperate with [U.S.] identity-management and information-sharing policies . . . whether [each country] has a significant terrorist presence within its territory [and] foreign policy, national security, and counterterrorism goals," Proclamation § 1(h)(i), these were explicitly *not* the criteria relied on in the initial selection of the Designated Countries by the Secretary of Homeland Security. *See* Proclamation § 1(c). In addition, these factors did not alter the final choice of Designated Countries. *See* Proclamation §§ 1(g)-(i).

passport. Proclamation § 2(h). This more stringent requirement is not the Baseline standard under Criterion 1. In addition, although Somalia "satisfies the information-sharing requirements of the baseline," its "lack of territorial control . . . compromises Somalia's ability . . . to share." *Id.* In other words, Somalia was held to a different standard than other countries: although it *shares* what it can, it cannot *collect* the information that the United States wants. The Proclamation alters the standard for being included in the list of Designated Countries specifically to include Somalia.

Accordingly, the Proclamation's stated criteria do not ultimately explain which countries became the Designated Countries.

2. The Government Omitted Countries That, Under Its Stated Criteria, Should Have Been Designated.

The Proclamation's Baseline Criteria also prove too much: the Proclamation *omits* a large number of countries from the banned list despite those countries failing one or more Baseline Criteria. Iraq is explicitly said to have failed the Criteria, but nonetheless was not included on the Designated Countries list. Proclamation § 1(g). But Iraq is not alone:

a) *Criterion 1.* In 2017, 86 countries failed the requirement to use electronic passports, and many other countries allow their nationals to travel under older non-electronic passports.[11]

b) *Criterion 2*. At least 16 countries never report lost and stolen passport information,[12] and DHS has warned that, outside Canada and Europe, an "alarming number of countries . . . report very little."[13] Indeed, three of the four most populous countries in the world—China, India, and Indonesia—rarely or never reported this data.[14]

---

[11] David Bier, *Travel Ban Is Based on Executive Whim, Not Objective Criteria*, CATO INSTITUTE: CATO AT LIBERTY (Oct. 9, 2017), https://www.cato.org/blog/travel-ban-based-executive-whim-not-objective-criteria (***Bier,* Executive Whim**).

[12] *See* DEP'T OF HOMELAND SEC., WRITTEN TESTIMONY OF PLCY OFFICE OF INTERNATIONAL AFFAIRS ASSISTANT SECRETARY AND CHIEF DIPLOMATIC OFFICER ALAN BERSIN AND CBP OFFICE OF FIELD OPERATIONS ACTING DEPUTY ASSISTANT COMMISSIONER JOHN WAGNER FOR A HOUSE COMMITTEE ON HOMELAND SECURITY, SUBCOMMITTEE ON BORDER AND MARITIME SECURITY HEARING TITLED "PASSPORT FRAUD: AN INTERNATIONAL VULNERABILITY" (Apr. 4, 2014), https://www.dhs.gov/news/2014/04/04/written-testimony-plcy-office-international-affairs-and-cbp-office-field-operations (***Bersin Testimony***) (showing that the U.S. relies on INTERPOL's Stolen and Lost Travel Documents (***SLTD***) database, and that Interpol has 190 member countries); INTERPOL, *Stolen and Lost Travel Documents database*, https://www.interpol.int/INTERPOL-expertise/Border-management/SLTD-Database (showing that the SLTD database is populated by only 174 countries) (last visited Nov. 13, 2017).

[13] Bersin Testimony.

[14] *Id*.

c) *Criterion 7*. In 2017, the State Department identified 13 terrorist safe havens—the focus of Criterion 7—but nine of these did not end up as Designated Countries.[15]

d) *Criterion 9*. Criterion 9 is meant to address countries that regularly refuse to accept U.S. deportees. However, although ICE maintains a list of counties which are "recalcitrant" in receiving deportees from the U.S., only one country (Iran) out of the 12 countries identified in ICE's latest July 2017 report became a Designated Country.[16] Moreover, in September 2017, the United States sanctioned four countries for refusing to accept deportees, but, again, none became Designated Countries.[17]

In short, if the government were really applying the Baseline Criteria neutrally and objectively, it would have had to include a far greater number of countries on the Designated Countries list than it did.[18] The only explanations are

---

[15] *See* Dep't of State, *2016 Terrorism Report* at 313-22.

[16] Those countries are China, Cuba, Vietnam, Laos, Iran, Cambodia, Burma, Morocco, Hong Kong, South Sudan, Guinea and Eritrea. Mohammed & Torbati, *Deportation Crackdown*.

[17] Those countries were Cambodia, Eritrea, Guinea, and Sierra Leone. Dep't of Homeland Sec., *Visa Sanctions*.

[18] The Proclamation actually states that sixteen countries were found to be "inadequate" when assessed against these Baseline Criteria. However, after several countries provided passport exemplars or agreed to share information on known or suspected terrorists, the Secretary of Homeland Security ultimately recommended to the President—and the President agreed—that only seven of these countries be included on the list of Designated Countries. Proclamation §§ 1(e)-(h). Those

that the government did not actually design the Designated Countries list based on the Baseline Criteria, or did not apply the Baseline Criteria neutrally.

The government's failure to include many countries on the ban list is even less rational if one considers not the government's *stated* criteria, but the *actual* criteria that it applied to exclude Iran, Syria, Chad, and Somalia. For example:

a) The government included Somalia as a Designated Country in part because many "countries do not recognize" its electronic passport. Proclamation § 2(h)(i). But if the government applied this criterion consistently, it would have to add another 39 countries that issue electronic passports that do not conform to the international standards recognized by the United States (in addition to the 86 countries that issue no electronic passport at all).[19]

b) Somalia was also added to the Designated Countries list in part because it lacks "territorial control." Proclamation § 2(h)(i). If the government were

---

passport exemplars and agreements in no way address whether those otherwise "inadequate" countries still fail to use electronic passports, report lost or stolen passport information, provide safe havens for terrorists, or regularly refuse to accept deportees from the U.S.

[19] Bier, *Executive Whim* (noting that 86 countries fail to use electronic passports, and that 125 do not use electronic passports or use electronic passports that many countries do not recognize, and citing the International Civil Aviation Organization's (***ICAO***) list of countries conforming to the Public Key Directory (***PKD***) standards for passports, *ICAO PKD Participants*, https://icao.int/Security/FAL/PKD/Pages/ICAO-PKDParticipants.aspx) (last visited Nov. 13, 2017).

to consistently apply this unstated "territorial control" criterion the number of Designated Countries would increase by at least nine.[20]

c) The government included Iran and Syria in part because they are state sponsors of terrorism. Proclamation §§ 2(b), (e). But if the government applied this actual criteria consistently, it would have to include Sudan, too, which it did not.[21]

d) The government included Chad in part because terrorists are "active within [the country] or the surrounding region." Proclamation § 2(a). However, there are more than 30 other countries that similarly have U.S.-designated Foreign Terrorist Organizations operating inside their borders but which are not Designated Countries, including countries such as France, India, Spain, and the United Kingdom.[22]

In short, the consistent application of the government's criteria—whether the government's stated criteria or the actual criteria that the government applied—should have produced a very different list of Designated Countries. These criteria cannot, therefore, explain the government's selection of nationals to exclude from

[20] This number is calculated by counting the thirteen State Department designated terrorist safe havens, and subtracting those countries already included among the Designated Countries (Libya, Somalia, Venezuela, and Yemen). *See* Dep't of State, *2016 Terrorism Report* at 313-22 (defining "terrorist safe haven" to include countries with "ungoverned, under-governed, or ill-governed physical areas").
[21] *See* Dep't of State, *2016 Terrorism Report* at 303-06.
[22] *Id.* at 381-444 (listing terrorist groups and where they operate).

entry. Because the Baseline was not applied, the Proclamation's purpose cannot be, as the government claims, to "encourage cooperation" with it. First Cross-Appeal Br. for Appellants at 10. This inconsistency belies the government's purported rationale.

B. The Entry Ban Is Based On The False Premise That The Government Needs The Cooperation Of Foreign Governments To Process Visa Applications.

The Entry Ban resulted from a report by the DHS of what "additional information will be needed from each foreign country to adjudicate an application." Proclamation § 1(c). The resulting report concluded that the Entry Ban is required because the government is not able "to confirm the identity of individuals seeking entry" from certain countries. *Id.* But it is *applicants*, and not the government, who bear the burden to produce information showing their eligibility for a visa. The government has no obligation to obtain this information on its own, and may exclude any individual who fails to meet this burden. 8 U.S.C. § 1361. The government makes no assertion that consular officers are not enforcing this burden of proof. Publicly available evidence indicates that they do enforce this law and have reacted to the changing conditions in each of the Designated Countries on an individualized basis. For the past seven years, the B visa refusal rate (the share of applicants denied a business and/or tourism visitor

visa for any reason) for the Designated Countries has been an average of 61 percent higher than for all other nationalities.[23]

[23] U.S. DEP'T OF STATE, CALCULATION OF THE ADJUSTED VISA REFUSAL RATE FOR TOURIST AND BUSINESS TRAVELERS UNDER THE GUIDELINES OF THE VISA WAIVER PROGRAM, https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/refusalratelanguage.pdf (***Dep't of State,* Visa Refusal Rate**) (last visited Nov. 3, 2017); U.S. DEP'T OF STATE, *Visitor Visa*, https://travel.state.gov/content/visas/en/visit/visitor.html (last visited Nov. 3, 2017).

Table 1: B Visa Refusal Rate (% of Applicants) by Country[24]

Country	2010	2011	2012	2013	2014	2015	2016
Somalia	70	67	62	66	52	65	64
Syria	28	33	42	46	60	63	60
Yemen	54	48	48	44	44	54	49
Iran	39	31	38	48	42	39	45
Chad	59	43	44	36	32	34	43
Libya	14	31	39	34	34	43	41
Venezuela	18	16	12	14	15	16	40
North Korea	23	8	36	29	56	48	15
***Average*[25]**	*38*	*35*	*40*	*40*	*42*	*45*	*44*
***All other countries*[26]**	*26*	*25*	*24*	*25*	*25*	*26*	*27*

These denial rates reflect in part the existing availability of documentary evidence from visa applicants. While the average visa denial rate for all other countries has remained relatively constant in recent years, the average denial rate

[24] Dep't of State, *Visa Refusal Rate*.
[25] Average based on the simple arithmetic mean of the data for the eight countries shown in the table and not weighted by number of applicants.
[26] Average based on the arithmetic mean of the data for all countries, excluding the eight shown in the table; data includes stateless persons.

of the eight Designated Countries increased from approximately 38% to 44% between 2010 and 2016—a rate increase of 16%. In particular, the conflicts in Libya and Syria coincided with refusal rates that more than doubled. *See supra* Table 1. These rejections demonstrate that consular officers can respond to changing circumstances without a blanket ban and that they do enforce applicants' burden of proof.

C. The Entry Ban Would Not Have Prevented The Entry Of Any Terrorists Since 9/11.

The Proclamation claims that individualized "vetting is less reliable when the country from which someone seeks to emigrate exhibits significant gaps in its identity-management or information-sharing policies, or presents risks to the national security of the United States." Proclamation § 1(h)(ii). Yet the government provides no evidence that these "gaps"—however defined—have, in fact, made individualized vetting from these countries less reliable.

The Entry Ban would not have prevented the entry of *any* terrorist who received a visa since 9/11 and who was convicted of, or killed during, a plot to carry out an attack in the United States.[27] This is not a surprise because very few

[27] David Bier, *New Travel Ban Would Not Have Prevented the Entry of Any Terrorists Since 9/11*, CATO INSTITUTE: CATO AT LIBERTY (Sept. 25, 2017), https://www.cato.org/blog/new-travel-ban-wouldve-prevented-entry-no-terrorists-911 (***Bier,* Terrorists Since 9/11**) (reporting findings based on a review of the terrorist information provided by the Department of Justice National Security Division, the Department of Justice website, the George Washington University

terrorists have entered the United States since 9/11. Since October 2001—when Congress began to revamp the individualized vetting system—only seven foreign-born persons entered the United States on immigrant or nonimmigrant visas and went on to be convicted of or killed during a terrorist attack on U.S. soil.[28] None of the six nationalities that these attackers represent are subject to the Entry Ban.[29]

At most six of these offenders radicalized prior to entry,[30] meaning that—at worst—consular officers failed to identify one terrorist out of every 19.3 million visa approvals during fiscal years 2002 to 2016.[31] The only offender who

---

Program on Extremism, and the New America Foundation International Security Program). The 9/11 hijackers themselves were not nationals of the Designated Countries.

[28] David Bier, *Very Few Immigration Vetting Failures of Terrorists Since 9/11*, CATO INSTITUTE: CATO AT LIBERTY (Aug. 31, 2017), https://www.cato.org/blog/very-few-immigration-vetting-failures-terrorists-911 (***Bier,* Few Vetting Failures**) (last updated Nov. 13, 2017). This includes self-admitted terrorist Sayfullo Saipov, who was injured while killing eight people in New York City in October 2017.

[29] *Id.* (the seven individuals were: Umar Abdulmatallab (Nigeria), Khalid Aldawsari (Saudi Arabia), Tashfeen Malik (Pakistan), Ulugbek Kodirov (Uzbekistan), Quazi Nafis (Bangladesh), Hosam Smadi (Jordan), and Sayfullo Saipov (Uzbekistan)).

[30] Bier, *Terrorists Since 9/11*; Mark Berman & Matt Zapotosky, *Investigators probe New York attack suspect's communications while Trump calls for death penalty*, WASH. POST (Nov. 2, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/11/02/investigators-probe-new-york-attack-suspects-communications-while-trump-calls-for-death-penalty (showing that, according to U.S. government officials, the October 31, 2017 New York City truck attacker radicalized after entering the United States in response to Islamic State propaganda).

[31] U.S. DEP'T OF STATE, REPORT OF THE VISA OFFICE 2016: TABLE XIV, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016Annual

radicalized prior to entry and killed anyone on U.S. soil was a Pakistani national, Tashfeen Malik.[32] In other words, one vetting failure that led to deaths in the United States occurred in over 116 million visa approvals from 2002 to 2016.[33] Neither Pakistan nor any of the other nationalities represented by attackers who radicalized prior to entry are subject to the Entry Ban.[34]

Although the past is not necessarily prologue, the government provides no evidence of new threats from these nationals. Indeed, the Proclamation states that it did not select Designated Countries based on intelligence regarding future plans to conduct attacks inside the United States, but rather factors related to identity and information sharing procedures (and, in some cases, terrorist activity inside or near the country of origin). Proclamation § 2. Moreover, the president justified his order to carry out the study that led to the Entry Ban with evidence relating exclusively to *past* terrorist infiltrations. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 § 1(h)

Report/FY16AnnualReport-TableXIV.pdf (last visited Nov. 13, 2017); U.S. DEP'T OF STATE, REPORT OF THE VISA OFFICE 2006: TABLE XIV, https://travel.state.gov/content/dam/visas/Statistics/FY06AnnualReportTableXIV.pdf (last visited Nov. 13, 2017); U.S. DEP'T OF STATE, NONIMMIGRANT VISA STATISTICS: NONIMMIGRANT VISA ISSUANCE BY VISA CLASS AND NATIONALITY, https://travel.state.gov/content/visas/en/law-and-policy/statistics/non-immigrant-visas.html (data file) (last visited Nov. 13, 2017).

[32] Bier, *Few Vetting Failures; see also* Pat St. Claire, Greg Botelho & Ralph Ellis, *San Bernadino shooter Tashfeen Malik: Who was she?*, CNN (Dec. 8, 2015), http://www.cnn.com/2015/12/06/us/san-bernardino-shooter-tashfeen-malik/index.html.

[33] Bier, *Few Vetting Failures.*

[34] *Id.*

(Mar. 6, 2017). This suggests that the government also considers the past the best predictor of future threats, and the past indicates that the Entry Ban fails to target those threats.

D. Nationals Of The Designated Countries Have Not Committed Any Deadly Terrorist Attacks.

The government's selection of the Designated Countries is not based on any meaningful national security risk when viewed in light of the "terrorist attacks and other public-safety threats" suggested by the Proclamation. Proclamation § 1. To the contrary, there is a total disconnect between the countries chosen and countries whose nationals, historically, have committed acts of terrorism or other crimes on U.S. soil.

Table 2 provides the number of deaths and the historical probability of death on U.S. soil by foreign-born nationals from the Designated Countries, other non-U.S. countries, and U.S.-born or unidentified attackers. Based on data from 1975 through October 31, 2017, the annual probability of death in an act of terrorism committed by other foreign nationals was 1 in 3.8 million.[35] During this time, no

[35] Alex Nowrasteh, *The Halloween Terror Attack in New York: The Threat from Foreign-Born Terrorists*, CATO INSTITUTE: CATO AT LIBERTY (Oct. 31, 2017), https://www.cato.org/blog/halloween-terror-attack-new-york-threat-foreign-born-terrorists.

one has been killed in a terrorist attack on U.S. soil by nationals from any of the eight Designated Countries.[36]

Table 2: Risk of Death by Terrorism by Nationality, 1975-2017[37]

Nationality	Deaths	Historical Annual Chance of Death
Other Non-U.S. Countries	**3,037**	**1 in 3.8 million**
U.S. Citizen and Unknown	**411**	**1 in 28 million**
Eight Designated Countries	**Zero**	**Zero**

The Proclamation also specifically singles out immigrant visa applicants (those who would receive legal permanent residency upon entry), barring all such applications from six countries while allowing some nonimmigrants (temporary visitors, such as students) from all but two countries. Proclamation § 2. The evidence regarding terrorism threats cannot justify this discrimination. Indeed, as Table 3 highlights, nonimmigrants (*e.g.*, tourists, students, and those with fiancée

[36] Alex Nowrasteh and David Bier, *A List of Deadly Terrorists*, CATO INSTITUTE (Nov. 16, 2017), https://object.cato.org/sites/cato.org/files/wp-content/uploads/cato_a_list_of_deadly_terrorists.pdf (***Cato,* Deadly Terrorists**).

[37] Calculations based on data and sources in Cato, *Deadly Terrorists*. Annual chance of death was calculated according to the methodology used in Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, 798 CATO INSTITUTE POLICY ANALYSIS 1, 2-4 (Sept. 13, 2016), https://object.cato.org/sites/cato.org/files/pubs/pdf/pa798_2.pdf.

visas) caused 87 percent of all terrorism deaths from 1975 to 2017, and immigrants (*e.g.*, Green Card holders) caused one half of one percent.

Table 3: Annual Chance of Being Killed in an Attack on U.S. Soil, Based on Immigration Status of Terrorist, 1975-2017[38]

Category	Deaths	Share of Deaths	Annual Chance of Being Killed
Nonimmigrant (tourist, student, fiancé visas)	**3,003**	**87.1%**	**1 in 3.9 million**
Other foreign entry	**18**	**0.5%**	**1 in 642 million**
Immigrant visa (permanent resident)	**16**	**0.5%**	**1 in 723 million**
U.S. Citizen or Unknown	**411**	**11.9%**	**1 in 28 million**

The Proclamation also determines that the Designated Countries' nationals pose a "public safety threat." *See* Proclamation § 1(c). Again, neither the Proclamation nor government presents any evidence to support this conclusion. Data from the U.S. Census Bureau, however, lead to the opposite inference: nationals of Designated Countries are much less likely to be threats or become

[38] Calculations based on Cato, *Deadly Terrorists*.

threats to the nation. Each individual nationality subject to restrictions under the Entry Ban is less likely to be incarcerated than U.S.-born persons.[39]

As Table 4 shows, people from Designated Countries as a group are about half as likely to end up incarcerated in the United States as those from other foreign countries. U.S.-born persons are about five times more likely to be incarcerated as those born in the Designated Countries. This evidence indicates that people from Designated Countries are much less likely to commit the types of serious crimes that result in incarceration than nationals from other countries.

Table 4: Incarceration Rates by Country of Origin, Ages 18-54, 2015[40]

	Other Non-U.S. Countries	Designated Countries	United States
Incarceration Rate	0.59%	0.32%	1.54%

Allowing lower-crime populations to immigrate to the United States—such as the individuals targeted by the Entry Ban—reduces the overall crime rate. The United States has benefited tremendously from an influx of legal immigrants who

[39] Alex Nowrasteh, *There Is No Public Safety Justification for the "Travel Ban"*, CATO INSTITUTE: CATO AT LIBERTY (Oct. 8, 2017), https://www.cato.org/blog/there-no-public-safety-or-criminal-justification-travel-ban (deriving statistics based on U.S. Census Bureau's American Community Survey, available at https://www.census.gov/programs-surveys/acs/data/summary-file.2015.html).

[40] *Id.*

are less than one-third as likely as native-born Americans to be incarcerated, and their lower rates of criminality have reduced crime rates across the country.[41] Immigrants from the Designated Countries are not only no exception, but even better in this regard than other immigrants.

[41] Michelangelo Landgrave & Alex Nowrasteh, *Criminal Immigrants: Their Numbers, Demographics, and Countries of Origin*, CATO INSTITUTE: IMMIGR. RES. & POL'Y BRIEF 1 (Mar. 15, 2017), https://www.cato.org/publications/immigration-reform-bulletin/criminal-immigrants-their-numbers-demographics-countries (finding that the native incarceration rate is 1.53 percent whereas the legal immigrant incarceration is only 0.47 percent); Alex Nowrasteh, *Immigration and Crime—What the Research Says*, CATO INSTITUTE: CATO AT LIBERTY (July 14, 2015), https://www.cato.org/blog/immigration-crime-what-research-says.

CONCLUSION

Amicus respectfully submits that the Court should consider the foregoing evidence in assessing the statutory and constitutional challenges to the Proclamation and the government's challenge to the preliminary injunction.

Dated: November 17, 2017
New York

Respectfully submitted,

By: /s/ Cameron C. Russell

FRESHFIELDS BRUCKHAUS DERINGER US LLP

DAVID Y. LIVSHIZ
CAMERON C. RUSSELL
KAREN WISWALL
601 Lexington Avenue,
31st Floor
New York, New York 10022
(212) 277-4000
david.livshiz@freshfields.com

DANIEL BRAUN
PETER JAFFE
700 13th Street, NW,
10th Floor
Washington, DC 20005
(202) 777-4500

Attorneys for Amicus Curiae
The Cato Institute

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation under Fed. R. App. P. 29(a)(4) because, excluding items exempted under Fed. R. App. P. 32(f), it contains 6453 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it uses a proportionally spaced Times New Roman typeface in 14-point size.

Dated: November 17, 2017
New York

/s/ Cameron C. Russell

CAMERON C. RUSSELL
FRESHFIELDS BRUCKHAUS
DERINGER US LLP

Attorney for Amicus Curiae
The Cato Institute

CERTIFICATE OF SERVICE

I, Cameron C. Russell, hereby certify that I electronically filed the foregoing motion with the Clerk of the Court for the U.S. Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on November 17, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed November 17, 2017,
at New York, New York.

/s/ Cameron C. Russell

CAMERON C. RUSSELL
FRESHFIELDS BRUCKHAUS
DERINGER US LLP

Attorney for Amicus Curiae
The Cato Institute