No. 17-35105

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON, et al.,
Plaintiffs-Appellees

v.

DONALD TRUMP, President of the United States, et al.,
Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF *AMICUS CURIAE* DANIEL O. ESCAMILLA IN SUPPORT OF DEFENDANT-APPELLANTS

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TABLE OF CONTENTS

TABLE OF CONTENTS (cont.)

TABLE OF AUTHORITIES

RELEVANT FACTS

Prior to the Trump Administration, in 2015 and after the San Bernardino terrorism attack, Congress passed section 217(a)(12) of the Immigration and Nationality Act (INA) which imposes additional restrictions on travel to the US by persons who have traveled to regions of the world with significant terrorist presence. The statute specifically names Iraq and Syria and provides a process whereby further countries can be added. At present, five others are also on the list: Iran, Libya, Somalia, Sudan, and Yemen.

Seven (7) days into office, on January 27, 2017, President Donald J. Trump issued an *Executive Order (EO): Protecting the Nation from Foreign Terrorist Entry into the United States.*

Insofar as is relevant to this amicus brief, the EO (at Section 3) suspends entry into the US for 90-days, of immigrants from the list of countries referred to in section 217(a)(12) of the INA.

The EO (at Section 5) also suspends U.S. Refugee Admissions Program (USRAP) for 120 days, indefinitely suspends Syrian refugees based on a proclamation that "the entry of nationals of Syria as refugees is detrimental to the interests of the United States." Finally, the EO caps the total refugee admissions for fiscal year 2017 to 50,000.

The States of Washington and Minnesota sought and received, on February 3, 2017, a Temporary Order from the U.S. District Court for the Western District of Washington, preventing implementation of the EO. The Trump Administration, through the Department of Justice, has filed an appeal with the Ninth Circuit Court of Appeal on February 4, 2017.

ARGUMENT

I.
BECAUSE THERE HAS BEEN A DETERMINATION OF THE LIKELIHOOD OF SUCCESS ON THE MERITS THE COURT MUST NECESSARILY CONSIDER THE MERITS OF THE CAUSE IN THIS MATTER

The temporary order of the District Court required a finding of the likelihood of success on the merits. On appeal, as Plaintiff argued during oral argument, Appellant must establish the likelihood of success on appeal.

Absent a dispositive threshold issue (such as standing), the Court is therefore justified in addressing the merits of the underlying action of Plaintiff's challenge to the President's Executive Order: Protecting the Nation from Foreign Terrorist Entry into the United States.

Federal Rule of Appellate Procedures (FRAP) Rule 29(a) permits amicus filings during a court's initial consideration of a case on the merits.

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II.

THE EXECUTIVE ORDER IS NOT REVIEWABLE AS A MATTER OF LAW SINCE THE FINDINGS OF THE EXECUTIVE ARE BASED ON MATTERS OF NATIONAL SECURITY, OSTENSIBLY CLASSIFIED AND NOT SUBJECT TO REVIEW BY THE JUDICIARY

There is undeniable statutory authority under the *Immigration and Nationality Act*, permitting the president to suspend any class of aliens upon a finding that their entry would be "detrimental to the interest of the United States."

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he 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. Title 8, U.S.C. § 212(f).

Facts relating to the president's determination of any national security risk or as to a particular class of aliens, does not lend itself to judicial review because such determinations would necessarily implicate matters of national security which are classified and provided only to the president who, as head of the executive branch, is charged with the protection of our national security.

The classified information is generally provided to the president by the President's Daily Brief (PDB), considered the most highly classified and closely held document in the government, prepared on a regular basis.[1] PDBs are presented to presidents and their closest aides by representatives of the Office of

[1] Mark Hosenball, Reuters, *Trump gets one presidential intelligence brief a week: sources"* December 9, 2016, http://www.reuters.com/article/us-usa-trump-briefings-idUSKBN13X2M9

the Director of National Intelligence (ODNI), though material in them is prepared by the CIA, the National Security Agency, the Defense Intelligence Agency and other parts of the U.S. intelligence community.[2]

It is reasonable to presume that an investigation of risk posed by a particular class of aliens must include not only the history of *domestic* incidents of terrorism committed by the particular class, but also the *international* incidents as well. The assessment of risk may also include foiled attempts to commit acts of terrorism which may only be known to those in the intelligence community.

It is indisputable that this information, provided by the intelligence community to the Executive Branch, places the president and his advisors in the best position to assess and address the national security risk posed by any particular class of aliens. The president's exercise of plenary power, ostensibly based on classified information complied by our intelligence community, should not be second-guessed by the judiciary.

III.
THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT, BY ITS PLAIN LANGUAGE, DOES NOT RESTRICT THE PRESIDENT OR PRECLUDE EXECUTIVE ORDER ISSUED BY PRESIDENT

The Establishment Clause of the First Amendment, provides in relevant part, that "***Congress** shall make no law respecting an establishment of religion...*" (Bold added for emphasis.) The plain language of the First Amendment limits its

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[2] Ibid.

application of the Establishment Clause to *laws enacted by Congress* and not to Executive Orders of the President. Accordingly, the president's Executive Order, even it is treated as a law and demonstrates preference of one religion over another, cannot be deemed unconstitutional as in violation of the Establishment Clause.

IV.

THE EQUAL PROTECTION CLAUSE OF THE FOURTEETH AMENDMENT, BY ITS PLAIN LANGUAGE, DOES NOT APPLY TO THE FEDERAL GOVERNMENT, INCLUDING THE EXECUTIVE BRANCH

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (emphasis added).

By its terms, the equality requirement of the 14th Amendment, whether derived from the Equal Protection Clause or the Privileges or Immunities Clause, and the Due Process Clause of the 14th Amendment, restrains only state governments and not the federal government. (See *Bolling v. Sharpe* 347 U.S. 497 (1954) [holding that the 14th Amendment applies only to states]).

Even if the protections afforded by the 14th Amendment did apply against the federal government, because alien immigrants are neither citizens of the United States, nor within the jurisdiction of any State within the United States, they are not within the class of persons entitled to 14th Amendment protections.

V.

THE EXECUTIVE'S ACTION TO TEMPORARILY HALT IMMIGRATION OF A PARTICULAR CLASS OF IMMIGRANTS FOR REASONS OF NATIONAL SECURITY OR FOR THE MARSHALLING OF RESOURCES TO IMPROVE THE EFFECTIVENESS OF THE IMMIGRATION SCREENING PROCEDURE IS WITHIN THE EXECUTIVE'S PLENARY POWER

While the scope of the terror threat by a particular class of aliens may not be fully known to those outside of the president's National Security Council, the potentially catastrophic consequences of such a terror threat weighs in favor of cautious action by the president. Indeed Congress has vested the president with broad powers to exercise his discretion to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate" for "such period as he shall deem necessary..." under the Immigration *and Nationality Act*, Title 8, U.S.C. § 212(f),

Given the expansive scope of immigration to our country and the daunting task of screening immigrants, the exercise of the Executive's plenary power to maintain our national security and to properly manage of our nation's immigration screening process justifies the Executive's temporary or permanent suspension of a particular class or classes of aliens in order to protect the nation from foreign terrorist entry. The stated purpose for this suspension is to "temporarily reduce investigative burdens on relevant agencies during the review period..."

According to the Migration Policy Institute, during the last decade just over 1 million persons annually, have lawfully immigrated to the United States. In 2014, California had the highest number of total immigrants of any state, with 10.5 million. This comprised 27 percent of the total state population. Almost one-half (49 percent) of all children in California under the age of 18, were living with immigrant parents.[3]

Immigration takes a toll on our nation's infrastructures and may add to our troubling domestic issues such as homelessness, unemployment and the availability of health care. The negative ramifications of unchecked immigration have led many to advocate a policy of helping the impoverished in their own country and discouraging immigration to the United States.[4]

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[3] Jie Zong and Jeanne Batalova. *Frequently Requested Statistics on Immigrants and Immigration in the United States*, April 14, 2016, http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states

[4] Roy Beck, an immigration author with one of the most viewed immigration policy presentation on the Internet, *Immigration, World Poverty and Gumball – NumbersUSA.com*,[4] advocates helping impoverished people in their own country, discouraging immigration to the United States. His reasoning is sound:

> Allowing immigration may even hurt the impoverished people of the world because the 1 million immigrants that we do take are among the most energetic, often the better educated, certainly the most dissatisfied people that if they did not immigrate, would be the aegis for change to improve the lot of all the people in their countries. The true heroes in the global humanitarian field are the people in the [impoverished] countries who have the wherewithal to immigrate to another country but instead stay in their

While Congress enacts laws regulating the admission of immigrants to the United States, the Executive is charged with the orderly administration of our country's immigration and has been empowered to suspend the entry of aliens as he as in his Executive Order. This power to manage the immigration process by allocating its personnel resources in a manner which, in the determination of the Executive, best serves the national interest, should not be subject to interference by the Courts.

VI.

THE POLICY OF TEMPORARY IMMIGRATION SUSPENSION IS SOUND AND, IF REVIEWABLE BY THE COURTS ON CONSTITUTIONAL GROUNDS, THE PRESIDENT'S DETERMINATION TO SUSPEND ADMISSION OF SYRIAN REFUGEES SHOULD BE DEEMED PROPER TO ACHIEVE A PROPER GOVERNMENTAL OBJECTIVE

Many of the amicus briefs filed in this matter argue the constitutionality of the Executive Order and advocate a particular policy of immigration rather than addressing the legal issues surrounding the executive's prerogative to suspend immigration pending a revision of security screening measures.

Even if the Courts were to apply the strict scrutiny test to the constitutional challenges made to the Executive Order, there is certainly a compelling

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countries to ply their skills to help their fellow countrymen. Unfortunately, our immigration system tends to entice these very types of people to abandon their countrymen."
https://www.youtube.com/watch?v=LPjzfGChGIE

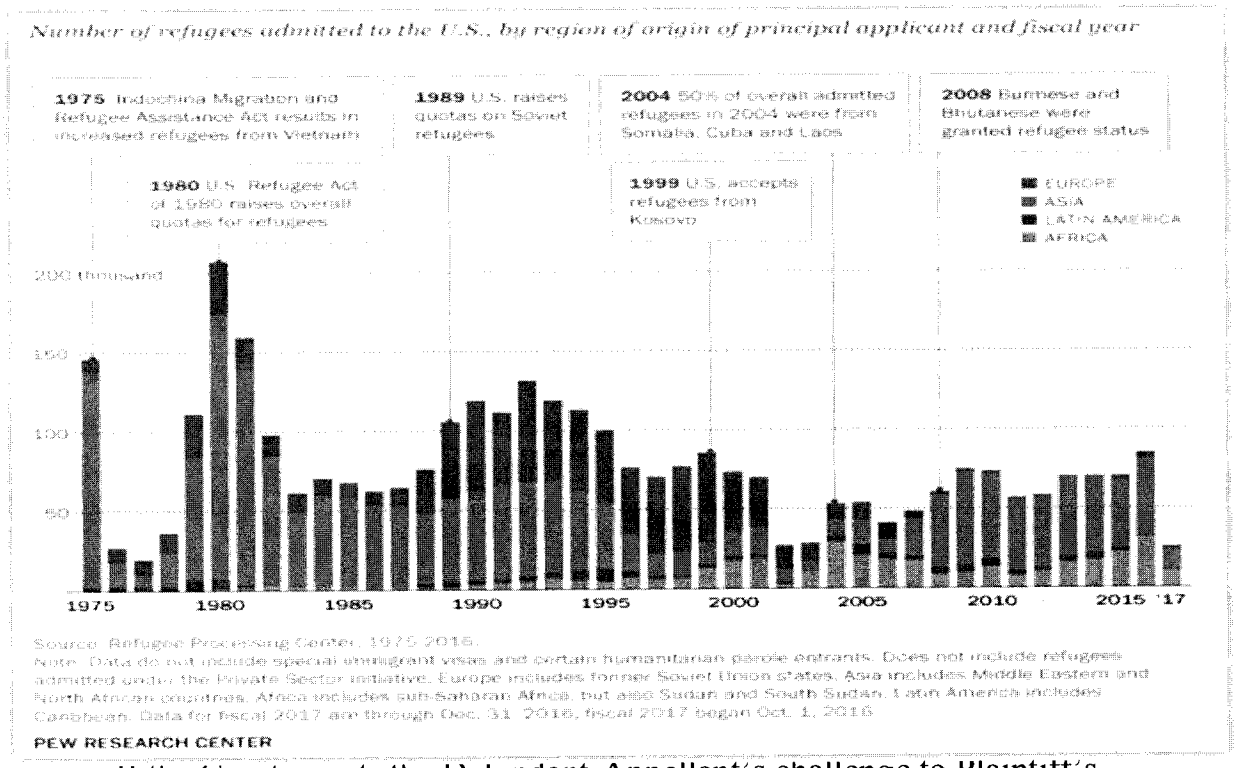
governmental interest in both national security and responsible immigration policy, either of which would outweigh any individual rights that are being raised. Further, limiting the suspension to the particular class of aliens rather than an across-the-board suspension of immigrant and refugee admissions, demonstrates that the Executive Order is narrowly tailored to achieve the government's objectives of protecting the nation from foreign terrorist entry.

Section 5 of the EO (Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017), which suspends the entry of Syrian refugees, is supported by the presidential proclamation that "the entry of nationals of Syria as refugees is detrimental to the interests of the United States..." (at Section 5(c)) and that "entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States..."

Placing a reasonable 50,000-person limitation on refugee immigration is the prerogative of the Executive and consistent with good management of the nation's infrastructure and national security. The Obama administration had announced a goal of admitting 110,000 refugees in fiscal 2017, which would have been the highest number of refugees admitted since 1994.[5] The 50,000 limit on refugee

[5] Jens Manuel Krogstad and Jynnah Radford, *Key facts about refugees to the U.S.* Pew Research Center. http://www.pewresearch.org/fact-tank/2017/01/30/key-facts-about-refugees-to-the-u-s/

immigration is reasonable from a historical context and is calculated to achieve the approximate figures of our most recent Republican administration:



If the Court rejects the Defendant-Appellant's challenge to Plaintiff's standing, a consideration of the merits of Plaintiff's argument challenging the Executive Order is proper. On the merits, the facts upon which the Executive Order is based, since they involve ostensibly classified matters of national security, are not subject to review by the Courts. The President's plenary power permits the immigration and national security actions taken by the Executive Order and the Plaintiff is not entitled to constitutional protection, as against the Executive, under the Establishment Clause.

Plaintiff is also not entitled to invoke the protections under the 14th Amendment for the protection of non-citizens who are outside of the jurisdiction of any State of the United States. Even if a strict scrutiny test were applied, the Plaintiffs fail to establish that the Executive Order is unconstitutional.

Finally, with regard to the limits placed on refugees, the Executive Order is in line with the approximate number of refugees permitted by the most recent Republican administration.

For the reasons set forth herein, and to support the president's efforts to protect national security and effectively manage immigration procedure as permitted by the Immigration and Nationality Act, Section 212(f), this amicus urges the Court to grant Appellant-Defendant's Emergency Motion.

DATED: February 8, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned individual, appearing *pro se*, certifies that this *amicus curiae* brief:

(i) Complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Professional Plus 2013 and is set in Times New Roman font in a 14-point size and,

(ii) Complies with the length requirement of Rule 29(a)(5) because it is 11 pages.

DATED: February 8, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2017, a true and correct copy of the foregoing: BRIEF OF *AMICUS CURIAE* DANIEL O. ESCAMILLA, *PRO SE* IN SUPPORT OF DEFENDANT-APPELLANTS with first class postage prepaid has been deposited in the U.S. Mail in Santa Ana, California, and properly addressed to the persons whose names and addresses are listed below.

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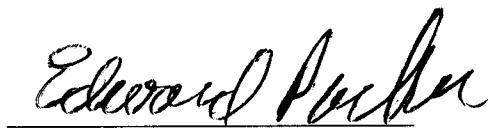

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