

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 *AMICI CURIAE*
LAW PROFESSORS AND CLINICIANS
SUPPORTING PLAINTIFFS-APPELLEES**

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STATEMENT OF INTEREST

Amici are law professors and clinicians at institutions of higher education. *Amici* have personal, professional, and academic connections to students, researchers, faculty, and staff from all over the world. Many *amici* teach law school clinics and have had first-hand experience with international students, faculty, and clients who have sought their direct assistance with immigration issues resulting from the President's recent Executive Order (EO). As law professors and clinicians, we have worked hard in a climate of chaos and confusion to assist international students and faculty detained at airports and stranded abroad after participating in conferences, giving talks, or engaging in research. We have also helped students and faculty navigate concerns about the impact of the revocation of their visas on their studies and employment, including the risk of being placed in removal proceedings. In addition, we have scrambled to assist numerous noncitizens not affiliated with universities who have similarly been affected by the EO. *Amici* submit this brief under Fed. R. App. P. 29, Circuit Rule 29(a)(2). All parties have consented to the submission of amici briefs in this case.

INTRODUCTION

The Ninth Circuit should deny the motion for an emergency stay of the temporary restraining order (TRO) issued by the U.S. District Court for the Western District of Washington. The EO issued on January 27, 2017 creates a

serious risk of irreparable harm to our clients, students, and colleagues who have nonimmigrant (temporary) visas at United States universities. In addition, Plaintiffs-Appellees are likely to succeed on the merits of their constitutional and statutory claims.

ARGUMENT

I. THE EO INFLECTS IRREPARABLE HARM ON INTERNATIONAL STUDENTS AND RESEARCHERS.

On January 31, 2017, the U.S. Department of Justice released a State Department notice dated January 27, 2017, “provisionally revok[ing] *all valid nonimmigrant and immigrant visas* of nationals of Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen,” subject to narrow exceptions for diplomatic visas and case-by-case determinations made in the national interest.¹ This revocation of visas made everyone with nonimmigrant visas from the seven countries, even those *within* the United States, potentially deportable under 8 U.S.C. § 1227(a)(1)(B), which provides: “Any alien who is present in the United States in violation of this Act or any other law of the United States, *or whose nonimmigrant visa (or other*

¹ U.S. Department of State, letter dated Jan. 27, 2017 (released by U.S. Department of Justice on Jan. 31, 2017), <http://www.politico.com/f/?id=00000159-f6bd-d173-a959-ffff671a0001>.

documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 221(i) is deportable.” (Emphasis added).²

On or about February 4, 2017, the State Department issued an announcement confirming that it had, “under the Executive Order, provisionally revoked *all valid visas* of nationals of those seven countries, with limited exceptions.”³ (Emphasis added). In light of the TRO issued by the U.S. District Court for the Western District of Washington, however, the State Department lifted the provisional revocation. *Id.*

The nationwide TRO currently protects thousands of international students and researchers in the United States. If the order is reversed, students and researchers will suffer irreparable harm, namely the inability to travel outside the United States and a fear that they may fall out of legal status and suffer deportation. They would be unable to leave the country to attend international symposia or conferences, engage in overseas field research, collaborate with colleagues in other countries, or visit their families without encountering impediments to their return.

² The State Department invoked its authority under 8 U.S.C. § 1201(i), INA § 221(i), in its letter dated Jan. 27, 2017. *See supra* note 1.

³ U.S. Department of State, Bureau of Consular Affairs, Important Announcement, Executive Order on Visas, <https://travel.state.gov/content/travel/en/news/important-announcement.html>.

According to data collected from the Department of Homeland Security by College Factual, a higher education data analytics and research company, there were 23,763 students with F-1 and M-1 student visas at 596 universities in the United States affected by the travel ban.⁴ Since this number only includes students, not faculty, it actually underestimates the true number of individuals who are affected and who may be subjected to deportation if their nonimmigrant visas expired. Post-docs, medical residents, and faculty often work at United States universities with other types of nonimmigrant visas, such as J-1 visas for exchange visitors and H-1 visas for temporary workers.

Students' and researchers' concerns are consistent with those expressed by numerous American universities.⁵ The students and researchers we work with and represent provide critical, diverse viewpoints to university life. Their experiences

⁴ College Factual, *How Trump's Executive Order Affects Thousands of International Students in the U.S.*, Jan. 31, 2017, <http://inside.collegefactual.com/blog/how-trumps-travel-ban-affects-thousands-of-international-students>.

⁵ See Appendix A (list of hundreds of institutions of higher education that have expressed concerns about the EO); Association of Public Land-Grant Universities, Public Universities Respond to New Immigration Executive Order (including statements from 140 public universities expressing concerns about the ban), <http://www.aplu.org/members/councils/strategic-communications/immigration-actions/index.html>; International Higher Education Consulting Blog, Running List of University/College and Higher Education Organization/Association Responses to President Trump's Executive Order Entitled "Protecting the Nation from Terrorist Entry into the United States by Foreign Nationals," Jan. 27. 2017, <http://ihec-djc.blogspot.com/2017/01/running-list-of-universitycollege-and.html>.

and perspectives enrich our understanding of new problems to be solved, and help identify original solutions to those problems.

Shortly after the EO was announced, over 3,000 international scholars signed a petition to “boycott international academic conferences held in the United States in solidarity with those affected by” the EO.⁶ Not only does this suppress intellectual activity and collaboration, but it also inflicts substantial financial harm. Furthermore, if international students from the seven banned countries are no longer able to attend school in the U.S., either because they are denied entry to the country or their visas expire, our universities stand to lose hundreds of millions of dollars.⁷ These financial losses, which would affect our programs, including our law school clinics, could be even greater if the ban also discourages students who are citizens of other Muslim-majority countries from studying in the United States.

II. PLAINTIFFS-APPELLEES ARE LIKELY TO SUCCEED ON THE MERITS

Unlike the First Circuit, the Ninth Circuit has never placed special emphasis on the “likelihood of success” factor, resulting in a different legal standard here than was applied in the Massachusetts case. *See* Exh. B to Emergency Motion for Stay (*Louhghalam v. Trump*, Civ. 17-10154-NMG, Order at 20 (Feb. 3, 2017))

⁶ Elizabeth Redden, *Boycotting the U.S.*, Inside Higher Ed (Jan. 31, 2017), <https://www.insidehighered.com/news/2017/01/31/protest-trump-entry-ban-some-scholars-are-boycotting-us-based-conferences>.

⁷ *See* College Factual, *supra* note 4 (estimating that revocation of student visas at 596 schools would result in losses of \$700 million).

(citing *Coquico, Inc. v. Rodriguez-Miranda*, 562 F.3d 62, 66 (1st Cir. 2009) (holding that the likelihood of success factor weighs most heavily in the decision). Here, the District Court judge correctly relied on Ninth Circuit precedents that consider all four factors using a sliding scale. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)).

A. The EO Violates Due Process Rights of Nonimmigrants

Nonimmigrants who have been *granted visas* and are *already living* in the United States have due process rights to stay here; those who are abroad have a due process interest in proper adjudication of their rights to be in the United States. U.S. Const. amend. V. The EO affects not only nonimmigrants who are seeking entry for the first time, but also those who have established ties to the United States, including students and faculty who we have assisted in the past weeks as they grapple with the EO's impact. The EO inflicted irreparable harm on nonimmigrants within the United States who suddenly lost their ability to travel, had their visas revoked, and thereby feared deportation. Many of these students and faculty members have already been in the United States for years, are in the middle of degree programs, and have made significant intellectual contributions to the United States. They should receive due process protections commensurate with

their substantial ties to the United States. This Court need not determine the precise contours of the process due to nonimmigrants living in the United States (or those abroad) in deciding this appeal. It need only find a likelihood of success in showing that the process received by these nonimmigrants – which involved no notice, no opportunity to respond, and no individualized analysis of risk to national security – was insufficient.

Even if the Court applies the “facially legitimate and bona fide” standard that has been applied to individuals seeking admission, the EO fails to satisfy that test. While national security may, in some cases, be a facially legitimate reason, it is not legitimate when applied without any individualized analysis to entire nations. *Cf. Kleindienst v. Mandel*, 408 U.S. 753, 769 (1982) (finding a “facially legitimate and bona fide” reason for the denial of visa to an individual who had violated the conditions of his visa on two prior trips); *Kerry v. Din*, 135 S.Ct. 2128, 2140 (2015) (finding a “facially legitimate and bone fide” reason for the denial of a visa to an Afghan national who had previously been employed by the Taliban). Neither the Supreme Court nor the Ninth Circuit has ever held that national origin, religion, or race alone constitutes a “facially legitimate and bona fide reason.” The overbreadth of the EO reflects the type of “unfettered discretion” that the Supreme Court has explicitly rejected. *See Kleindienst*, 408 U.S. at 762; *Fiallo v. Bell*, 430 U.S. 787, 807 (1977).

Furthermore, even if national security provides a facially legitimate reason for the EO, it is not a bona fide reason for the ban on all individuals from seven Muslim-majority countries. As previously recognized by this Court, the “facially legitimate” and “bona fide” prongs of the test are distinct. *See Bustamante v. Mukasey*, 531 F.3d 1059, 1062-1063 (9th Cir. 2012) (examining the “bona fide” prong separately). The “bona fide” part of the test requires a court to distinguish between good faith reasons and pretextual excuses. In other contexts, appellate courts have given great deference to trial courts’ determinations of whether the government’s explanation is bona fide. *See Kesser v. Cambra*, 465 F.3d 351, 356 (9th Cir. 2006) (noting that the court of appeal gave “great deference to the trial court in distinguishing bona fide reasons from sham excuses”); *Felkner v. Jackson*, 562 U.S. 594, 596 (2011) (same).

Here, there is substantial evidence that the ban was motivated by animus against Muslims. For example, on January 28, 2017, a week after the inauguration, Former New York City Mayor Rudy Giuliani stated in an interview that President Trump had previously asked him about legally implementing a “Muslim ban.”⁸ Indeed, for nearly a year preceding the election, President Trump’s campaign

⁸Rebecca Savransky, Giuliani: Trump asked me how to do a Muslim ban ‘legally’, THE HILL, Jan. 28, 2017, <http://thehill.com/homenews/administration/316726-giuliani-trump-asked-me-how-to-do-a-muslim-ban-legally>.

website referred to a “Muslim ban,” indicating discriminatory intent.⁹ The evidence that there was no bona fide reason for the ban will be developed further through discovery. In the interim, however, the TRO should remain in place to prevent irreparable harm to nonimmigrants.

B. The EO Violates the Immigration and Nationality Act and the Administrative Procedure Act

The INA provides the procedure due to arriving nonimmigrants with valid nonimmigrant visas. The EO violates those procedures in three ways. First, the statute requires that the procedure for admission be set through regulation. 8 U.S.C. § 1184(a) (“The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe[.]”). The EO was not promulgated as a regulation. It never went through the public notice and comment procedures that help ensure transparent, deliberate, well-reasoned policies under § 553 of the Administrative Procedure Act (APA). In fact, the EO was never even vetted by key agency officials or career diplomats with relevant expertise, hundreds of whom

⁹Noah Bierman, Donald Trump’s Muslim ban was removed from the Website, but it’s back,” LOS ANGELES TIMES, Nov. 10, 2016, <http://www.latimes.com/nation/politics/trailguide/la-na-updates-trail-guide-so-what-s-the-deal-with-donald-trump-s-1478812963-htmlstory.html>; *see also* Press Release, Trump-Pence Campaign, Donald J. Trump Statement on Preventing Muslim Immigration, Dec. 7, 2015, <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>.

have since explicitly voiced their opposition to the EO, including the former Acting Attorney General, Sally Yates, who refused to defend the ban.¹⁰ The failure to use a transparent process also contributed to the chaos and confusion that ensued after the EO was suddenly issued.

Second, the statute requires that a nonimmigrant visa “shall be valid for the period the regulations proscribe.” *Id.* § 1201(c)(2). However, the EO effectively invalidated the visas for travel purposes. Third, the INA denies admission to nonimmigrants only when they are inadmissible under the INA or “any other provision of law.” 8 U.S.C. § 1201(h). The EO denies admission to all visa holders from the seven countries regardless of admissibility.

In addition, with respect to immigrant visas, the INA prohibits discrimination in admissions based on nationality. 8 U.S.C. § 1152(a)(1)(A). Congress enacted the nondiscriminatory provision *after* 8 U.S.C. § 1182(f), which authorizes the President to “suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.” The provision allowing suspension of entry of

¹⁰ See Elisa Labott, *Over 900 US Career diplomats protest Trump Order*, CNN, Jan. 31, 2017, <http://www.cnn.com/2017/01/30/politics/career-diplomats-dissent-memo/>; Michael D. Shear, Mark Landler, Matt Apuzzo, and Eric Lichtblau, *Trump Fires Acting Attorney General Who Defies Him*, NEW YORK TIMES, Jan. 30, 2017, <https://www.nytimes.com/2017/01/30/us/politics/trump-immigration-ban-memo.html>.

classes of aliens is therefore subject to the nondiscrimination requirement in 8 U.S.C. § 1152(a)(1)(A). Furthermore, the President’s authority under 8 U.S.C. § 1182(f) should not be interpreted to undermine the requirement that the procedures for nonimmigrant admission be set through regulation. 8 U.S.C. § 1184(a).

By violating the plain language of the INA, the EO is also arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of APA § 706(2)(A); in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, in violation of APA § 706(2)(C); and without observance of procedure required by law, in violation of § 706(2)(D).

Although the President is not an “agency” under the APA, *Franklin v. MA*, 505 U.S. 788, 797 (1992), an agency’s implementation of presidential directives must still conform to the APA. *See, e.g., Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996) (“that the Secretary’s regulations are based on the President’s Executive Order hardly seems to insulate them from judicial review under the APA, even if the validity of the Order were thereby drawn into question.”); *Public Citizen v. United States Trade Representative*, 5 F.3d 549, 552 (D.C. Cir. 1993) (noting that the denial of judicial review over presidential actions “is limited to those cases in which the President has constitutional or statutory responsibility for the *final step* necessary for the agency action directly to affect the parties). Where, as here, immigration decisions require action by administrative

officials, courts routinely apply the APA and administrative law doctrines.

CONCLUSION

In order to protect the constitutional and statutory rights of nonimmigrants and prevent irreparable harm to our colleagues and clients -- students and faculty with nonimmigrant visas -- the Court should deny the motion to stay or vacate the TRO issued by the U.S. District Court for the Western District of Washington. The TRO should remain in place as parties conduct discovery and the trial court holds an evidentiary hearing.

DATED: February 5, 2017

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)(a) and (a)(6) because it has been prepared in a proportionally spaced typeface, using Microsoft Word in Times New Roman 14-point font.

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 2,577 words excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii). (The maximum number of words is 2,600 for an *amicus* brief in connection with a motion, which has a word limit of 5,200 words under Fed. R. App. P. 27(d)(2)(A)).

Dated: February 5, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2017, I electronically filed the foregoing with the Clerk of the court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

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

DATED: February 5, 2017

Respectfully submitted,

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