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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

STATE OF HAWAI'I and ISMAIL ELSHIKH,

Plaintiffs,

vs.

DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA,

Defendants.

CV. No. 1:17-cv-00050-DKW-KJM

**BRIEF OF *AMICUS CURIAE* T.A., A U.S. RESIDENT OF YEMENI DESCENT, SUPPORTING PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER; EXHIBITS "1" – "6"; CERTIFICATE OF SERVICE**

**BRIEF OF *AMICUS CURIAE* T.A., A U.S. RESIDENT OF YEMENI DESCENT, SUPPORTING PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER**

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## STATEMENT OF INTEREST

*Amicus* files this brief in support of Plaintiffs' Motion for a Temporary Restraining Order to enjoin enforcement of President Trump's Amended Executive Order, dated March 6, 2017 (the "Amended Order" or the "Amended Executive Order").

T.A.[1] is a United States citizen who was raised in Yemen. T.A.'s father and many members of T.A.'s extended family hold Yemeni passports and reside abroad. They are barred from entering the United States under the Amended Order. Although the Government states that banned persons "could" apply for "[c]ase by case" waivers under Section 3 of the Amended Order, Section 16(c) provides that nothing in the Amended Order provides any "enforceable" right, "substantive or procedural." Am. Compl.,[2] Ex. 1 (Amended Order) at § 16(c). The Amended Order does not even provide for any *un*enforceable opportunity to be heard as to any purported reason to deny entry, any timing for or notification of a denial, much less any reason, or any ability to appeal a denial.

[1] This brief uses initials, rather than T.A.'s full name, to reduce the risk of potential reprisals to T.A. or his family members. *United States v. Doe*, 655 F.2d 920, 922 n.1 (9th Cir. 1981) (Even for a party, "[w]here it is necessary, however, to protect a person from harassment, injury, ridicule or personal embarrassment, courts have permitted the use of pseudonyms.")

[2] Citations to "Am. Compl." refer to the Second Amended Complaint For Declaratory and Injunctive Relief, filed March 8, 2017, at ECF No. 64.

## INTRODUCTION

The travel ban in the Amended Order would cause severe harms to T.A., his family, and countless others. This brief focuses on one issue: the assertion that these harms that the Amended Executive Order would impose are justified by national security. That assertion does not pass even rational basis scrutiny.

The Amended Order is not rationally related to the Government interests it purports to further. First, no national from any of the six countries has committed a fatal terrorist attack in the United States since 1975. Thus, the Amended Order is both widely overbroad and too narrow in comparison to its stated purpose. The Amended Order applies to every national of the six countries identified but, at the same time, does not include any national of the many other countries whose nationals previously committed deadly terrorists attacks against the United States, including 9/11.

Second, although the Amended Order cites the need to review purportedly-deficient vetting procedures, as a Department of Homeland Security ("DHS") report indicates, there is no evidence of a correlation between the adequacy of a country's vetting procedures and the likelihood one of its nationals will commit a terrorist attack within the United States. Nor is there any indication that the United States cannot introduce its own sufficient, supplemental vetting

procedures to remedy any potential screening deficiencies in the six countries. Indeed, the Amended Order concedes the Government will now do this for Iraqi nationals.

Third, the timing of the Amended Order betrays its supposed national security justification. President Trump first issued his Executive Order entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States" on January 27, 2017 (the "Original Order" or "Original Executive Order"). Were national security the true impetus for the Amended Order, the Administration would not have waited more than 35 days—after the courts enjoined the enforcement of the Original Executive Order—to roll out the Amended Order and make it effective. And the Administration certainly would not have waited almost a week to roll out the already-completed, revised version, for the sole purpose of extending favorable press coverage for President Trump's Joint Address to Congress.

All of the above and more demonstrate that national security is more of a pretext than a reason for the Amended Order. Stripped of this pretext, the Amended Order is what it seems—a payoff on the President's campaign promise to ban Muslims because of their purported terrorist proclivities. That is prejudice and would cause severe harms. Even *assuming* there was statutory authorization, the travel ban in the Amended Order is unconstitutional.

## FACTUAL BACKGROUND

### A. President Trump's Campaign Promise to Ban All Muslims.

On January 27, 2017, President Trump issued the Original Executive Order. Am. Compl., Ex. 2 (Original Executive Order). Nationals from seven Muslim-majority countries, Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen, were immediately "suspend[ed]" from entering the United States. *Id*. at § 3(c). Although the Original Executive Order asserted that numerous "foreign-born individuals" had "been convicted or implicated in terrorism-related crimes" since September 11, 2001, *id*. at § 1, it provided no support for that claim. The overwhelming public record demonstrates that this justification was and remains a pretext for a travel ban targeted at Muslims.

#### 1. Anti-Muslim Rhetoric (Jul. 2015 – Nov. 2015)

On June 16, 2015, Donald J. Trump announced his candidacy for Presidency. Soon after, at a July 11, 2015, Las Vegas rally, Mr. Trump said: "If you are Islamic . . . it's hard to believe, you can come in so easily." Am. Compl. ¶ 36 (citing Louis Jacobson, *Donald Trump says if you're from Syria and a Christian, you can't come to the U.S. as a refugee*, Politifact (July 20, 2015)).

At a September 30, 2015 New Hampshire rally, Mr. Trump told his followers that a "200,000-man army" might grow out of the 10,000 Syrian refugees the Obama administration had accepted for 2016. *Id.* ¶ 37 (citing Ali Vitali, *Donald Trump in New Hampshire: Syrian Refugees Are 'Going Back*, NBC

News (Oct. 1, 2015)). "[T]hey could be ISIS," Mr. Trump said, but, "if I win, they're going back." *Id*.

On November 18, 2015, Mr. Trump doubled down on his promise to deport Syrian refugees if elected and, further, claimed that the United States would have "absolutely no choice" but to shut down mosques where "some bad things are happening." Ex. 1 (Nick Gass, *Trump: 'Absolutely no choice' but to close mosques*, Politico (Nov. 18, 2015)).

**2. The Unadorned Muslim Ban (Dec. 2015 – Mar. 2016)**

In a December 7, 2015 press release, titled "Donald J. Trump Statement on *Preventing Muslim Immigration*," Trump declared: "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States . . .[,]" because "there is great hatred towards Americans by large segments of the Muslim population." Am. Compl., Ex. 6 (Press Release, Donald J. Trump for President, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015)). Offered a last chance the next day to soften his tone, Mr. Trump declined to relent:

> Interviewer: [What would the customs process look like for a Muslim non-citizen trying to enter the U.S.?]
>
> Trump: [The official screening the entrant] would say, are you Muslim?

Interviewer: And if they said 'yes,' they would not be allowed into the country.

Trump: That's correct.

Am. Compl. ¶ 39 (citing Nick Gass, *Trump not bothered by comparisons to Hitler*, Politico (Dec. 8, 2015)). Instead, Mr. Trump justified his proposal by invoking one of this country's great shames—the internment of Japanese Americans during World War II—telling reporters, "[Roosevelt] did the same thing." *Id.* (citing Jenna Johnson, *Donald Trump says he is not bothered by comparisons to Hitler*, The Washington Post (Dec. 8, 2015)).

In March 2016, Mr. Trump told another interviewer, "I think Islam hates us," adding that distinguishing between Islam and "radical" Islam was not possible. Am. Compl. ¶ 41 (citing *Anderson Cooper 360 Degrees: Exclusive Interview With Donald Trump* (CNN television broadcast Mar. 9, 2016, 8:00 PM ET)). Asked whether "there [was] a war between the West and radical Islam, or between the West and Islam itself," Mr. Trump replied, "It's very hard to separate. Because you don't know who's who." *Id.*

### 3. Dressing the Muslim Ban in "National Security" Garb (Jun. 2016 – present)

When Mr. Trump became the presumptive Republican nominee, he began to change his semantics. In June 2016, Mr. Trump promised to "suspend immigration *from areas of the world where there's a proven history of terrorism*

*against the United States*, Europe or our allies until we fully understand how to end these threats." *Id.* ¶ 42-43 (emphasis added) (citing Ryan Teague Beckwith, *Read Donald Trump's Speech on the Orlando Shooting*, Time (June 13, 2016); Press Release, *Donald J. Trump Addresses Terrorism, Immigration, and National Security*, (Jun. 13, 2016)). Still, he coupled this promise with dual exhortations to world leaders to stop "importing *radical Islamic terrorism* to the West through a failed immigration system" and "tell the truth about *radical Islam*" in order "to protect the quality of life for all Americans—women and children, gay and straight, Jews and Christians and all people." *Id*.

On July 24, 2016, Mr. Trump admitted that he had changed only the label of his Muslim Ban. During a Meet the Press interview, a journalist said to the candidate: "The Muslim Ban. I think you've pulled back from it, but you tell me." Am. Compl., Ex. 7 (Transcript, *Meet the Press* (July 24, 2016)). Mr. Trump responded: "I don't think it's a rollback. In fact, you could say it's an expansion. I'm looking now at territories. *People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim.*" *Id*. (emphasis added).

By the fall, Mr. Trump said his Muslim ban was now called "extreme vetting." During the October 9, 2016 Presidential debate, a moderator asked, "Your running mate said this week that the Muslim ban is no longer your position.

Is that correct? And if it is, was it a mistake to have a religious test?" Am. Compl. ¶ 45 (citing The American Presidency Project, *Presidential Debates: Presidential Debate at Washington University in St. Louis, Missouri* (Oct. 9, 2016)). Mr. Trump replied: "*The Muslim ban is something that in some form has morphed into a[n] extreme vetting from certain areas of the world*." *Id*. (emphasis added). Asked to clarify whether "the Muslim ban still stands," Trump simply responded, "*It's called extreme vetting.*" *Id*. (emphasis added).

Former New York City Mayor and Trump-advisor Rudolph Giuliani has confirmed that Mr. Trump's intention to ban Muslims never changed. Mr. Giuliani explained that Mr. Trump wanted to enact a "Muslim Ban," and asked how he could get away with it legally. Mr. Giuliani admitted: "When [Mr. Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" Am. Compl., Ex. 8 (Amy B. Wang, *Trump asked for a 'Muslim ban,' Giuliani says – and ordered a commission to do it 'legally'*, The Washington Post (Jan. 29, 2017)).

**4. *Delivering on the Campaign Promise* – The January 27, 2017 Executive Order and March 6, 2017 Amended Order.**

President Trump unveiled the Original Executive Order, "Protecting the Nation From Foreign Terrorist Entry into the United States," on January 27, 2017. Am. Compl., Ex. 2 (Original Order). Section 3(c) of the Original Order "suspend[ed] entry into the United States, as immigrants and nonimmigrants" of

individuals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. *Id.* § 3(c). The Original Order also imposed a 120-day moratorium on the refugee resettlement program and "suspend[ed]" indefinitely the entry of refugees from Syria to the United States. *Id.* §§ 5(a), (c)–(d). Finally, Section 5(b) of the Original Order directed the Secretaries of State and Homeland Security, "[u]pon resumption of USRAP admissions," to "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." *Id.* § 5(b).

President Trump, in a January 27, 2017 interview with the Christian Broadcasting network, stated that under his Order, Christians would be given priority in refugee admissions. Am. Compl. ¶ 58 (citing *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority as Refugees*, Christian Broadcasting Network (Jan. 27, 2017)). President Trump remarked:

> Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them.

*Id.*

On February 3, 2017, federal Judge James L. Robart of the Western District of Washington issued a temporary restraining order (the "TRO"), enjoining the Executive Branch from enforcing the Original Order after the State of Washington challenged the ban on constitutional grounds. *See Washington v. Trump*, No. 2:17-CV-00141, ECF. No. 52 (W.D. Wash. Feb. 3, 2017)). On February 9, 2017, the Ninth Circuit denied the Government's motion for an emergency stay of the TRO. *Washington v. Trump*, 847 F.3d 1151, 1161 (9th Cir. 2017) (per curiam).

On March 6, 2017, President Trump issued the Amended Executive Order. Am. Compl., Ex. 1 (Amended Order.) Although the Amended Order made a number of changes, including the removal of Iraq from the list of affected countries, and exempting lawful permanent residents, it retains the contours and purpose of both the Original Order and the President's campaign promises. Indeed, the White House Press Secretary, Sean Spicer, heralded the issuance of the Amended Order as the fulfillment of President Trump's campaign promises, telling reporters, "President Trump yesterday *continue[d]* to deliver on ... his *most significant campaign promises*: protecting the country against radical *Islamic* terrorism." Ex. 2 (Press Briefing by Press Secretary Sean Spicer, (Mar. 7, 2017) (emphasis added)). Mr. Spicer's statement belies the Government's argument that the Amended Order can be divorced from President Trump's campaign promises.

### 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 currently lives and works here as a videographer.

T.A.'s father, aunts, uncles, and cousins—all of whom hold Yemeni passports—now live in Jordan, to which they fled as refugees from the ongoing Yemeni Civil War. Many of them would like to travel to the United States to visit T.A. and their extended family. In particular, T.A.'s cousin, with whom he is close, wishes to travel to this country to look at schools and visit his brother, a U.S. citizen, as well as T.A. The Amended Order would bar T.A.'s father, cousin and his extended family from traveling to this country.

## ARGUMENT

## I. THE GOVERNMENT'S NATIONAL SECURITY JUSTIFICATION IS REVIEWABLE BY THE JUDICIARY.

Both the Original and Amended Executive Orders asserted national security as a justification. *See* Am. Compl. Ex. 2 (Original Order) at § 2 (The Order is meant "to protect the American people from terrorist attacks by foreign nationals"); Am. Compl., Ex. 1 (Amended Order) at § 1(a). The Government has previously argued that this national security justification renders the Executive Orders "unreviewab[le]," positing that "[j]udicial second-guessing of the President's determination" that the Orders were necessary "to protect national

security" was "an impermissible intrusion" on the Executive's authority. *See* Mot. for Administrative Stay 2, 15-16, *Washington v. Trump*, No. 17-35105, 2017 WL 655437 (9th Cir. Feb. 4, 2017). If the Government were correct that national security assertions are unreviewable in this context, then even an open, avowed ban of all Muslims—or Jews, Hindus, or Sikhs—would be unchallengeable. But, as the Ninth Circuit ultimately concluded, the Government's position is not, and cannot be, the law.

Indeed, the Ninth Circuit found "no precedent to support" the Government's position. *Washington*, 847 F.3d at 1161. Citing a wealth of controlling authority stretching back more than 150 years, the Ninth Circuit confirmed that "concerns of national security . . . do not warrant abdication of the judicial role." *Id.* at 1161-64. (relying on *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010); *Boumediene v. Bush*, 553 U.S. 723, 765 (2008); *Aptheker v. Sec'y of State*, 378 U.S. 500 (1964); *Ex parte Endo*, 323 U.S. 283 (1944); *Ex parte Quirin*, 317 U.S. 1, 19 (1942); *Ex parte Milligan*, 71 U.S. 2, 120-21 (1866); *Alperin v. Vatican Bank*, 410 F.3d 532, 559 n.17 (9th Cir. 2005); *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1056 (9th Cir. 1995)). Federal courts uncontrovertibly possess the power "to review the political branches' actions with respect to matters of national security." *Id*.

The Ninth Circuit reiterated that while "deference" to the Executive Branch is appropriate in cases involving national security determinations, "given the relative institutional capacity, informational access, and expertise of the courts," national defense is not "an end in itself," and its assertion may not be used to justify unconstitutional exercise of power. *Id.* at 1163 (citing *United States v. Robel*, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."). The Executive Branch's "authority and expertise" in matters involving national security does not "trump the Court's own obligation to secure the protection that the Constitution grants to individuals." *Id.* Thus, courts should "review foreign policy arguments . . . offered to justify legislative or executive action when constitutional rights are at stake." *Id.*

The cases cited by the Ninth Circuit prudently establish that under our constitutional rule of law, the judiciary examines the extent of support for the Executive's invocation of national security. History is replete with too many scares, terrors, and pogroms to mention that occurred when a judiciary lacked either the authority or the resolve to perform such a constitutional role.

## II. A CONSTITUTIONAL CLAIM IS STRENGTHENED WHERE THE GOVERNMENT'S ASSERTED JUSTIFICATION OF NATIONAL SECURITY APPEARS TO BE A PRETEXT FOR PREJUDICE.

In many areas of constitutional law, where the "breadth" of government action is "so far removed" from the government's "particular justifications," those justifications are "impossible to credit." *Romer v. Evans*, 517 U.S. 620, 632 (1996). For example, in *Romer*, the Supreme Court reviewed an amendment to the Colorado state constitution that would have prevented any locality in the state from taking any action to recognize homosexuals as a protected class. *Id*. at 624. The Government justified the amendment by citing "respect for other citizens' freedom of association," including the rights of landlords to evict gay tenants if they found homosexuality morally offensive. *Id*. at 635. Justice Kennedy, writing for the majority, held that the amendment's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Id*. at 632 (the amendment "is at once too narrow and too broad," because it "identifies persons by a single trait and then denies them protection across the board.").

Because, as we next demonstrate, the Amended Executive Order is both radically overbroad and under-inclusive, it cannot withstand any level of review. As in *Romer*, the Amended Order "is at once too narrow and too broad,"

thus revealing its true purpose of animus toward a politically unpopular group. *Id.* at 633. Such animus is even clearer here in light of the comments of the President and his aides before and after the election. *See* supra at 4-10.

## III. THE GOVERNMENT'S NATIONAL SECURITY ASSERTION IS A PRETEXT FOR PREJUDICE.

In reviewing the Amended Order, the Court should consider its "historical context" and the "specific sequence of events leading to [its pronouncement]." *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005). History debunks the national security assertion in the Amended Executive Order.

### A. The Evidence Cited in the Amended Order Regarding National Security is Superficial.

The Amended Order "suspend[s] entry" into the United States of individuals from six countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen. Am. Compl., Ex. 1 (Amended Order) at § 2(c). The Amended Order asserts that its aim is to prevent "the entry into the United States of foreign nationals who may commit, aid, or support acts of terrorism." *Id.* § 1(j). It asserts that the ban is intended "to prevent infiltration by foreign terrorists. *Id.* §§ 1(d)-(e), 2(c). Likewise, the Amended Order justifies its refugee ban on the ground that "individuals seeking admission as refugees" may "pose a threat to the security and welfare of the United States." *Id.* § 6(a).

As the conservative-leaning Cato Institute has demonstrated, however, no national from any of the countries listed in the Amended Order has committed a fatal terrorist attack in the United States since at least 1975. Am. Compl. ¶ 53 (citing Alex Nowrasteh, *Little National Security Benefit to Trump's Executive Order on Immigration*, Cato Institute Blog (Jan. 25, 2017)). Cato also has determined that any American's chance of being killed by a refugee is approximately 1 in 3.6 billion. *See* Ex. 3 (Alex Nowrasteh, *Syrian Refugees and the Precautionary Principle*, Cato Institute Blog (Jan. 28, 2017)).

A leaked February 24, 2017 DHS draft report came to the same conclusion as the Cato Institute: citizenship is an "unlikely indicator" of terrorism threats against the United States, given that very few individuals from the seven countries included in the Original Order, or the six countries included in the Amended Order, carried out, or even attempted to carry out, *non-fatal* terrorist activity within the United States since 2011. Am. Compl., Ex. 10 (Department of Homeland Security, *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States*).

Specifically, of the eighty-two people inspired by a foreign terrorist group to carry out, or attempt to carry out, attacks in the United States, only three have been from Somalia, one each from Iran, Sudan, and Yemen, and none from Syria or Libya. Am. Compl., Ex. 12 (Phil Helsel, *DHS Draft Report Casts Doubt*

*on Extra Threat from 'Travel Ban' Nationals in U.S.*, NBC News (Feb. 24, 2017)). As important, there is no evidence that any of these individuals were radicalized *before* entering the United States. To the contrary, a second DHS report, dated March 1, 2017, concludes that "most foreign-born, U.S.-based violent extremists likely radicalized several years after their entry to the United States." Am. Compl., Ex. 11 (Department of Homeland Security, *Most Foreign-born, US-based Violent Extremists Radicalized after Entering Homeland; Opportunities for Tailored CVE Programs Exist* (March 1, 2017)). Thus, the lack of "extreme vetting" could not have contributed to their attacks.

Conversely, the countries with the most individuals on the DHS terror list remained conspicuously absent from both the Original and Amended Executive Orders. Am. Compl. ¶ 53 (citing Scott Schane, *Immigration Ban Is Unlikely to Reduce Terrorist Threat, Experts Say*, N.Y. Times (Jan. 28, 2017)). Although the Orders cite the attacks of September 11, 2001 as a rationale, the Amended Order imposes no restrictions on travelers from the countries whose nationals carried out those attacks (Egypt, Lebanon, Saudi Arabia, and the United Arab Emirates). In reality, as nearly a dozen high-ranking national security and intelligence officials have declared, these Orders "ultimately undermin[e] the national security of the United States, rather than making us safer." *See* Decl. Nat'l Security Advisors ¶ 3, *Washington v. Trump*, No. 17-35105, ECF. No. 28-2 (9th Cir. Feb. 6, 2017))

(concluding that there is no national security purpose for a total bar on entry from the seven countries named in the Original Order)).

Even the specific examples of individual terrorists cited in the Amended Order only exacerbate the logical inconsistencies inherent in the Administration's national security argument. The Amended Order asserts that "[r]ecent history shows that some of those who have entered the United States through our immigration system have proved to be threats to our national security." Am. Compl., Ex. 1 (Amended Order) at § 1(h). Then it goes on to offer two examples. The Amended Order would have prevented neither.

First, the Administration points to a "January 2013. . . [incident in which] two *Iraqi* nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses." *Id.* (emphasis added). But Iraq was removed from the list of banned countries in the Amended Order. *Id.* at § 1(f).

The second example does not fare any better. The Amended Order states, "[I]n October 2014, a native of Somalia *who had been brought to the United States as a child refugee* and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon." *Id.* (emphasis added). To start, no one

claims that this person was radicalized before he came to this country as a "child refugee," so this cannot be an example of failed vetting. Moreover, Section 3(c)(v) of the Amended Order provides for potential waivers in cases where the "foreign national is an infant, a young child or adoptee… ." *Id.* at § 3(c)(v). Thus, the Government cannot use either example to justify the still-overbroad Amended Executive Order on national security grounds.

### B. The Government's Vetting Justification Illustrates the Amended Order's Fatal Overbreadth.

The Amended Order asserts that preventing nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen from entering the United States, subject to certain exceptions, is needed "[i]n light of the conditions in the[] six countries, [and] until the assessment of current screening and vetting procedures required by section 2 of this order is completed." Am. Compl. Ex. 1 (Amended Order) at § 1(f). This purported justification in fact helps demonstrate the overbreadth of the travel ban.

First, there is no demonstrated correlation between the adequacy of a country's vetting procedures and the likelihood that it will produce an individual from that country who will commit a terrorist attack within the United States. Were this the case, then Saudi Arabia and Egypt, two countries with vetting procedures evidently stringent enough for the Administration to omit them from the Amended Order's travel ban list, *see id.* at § 1(f), would not have together

produced sixteen of the nineteen 9/11 hijackers. *See* Ex. 4 (Sergio Pecanha and K.K. Rebecca Lai, *The Origins of Jihadist-Inspired Attackers in the U.S.*, New York Times (Dec. 8, 2015)) (sixteen of the attackers were from Saudi Arabia, one from Egypt, two from the United Arab Emirates, and one from Lebanon).

Second, the illogic of the Amended Order's travel ban based on nationality is striking. For example, a Sudanese national who has lived and worked in, and travels to the United States from, Saudi Arabia as a doctor would be banned. Am. Compl. ¶ 63(c) (citing Jane Morice, *Two Cleveland Clinic doctors vacationing in Iran detained in New York, then released*, Cleveland.com (Jan. 29, 2017)). But a Saudi national of any background who lives and works in, and travels to the United States from, Sudan is not. This illogical disparity is justified by nothing, including national security.

Third, the Executive Branch has many undoubtedly constitutional tools at its disposal—such as diplomacy, aid, withholding aid, and sanctions—to induce other countries to improve their vetting procedures. But there is simply no evidence that *barring* citizens of these six countries will induce their respective governments to increase the stringency of their own vetting efforts.

Fourth, the Government has not demonstrated why, if unsatisfied with the six countries' existing vetting procedures, our country cannot engage in its own, additional vetting. To the contrary, the Amended Order removes Iraq from

the travel ban list, and instead imposes additional screening procedures by the United States for Iraqi nationals seeking a visa, admission, or other immigration benefit. Am. Compl., Ex. 1 (Amended Order) at § 1(f), at § 4 (stating that Iraqi applications will be subject "to thorough review, including, as appropriate, consultation with a designee of the Secretary of Defense and use of the additional information that has been obtained in the context of the close U.S.-Iraqi security partnership . . ."). The Amended Order offers no reason why supplemental vetting on the part of the United States would not similarly remedy any deficiencies in the vetting procedures of any of the remaining six countries on the travel ban list. To the contrary is a letter to President Trump from more than 130 generals and national security experts from across the political spectrum—including former Secretaries of State Susan Rice and John Kerry and two former Secretaries of the Department of Homeland Security. That letter explains that the United States can and should "implement any necessary [vetting] enhancements without a counterproductive ban or suspension on entry of nationals of particular countries or religions." Ex. 5 (Nat'l Security Experts' March 10, 2017 Letter to Trump).

### C. The Timing Surrounding the Amended Order's Roll-Out Belies Any "National Security" Justification.

The circumstances surrounding the Amended Order's roll-out further belies its "national security" justification. Discussing the Original Executive Order, President Trump claimed that he initially considered a one-month delay

between signing and implementation. Am. Compl. ¶ 60 (citing Kevin Liptak, *Trump: I wanted month delay before travel ban, was told no,* CNN Politics (Feb. 9, 2017)). But after being told by advisors that "you can't do that because then people are gonna pour in before the toughness," he says he relented and opted instead for the ban to become effective immediately. *Id*. On January 30, 2017, President Trump took to Twitter to explain: "If the ban were announced with a one week notice, the 'bad' would rush into our country during that week." *Id.* (citing Donald J. Trump (@realDonaldTrump), Twitter (Jan. 30, 2017, 5:31 AM ET)).

Indeed, when Judge Robart enjoined enforcement of the Original Executive Order, on February 3, 2017, President Trump's Tweets over the next two days reiterated that the threat to national security was immediate, real, and severely exacerbated by Judge Robart's order:

> Feb 4, 2017 07:48:12 PM The judge *opens up our country to potential terrorists* and others that do not have our best interests at heart. Bad people are very happy!
>
> Feb 4, 2017 04:44:49 PM Because the ban was lifted by a judge, *many very bad and dangerous people may be pouring into our country*. A terrible decision
>
> Feb 4, 2017 03:44:07 PM What is our country coming to when a judge can halt a Homeland Security travel ban and *anyone, even with bad intentions, can come into U.S.*?
>
> Feb 5, 2017 03:39:05 PM Just cannot believe a judge would put our country in such peril. *If something happens blame him and court system. People pouring in. Bad!*

Ex. 6 (Selected Trump Tweets (emphasis added)). The Justice Department sought an emergency stay of Judge Robart's TRO in the Ninth Circuit, arguing that the TRO put the security of the nation at immediate risk. *See* Gov't's Emergency Mot. Under Cir. Rule 27-3 for Admin. Stay and Mot. for Stay Pending Appeal at *20, *Washington v. Trump*, No. 17-35105, ECF. No. 14 (Feb. 4, 2017).

Despite the President's rhetoric, his Administration nevertheless *took five weeks* after the Original Order's enforcement was enjoined to roll out the Amended Order. Indeed, President Trump purposefully delayed rolling out the Amended Order by nearly a week, even *after it was already completed*, because his Administration did not want to disrupt a news cycle of favorable press coverage. The Amended Order was finished and set for President Trump's signature on March 1, 2017. *See* Am. Compl. ¶ 74 (citing Laura Jarrett, Ariane de Vogue & Jeremy Diamond, *Trump delays new travel ban after well-reviewed speech*, CNN (Mar. 1, 2017 6:01 AM ET)). But after President Trump's February 28, 2017 Joint Address to Congress was well received in the national press, the Administration decided to delay the issuance of the Amended Order to March 6, 2017. *Id.* It strains credibility to suggest that national security can be the true basis for the Amended Order if its implementation comes second to favorable media coverage.

### D. The Extended Time Periods Under the Amended Order Further Suggest "National Security" is a Pretext.

Credibility is further strained by the time periods set forth in the Amended Executive Order. The January 27, 2017 Original Executive Order declared that Section 3(c)'s entry ban was necessary to "reduce investigative burdens on relevant agencies during the review period" regarding vetting procedures. Am. Compl. at Ex. 2 (Original Order) at § 3(c). Accordingly, the Original Order suspended travel from the seven listed countries for 90 days, through April 27, 2017, ostensibly to facilitate such review. *Id*. § 3(c).

Yet, the March 6, 2017 Amended Executive Order, issued 38 days after the original, delayed its effective date *another* 10 days and called for an *additional* 90-day entry ban—until June 14, 2017—purportedly to enable executive agencies to conduct their already-ongoing review. *Compare* Am. Compl. Ex. 1 (Amended Order) at § 2(c), *with* Am Compl. Ex. 2 (Original Order) at § 3(c). The Amended Order does not even try to explain why an additional 48 days are necessary for the review. That extension brings the total period for the review, since January 27, 2017, to 138 days—a more-than-50% increase over the 90 days originally called for in the Original Order.

The Amended Order does not and cannot blame Judge Robart's TRO as a means to justify the 48-day extension. Nothing in any TRO across the country would have prevented the review from occurring. The review undoubtedly could

have continued, and, very likely did continue, after the TRO. The President does not need an executive order to direct cabinet members, or the Director of National Intelligence, to engage in the sort of review described in Section 3(a) of the Original Order and Section 2(a) of the Amended Order. To the contrary, such presidential direction to appointed officials is usually accomplished by phone call, email, letter, or other informal communication.

Curiously, the conclusory March 6, 2017 letter from the Attorney General and Secretary of DHS, that is Exhibit A to the Government's brief, does not even purport to request or justify the 48-day extension of the review. That silence, and the letter's belated timing, further suggest that national security is being used as a pretext for the Amended Order.

In light of all the above, the unwarranted extension of the travel ban until at least June 14, 2017 is further evidence of animus. So is the Amended Order's suggestion that the ban may well continue indefinitely beyond June 14, 2017, so long as the review is not "completed." Am. Compl. Ex. 1 (Amended Order) at § 2(c).

**E. Absent the Pretext, What Remains is Prejudice.**

Unlike President Trump during the campaign, *supra* at 5-6, the Government prudently has never cited *Korematsu v. United States*, 323 U.S. 214 (1944). Even *Korematsu*'s majority opinion provides no help as, among other

reasons, the United States is not at war with any of the six countries named in the travel ban. *See id.* at 217-18 (relying on "the war power of Congress and the executive"); *id.* at 219 ("Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to remove allegiance to the Japanese Emperor, and several thousand refugees requested repatriation to Japan.").

Moreover, *Korematsu* is no longer considered good law by the Ninth Circuit. *See Hirabayashi v. United States*, 828 F.2d 591, 593 (9th Cir. 1987) ("The *Hirabayashi* and *Korematsu* decisions have never occupied an honored place in our history."). Every indication is that a majority of the Supreme Court would agree. Justice Ginsburg and Breyer have said so. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 275 (1995) (Ginsburg, J. dissenting) (describing the use of strict scrutiny in *Korematsu* to "yield[] a pass for an odious, gravely injurious racial classification . . . . A *Korematsu*-type classification . . . will never again survive scrutiny: Such a classification, history and precedent instruct, properly ranks as prohibited."); Stephen Breyer, *Making Our Democracy Work: A Judge's View* (Knopf, 2010) ("The decision has been so thoroughly discredited, that it is hard to conceive of any future court referring to it favorably or relying on it."). And the Ninth Circuit's website has published a "Reading List of Justice Anthony M. Kennedy," *available at* www.ca9.uscourts.gov, that cites Justice Murphy's

*dissent* in *Korematsu* as an example of "key principles that are integral to our nation's DNA."

The core of Justice Murphy's dissent is: "Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support." *Korematsu*, 323 U.S. at 234. Justice Murphy stated that claims by the Executive regarding military necessity "must [be] subject" to the "judicial process of having . . . reasonableness determined and . . . conflicts with other interests reconciled." *Id.* at 234. That rational "relation" was "lacking" because the internment order simply "assum[ed] that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy." *Id*. at 235. However, no "reason, logic or experience could be marshalled in support of such an assumption." *Id*.

What remained, Justice Murphy explained, as the real reasons behind the internment were "an accumulation of much of the misinformation, half-truths, and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the most foremost advocates of the evacuation." *Id*. at 240. In Justice Murphy's view, even a "military judgment based upon such racial and sociological considerations is not entitled to the great weight" ordinarily given to national

security considerations. *Id*. Justice Murphy described the government's action as the "legalization of racism" and concluded:

> Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States.

*Id.* at 242.

The same is true here. The Government has marshalled no "reason, logic or experience" in support of the assumption that nationals from the six countries possess some innate tendency to commit terrorism in the United States. Instead, President Trump said in his campaign, "Islam hates us," *supra* at 6, and the White House Press Secretary trumpets that the Amended Order keeps one of President Trump's "most significant campaign promises: protecting the country against radical *Islamic* terrorism." *Supra* at 10 (emphasis added). That is prejudice, not national security. That prejudice does severe harm. It is unconstitutional.

## CONCLUSION

Plaintiffs' Motion for a Temporary Restraining Order should be granted.

Dated: Honolulu, March 14, 2017.

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