

No. 17-35105

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STATE OF WASHINGTON, *et al.*,
Plaintiffs-Appellees,
v.

DONALD J. TRUMP, President of the United States, *et al.*,
Defendants-Appellants.

On Motion for a Stay Pending Appeal of a Temporary
Restraining Order Issued by the United States District Court
for the Western District of Washington,
Case No. 2:17-cv-00141, Hon. James L. Robart

**BRIEF OF *AMICUS CURIAE* THE AMERICAN CENTER FOR LAW AND JUSTICE
IN SUPPORT OF DEFENDANTS-APPELLANTS' MOTION FOR A STAY**

ERIK ZIMMERMAN
AMERICAN CENTER FOR LAW
AND JUSTICE
3001 Plymouth Road, Suite 203
Ann Arbor, Michigan 48105
Telephone: (734) 680-8007
Facsimile: (734) 680-8006
Email: ezimmerman@aclj.org
Counsel for Amicus Curiae

JAY ALAN SEKULOW
Counsel of Record
AMERICAN CENTER FOR LAW
AND JUSTICE
201 Maryland Avenue, NE
Washington, D.C. 20002
Telephone: (202) 546-8890
Facsimile: (202) 546-9309
Email: sekulow@aclj.org
Counsel for Amicus Curiae

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**CORPORATE DISCLOSURE STATEMENT PURSUANT TO
FEDERAL RULE OF APPELLATE PROCEDURE 29(A)(4)(A)**

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(A), the American Center for Law and Justice makes the following disclosures:

- 1) Nongovernmental corporate parties list all parent corporations: *None*
- 2) Nongovernmental corporate parties list all publicly held companies that hold 10% or more of the party's stock: *None*

**CERTIFICATION PURSUANT TO
FEDERAL RULE OF APPELLATE PROCEDURE 29(A)(4)(E)**

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the American Center for Law and Justice affirms that no counsel for a party authored this brief in whole or in part and that no person other than the *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae the American Center for Law and Justice is an organization dedicated to the defense of constitutional liberties secured by law. Counsel for the ACLJ have presented oral argument, represented parties, and submitted *amicus* briefs before the United States Supreme Court and numerous state and federal courts around the country in cases concerning the First Amendment and immigration law, including *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007),

McConnell v. FEC, 540 U.S. 93 (2003), and *United States v. Texas*, 136 S. Ct. 2271 (2016). The ACLJ has been active in advocacy and litigation concerning the need for protecting the Constitution, the First Amendment, the separation of powers, and the immigration laws in place that protect American Citizens from harm.

BACKGROUND

On January 27, 2017, the President of the United States executed his Executive Order: Protecting the Nation from Foreign Terrorist Entry into the United States (Jan. 27, 2017) (Executive Order). In pertinent part, the Executive Order (1) suspends immigrant and nonimmigrant entry from seven countries of particular concern designated as such by the prior administration; (2) pauses the U.S. Refugee Admissions Program (USRAP) for 120 days to allow necessary improvements to the program to be identified and implemented; and (3) prioritizes claims of people seeking refugee status due to religious persecution from countries where their religion is a minority. *Importantly, nothing in the Executive Order bans the entry of Muslims because they are Muslims or even identifies any particular religion or faith.*

On February 3, 2017, the United States District Court for the Western District of Washington entered a Temporary Restraining Order barring enforcement of substantive provisions of the President's Executive Order.

According to the District Court, its Temporary Restraining Order had nationwide application — even though only two States appear as plaintiffs.¹

I. The District Court Failed to Support its Extraordinary Remedy With Meaningful Legal or Factual Analysis.

The District Court’s Temporary Restraining Order contains *no* meaningful legal analysis. The Court’s Order contains only a recitation of legal standards; but contains no application of any substantive law to a single fact. Nowhere in the District Court’s Order is there any citation to or analysis of a statute or an article of or amendment to the Constitution that the President’s Executive Order allegedly offends.

This defect is of particular moment here because the type of relief Plaintiffs seek is well known to be “extraordinary.” *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (TRO is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief”). For such extraordinary relief to be, in fact, extraordinary, it must not be lightly or routinely granted. A plaintiff must clearly show “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary

¹The Court also entered the injunction at the behest of two States — parties that are not themselves even subject to the Executive Order and lack Article III standing or any right to challenge the denial of entry or visas to third-party aliens. In any event, Plaintiffs’ likelihood of success on the issue of standing is anything but clear. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (concerning standing; explaining that certain regulatory matters are “the function of Congress and the Chief Executive” and not the federal courts).

relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009) (citing *Winter*, 555 U.S. at 20). A clear showing as to each and every element of this standard is, admittedly, a heavy burden. But that is precisely the way it is meant to be, as a temporary restraining order provides extraordinary relief without the benefit of a full trial or merits hearing. See *University of Texas v. Camenisch*, 451 U.S. 390, 396 (1981) (“[W]here a federal district court has granted a preliminary injunction, the parties generally will have had the benefit neither of a full opportunity to present their cases nor of a final judicial decision based on the actual merits of the controversy.”). In the realm of national security decisions, like those made by the President here and reflected in the challenged Executive Order, judicial intervention without a full trial can be dangerous. At the very least, such an extraordinary order by a court required a convincing and extensive legal analysis, which the District Court failed to provide. Merely stating, without explanation or analysis, that the Plaintiffs had shown a high likelihood of success on the merits cannot be enough — especially when a court is purporting to bar nationwide enforcement of a President’s Executive Order expressly made in the interest of national security.

II. The District Court's Temporary Restraining Order Affronts the Constitution and Congress.

It is undeniable that the admission of, or refusal to admit, any refugee or alien is a sovereign act of the United States. “The Supreme Court has ‘long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’” *Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)). The District Court’s Temporary Restraining Order contravened the considered judgment of Congress that the President should have the *unreviewable authority to suspend the admission of any class of aliens*. There can be no doubt that Congress expressly delegated to the President broad discretionary authority: 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,” the President has the authority 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.” 8 U.S.C. § 1182(f).

The express delegation of powers by Congress is but part of the equation. The United States Constitution grants to the President inherent foreign affairs and national security powers. U.S. Const. Article II; *Harisiades v. Shaughnessy*, 342 U.S. 580, 588 (1952) (recognizing that immigration control is an integral part of

Article II authorities “in regard to the conduct of foreign relations [and] the war power”). Where, as here, a President’s executive action is based on this convergence of authority, the President’s “authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 (1952).

To be sure, “an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.” *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (“[A]n alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe.”).² Moreover, the

²Again, the President’s Executive Order makes *no* reference to any particular faith or religion and can no more implicate the Establishment Clause than does 8 U.S.C.S. § 1101(a)(42)(A), the congressional statute expressly defining “refugee” to include persons fleeing actual or feared persecution on account of their religion. Neither the President’s nor the Congress’ recognition of religious persecution as a lawful ground for granting refugee status and eligibility for asylum constitutes forbidden governmental favor of one religion over another or entanglement. Properly understood, the Executive Order — providing that aliens seeking refugee status on account of religious persecution are to be given priority if their religion is a minority religion in their country — makes excellent sense. Around the globe, one whose religion is a minority is much more likely to be persecuted. *The result Plaintiffs seek would have extremely negative and far-reaching consequences for refugees of all religions.* Regardless, this is a policy determination by the political branches concerning non-resident aliens, to whom the First Amendment has not been held to apply.

Constitution “is not a suicide pact,” *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963), and the first responsibility of the United States government is national defense and security. The President’s Executive Order was based on precisely that responsibility.

The directives contained in the President’s Executive Order³ are closely tethered to discretionary powers vested in the Executive Branch by the Constitution *and Congress* and clearly fall within the President’s well-established constitutional and statutory authority. The Executive Order does *not* ban Muslim immigrants or refugees because they are Muslims and makes *no reference to any*

³Cutting through the hyperbole and inflammatory rhetoric surrounding the Order, *Amicus Curiae* urges this Court to carefully consider what the President’s Executive Order actually does and what it does not do. Expressly relying on authority and procedures set forth in 8 U.S.C. 1187(a)(12), the Order suspends for 90 days the entry of people from “countries of particular concern” (currently Iran, Iraq, Syria, Sudan, Libya, Yemen and Somalia – all countries *already* designated as such during President Obama’s administration). Sec. 3(c). Among other reasons, this 90-day pause is “to ensure that adequate standards are established to prevent infiltration by foreign terrorists or criminals.” *Id.* Certain diplomatic and governmental visa holders are exempted. The Order also requires a “determination of the information needed for adjudications and a list of countries that do not provide adequate information, within 30 days”; the U.S. Department of State to request such information from all foreign governments; and a recommendation of countries whose nationals should be prohibited entry due to a country’s failure to provide the information. Sec. 3.

Concerning refugee acceptance, the Executive Order suspends theUSRAP for 120 days, during which the program will be reviewed “to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures.” Sec. 5(a). The Order also “prioritize[s] 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.” Sec. 5(b). The Order suspends the acceptance of Syrian refugees as “detrimental to the interests of the United States” until “sufficient changes” have been made to the refugee program. Sec. 5(c). The Order decreases the overall refugee cap to 50,000, Sec. 5(d), much closer to normal refugee limits before the prior administration dramatically increased the number this past year. It is abundantly clear that the President clearly has the discretionary authority to make this adjustment.

specific religion. Instead, the Executive Order simply pauses the entry of immigrants from certain unstable and terrorism-infested countries and refugees for the clearly articulated purpose of allowing time for needed improvements to the United States' outdated immigration and refugee screening process. The countries whose nationals are implicated in the Order were *already* designated as countries of particular concern during the prior administration.

CONCLUSION

Wherefore, for these reasons and others, the *Amicus Curiae* respectfully urges this Court to stay the District Court's Temporary Restraining Order and sustain the Defendants-Appellants' Motion.

Dated: February 6, 2017. Respectfully submitted,

/s/ Erik Zimmerman

ERIK ZIMMERMAN
AMERICAN CENTER FOR LAW
AND JUSTICE
3001 Plymouth Road, Suite 203
Ann Arbor, Michigan 48105
Telephone: (734) 680-8007
Facsimile: (734) 680-8006
Email: ezimmerman@aclj.org
Counsel for Amicus Curiae

JAY ALAN SEKULOW
Counsel of Record
AMERICAN CENTER FOR LAW
AND JUSTICE
201 Maryland Avenue, NE
Washington, D.C. 20002
Telephone: (202) 546-8890
Facsimile: (202) 546-9309
Email: sekulow@aclj.org
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion of the American Center for Law and Justice for Leave to File its *Amicus Curiae* Brief and the proposed Brief of *Amicus Curiae* were electronically filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit on February 6, 2017, using CM/ECF, which will send notification of such filing to counsel of record.

Dated: February 6, 2017. Respectfully submitted,

/s/ Erik Zimmerman
ERIK ZIMMERMAN
AMERICAN CENTER FOR LAW
AND JUSTICE
3001 Plymouth Road, Suite 203
Ann Arbor, Michigan 48105
Telephone: (734) 680-8007
Facsimile: (734) 680-8006
Email: ezimmerman@aclj.org
Counsel for Amicus Curiae