Nos. 16-1436 and 16-1540

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
v.
STATE OF HAWAII, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF *AMICI CURIAE* FORMER NATIONAL SECURITY OFFICIALS IN SUPPORT OF RESPONDENTS

PHIL SPECTOR
MESSING & SPECTOR LLP
1200 Steuart Street
#2112
Baltimore, MD 21230
(202) 277-8173

HAROLD HONGJU KOH
Counsel of Record
HOPE METCALF
MATTHEW S. BLUMENTHAL
RULE OF LAW CLINIC
YALE LAW SCHOOL
127 Wall Street
P.O. Box 208215
New Haven, CT 06520-8215
(203) 432-4932
harold.koh@ylsclinics.org

Counsel for Amici Curiae

[Additional Counsel Listed On Inside Cover]

JONATHAN FREIMAN
TAHLIA TOWNSEND
WIGGIN AND DANA LLP
265 Church Street
P.O. Box 1832
New Haven, CT
06508-1832
(203) 498-4584

WILLIAM J. MURPHY
JOHN J. CONNOLLY
ZUCKERMAN SPAEDER LLP
100 E. Pratt St.
Suite 2440
Baltimore, MD 21202
(410) 332-0444

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES, RULES AND REGULATIONS

MISCELLANEOUS

STATEMENT OF INTEREST[1]

Amici curiae are former national security, foreign policy, intelligence, and other public officials who have worked on security matters at the most senior levels of the United States government.[2]

Amici have held the highest security clearances, and collectively devoted decades to combatting the various terrorist threats that the United States faces in an increasingly dangerous and dynamic world. A number of amici have worked in senior leadership positions in the administrations of Presidents from both major political parties. Many were current on active intelligence regarding credible terrorist threat streams directed against the United States as recently as one week before the issuance of the original January 27, 2017 Executive Order on "Protecting the Nation from Foreign Terrorist Entry into the United States" ("January Order"), and one was current as recently as the beginning of March 2017, shortly before the issuance of the identically titled March 6, 2017 Executive Order ("Order") under review here.

Amici have devoted their careers across multiple decades to protecting the security of the United States. They write to provide their views regarding the substantial national security and foreign policy issues raised by the Order under dispute in these proceedings.

---

[1] No counsel for a party to this case authored this brief in whole or in part, and no counsel for a party contributed monetarily to the preparation or submission of any portion of this brief. Amici received consent from Respondents to file this brief. Petitioners provided blanket consent to file *amicus curiae* briefs.

[2] A complete list of signatories can be found in the Appendix.

SUMMARY OF ARGUMENT

Amici agree that to keep our country safe from terrorist threats, the U.S. Government must gather all credible evidence about growing threat streams—including through the best available intelligence—to thwart those threats before they ripen. Through the years, amici have worked individually and collectively to help develop national security-based immigration restrictions that have: (1) responded to specific, credible threats based on individualized information, (2) rested on the best available intelligence, and (3) been subject to thorough interagency review. The Executive Orders at issue in this case do not rest on such carefully tailored grounds, but rather, (1) are blanket entry bans based on national origin, (2) that are not supported by any intelligence that Petitioners have cited or of which amici are aware, and (3) did not emerge from the sort of careful interagency legal and policy review that would compel judicial deference.

Petitioners insist that amici are trying to second-guess the "national-security judgment" of the President. Pet. Br. at 48-49. In fact, amici—who include senior officials from Democratic and Republican administrations, and several who served in both—well understand that national security decisions will differ from administration to administration, and evolve with changing circumstances. On some issues, amici disagree among themselves regarding the best approach to protecting the national security and immigration policy of the United States. But amici join together here, not to second-guess the President's national security judgment, but to underscore the many ways in which the Order under review does

not appear to reflect sound national security judgment at all.

First, the Order radically departs from the consistent approach to national security of multiple administrations, which for good reason have adopted individualized approaches based on cognizable intelligence rather than blanket, national origin-based bans. Overwhelming evidence demonstrates that the Order's overbroad bans on travel and refugees will not only fail to advance our national security or foreign policy, but will seriously damage those interests. *Second*, the January Order was not vetted through national security agencies, and took the President's own national security officials by surprise. *Third*, nearly eight months later, Petitioners offer no meaningful evidentiary support for the claimed national security imperative underlying the Order. *Fourth*, Petitioners' subsequent actions have shown that they never took their own claimed national security rationale seriously. Although the Order imposes a 90-day "pause" in travel from the listed countries—allegedly so that Petitioners may conduct an interagency review of vetting procedures—once the Order was in place, Petitioners failed to conduct that review, making clear that the "pause" was just another disguised travel ban, unconnected to the review of vetting procedures claimed as its *raison d'être*. Finally, the President's and his advisors' well-publicized statements repeatedly calling for a "Muslim ban" undercut Petitioners' claim that any considered national security judgment really underlies the Order.

In sum, all available evidence suggests that the Order was not based on national security judgment at all, but rather, on a deliberate political decision to

discriminate against a religious minority. In *Winter* v. *Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008), this Court "[gave] 'great deference *to the professional judgment* of military authorities concerning the relative importance of a particular military interest.'" (quoting *Goldman* v. *Weinberger,* 475 U.S. 503, 507 (1986)) (emphasis added)). While the Order at issue here may be *about* national security, Petitioners have provided no evidence that it actually involves the kind of considered national security *judgment*—based on process, evidence, findings, and careful interagency deliberation conducted by experienced national security professionals—that would warrant judicial deference.

This Court should not allow Petitioners to shield this Order from meaningful judicial review by cloaking discrimination in a thin veil of "national security." The record establishes that our nation's security was hardly deliberated, let alone through the appropriate channels, and was never this Order's true aim.

ARGUMENT

I. The Order departs sharply from historical precedent and would cause serious national security and foreign policy harm.

Amici are aware of no national security or foreign policy interest that would justify the Order at issue in this case. While amici include officials who were current on active intelligence concerning all credible terrorist threat streams directed against the United States as recently as March 2017, they know of no specific threat that justified either the unprecedented January Order—which suspended both travel from a number of listed countries ("the country ban") and refugee admissions ("the refugee ban")

—or the similar bans in the slightly revised March Order.

In fact, the Order (1) fails to advance the national security or foreign policy interests of the United States, (2) will harm those interests, and (3) is an unprecedented step that cannot be defended by reference to U.S. history.

A. The Order does not advance the national security or foreign policy interests of the United States.

In amici's professional judgment, the country and refugee bans bear no rational relation to the President's stated aim of protecting the nation from foreign terrorism.

1. The Country Ban. The current Order targets six countries whose nationals have committed no deadly terrorist attacks on U.S. soil in the last forty years.[3] Although Petitioners initially invoked the September 11, 2001 attacks as a rationale for the ban,[4] none of the September 11 hijackers were in fact citizens of those six listed countries.[5] The overwhelming majority of individuals who have been charged with—or who died in the course of committing—terrorism-related crimes inside the United

---

[3] Alex Nowrasteh, *Little National Security Benefit to Trump's Executive Order on Immigration*, CATO Institute: CATO at Liberty (Jan. 25, 2017) [hereinafter Nowrasteh Jan. 2017].

[4] Exec. Order No. 13,769, 82 Fed. Reg. 8977, §1 (Feb. 1, 2017) [hereinafter January Order].

[5] Peter Bergen et al., *Terrorism in America After 9/11*, New America Foundation, http://www.newamerica.org/in-depth/terrorism-in-america/ (accessed Sept. 16, 2017).

States since September 11 have been U.S. citizens or legal permanent residents.[6]

---

[6] See *ibid.*; Lorenzo Vidino & Seamus Hughes, *ISIS in America: From Retweets to Raqqa*, George Washington University Program on Extremism 7 (Dec. 2015); Nora Ellingsen, *It's Not Foreigners Who Are Plotting Here: What the Data Really Show*, Lawfare (Feb. 7, 2017); see also Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, Cato Institute (Sept. 13, 2016) [hereinafter Nowrasteh Sept. 2016]; Felicia Schwartz & Ben Kesling, *Countries Under U.S. Entry Ban Aren't Main Sources of Terror Attacks*, Wall St. J. (Jan. 29, 2017). "Of 161 people charged with jihadist terrorism related crimes or who died before being charged, 11 were identified as being from" the countries listed in the Order, but "none of the 11 were involved in any major U.S. plot resulting in the deaths of Americans, including the attacks of Sept. 11, 2001." Schwartz & Kesling, *supra.* The March Order asserts that "[s]ince 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States," and a letter from then-Secretary of Homeland Security Kelly and Attorney General Sessions asserts that since September 11, 2001, "a substantial majority of those convicted in U.S. courts for international terrorism-related activities were foreign-born." Exec. Order No. 13,780, 82 Fed. Reg. 13,209, §1(h) (Mar. 9, 2017) [hereinafter March Order]; Letter from Jeffrey B. Sessions, Attorney Gen., & John Francis Kelly, Sec'y of Homeland Sec., to Donald J. Trump, President (Mar. 6, 2017) [hereinafter March 6 Letter]. These documents cite no support for these assertions, and appear to be based upon a data set that has been widely criticized, *inter alia*, for its overly broad definition of offenses. See Nora Ellingsen & Lisa Daniels, *What the Data Really Show about Terrorists Who "Came Here"*, Lawfare (Apr. 11, 2017); Alex Nowrasteh, *42 Percent of "Terrorism-Related" Convictions Aren't for Terrorism*, Cato Institute: Cato at Liberty (Mar. 6, 2017); Molly Redden, *Trump Powers "Will Not be Questioned" on Immigration, Senior Official Says*, The Guardian (Feb. 12, 2007); Shirin Sinnar, *More Misleading Claims on Immigrants and Terrorism*, Just Security (Mar. 4, 2017).

Against this history, Petitioners offer no proof that the threat from the listed countries has increased recently so as to warrant the country-based ban in the Orders. In the January Order, Petitioners offered no such information at all. In the March Order, Petitioners added only general excerpts from documents such as the 2015 Department of State Country Reports on Terrorism, describing how these nations are home to violent extremist groups, and do not cooperate in U.S. counterterrorism efforts.[7] But a closer reading of those Country Reports—which several amici reviewed before publication—only confirms the gross imprecision of the Order's country bans. In fact, those Reports show that the majority of the terrorist attacks occurring in 2015 took place in five countries, *none of which are subject to the travel ban.*[8]

The only other claimed evidence cited in the March Order—two anecdotal cases in which refugees were later sentenced for terrorism-related crimes—provide no support at all for the overbroad ban.[9] In one instance, the terrorist activities were undertaken *before* the individual came to the United States from a country that is no longer listed in the Order.[10] Refugee procedures had already been fully reviewed

---

[7] March Order, *supra* note 6, at §1(e).

[8] Nat'l Consortium for the Study of Terrorism and Responses to Terrorism, *Annex of Statistical Information: Country Reports on Terrorism 2015* (June 2016) [hereinafter *Country Reports* 2015] (identifying Iraq, Afghanistan, Pakistan, India, and Nigeria).

[9] March Order, *supra* note 6, at §1(h).

[10] Office of Public Affairs, *Former Iraqi Terrorists Living in Kentucky Sentenced for Terrorist Activities*, Dep't of Justice, (Jan. 29, 2013).

and revised to address the concerns raised by this instance *before* the Order was issued.[11] Nor would a country-based suspension of travel to "improve the vetting process" have affected the entry of the other named individual, who never executed his plans, and was in any event admitted as a baby and radicalized in the United States.

Finally, the March Order claims that Petitioners must suspend travel from the six listed countries in order to review vetting procedures in all countries around the world. The Order asserts that a pause in travel is needed "[t]o temporarily reduce investigative burdens on relevant agencies during the review period" and "to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals."[12] But no actual evidence is offered for these assertions, and no explanation is provided for why a suspension of travel from six countries is needed to facilitate a vetting review of every country in the world. In fact, the United States has undertaken periodic reviews of vetting procedures throughout its history without claiming the need arbitrarily to block travel by some 180 million people to do so. And in recent weeks, Petitioners moved forward with their vetting-procedure review

---

[11] *Ten Years After 9/11: Preventing Terrorist Travel: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 112th Cong. 522 (2011) (written statements of Rand Beers, Under Secretary, National Protection and Programs Directorate, Department of Homeland Security, & Janice L. Jacobs, Assistant Secretary, Bureau of Consular Affairs, Department of State); Andorra Bruno, Cong. Research Serv., R43725, Iraqi and Afghan Special Immigrant Visa Programs, 14 (Feb. 26, 2016).

[12] March Order, *supra* note 6, at §2(c).

without an accompanying total suspension of travel.[13] Nearly eight months after the supposed emergency conditions necessitating issuance of the initial Order, Petitioners still cannot point to any genuine security threat, or any claimed flaw in our existing security screening of travelers, that suddenly demands imposition of the Orders' overbroad bans.

In fact, since the September 11, 2001 attacks, the United States has developed a rigorous system of security vetting, leveraging the full capabilities of the law enforcement and intelligence communities. Over the years, amici have worked individually and collectively to develop that system. In amici's experience, the current individualized vetting system is applied to travelers not once, but multiple times, and is continually re-evaluated to ensure its effectiveness. Successive administrations have strengthened the vetting process through robust information-sharing and data integration. This approach allows the U.S. Government to identify potential terrorists without resorting to blanket bans.[14]

Throughout this protracted litigation, Petitioners have offered no persuasive national security justification for abruptly moving to a country-based travel ban, particularly when the United States already has

---

[13] U.S. Dep't of State, *Demarche Request: E.O. 13780 – Improving Information Sharing with Foreign Governments* (July 12, 2017),
http://live.reuters.com/Event/Live_US_Politics/1012197528.

[14] *The Security of U.S. Visa Programs: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 114th Cong. (2016) (written statements of David T. Donahue, Principal Deputy Assistant for Consular Affairs, Department of State, & Sarah R. Saldaña, Director, U.S. Immigration and Customs Enforcement).

in place a tested, proven system of rigorous individualized vetting. Far from providing that justification, the information that has surfaced from within the U.S. Government has only undermined its national security claim. Since the initial Order issued this past January, a document generated by the Department of Homeland Security, prepared in response to a request from the new Administration, only confirmed amici's conclusion that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity."[15]

2. The Refugee Ban. For similar reasons, the March 6 Order's 120-day ban on refugee admissions serves no legitimate national security or foreign policy purpose. Amici include a number of officials who have held for extended periods of time the most senior responsibility within the U.S. Government for overseeing the refugee resettlement process. Amici know of no factual basis for Petitioners' claim that refugees pose a particular security threat to the

---

[15] U.S. Dep't of Homeland Sec., *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States* 1 [hereinafter *Citizenship Likely an Unreliable Indicator*], http://assets.documentcloud.org/documents/3474730/DHS-intelligence-document-on-President-Donald.pdf. Although the lower courts largely blocked a formal country ban from taking effect, the State Department still sharply reduced the number of non-immigrant visas issued to nationals of those six listed countries. See U.S. Dep't of State, Bureau of Consular Affairs, *Monthly Nonimmigrant Visa Issuances*, http://travel.state.gov/content/visas/en/law-and-policy/statistics/non-immigrant-visas/monthly-nonimmigrant-visa-issuances.html (showing 45% drop in issuance of such visas compared to the same period one year earlier); see also Yeganeh Torbati, *U.S. Visas Issued to Citizens of Trump Travel Ban Nations Continue To Decline*, Reuters (May 25, 2017).

United States that would justify the Order's categorical bans. To the contrary, the Government's position entirely misunderstands the realities of—and the national security protections provided by—the existing vetting process.

Refugees already receive the most thorough vetting of any travelers to the United States.[16] Refugee candidates are vetted repeatedly throughout the resettlement process, as "pending applications continue to be checked against terrorist databases, to ensure new, relevant terrorism information has not come to light."[17] By the time refugees referred by the United Nations High Commissioner for Refugees ("UNHCR") are approved for resettlement in the United States, they have been reviewed not only by UNHCR but also by the National Counterterrorism Center, the Federal Bureau of Investigation, the Department of Homeland Security, the Department of Defense, the Department of State, and the U.S. intelligence community.[18]

The refugee vetting process is also reviewed and enhanced on an ongoing basis in response to particular threats.[19] For Syrian applicants, the Department

---

[16] U.S. Dep't of State, *U.S. Refugee Admissions Program FAQs*.

[17] Amy Pope, *The Screening Process for Refugee Entry into the United States* (Nov. 20, 2015), http://obamawhitehouse.archives.gov/blog/2015/11/20/infographic-screening-process-refugee-entry-united-states.

[18] U.S. Dep't of State, *The Refugee Processing and Screening System*, http://www.state.gov/documents/organization/266671.pdf.

[19] U.S. Citizenship and Immigration Services, *Fact Sheet: Refugee Security Screening* (Dec. 3, 2015), http://www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20

of Homeland Security in 2015 described a layer of enhanced review that involves collaboration between the U.S. Citizenship and Immigration Services' Refugee, Asylum, and International Operations Directorate and the Fraud Detection and National Security Directorate. Among other measures, this review provided additional, intelligence-driven support to refugee adjudicators that U.S. officials could then use to more precisely question refugees during their security interviews.[20]

Under current vetting procedures, refugees often wait eighteen to twenty-four months to be cleared for entry into the United States.[21] Fewer than one percent of all refugees determined by the UNHCR to be eligible for resettlement were settled in any single country in 2015.[22] Because refugees do not decide where they will be resettled, the odds that any terrorist posing as a refugee will be resettled in the United States are vanishingly small.

During the four decades from 1975 to the end of 2015, over three million refugees have been admitted to the United States. Despite this vast number, only three refugees have killed people in terrorist attacks on U.S. soil during this period. All three were refu-

---

Asylum%2C%20and%20Int%27l%20Ops/Refugee_Security_Screening_Fact_Sheet.pdf.

[20] U.S. Dep't of State, *supra* note 18; Andorra Bruno, Cong. Research Serv., R44277, Syrian Refugee Admissions and Resettlement in the United States: In Brief 4-5 (2016).

[21] U.S. Dep't of State, *U.S. Refugee Resettlement Processing for Iraqi and Syrian Beneficiaries of an Approved I-130 Petition* (Mar. 11, 2016).

[22] U.N. High Commissioner for Refugees, *Resettlement*, http://www.unhcr.org/en-us/resettlement.html.

gees from Cuba—a country not listed in the Order—who were admitted to the United States and carried out their crimes *before* the creation of the modern refugee vetting system in 1980.[23] According to a recent study, over that same period, only 20 refugees have been convicted of *any* terrorism-related crimes on U.S. soil.[24] Between October 1, 2011 and December 31, 2016, more than 18,000 Syrian refugees were resettled in the United States; amici know of none who has been detained due to an alleged connection with terror.[25]

Petitioners allege no specific information about any vetting step omitted by these current procedures that would demand a generalized suspension of the refugee program.[26] At bottom, the U.S. refugee re-

---

[23] Nowrasteh Sept. 2016, *supra* note 6, at 13.

[24] *Ibid.*; see also *ibid.* ("[T]he chance of an American being murdered in a terrorist attack caused by a refugee is 1 in 3.64 *billion* per year * * *." (emphasis in original)).

[25] Nowrasteh Sept. 2016, *supra* note 6, at 13.

[26] Nor have Petitioners offered any national security reason why a "*bona fide* relationship" requirement should be superimposed on existing refugee vetting procedures to block entry even of those refugees with formal assurances from a U.S.-based resettlement agency. In reality, *all* refugees in the U.S. Refugee Admissions Program develop close *bona fide* relationships with U.S.-based entities by virtue of the refugee process, and in some cases well before a formal assurance of admittance is provided. The decision to admit individual refugees, once screened, depends on the U.S. Government's assessment that an agency in the United States is prepared to handle the particularized and often unique cultural, medical, and familial needs of individual refugees. By the time refugees have made their way through this intensive vetting process of matching individuals to resources, and have been formally admitted, they have necessarily acquired the kind of formal and documented "*bona fide* relationship" with the United States called for by this Court's June

settlement program is a humanitarian assistance program that was not set up to benefit relatives of American citizens or residents, nor to serve the employment or educational needs of American companies or institutions. It was instead established to further the noble and historical American tradition of aiding people fleeing persecution. Of course, this includes people with relatives and other prior connections to the United States. But it also includes people who, before having their case considered, had no relationship at all with the United States, but after full vetting under rigorous, individualized modern procedures, have been found to pose no national security threat.

B. The Order would do serious damage to the national security and foreign policy interests of the United States.

The Order not only fails to advance the national security or foreign policy interests of the United States but would cause serious and multiple harms to those interests.

First, the Order would harm interpreters and others who have assisted our troops at great risk to their own lives. While Iraq has been removed from the list of banned countries, the Order would halt the entire U.S. Refugee Assistance Program for 120 days for all countries. This pause would affect thousands of individuals who, because they assisted the United States overseas, are waiting for admission under the

---

26 *per curiam* order. See generally Brief of Amici Curiae Former National Security Officials in Opposition to the Motion for Clarification at 6-9, *Trump* v. *Hawaii*, No. 16-1540 (U.S. July 19, 2017), 2017 WL 3045234.

already backlogged "Priority 2" program.[27] By discouraging future assistance and cooperation from these and other affected military allies and partners, the Order would jeopardize the safety and effectiveness of our troops.

Second, the Order would disrupt key counterterrorism, foreign policy, and national security partnerships, in particular with countries in the Middle East. These partnerships are critical to our country's efforts to address the threat posed by terrorist groups such as the "Islamic State" ("IS"). The Order would also endanger U.S. intelligence sources in the field. For up-to-date information, our intelligence officers often rely on human sources in some of the countries listed. The Order breaches trust with those very sources, who have put themselves at great risk to keep Americans safe—and whom our officers had promised to protect.[28] Finally, by suspending visas, this Order halts the collection of vital intelligence that occurs during visa screening processes, information that can be used to recruit agents and identify regional trends of instability.

Third, the Order's disparate impact on Muslim travelers feeds IS's propaganda narrative and sends the wrong message to the Muslim community at home and abroad—that the U.S. Government is at

---

[27] See U.S. Dep't of State et al., Report to the Congress, Proposed Refugee Admissions for Fiscal Year 2016, at 57 (2016); Urban Justice Ctr., Int'l Refugee Assistance Project, IRAP Stands with Iraqi Allies of the United States Affected by Executive Order (Feb. 1, 2017).

[28] Michael V. Hayden, Opinion, *Former CIA Chief: Trump's Travel Ban Hurts American Spies – and America*, Wash. Post (Feb. 5, 2017).

war with Islam. The day after President Trump signed the January 27 Order, jihadist groups began citing its contents in recruiting messages online.[29] Likewise, domestic law enforcement relies heavily on partnerships with American Muslim communities to fight homegrown terrorism.[30] By alienating Muslim-American communities in the United States, the Order will harm our efforts to enlist their assistance in identifying radicalized individuals who might launch attacks such as those in San Bernardino and Orlando.

Fourth, the Order has already had a devastating humanitarian impact. The travel ban has disrupted the travel of men, women, and children who have been victimized by actual terrorists.[31] Countless other travelers now face deep uncertainty about whether they will be able to travel to or from the United States for reasons including medical treatment, study or scholarly exchange, funerals, or other pressing family reasons. While the Order allows the Secretaries of State and Homeland Security to admit travelers from targeted countries on a case-by-case basis, in amici's experience administering that process, it would impose unrealistic obligations on these overburdened agencies to apply such procedures to each and every affected individual with urgent and compelling needs to travel.

---

[29] See, *e.g.*, Joby Warrick, *Jihadist Groups Hail Trump's Travel Ban as a Victory*, Wash. Post (Jan. 29, 2017).

[30] See, *e.g.*, Kristina Cooke & Joseph Ax, *U.S. Officials Say American Muslims Do Report Extremist Threats*, Reuters (June 16, 2016).

[31] See, *e.g.*, Cora Currier, *U.S. Embassy Memos Offer a Glimpse into the "Devastated" Lives of Refugees Rejected by the Travel Ban*, The Intercept (Sept. 15, 2017).

Finally, the Order would affect many foreign travelers, who annually inject hundreds of billions of dollars into the U.S. economy, supporting well over a million U.S. jobs.[32] The travel ban also could be expected to have a negative economic impact on strategic economic sectors including defense, technology, and medicine. About a third of U.S. innovators were born outside the United States, and their scientific and technological innovations have contributed to making our nation and the world safe.[33] The unwarranted harm caused by the ban to the economic dynamism of our country would carry long-term negative and serious consequences for our national security.

C. The Order is of unprecedented scope.

In their long collective experience, amici know of no case where a President has invoked authority under the Immigration and Nationality Act to suspend admission of such a sweeping class of people. Even after the September 11 attacks, the U.S. Government did not invoke the provisions of law cited by Petitioners to broadly bar entrants based on nationality, national origin, or religious affiliation. To the contrary, across the decades, executive orders under the

---

[32] U.S. Dep't of Commerce, *Department of Commerce Releases October Travel and Tourism Expenditures* (Dec. 15, 2016), http://trade.gov/press/press-releases/2016/department-of-commerce-releases-october-travel-tourism-expenditures-121516.asp.

[33] Adams Nager et al., *The Demographics of Innovation in the United States*, Information Technology & Innovation Foundation 29 (Feb. 2016), http://www2.itif.org/2016-demographics-of-innovation.pdf; Patrick O'Neill, *How Academics Are Helping Cybersecurity Students Overcome Trump's Immigration Order*, Cyberscoop (Jan. 30, 2017).

Immigration and Nationality Act usually have targeted specific government officials,[34] undocumented immigrants,[35] or other individuals whose personalized screenings indicated that *as individuals*, they posed a national security risk.[36] No example in the modern era approaches the breadth of this Order, which, with one stroke of the pen, bans more than 180 million people in six separate countries from traveling to the United States based solely on their national origin.

Petitioners point to three inapposite examples in modern history. One involved actions in 1981 to stop *undocumented aliens* from Haiti "coming by sea to the United States without necessary documentation," hardly precedent for the sweeping ban on lawful travel imposed in this case.[37] The other two examples, Cuba in 1986[38] and Iran in 1979[39], imposed bans on travel, with exceptions, as part of an escalation against a foreign government during a diplomatic impasse between our countries, to exert pressure on the opposing government, not the individual trav-

---

[34] See, *e.g.*, Proclamation No. 6,958, 61 Fed. Reg. 60,007 (Nov. 22, 1996).

[35] See, *e.g.*, Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (May 24, 1992); Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981).

[36] See, *e.g.*, Exec. Order No. 13,726, 81 Fed. Reg. 23,559 (Apr. 19, 2016); Exec. Order No. 13,694, 80 Fed. Reg. 18,077 (Apr. 1, 2015).

[37] Exec. Order 12,807, *supra* note 35.

[38] Proclamation No. 5,517, 51 Fed. Reg. 30,470 (Aug. 26, 1986).

[39] Exec. Order 12,172, 44 Fed. Reg. 67,947 (Nov. 26, 1979).

elers involved.[40] No President has ever used such a sweeping ban to target legal travelers in order to minimize a claimed security threat by the travelers themselves.

Nor can the Order be defended as a mere continuation of more recent U.S. counterterrorism policy. Because threat streams constantly evolve, amici sought continually to improve vetting when serving as national security officials. That effort included reviews in 2011 and 2015-16, when the U.S. Government acted in response to particular threats identified by intelligence sources. In 2011, after receiving suspicious information regarding two Iraqi nationals who had entered the United States as refugees, the U.S. Government undertook an extensive interagency review of the Iraqi refugee vetting system.[41] During the pendency of the review, the flow of refugees from Iraq slowed but did not stop,[42] and upon completion of the review, the U.S. Government implemented new, stronger security procedures in areas of identified vulnerability.[43]

Likewise, in late 2015 and early 2016, in response to the emerging threat posed by IS, the U.S.

---

[40] See, *e.g.*, Charles Babcock, *Carter's Visa Crackdown Won't Hurt Immediately*, N.Y. Times (Apr. 9, 1980); Gerald M. Boyd, *Reagan Acts to Tighten Trade Embargo of Cuba*, N.Y. Times (Aug. 23, 1986).

[41] Jon Finer, *Sorry, Mr. President: The Obama Administration Did Nothing Similar to Your Immigration Ban*, Foreign Policy (Jan. 30, 2017).

[42] U.S. Dep't of State, Bureau of Population, Refugees, and Migration, *Refugee Arrivals*, Interactive Reporting (2011), http://ireports.wrapsnet.org/; Finer, *supra* note 41.

[43] *Ten Years After 9/11*, *supra* note 11; Bruno, *supra* note 11.

Government took several steps to strengthen the Visa Waiver Program, which allows citizens from thirty-eight approved countries to travel to the United States without first obtaining a visa. President Obama introduced a series of new measures to enhance security screenings and traveler risk assessments in the program and to bolster our relationship with partner countries.[44] Around the same time, President Obama signed into law a statute that removed from the Visa Waiver Program those nationals of existing Visa Waiver Program countries who: (1) had been present in Iraq, Syria, Iran, or Sudan after March 1, 2011, or (2) were dual nationals of one of those four countries.[45] Several months later, the Secretary of Homeland Security—acting under the new statute and in consultation with the Director of National Intelligence and the Secretary of State—expanded the list to include persons who had traveled to Yemen, Libya, and Somalia.[46]

Contrary to Petitioners' claims, these prior reforms provide no justification for a blanket, group-based ban on the entry of nationals from these six countries. The security enhancements introduced into the refugee system simply enabled *more searching,*

---

[44] U.S. Dep't of Homeland Sec., *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016); White House, *Fact Sheet: Visa Waiver Program Enhancements* (Nov. 30, 2015).

[45] 8 U.S.C. § 1187; U.S. Dep't of State, *Visa Waiver Program*, http://travel.state.gov/content/visas/en/visit/visa-waiver-program.html.

[46] The exemptions for Yemen, Libya, and Somalia only applied to those who had traveled to or been present in one of those countries, not dual nationals. U.S. Dep't of Homeland Sec., *supra* note 44.

individualized vetting of travelers, the opposite of the categorical ban in this Order. Similarly, the reforms to the Visa Waiver Program did not automatically bar anyone—including nationals of any country—from travel to the United States. Instead, the affected individuals no longer could *automatically enter*; they were simply required to obtain *individually-vetted visas* before entering the United States, in the same way as nationals of the more than 150 other nations that are not currently part of the Visa Waiver Programs.

II. The Order was not vetted through national security agencies, and even took the President's own national security officials by surprise.

The aberrant process that produced the Executive Orders provides further evidence that this Order rested on no identifiable national security purpose. This Court has stated that "[d]epartures from the normal procedural sequence * * * might afford evidence that improper purposes are playing a role" in government action.[47] Likewise, this Court has ruled that evidence of an improper motivation in an initial policy cannot be cured by a later-in-time substitute that simply carries forward the essence of the original.[48]

---

[47] *Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

[48] See *McCreary County* v. *ACLU of Kentucky,* 545 U.S. 844, 866 (2005) (finding continued religious discrimination because the argument that "purpose in a case like this one should be inferred * * * only from the latest news about the last in a series of governmental actions * * * just bucks common sense"); *United States* v. *Fordice*, 505 U.S. 717, 730 (1992) (invalidating Mis-

In this case, the process that produced the original January Order departed dramatically from the traditional national security policy-making process, with little to no consultation or scrutiny across the Departments of State, Justice, Homeland Security, or the Intelligence Community. While further consideration undoubtedly went into the March Order, that order so closely tracks the old ban that its lingering underlying intent cannot be disregarded.

In every recent administration, Presidents considering an important change to immigration policy have followed an interagency review process, in which many amici have participated. That process allows experienced national security professionals to ensure that all relevant uncertainties are addressed by policy and legal experts, appropriate preparations are made for implementation, and any potential risks are effectively identified and mitigated. Before recommendations are submitted to the President, the National Security Council oversees a legal and policy process that typically includes: a review by the career professionals in those institutions of the U.S. Government charged with implementing an order; a review by the career lawyers in those institutions to ensure legality and consistency in interpretation; and a policy review among senior leadership across all relevant agencies, including Deputies and Principals at the cabinet level.[49]

---

sissippi's re-classification of its state colleges and universities because "[i]f policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable").

[49] This is true whether or not the executive orders were issued at the start of a new presidency. See, *e.g.*, Henry B. Hogue, Cong. Research Serv., RS22979, Presidential Transition Act:

This sustained practice of interagency deliberation has been followed even—and especially—in times of national emergency to set temporary exclusions or establish criteria for admission to the United States. For example, in the immediate aftermath of the September 11, 2001 attacks, the Bush Administration considered whether the President should invoke 8 U.S.C. § 1182(f)—the very same provision that Petitioners cite here—to bar certain immigrants or take other actions to secure the border.[50] Officials engaged in consultations across the national security agencies to arrive at a decision. The reexamination of the Iraqi refugee vetting system in 2011[51] and the security reforms to the Visa Waiver Program in 2015-16[52] involved similar interagency consultation.

The process that produced the January Order deviated sharply from this standard practice. Collectively, amici are aware of no intragovernmental process that was underway before January 20, 2017 to change current immigration vetting procedures. Ac-

---

Provisions and Funding (2016); William Glaberson & Helene Cooper, *Obama's Plan to Close Prison at Guantanamo May Take One Year*, N.Y. Times (Jan. 12, 2009).

[50] See, *e.g.*, Thomas R. Eldridge et al., *9/11 and Terrorist Travel: Staff Report of the National Commission on Terrorist Attacks Upon the United States* 151-154 (2004); Edward Alden, *The Closing of the American Border* 104-106 (2008). That same statute—8 U.S.C. § 1182(f)—authorizes the President to act only if he "finds" the entry of the individuals "would be detrimental to the interests of the United States." But the Order in this case makes no such finding with respect to the entry of "*any* of the approximately 180 million individuals subject to the ban." *Int'l Refugee Assistance Project* v. *Trump*, 857 F.3d 554, 609 (4th Cir. 2017) (Keenan, J., concurring) (emphasis added).

[51] See *supra* notes 41-43 and accompanying text.

[52] See *supra* notes 44-46 and accompanying text.

cording to extensive reporting, Petitioners followed no such interagency review in producing the January 27 Order. Nor, apparently, did the White House consult officials from *any* of the seven agencies tasked with enforcing immigration laws, much less the congressional committees and subcommittees that oversee them. To the contrary, that Order evidently received little, if any, advance scrutiny by the Departments of State, Justice, Homeland Security, or the intelligence community.[53]

According to reports, the January Order took the President's own senior-most national security officials by surprise. The then-Secretary of Homeland Security reportedly received his first full briefing on the Order just as the President was signing it.[54] The Secretary of Defense was neither consulted during the drafting of the Order nor given an opportunity to

---

[53] Jonathan Allen & Brendan O'Brien, *How Trump's Abrupt Immigration Ban Sowed Confusion at Airports, Agencies*, Reuters (Jan. 29, 2017); Evan Perez et al., *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017); Michael D. Shear & Ron Nixon, *How Trump's Rush to Enact an Immigration Ban Unleashed Global Chaos*, N.Y. Times (Jan. 29, 2017).

[54] Shear & Nixon, *supra* note 53 ("As President Trump signed a sweeping executive order on Friday, shutting the borders to refugees and others from seven largely Muslim countries, the secretary of homeland security was on a White House conference call getting his first full briefing on the global shift in policy."). Customs and border officials reported that their superiors could not provide clear guidance about the new policy. *Ibid.*; see also Allen & O'Brien, *supra* note 53 (quoting CBP chief of passenger operations at John F. Kennedy International Airport declaring, "[w]e are as much in the dark as everybody else.").

provide input.[55] Most State Department officials first heard of the Order through the media, and within hours a dissent channel cable objecting to it had been signed by over 1,000 career officials.[56]

As telling, the January Order was apparently issued without even the ordinary interagency *legal* process for review of Executive Orders. In recent history, administrations of both political parties have followed a protocol of submitting proposed Executive Orders to the Attorney General, the Justice Department's Office of Legal Counsel ("OLC") and all other agency legal offices involved with enforcing the law.[57] Legal review by multiple agencies helps to identify potentially unforeseen legal implications of an order, determines the lawfulness of the proposed action, and analyzes whether the proposed language has established legal meaning that can be interpreted consistently with other laws and regulations. Here, the White House reportedly never asked the Department of Homeland Security for legal review in advance of the Order being promulgated, so "[t]he Department * * * was left making a legal analysis on the order *after* [President] Trump signed it."[58]

---

[55] Shear & Nixon, *supra* note 53 (Secretary of Defense "Mattis, according to administration officials familiar with the deliberations, was not consulted by the White House during the preparation of the order and was not given an opportunity to provide input while the order was being drafted.").

[56] Allen & O'Brien, *supra* note 53; Jeffrey Gettleman, *State Dep't Dissent Cable on Trump's Ban Draws 1,000 Signatures*, N.Y. Times (Jan. 31, 2017).

[57] See Exec. Order No. 11,030, 27 Fed. Reg. 5,847 (Jun. 19, 1962).

[58] Shear & Nixon, *supra* note 53; Perez et al., *supra* note 53 (emphasis added).

Although the White House apparently brought more agencies into the fold in the days leading up to the March Order, whatever process took place after January 27, 2017 plainly was meant to preserve the same structure, substance, and purpose of the original flawed Order. Indeed, White House political advisor Stephen Miller publicly admitted that the March 6 Order would reflect "mostly minor technical differences," and achieve "the same basic policy outcome for the country," statements that were echoed by other senior officials.[59]

Many months later, Petitioners remain unable to offer any evidence that the country-based approach that is maintained in the executive orders emerged from the considered professional judgment of national security experts from across multiple affected agencies. In fact, internal government documents show just the opposite. When DHS officials were asked by the new administration to identify the terrorist threat from the countries listed in the January Order, their written answer concluded—directly contrary to the assumptions underlying the Orders—that citizenship in fact is likely an unreliable indicator of terrorist threat, and that few of the listed countries are in fact home to terrorist groups that threaten the United States.[60]

As Justice Thomas explained in *United States* v. *Fordice*, "if a policy remains in force, without ade-

---

[59] Matthew Nussbaum et al., *White House Creates Confusion About Future of Trump's Travel Ban*, Politico (Feb. 21, 2017) (recounting similar statements by President Trump, Press Secretary Sean Spicer, and White House spokesman Michael Short).

[60] *Citizenship Likely an Unreliable Indicator*, *supra* note 15.

quate justification and despite tainted roots * * *, it appears clear—clear enough to presume conclusively—that the State has failed to disprove discriminatory intent."[61] The manifestly hasty and defective process here supports the lower courts' conclusion that the Order here grew out of unlawful discriminatory intent, not actual national security need.

III. Petitioners have consistently failed to provide evidence of a national security or foreign policy rationale for the Order.

At no point during these proceedings have Petitioners offered concrete evidence of a credible national security threat that would be effectively neutralized by the directives of the Order. This total absence of material evidence—combined with multiple statements by Petitioners suggesting an altogether different purpose[62]—suggests that the decision was not motivated by national security at all.

The January Order offered no evidence of a national security imperative for a ban on refugees or travel from the listed countries. That Order offered only vague allusions to the need to "protect the American people from terrorist attacks by foreign nationals" and that "numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes," without tying these assertions to any of the seven listed countries.[63] In court proceedings,

---

[61] *Fordice*, 505 U.S. at 747 (Thomas, J., concurring).

[62] See, *e.g.*, Jenna Johnson, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering the United States'*, Wash. Post (Dec. 7, 2015); Amy B. Wang, *Trump Asked for a 'Muslim Ban,' Giuliani Says – And Ordered a Commission To Do It 'Legally'*, Wash. Post (Jan. 29, 2017).

[63] January Order, supra note 4.

Petitioners, sought to defend the January Order mostly by quoting language from the face of the Order, repeating that the Court should defer to President's national security prerogative.[64]

Shifting course, the revised Order added language describing each of the listed countries as a haven of terrorism and claiming that their nationals "present heightened risks to the security of the United States."[65] But this new language appeared to be drawn principally from the 2015 Department of State Country Reports on Terrorism and other public reports discussing the security conditions in the six countries in broad terms. In court, Petitioners relied on similarly vague assertions about the "danger" posed by travelers from these countries.[66] Petitioners added a newly written, two-page letter from the Secretary of Defense and the Secretary of Homeland Security that discussed the risks of terrorism in general terms, but without any specific reference to the six listed countries.[67] Petitioners have never offered

---

[64] Brief for Respondents at 12-18, Darweesh v. Trump, No. 1:17-cv-00480 (E.D.N.Y., Feb. 10, 2017).

[65] March Order, supra note 6.

[66] See Def. Memorandum at 36, *Int'l Refugee Assistance Project v. Trump*, 241 F.Supp.3d 539 (D. Md. 2017) (No. 8:17-cv-00361-TDC) ("The President * * * determined that, while the review of screening and vetting procedures is ongoing, the 'risk of erroneously permitting entry' of an individual who intends to commit terrorist acts 'is unacceptably high.'" (quotation omitted); Def. Memorandum at 49-51, *Hawai'i v. Trump*, 241 F.Supp.3d 1119 (D. Haw. 2017) (CV. NO. 17–00050 DKW–KSC) (emphasizing "the ability of would-be terrorists to infiltrate the country" and defending the order as "a preventive measure" in order "to prevent imminent harms") (citations omitted)).

[67] That letter claimed that a substantial majority of those convicted in U.S. courts for international terrorism-related activi-

any careful analysis of the threat to the United States from the listed countries or of the alleged harm that would occur in the absence of such a ban. The only governmental analyses that did emerge—along with numerous non-governmental reports—showed no heightened risk from these countries.[68]

Before this Court, Petitioners have again shifted emphasis, downplaying the terrorist risk posed by the individuals from the listed nations, and focusing instead on their nations' alleged failure to engage in

---

ties were foreign-born, while offering no citation or support for this assertion, which appears based on highly questionable evidence, see *supra* note 7 and accompanying text, that is entirely unconnected to the listed countries actually at issue in the ban. Nothing in the letter expressly identified any of the six countries singled out in the Order's generalized travel ban, or provided any concrete evidence or data on the risk from those countries in particular. The letter similarly argued that "based on DHS data and the experience of its operators, nationals from these countries are more likely to overstay their visas and are harder to remove to their home countries," and "there is a greater risk that the United States will not have access to necessary records," but includes no data, citations or supporting evidence for these assertions. March 6 Letter, *supra* note 6. It remains unclear whether these statements were alluding to the six listed countries in the Order, or instead *all* countries that, in the words of the letter, are deemed "state sponsors of terrorism [or] have active conflict zones in which the central government has lost control of territory to terrorists." *Ibid.*; *see* Country Reports 2015, *supra* note 8, ch. 5 (listing more than a dozen countries or regions as "terrorist safe havens," defined as "ungoverned, under-governed, or ill-governed physical areas where terrorists are able to organize * * * in relative security because of inadequate governance capacity, political will, or both.")

[68] *See Citizenship Likely an Unreliable Indicator*, *supra* note 15; *supra* note 6 and accompanying text.

the sharing of national security information.[69] While Petitioners' asserted national security basis for the ban has shifted over time, they have consistently failed to muster any real evidence of national security risk that would justify the sweeping bans in the Order. Petitioners' new "information-sharing argument" derives almost entirely from unsupported assertions in the text of the Order.[70] They offer this Court no sworn declarations from any national security officials, no careful analyses of national security risk, and no statements from or about foreign governments documenting their unwillingness to cooperate.

---

[69] See, *e.g.*, Pet. Br. at 44 ("Section 2 is designed to assess what information is needed from foreign governments, whether they are furnishing it, and what further steps are needed"); *id.* at 47 ("The President did not determine that all nationals of the six countries are likely terrorists. Rather, given his assessment of future threats and risk tolerance, he determined that certain foreign governments—especially those that sponsor or shelter terrorism—may not be able and willing to provide sufficiently complete and reliable information * * *.").

[70] See Pet. Br. at 44-47. Although Petitioners claim—pointing only to the text of the Order itself—that Iraq was removed from the March Order because it undertook steps to supply travel information, *id.* at 9, 45, 65, extensive reporting indicates otherwise, see, *e.g.*, Stephen Dinan, *Trump's First Victory in Deportation Feud is Iraq*, The Wash. Times (Mar. 7, 2017) ("Iraq earned its way out of President Trump's 'extreme vetting' doghouse in large part because it agreed to play ball on another of the president's big goals: getting countries to take back their illegal immigrant criminals."); Jack Moore, *Iraq to be Removed From Trump's New Travel Ban List: Official*, Newsweek (Mar. 2, 2017) (Cabinet officials "lobbied Trump and his team to remove Iraq from the ban" due to ongoing U.S. military and civilian operations in the country).

IV. Petitioners have failed to take their own claimed national security arguments for the Order seriously.

Perhaps the most telling evidence undermining Petitioners' national security claim is that they themselves did not consider it either serious or urgent. When their initial Order suspended travel from the listed countries for 90 days, it cited the need to establish a period to review existing screening and vetting protocols.[71] Under the Order, within the first 30 days, the named officials were to complete the review, report to the President, then start making the necessary requests to foreign governments to begin providing requested information. But during the 47 days between the January Order taking effect, and

---

[71] Specifically, Section 3 of the initial Order: (i) instructed the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to "*immediately conduct* a review" to identify what additional information would be needed from any country to ensure that an application by a national of those countries for a visa or other benefit is not a security or public safety threat, January Order, *supra* note 4, at §3(a) (emphasis added); (ii) instructed the Secretary of Homeland Security to submit to the President and the Secretary of State "a report on the results of the review * * * *within 30 days of the date of the Order*," *id.* at §3(b) (emphasis added); (iii) ordered the Secretary of State, "*immediately upon receipt of the report*," to request that all foreign governments that do not supply the necessary information begin providing it within 60 days of notification, *id.* at §3(d) (emphasis added); and (iv) instructed the Secretary of Homeland Security, after the 60-day period expires and in consultation with the Secretary of State, to submit to the President a list of countries that do not provide the requested information for inclusion in a subsequent Presidential proclamation that would prohibit the entry of foreign nationals until compliance is achieved, *id.* at §3(e) (emphasis added).

the review process being blocked by the U.S. District Court for the District of Hawaii, Petitioners admittedly managed only to do "some work" on the very first stage of the "review-report-request" process described above.[72] While evincing no apparent urgency to implement the various procedural steps called for by their own Executive Order, Petitioners now claim the suspension is essential to protect national security.

Although the Order currently ties the travel ban to a time-bound review of selected countries, Petitioners plainly anticipate that today's ban could turn into something far more expansive and permanent.[73] They would surely look to any opinion this Court may issue in the current posture to defend such a broader move. Yet Petitioners have offered no con-

---

[72] Oral Argument at 8:02, *Int'l Refugee Assistance Project* v. *Trump*, 857 F.3d 554 (4th Cir. 2017) (No. 17-1351) (en banc).

[73] The January Order envisioned that after the review, the President would issue a "proclamation that would prohibit the entry of foreign nationals * * * from countries that do not provide the information requested." January Order, *supra* note 4, at § 3(e). The March Order said the proclamation "would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested." March Order, *supra* note 6, at § 2(e). Both Orders also provided that officials "may submit to the President the names of any additional countries recommended for similar treatment" at any point. January Order, *supra* note 4, at § 3(f); March Order, *supra* note 6, at § 2(f). See also Donald J. Trump (@realDonaldTrump), Twitter (September 15, 2017, post uploaded at 3:54 a.m.) ("The travel ban into the United States should be far larger, tougher and more specific * * *."); ABC News, *National Security Adviser McMaster says White House 'looking at" new travel ban*, Sept. 17, 2017, http://abcnews.go.com/ThisWeek/video/white-house-national-security-adviser-latest-north-korea-49907174.

crete national security evidence to support the ban they have currently offered, much less a broader indefinite ban on travel by a potentially much larger number of people, from a greater number of countries.

* * *

Petitioners now ask this Court to afford the President's judgment in this case "the utmost deference." Pet. Br. at 49. Yet Petitioners have offered this Court no good reason to defer to a decision that was not based on considered national security judgment, process, or evidence. This Court has expressed its willingness to defer to the "considered professional judgment" of "appropriate military officials." *Goldman* v. *Weinberger*, 475 U.S. 503, 508-09 (1986). But this record reveals no evidence that considered professional judgment was ever exercised by the appropriate national security officials, who were both excluded from consideration of the Order, and did not pursue the review that was its supposed rationale.

Ours is a nation of immigrants, committed to the faith that we are all equal under the law, and rejecting discrimination, whether based on race, religion, sex, or national origin. As government officials, amici sought diligently to protect our country, while maintaining an immigration system that is as free as possible from prejudice, that applies no religious tests, and that measures individuals by their merits, not stereotypes of their countries or groups. Blanket bans of certain countries or classes of people are beneath the dignity of the Nation and Constitution that we each took oaths to protect. Rebranding a proposal first advertised as a "Muslim Ban" as "Protecting the Nation from Foreign Terrorist Entry into the United States" does not disguise the Order's discriminatory

intent, or make it necessary, effective, or faithful to America's Constitution, laws, or values.

CONCLUSION

For the foregoing reasons, this Court should affirm the opinions of the Fourth and Ninth Circuits.

Respectfully submitted,

PHIL SPECTOR
Messing & Spector LLP
1200 Steuart Street
#2112
Baltimore, MD 21230
(202) 277-8173

JONATHAN FREIMAN
TAHLIA TOWNSEND
Wiggin and Dana LLP
265 Church Street
P.O. Box 1832
New Haven, CT
06508-1832
(203) 498-4584

WILLIAM J. MURPHY
JOHN J. CONNOLLY
Zuckerman Spaeder LLP
100 E. Pratt St.
Suite 2440
Baltimore, MD 21202
(410) 332-0444

HAROLD HONGJU KOH
Counsel of Record
HOPE METCALF
MATTHEW S. BLUMENTHAL
Rule of Law Clinic
Yale Law School
127 Wall Street
P.O. Box 208215
New Haven, CT
06520-8215
(203) 432-4932
harold.koh@ylsclinics.org

September 18, 2017

Counsel for Amici Curiae

APPENDIX

APPENDIX

List of *Amici Curiae*

1. Madeleine K. Albright served as Secretary of State from 1997 to 2001. A refugee and naturalized American citizen, she served as U.S. Permanent Representative to the United Nations from 1993 to 1997. She has also been a member of the Central Intelligence Agency External Advisory Board since 2009 and of the Defense Policy Board since 2011, in which capacities she has received assessments of threats facing the United States.

2. General (ret.) John R. Allen, USMC, served as Special Presidential Envoy for the Global Coalition to Counter ISIL from 2014 to 2015. Previously, he served as Commander of the International Security Assistance Force and U.S. Forces Afghanistan.

3. Rand Beers served as Deputy Homeland Security Advisor to the President of the United States from 2014 to 2015.

4. John B. Bellinger III served as the Legal Adviser for the U.S. Department of State from 2005 to 2009. He previously served as Senior Associate Counsel to the President and Legal Adviser to the National Security Council from 2001 to 2005.

5. Daniel Benjamin served as Ambassador-at-Large for Counterterrorism at the U.S. Department of State from 2009 to 2012.

6. Antony Blinken served as Deputy Secretary of State from 2015 to January 20, 2017. He previously served as Deputy National Security Advisor to the President of the United States from 2013 to 2015.

7. John O. Brennan served as Director of the Central Intelligence Agency from 2013 to 2017. He previously served as Deputy National Security Advisor for Homeland Security and Counterterrorism and Assistant to the President from 2009 to 2013.

8. R. Nicholas Burns served as Under Secretary of State for Political Affairs from 2005 to 2008. He previously served as U.S. Ambassador to NATO and as U.S. Ambassador to Greece.

9. William J. Burns served as Deputy Secretary of State from 2011 to 2014. He previously served as Under Secretary of State for Political Affairs from 2008 to 2011, as U.S. Ambassador to Russia from 2005 to 2008, as Assistant Secretary of State for Near Eastern Affairs from 2001 to 2005, and as U.S. Ambassador to Jordan from 1998 to 2001.

10. James Clapper served as U.S. Director of National Intelligence from 2010 to January 20, 2017.

11. David S. Cohen served as Under Secretary of the Treasury for Terrorism and Financial Intelligence from 2011 to 2015 and as

Deputy Director of the Central Intelligence Agency from 2015 to January 20, 2017.

12. Eliot A. Cohen served as Counselor of the U.S. Department of State from 2007 to 2009.

13. Bathsheba N. Crocker served as Assistant Secretary of State for International Organization Affairs from 2014 to 2017.

14. Ryan Crocker served as U.S. Ambassador to Afghanistan from 2011 to 2012, as U.S. Ambassador to Iraq from 2007 to 2009, as U.S. Ambassador to Pakistan from 2004 to 2007, as U.S. Ambassador to Syria from 1998 to 2001, as U.S. Ambassador to Kuwait from 1994 to 1997, and U.S. Ambassador to Lebanon from 1990 to 1993.

15. Thomas Donilon served as U.S. National Security Advisor from 2010 to 2013.

16. Jen Easterly served as Special Assistant to the President and Senior Director for Counterterrorism from October 2013 to December 2016.

17. Daniel Feldman served as U.S. Special Representative for Afghanistan and Pakistan from 2014 to 2015, Deputy U.S. Special Representative for Afghanistan and Pakistan from 2009 to 2014, and previously Director for Multilateral and Humanitarian Affairs at the National Security Council.

18. Jonathan Finer served as Chief of Staff to the Secretary of State from 2015 until January 20, 2017, and Director of the Policy Planning Staff at the U.S. Department of State from 2016 to January 20, 2017.

19. Michèle Flournoy served as Under Secretary of Defense for Policy from 2009 to 2013.

20. Robert S. Ford served as U.S. Ambassador to Syria from 2011 to 2014, as Deputy Ambassador to Iraq from 2009 to 2010, and as U.S. Ambassador to Algeria from 2006 to 2008.

21. Josh Geltzer served as Senior Director for Counterterrorism at the National Security Council from 2015 to 2017. Previously, he served as Deputy Legal Advisor to the National Security Council and as Counsel to the Assistant Attorney General for National Security at the Department of Justice.

22. Suzy George served as Deputy Assistant to the President and Chief of Staff and Executive Secretary to the National Security Council from 2014 to 2017.

23. Phil Gordon served as Special Assistant to the President and White House Coordinator for the Middle East, North Africa and the Gulf from 2013 to 2015, and Assistant Secretary of State for European and Eurasian Affairs from 2009 to 2013.

24. Chuck Hagel served as Secretary of Defense from 2013 to 2015, and previously served as

Co-Chair of the President's Intelligence Advisory Board. From 1997 to 2009, he served as U.S. Senator for Nebraska, and as a senior member of the Senate Foreign Relations and Intelligence Committees.

25. Avril D. Haines served as Deputy National Security Advisor to the President of the United States from 2015 to January 20, 2017. From 2013 to 2015, she served as Deputy Director of the Central Intelligence Agency.

26. Luke Hartig served as Senior Director for Counterterrorism at the National Security Council from 2014 to 2016.

27. General (ret.) Michael V. Hayden, USAF, served as Director of the Central Intelligence Agency from 2006 to 2009. From 1995 to 2005, he served as Director of the National Security Agency.

28. Heather A. Higginbottom served as Deputy Secretary of State for Management and Resources from 2013 to 2017.

29. Christopher R. Hill served as Assistant Secretary of State for East Asian and Pacific Affairs from 2005 to 2009. He also served as U.S. Ambassador to Macedonia, Poland, the Republic of Korea, and Iraq.

30. John F. Kerry served as Secretary of State from 2013 to January 20, 2017.

31. Prem Kumar served as Senior Director for the Middle East and North Africa on the National Security Council staff of the White House from 2013 to 2015.

32. Richard Lugar served as U.S. Senator for Indiana from 1977 to 2013, and as Chairman of the Senate Committee on Foreign Relations from 1985 to 1987 and 2003 to 2007, and as ranking member of the Senate Committee on Foreign Relations from 2007 to 2013.

33. John E. McLaughlin served as Deputy Director of the Central Intelligence Agency from 2000 to 2004 and as Acting Director in 2004. His duties included briefing President-elect Bill Clinton and President George W. Bush.

34. Lisa O. Monaco served as Assistant to the President for Homeland Security and Counterterrorism and Deputy National Security Advisor from 2013 to January 20, 2017.

35. Cameron P. Munter served as U.S. Ambassador to Pakistan from 2009 to 2012 and to Serbia from 2007 to 2009.

36. James C. O'Brien served as Special Presidential Envoy for Hostage Affairs from 2015 to January 20, 2017. He served in the U.S. Department of State from 1989 to 2001, including as Principal Deputy Director of Policy Planning and as Special Presidential Envoy for the Balkans.

37. Matthew G. Olsen served as Director of the National Counterterrorism Center from 2011 to 2014.

38. Leon E. Panetta served as Secretary of Defense from 2011 to 2013. From 2009 to 2011, he served as Director of the Central Intelligence Agency.

39. Jeffrey Prescott served as Special Assistant to the President and Senior Director for Iran, Iraq, Syria and the Gulf States from 2015 to 2017.

40. Samantha J. Power served as U.S. Permanent Representative to the United Nations from 2013 to January 20, 2017. From 2009 to 2013, she served as Senior Director for Multilateral and Human Rights on the National Security Council.

41. Susan E. Rice served as U.S. Permanent Representative to the United Nations from 2009 to 2013 and as National Security Advisor from 2013 to January 20, 2017.

42. Anne C. Richard served as Assistant Secretary of State for Population, Refugees and Migration from 2012 to January 20, 2017.

43. Kori Schake served as the Deputy Director for Policy Planning at the U.S. Department of State from December 2007 to May 2008. Previously, she was the director for Defense Strategy and Requirements on the National Security Council in President George W. Bush's first term.

44. Eric P. Schwartz served as Assistant Secretary of State for Population, Refugees and Migration from 2009 to 2011. From 1993 to 2001, he was responsible for refugee and humanitarian issues on the National Security Council, ultimately serving as Special Assistant to the President for National Security Affairs and Senior Director for Multilateral and Humanitarian Affairs.

45. Wendy R. Sherman served as Under Secretary of State for Political Affairs from 2011 to 2015.

46. Vikram Singh served as Deputy Special Representative for Afghanistan and Pakistan from 2010 to 2011 and as Deputy Assistant Secretary of Defense for Southeast Asia from 2012 to 2014.

47. Jeffrey H. Smith served as General Counsel of the Central Intelligence Agency from 1995 to 1996. Previously, he served as General Counsel of the Senate Armed Services Committee.

48. James B. Steinberg served as Deputy National Security Adviser from 1996 to 2000 and as Deputy Secretary of State from 2009 to 2011.

49. William Wechsler served as Deputy Assistant Secretary for Special Operations and Combating Terrorism at the U.S. Department of Defense from 2012 to 2015.

50. Samuel M. Witten served as Principal Deputy Assistant Secretary of State for Population,

Refugees, and Migration from 2007 to 2010. From 2001 to 2007, he served as Deputy Legal Adviser at the State Department.