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, ET AL.,
DEFENDANTS-APPELLANTS.

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

United States District Judge James L. Robart
Case No. 2:17-cv-00141-JLR

BRIEF OF AMICI CURIAE NATIONAL IMMIGRANT JUSTICE CENTER AND ASISTA

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Date: February 6, 2017

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INTRODUCTION

The case at bar involves a challenge from the State of Washington et al. to Executive Order #13,769 (EO) issued by President Trump, which purported to entirely cut off immigrant and nonimmigrant entries from seven countries. This is the federal government's appeal from a temporary restraining order entered in District Court. The Court set a highly expedited briefing schedule for this matter.[1]

Amici write separately for two reasons. First, Amici write to explain additional ways in which the breadth of the Executive Order likely violates the Immigration and Nationality Act, apart from those respects noted below. Specifically, while the parties below focused on visas aimed at protecting American business (a consideration highly relevant to state standing), the EO appears to affect visas for victims of human trafficking and their families; victims of specified criminal offenses; visas pertaining to spouses of U.S. citizens; and travel by admitted refugees and asylees. Each of these visa categories are governed by statute and regulation, and the EO, together with the putative termination of visas promulgated under that authority, runs contrary to statute and regulation.

[1] This brief was authored by counsel for Amici, without the involvement of counsel for any party in this matter. No party or counsel for such party contributed money that was intended to fund preparing or submitting this brief. No person other than the amici or their counsel contributed money that was intended to fund preparing or submitting this brief.

The EO's language is not severable as to aspects of the EO which clearly violate statute and aspects which would be unlawful only if done for an improper or irrational reason. Thus, the Court could choose to uphold the TRO under challenge without reaching several of the other important issues presented by this case.

STATEMENT OF INTEREST OF AMICI

Amici are public interest organizations with longstanding commitments to serving immigrants, victims of crime, asylees, and refugees. Amici have decades of experience and an interest in ensuring that the laws relating to immigrants properly applied.

The National Immigrant Justice Center (NIJC) is a Chicago-based national non-profit organization that provides free legal representation to low-income immigrants, refugees and asylum seekers. With collaboration from more than 1,500 *pro bono* attorneys, NIJC represents hundreds of applicants for U visas, T visas, K-3 visas, asylees, and refugees at any given time. In addition to the cases that NIJC accepts for representation, it also screens and provides legal orientation to hundreds of potential asylum applicants every year. The Court has granted NIJC leave to appear amicus curiae in various matters. *See, e.g.*, *Diouf v. Napolitano*, 634 F.3d 1081, 1087 (9th Cir. 2011); *Singh v. Holder*, 649 F.3d 1161 (9th Cir.

2011) (en banc); *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc).

ASISTA Immigration Assistance (ASISTA) worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes, which were incorporated in the 1994 Violence Against Women Act (VAWA) and its progeny. ASISTA serves as liaison for the field with Department of Homeland Security (DHS) personnel charged with implementing these laws, most notably Citizenship and Immigration Services (CIS), Immigration and Customs Enforcement (ICE), and DHS's Office for Civil Rights and Civil Liberties. ASISTA also trains and provides technical support to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates, and legal services, non-profit, pro bono, and private attorneys working with immigrant crime survivors. ASISTA has previously filed amicus briefs in the Second, Seventh, Eighth, and Ninth Circuits. *See Rosario v. Holder*, 627 F.3d 58 (2d Cir. 2010); *Sanchez v. Keisler*, 505 F.3d 641 (7th Cir. 2007); *Torres-Tristan v. Holder*, 656 F.3d 653 (7th Cir. 2011); *L.D.G. v. Holder*, 744 F.3d 1022 (7th Cir. 2014); *Lopez-Birrueta v. Holder*, 633 F.3d 1211 (9th Cir. 2011).

As organizations dedicated to ensuring that bona fide refugees are afforded the protection of asylum, Amici have an interest in ensuring that the right to seek asylum is afforded to all noncitizens, including those with prior removal orders.

ARGUMENT

The EO is flatly contrary to the immigration statute and regulations in various respects, in ways neither discussed nor (to all appearances) contemplated by the drafter of the EO. Nor is the sweeping language of the EO severable. It follows that the EO should be enjoined in its entirety.

I. The EO is Contrary to the Statute and the Regulations.

Plaintiffs appropriately focused their arguments on those aspects of the EO which are legally problematic and would work substantial harm on the State of Washington. Amici write to explain additional ways in which the breadth of the Executive Order likely violates the Immigration and Nationality Act, in ways which would cause cognizable, albeit less economically significant, harm to the Plaintiff states. It has been noted in other submissions to this Court that the EO violates the anti-discrimination provision at 8 U.S.C. § 1152(a)(1)(A) as to immigrant visas. Amici agree. In addition, the EO would on its face preclude entry for noncitizens seeking to travel on visas related to human trafficking (T visas); to victims of specified criminal offenses (U visas); and to spouses of U.S. citizens (K-3 visas); as well as admitted refugees and asylees. Termination of a

visa or travel authorization in these contexts is governed by statute and regulation. The EO would terminate these visas without regard to that scheme, and in ways contrary to the scheme. The general grant of authority at 8 U.S.C. § 1182(f) must be read, if reasonably possible, in ways harmonious with the rest of the INA. It is amenable to such a reading, containing implied limitations on the scope of that authority. Since the EO is irreconcilable with multiple parts of the INA, it is unlawful.

A. The Authority Granted at 8 U.S.C. § 1182(f) Must Be Read to Be Consistent with the Rest of the INA.

It is black letter law that courts must read a statute if possible in a manner that gives meaning to all the text. *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). That is, a Court construing a statute must attempt to "fit, if possible, all parts into a harmonious whole." *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1145 (9th Cir. 2013).

It is apparently the contention of the federal government that the broad authority at 8 U.S.C. § 1182(f) should be understood to trump all other provisions of the statute. (*E.g.*, Dkt. 14, Emergency Mot. to Stay at 11-15.) Thus, the federal government initially contended that it could exercise this authority even as to returning permanent residents, notwithstanding statutory authority on point. *Cf.* 8 U.S.C. § 1101(a)(13)(C).

Such a contention is inconsistent with the requirement that the immigration statute be read as a harmonious whole. The INA is a complex, multi-faceted statute which accommodates a variety of rights and interests in the context of a global economy and globalized personal relationships. While § 1182(f) authority may be broad, it cannot be read so broadly as to bring it into conflict with other provisions of the INA. Section 1182(f) authority must be implicitly limited to not conflict with other portions of the INA, including the anti-discrimination provision of 8 U.S.C. § 1152(a)(1)(A), as well as the statutory provisions protecting visas issued to particularly vulnerable aliens.

B. The EO Conflicts with Statute and Regulations in Multiple Respects.

The meaning and breadth of the EO in question was left unexplained in the EO itself, but in the days since the EO was enacted, the federal government has limited it in several respects. First, the federal government backed away from the argument that the EO would apply to permanent residents of the United States. Permanent residents are not generally treated as seeking "entry" after a brief trip abroad. 8 U.S.C. § 1101(a)(13)(C). The federal government initially stated that it would grant "waivers" to returning residents; then the Counsel to the President published a memorandum instructing that the EO is inapplicable to returning permanent residents. Donald F. McGahn II, Counsel to the President,

Authoritative Guidance on Executive Order Entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" (Feb. 1, 2017).

Likewise, the EO appeared on its face to include application with USCIS for individuals from the seven affected countries. *See* EO § 3(a) (describing "Suspension of Issuance of … Other Immigration Benefits to Nationals of Countries of Particular Concern," as including "adjudicat[ion] of any visa, admission, or other benefit under the INA (adjudications)"); EO § 3(g) ("[n]otwithstanding a suspension" of adjudication, the Secretar[y] of … Homeland Security may, on a case-by-case basis, and when in the national interest, issue … other immigration benefits to nationals of countries for which visas and benefits are otherwise blocked."). USCIS was initially instructed not to adjudicate cases for individuals from those countries. *See* Email, Daniel Renaud, Associate Director of Field Operations (Jan. 28, 2017) ("Effectively [sic] immediately and until additional guidance is received, you may not take final action on any petition or application where the applicant is a citizen or national of Syria, Iraq, Iran, Somalia, Yemen, Sudan, and Libya"). USCIS subsequently issued a clarification allowing asylum adjudication and other adjudications to proceed forward for such individuals. Memorandum, "Guidance Concerning Executive Order on Immigration," Lori Scialabba, Acting Director, USCIS (Feb. 2, 2017).

In all other respects, the breadth of the EO remains unchanged.

1. The EO is Contrary to Statute Governing Visas for Victims of Specified Criminal Offenses.

Congress created a category of visas for noncitizens who are victims of specified crimes – including *inter alia* domestic violence, sexual assault, and stalking – who assist U.S. law enforcement in the prosecution of criminal cases. *See* 8 U.S.C. § 1101(a)(15)(U). The INA specifies a process for the grant of U visas, the length of U visa status, and extensions thereof. 8 U.S.C. §§ 1184(p)(1), (6). U visas are multiple-entry visas, permitting noncitizen visa holders to travel abroad. 9 Foreign Affairs Manual 402.6-6(G)(b) ("U visas must be issued for multiple entries").

By regulation, the federal government may revoke a U visa only where the noncitizen notifies USCIS that she will not use the visa, or after notice of intent to revoke, tied to one of five specific situations. 8 C.F.R. § 214.14(h). Designation under § 1182(f) is not one of the specified bases for revocation of a U visa.

Thus, a U visa holder from one of the seven relevant countries residing within the United States would no longer be able to make brief trips abroad. The EO would effectuate a de facto termination of U visa status by precluding an individual from traveling abroad. Moreover, the State Department, under the authority of the challenged EO, has purported to provisionally terminate all immigrant and nonimmigrant visas for individuals from seven countries. This would apparently include U visa holders within the United States. The EO would

also appear to apply to U visa derivatives, notwithstanding statutory and regulatory provisions governing U visa derivate status.

2. The EO is Contrary to Regulations and Statutes Governing Visas for Victims of Human Trafficking and Their Family Members.

In order to target the problem of human trafficking, Congress created a visa for victims of severe forms of human trafficking, and their family members. 8 U.S.C. § 1101(a)(15)(T) ("T visa"). As with the U visa, Congress specified by statute the length of T visa, as well as termination of T visa status as to derivative beneficiaries. See 8 U.S.C. §§ 1184(o)(7)(A) (length of status); (o)(7)(C) (automatic extension); (o)(4) (continued classification of children).

Again, revocation of T visa status is authorized only for limited reasons such as violation of the requirements of the statute or unreasonable failure to cooperate in a law enforcement investigation. 8 C.F.R. §§ 214.11(s)(1)(i), (s)(1)(iv). Revocation is permitted only after notice, and appeal is permitted from the revocation decision. 8 C.F.R. §§ 214.11(s)(2), (s)(4). Designation of an entire nation under § 1182(f) is not one of the specified bases for revocation of a T visa.

Noncitizens seeking T status abroad are generally family members of the victim of severe human trafficking. 9 Foreign Affairs Manual 402.6-5(E)(1).

The EO would effectuate a de facto termination of T visa derivative status for any T visa child or parent seeking to join the individual found to have been a

victim of severe forms of human trafficking. Moreover, the State Department, under the authority of the challenged EO, has purported to provisionally terminate all immigrant and nonimmigrant visas for individuals from seven countries. This would apparently include T visas, including T visa derivatives, notwithstanding statutory and regulatory provisions governing T visa derivate status.

3. The EO is Contrary to Law Relating to Spouses of U.S. Citizens Under the K-3 Visa.

Worried at lengthy delays, Congress created a nonimmigrant visa category for spouses of U.S. citizens seeking to enter the United States to seek permanent resident status here. 8 U.S.C. § 1101(a)(15)(K)(ii). Spouses of U.S. citizens seeking K status may obtain K-3 nonimmigrant status. *In re Sesay*, 25 I. & N. Dec. 431, 433 n. 3 (BIA 2011) (citing 8 C.F.R. § 214.1(a)(1)(v), (a)(2)).

A K-3 visa is a multiple entry visa, meaning that it permits the visa holder to travel in and out of the United States multiple times. 9 Foreign Affairs Manual 502.7-5(C)(7)(a); see also USCIS, "K-3/K-4 Nonimmigrant Visas," available at https://www.uscis.gov/family/family-us-citizens/k3-k4-visa/k-3k-4-nonimmigrant-visas ("Applicants presently in the United States in a K-3 or K-4 nonimmigrant classification may travel outside the United States and return using their K-3 or K-4 nonimmigrant visa.").

Under the EO, a K-3 visa holder from one of the seven relevant countries could remain in the United States, but would no longer be able to make brief trips

abroad. The EO itself would effectuate a de facto termination or limitation of K-3 visa status by precluding an individual from traveling abroad. Moreover, the State Department, under the authority of the challenged EO, has purported to provisionally terminate all immigrant and nonimmigrant visas for individuals from seven countries. This would apparently include K-3 visa holders, including K-3 visa holders within the United States.

It is established in this circuit that due process liberty interests are implicated by visa decisions affecting U.S. citizen spouses. *See Bustamonte v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008) ("Freedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause.").[2] Nor would this implicate questions of consular nonreviewability; this provision would affect a K-3 visa holder who had been issued a visa at the consulate and thereafter traveled abroad or wishes to do so.

It is highly unlikely that the EO could survive Due Process scrutiny. The EO applies a one-size-fits-all approach to thousands of families from seven countries, despite vast differences in individual cases. The EO does not specify "discrete factual predicates" or a fact providing "at least a facial connection" to a statutory ground of inadmissibility. The EO identifies no facts at all that pertain to

[2] Circuit precedent was undisturbed in this regard by *Kerry v. Din*, 135 S.Ct. 2128 (2015), because five justices did not reach the question of "whether a citizen has a protected liberty interest in the visa application of her alien spouse." *Id.* at 2139 (Kennedy, J., concurring).

visa holders who are the spouses of U.S. citizens. *Cf. Bustamonte*, 826 F.3d at 1062-63 (upholding denial of visa where consular official relied on specific information that applicant was involved in drug trafficking, giving a basis for inadmissibility under § 1182(a)(2)(C)).

Moreover, even if the EO otherwise made such a showing (and it does not), the EO itself and the various statements of President Trump and others connected to the administration concerning the EO demonstrate bad faith. These include then-candidate Donald Trump's December 2015 call for "a total and complete shutdown of Muslims entering the United States," President Trump's January 27, 2017 interview with Christian Broadcasting Network stating that immigration and refugee policy had been "very, very unfair" to Christians and that he was "going to help them," and former mayor of New York City Rudy Giuliani's January 28, 2017 statement that he had been asked by then-candidate Donald Trump to "put a commission together" on the proposed "Muslim ban" to show Mr. Trump "the right way to do it legally."

4. To the Extent that the EO Applies to Preclude Travel by Admitted Refugees and Asylees, It is Contrary to Regulation and International Treaty Obligations.

It appears uncontested that an individual who has been granted asylum status in the United States, or has been admitted in refugee status, will not have their status directly questioned by the EO. However, the ability for an asylee or refugee

to travel abroad—often necessary to visit family or arrange for their safety—appears to be impacted by the EO.

By regulation, asylees and refugees are allowed to seek "refugee travel documents." 8 C.F.R. § 223.1. These documents fill the role of passports for refugees, and function to permit international travel.

The right to refugee travel documents is enjoined by international law. Treaty obligations undertaken by this country require the federal government to issue refugees and asylees with travel authorization. Convention Relating to the Status of Refugees, art. 28(1), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 ("The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.").

Federal statutes "ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 64 (1804). This principle is particularly appropriate as to

admitted refugees and asylees because, by enacting the Refugee Act of 1980, "one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987). Asylum status offers not only protection for legitimate refugees, but also the ability to travel internationally, as well as the opportunity to be united with family.

The EO does not specifically address the circumstance of admitted refugees and asylees. It is unclear whether travel on a refugee travel document would constitute travel as an immigrant or nonimmigrant. *Cf.* 8 U.S.C. § 1101(a)(15) (providing that "immigrant" includes "every alien except an alien who is within one of the following classes," refugees and asylees not listed). However, the EO on its face applies to all entries, both immigrant and nonimmigrant. EO § 3(c). While the Counsel to the President has "clarified" that the EO is not intended to apply to permanent residents, no such clarification has been issued as to lawfully admitted refugees and asylees.

By regulation, a refugee travel document is valid for one year from the date of issuance. 8 C.F.R. § 223.3(a)(2). It may be invalidated only for specified reasons, such as a materially false representation or concealment. 8 C.F.R. § 223.3(b). A returning refugee or asylee is mandated to be accorded the status

noted in the refugee travel document unless she is "no longer eligible for that status." 8 C.F.R. § 223.3(d)(2)(i).

Under the EO, an admitted refugee or asylee from one of the seven countries residing within the United States would apparently no longer be able to make trips abroad, in violation of the regulations and in violation of international law. The EO does not mention the regulations or American treaty obligations.

II. The EO Lacks a Severability Clause, Nor Is It Apparent That the Drafter Would Wish to Partially Enforce the EO.

Although there is substantial reason to doubt that severability analysis should apply to executive orders, this Court has held that the test for severability with respect to executive orders is the same as that for statutes. *Matter of Reyes*, 910 F.2d 611, 613 (9th Cir. 1990) (affirming judgment striking executive order in its entirety). *See also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) (assuming without deciding "that the severability standard for statutes also applies to Executive Orders"). Therefore, "[u]nless it is evident that the [Executive] would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law." *Board of Natural Resources v. Brown*, 992 F.2d 937, 948 (9th Cir. 1993).

The EO lacks a severability clause. While that does not "raise a presumption against severability . . . it does suggest an intent to have all

components operate together or not at all." *Matter of Reyes*, 910 F.2d at 613 (citations and quotation marks omitted). Section 3(c) of the order, which provides for the immediate suspension of entry for nearly all visa holders, is plainly central to the stated purpose of the EO from its inception—"a total and complete shutdown" of immigration from Muslim-majority nations. That history, coupled with the lack of a severability clause, makes it apparent the President would not have signed the EO if it did not contain Section 3(c). At a minimum, as demonstrated above the application of Section 3(c) to multiple classes of visa holders is unlawful. But severability analysis does not permit courts to rewrite statutes, much less would it permit courts to revise and modify an executive order in an effort to make it an assertion of presidential authority that complies with the law. *See United States v. Rutherford*, 442 U.S. 544, 555 (1979) ("Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy."); *R.R. Ret. Bd. v. Alton R. Co.*, 295 U.S. 330, 362 (1935) ("[W]e cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole."). Further, there is no basis to conclude that the President would have signed a version of the order that excluded any of the classes of visa holders described above. Nor, for the reasons articulated by the State of Washington and other *amici*, would additional exclusions of visa classes from

Section 3(c) actually bring the EO into compliance with the law. The EO is not severable and must be enjoined in its entirety.

CONCLUSION

For these reasons, and for the reasons stated in the various other briefs presented to the Court, Amici request that this Court deny the government's motion to stay the temporary restraining order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Charles Roth, certify that:

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 3822 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and is 20 pages or less;

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

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 6, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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