Docket No. 17-35105

IN THE
United States Court of Appeals
FOR THE
Ninth Circuit

STATE OF WASHINGTON, ET AL.,

Plaintiffs-Appellees,

v.

DONALD TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Washington
Civil Action No. 2:17-cv-00141-JLR
The Honorable James L. Robart

MOTION FOR LEAVE TO FILE BRIEF OF AMERICAN IMMIGRATION COUNCIL, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NORTHWEST IMMIGRANT RIGHTS PROJECT, HUMAN RIGHTS FIRST, KIND (KIDS IN NEED OF DEFENSE), AND THE TAHIRIH JUSTICE CENTER AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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Northwest Immigrant Rights Project, National Immigration Project of the National Lawyers Guild, American Immigration Council, KIND (Kids in Need of Defense), Human Rights First, and Tahirih Justice Center (collectively, "*Amici*") respectfully move for leave to file an *amicus curiae* brief in support of Appellees' Response to the Government's Emergency Motion for Stay Pending Appeal. Counsel for all parties have consented to the filing of an *amicus* brief; however, out of an abundance of caution, *Amici* also file this motion to request the Court's leave to file an *amicus* brief by 11:59 p.m. on February 6, 2007. *Amici* state as follows:

1. *Amici* are organizations that provide, *inter alia*, legal assistance and technical support to immigrant communities, advocate in favor of immigrant rights, educate the public and policymakers about the enduring contributions of America's immigrants, and promote justice and equality of treatment in all areas of immigration law.

2. *Amici* are concerned about the real-life implications of the Executive Order issued on January 27, 2017, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" (the "Executive Order"). *Amici* are concerned with the interference in familial relations that will result from enforcement of the Executive Order, as well as limitations on immigrant travel and economic interests.

3. The proposed *amicus* brief, attached to this motion, explains why the Court should not hear this extraordinary appeal of a temporary restraining order, how the Executive Order will harm *amici* and the populations they serve, and how the Executive Order is unlawful.

4. Although all parties consented to the filing of an *amicus* brief, *amici* file this motion out of an abundance of caution because neither the Federal Rules of Appellate Procedure nor this Court's Rules expressly address the filing of an *amicus* brief in connection with a motion for a stay.

5. The Federal Rules of Appellate Procedure and this Court's Rules similarly are unclear regarding the deadline for filing an *amicus* brief in light of the expedited briefing schedule on the Appellants' emergency motion. The Court ordered that Appellees file their opposition by 1:00 a.m. on February 6, 2017, and Appellants file their reply by 3:00 p.m. on February 6, 2017. Out of an abundance of caution, *amici* request leave to file their *amicus* brief within twenty-three hours of the filing of Appellants' reply brief, by 11:59 p.m. on February 6, 2017.

6. Out of an abundance of caution, *amici* file this motion to request the Court's leave to file a 16-page brief, because the Federal Rules of Appellate Procedure are unclear as to the permitted length of an *amicus* brief under these circumstances, and because *amici* believe that a 16-page brief is warranted in light of the importance of the issues presented.

CONCLUSION

Amici respectfully request that this Court grant them leave to file the 16-page *amicus* brief attached hereto.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

I, Harrison Frahn, attorney for *Amici Curiae*, certify that *amici* are not-for-profit organizations. No *amicus* has a parent corporation; nor issues stock; nor does there exist a publicly held corporation that owns 10% or more of the stock of any *amicus*.

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CONSENT TO FILE AS *AMICI CURIAE*

All parties consent to the filing of this brief.

INTEREST OF *AMICI CURIAE*

The American Immigration Council is a national non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants.

The National Immigration Project of the National Lawyers Guild is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrant rights.

The Northwest Immigrant Rights Project ("NWIRP") is a Washington State nonprofit organization that promotes justice by defending and advancing the rights of immigrants through direct legal services, systemic advocacy, and community education. NWIRP strives for justice and equity for all persons, regardless of where they were born.

Human Rights First (formerly known as the Lawyers Committee for Human Rights) has worked since 1978 to promote fundamental human rights and to ensure protection of refugees' rights, including the right to seek and enjoy asylum. Human Rights First grounds its refugee protection work in the standards set forth in the 1951 Convention Relating to the Status of Refugees (the "Refugee Convention"), the 1967 Protocol Relating to the Status of Refugees (the "1967

Protocol"), the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and other international human rights instruments, and advocates adherence to these standards in the policies, practices and laws of the United States government. Human Rights First also operates one of the largest pro bono asylum representation programs in the country, providing legal representation without charge to hundreds of indigent asylum applicants each year. Human Rights First is committed to ensuring that all protections granted under the 1951 Refugee Convention and the 1967 Protocol remain available to refugees and asylum seekers in the United States.

KIND (Kids in Need of Defense) ("KIND") is the leading organization committed to ensuring high-quality legal representation for immigrant children appearing in immigration court.

Tahirih Justice Center is a national non-profit that has served courageous individuals fleeing violence since 1997. Through direct services, policy advocacy, and training and education, Tahirih protects immigrant women and girls and promotes a world where women and girls enjoy equality and live in safety and dignity. Tahirih serves immigrant women and girls who have rejected violence, but face incredible obstacles to justice, including language barriers, lack of resources, and a complex immigration system. Some are U.S. citizens or have another type of resident status. Some do not.

All six organizations have a direct interest in the outcome of this case.[1]

SUMMARY OF ARGUMENT

As an initial matter, our nation's laws make clear that this appeal should not be heard at all. Temporary restraining orders are generally non-appealable, and Appellants have provided no credible argument otherwise. But if the Court does consider this appeal, it clearly should not reverse the district court's temporary restraining order ("TRO").

As President George Washington wrote to a religious minority community containing many immigrants in 1790, "the government of the United States . . . gives to bigotry no sanction, to persecution no assistance."[2] From as early as the arrival of the Pilgrims, this land has been a haven for immigrants, regardless of their faith and country of birth. Freedom of religion and from the establishment of religion are, of course, enshrined in our First Amendment.

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[1] All parties have consented to the filing of this brief. *Amici* state that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and that no person other than *amici* or their counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

[2] From George Washington to the Hebrew Congregation in Newport, Rhode Island, 18 August 1790, NATIONAL ARCHIVES, https://founders.archives.gov/documents/Washington/05-06-02-0135.

The Executive Order hews away at these foundations of our nation. If this Court reverses the TRO, scores of refugees, students, professors, skilled workers, and many others who already have been approved to enter, or re-enter, the United States will be blocked from doing so solely based on their religion or national origin. For U.S. citizens and legal permanent residents ("LPR") who petitioned for immigrant visas for their family members and for the family members themselves, reversal of the TRO would cause them to lose their fundamental, constitutional right to live together as a family.

As organizations committed to serving and advocating on behalf of the nation's immigrant populations, *amici* urge this Court to recognize the incalculable and irreparable harms that immigrant families will face under the Executive Order, by refusing to lift the District Court's TRO.

Appellants argue that the President has the unfettered right to suspend the entry of aliens, even if based on their religion or national origin. But we live in a nation "of laws and not men." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). And the Constitution and Immigration and Nationality Act ("INA") make clear that such distinctions are forbidden.

ARGUMENT

I. APPELLANTS CANNOT APPEAL THE TEMPORARY RESTRAINING ORDER

This Court lacks jurisdiction to hear this appeal because "courts of

appeals may review only final decisions of district courts." *Orange Cty. v. Hongkong & Shanghai Banking Corp.*, 52 F.3d 821, 823 (9th Cir. 1995) (internal quotation omitted); 28 U.S.C. § 1291. The general rule is that the grant of a TRO is not subject to interlocutory review. "The rationale for this rule is that TROs are of short duration and usually terminate with a prompt ruling on a preliminary injunction, from which the losing party has an immediate right of appeal." *Ne. Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1005 (6th Cir. 2006). There are three general exceptions to this rule. One exception is if the case touches on extraordinary considerations or the infliction of irreparable consequences. *Id.* at 1005–06 (6th Cir. 2006); *Adams v. Vance*, 570 F.2d 950, 955–56 (D.C. Cir. 1978). The second exception is where "the denial of the temporary restraining order is tantamount to the denial of a preliminary injunction." *Envtl. Def. Fund, Inc. v. Andrus*, 625 F.2d 861, 862 (9th Cir. 1980). Finally, courts have allowed interlocutory appeals of temporary restraining orders if the stays "do not preserve the status quo but rather act as a mandatory injunction requiring affirmative action." *Ne. Ohio Coal.*, 467 F.3d at 1006 (6th Cir. 2006). None of these exceptions apply here.

First, the TRO in this case acts to preserve the status quo, and there is no factual evidence of irreparable harm before it expires and the preliminary injunction can be considered. *See, e.g., Ne. Ohio Coal.*, 467 F.3d 999, 1006 (6th

Cir. 2006). Appellants cite to no incidents of national security violations from individuals subject to the Executive Order that justify a reversal of the status quo for purposes of the appeal of the TRO grant.

Second, the granting of the TRO in this case is not tantamount to the denial of a preliminary injunction. The practical length of the TRO is sufficiently short and no decision on the merits was made by the District Court's order. *Cf. Religious Tech. Ctr. v. Scott*, 869, F.2d 1306, 1309 (9th Cir. 1989) (finding that a TRO denial was tantamount to denial of a preliminary injunction where "[t]he futility of any further hearing was [] patent" because the decision was based on the merits).

Finally, the TRO in this case does not act as a mandatory injunction. The TRO simply halts the Executive Order from applying while the District Court considers the legal arguments and the evidence the State Plaintiffs will present at the preliminary injunction stage.

Appellants are unable to show they will suffer "serious, perhaps irreparable consequences." *Ne. Ohio Coal.*, 467 F.3d at 1005. In fact, Appellants have failed to demonstrate any harm by allowing those affected to enter the country. In the last 30 years, no individual from the seven affected countries has killed an American in a terrorist attack in the United States. *See* Alex Nowrasteh, *Guide to Trump's Executive Order to Limit Migration for "National Security"*

Reasons, CATO INSTITUTE (Jan. 26, 2017), https://www.cato.org/blog/guide-trumps-executive-order-limit-migration-national-security-reasons. So, rather than facing serious, irreparable consequences, Appellants' compliance with the District Court order will spare them the expense of reprocessing those who have already been approved. The order is thus unlike those orders found to have irreparable consequences because of "numerous costly obligations," *Valdivia v. Schwarzenegger*, 599 F.3d 984, 988 (9th Cir. 2010), or interference with other actions, *see Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1097 (9th Cir. 2008).

Finally, because the District Court is moving forward to hear the preliminary injunction motion, Appellants will not be able to show the order "can be effectively challenged only by immediate appeal." *Thompson v. Enomoto*, 815 F.2d 1323, 1327 (9th Cir. 1987). Appellants will be able to present their arguments on the constitutionality and importance of the Executive Order to this Court after the District Court issues a final ruling. This Court found an order can be effectively challenged by immediate appeal only when there are significant costs to the party, and "[a] decision by us months or years after that cannot repair the damage." *Valdivia*, 599 F.3d at 988 (citing *Negrete*, 523 F.3d at 1097). But Appellants have not demonstrated any cost to delaying implementation of the Executive Order, nor have they established that the District Court will delay

issuing a ruling for "months or years." In short, "no aspect of the district court's ruling vitiates the [Appellants'] access to appellate review of the eventual outcome of the district court's decision." *Alsea Valley*, 358 F.3d at 1184.

II. THE JUDICIARY MUST ACT AS A CHECK ON PRESIDENTIAL ACTIONS.

Appellants argue that this Court should not look behind the President's proffered explanation that his Executive Order was issued for legitimate national security reasons, despite contemporaneous public statements by the President and his advisers indicating that unlawful animus was in fact the prime motivation. Supreme Court "precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010). Despite this clear command to the contrary, Appellants insist that this Court must close its eyes to the evident indications of animus.

Beginning as early as December 2015, and throughout the Presidential campaign, President Trump repeatedly called for a "total and complete shutdown of Muslims entering the United States."[3] Most recently, just two days after the

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[3] Press Release, Donald J. Trump for President, Inc., Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015), https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration.

Executive Order was issued, former New York City Mayor and Trump advisor Rudy Giuliani stated that the President sought to impose a "Muslim ban."[4]

These statements, taken together, provide a strong basis for this Court to decline to defer to the government's purported national security rationale. Courts have refused to take the government's assertions at face value where there is a risk of "complete deference in all facets of immigration law," particularly where the law "infringe[s] upon the Constitution." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 685 (6th Cir. 2002). Here, Appellants seek to exclude whole nations of individuals—without any individualized consideration—so it is difficult to fathom what legitimate purpose the Executive Order could have. While Appellants claim a national security interest, there is no basis to believe a national security threat is posed by all nationals of the seven affected countries, much less nationals of those countries who are now here as LPRs or whose visa applications have been approved by the U.S. government. In the absence of some more concrete basis for the stated national security rationale, reversing the TRO would set a precedent preventing review of any alleged constitutional violations when the President claims a national security interest.

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[4] Amy B. Wang, *Trump asked for a 'Muslim ban,' Giuliani says – and ordered a commission to do it 'legally,'* WASHINGTON POST (Janary 29, 2017).

III. THE EXECUTIVE ORDER CAUSES IRREPARABLE HARM TO NUMEROUS INDIVIDUALS AND ORGANIZATIONS.

The Executive Order already has harmed—and, if the Temporary Restraining Order is lifted, will continue to harm—numerous and varied categories of people and organizations. These categories include, but are not limited to (1) U.S. citizens and LPRs with family overseas, and those family members themselves; (2) foreign nationals lawfully present in the United States with valid immigrant and non-immigrant visas; (3) for-profit corporations that employ foreign nationals; and (4) non-profit organizations that seek to serve refugees. *Amici* seek to strengthen diversity and promote justice and equality. Connected by our common humanity, *amici* believe that these groups' interests reflect the broader interests of American society. The individual and organizational harms faced by these groups are irreparable, weighing against a stay of the TRO issued by the District Court.

U.S. citizens, LPRs, and overseas visa applicants from Iraq, Iran, Libya, Somalia, Sudan, Syria, or Yemen (together the "banned countries") are currently suffering concrete harms to their recognized liberty interest in maintaining familial relationships, specifically in the right to live together as a family. *See Moore v. City of E. Cleveland*, 431 U.S. 494 (1977). The Supreme Court long has held that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's

history and tradition." *Id.* at 503; *see also Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1928); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

By utilizing a discriminatory test to prevent U.S. citizens and LPRs from sponsoring family members who are nationals of the seven targeted countries for lawful permanent residence, the Executive Order violates the constitutional rights of these U.S. citizens, LPRs, and overseas visa applicants to familial relations. Specifically, it violates their right to the equal protection guarantee inherent in the Due Process Clause of the Fifth Amendment. *Cf. Bolling v. Sharpe*, 347 U.S. 497 (1954). It is beyond question that U.S. citizens, LPRs, and overseas visa applicants have concrete Due Process interests at stake when the government interferes with their familial relations on the basis of national origin.

That these harms to U.S. citizens, LPRs, and their family members have resulted from the Executive Order is not speculative, but rather self-evident in countless individual stories of husbands separated from wives[5] and children

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[5] *See, e.g.,* Decl. of Abdelaziq Adam, Ex. A; Decl. of Carol E. Edwards, Ex. B; Decl. of Elias Abdi, Ex. C; Decl. of Jaffer Akhlaq Hussain, Ex D. The declarations cited in and attached to this brief are from pleadings filed on February 6, 2017 by the American Immigration Council, the National Immigration Project of the National Lawyers Guild, and the Northwest Immigrant Rights Project in *Ali, et al. v. Trump, et al.*, No. 2:17-cv-00135-JLR (W.D. Wash. 2017).

separated from parents.[6] Many of these separated family members have not been able to see each other for years due to the already long and thorough vetting process that foreign nationals must pursue to obtain visas.[7] This lengthy process also imposes significant financial hardship on the U.S.-based sponsors as they sometimes must pay the visa application fees while supporting their separated family members at a higher cost than if the family members were able to live with them in the United States. *See e.g.*, Decl. of Abdelaziq Adam, Ex. A ¶ 9. That financial hardship will multiply if the TRO is lifted and their separation prolonged. Additional economic harms resulting from canceled plane tickets and temporary housing for those who had expected to travel to the United States rapidly reach into the thousands of dollars. *See, e.g.*, Decl. of Elias Abdi, Ex. C ¶ 5; Decl. of Ahmed Mohammad Ahmed Ali, Ex. E ¶ 23. U.S. and LPR sponsors of family members trying to escape war-torn countries such as Syria and Iraq also must grapple with the emotional toll arising from constant fear for their loved ones' safety. *See, e.g.*, Decl. of Ghassan Tahhan, Ex. G ¶ 5. These U.S. citizens and LPRs, as well as the

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[6] *See, e.g.,* Decl. of Ahmed Mohammed Ahmed Ali, Ex. E; Decl. of Azin Safari, Ex. F; Decl. of Ghassan Tahhan, Ex. G; Decl. of Hesam Moazzami Farahani, Ex. H; Decl. of Mohamed Barre Omar, Ex. I; Decl. of Nikoo Niknejad, Ex. J.

[7] Decl. of Azin Safari, Ex. F; Decl. of Hesam Moazzami Farahani, Ex. H.

individuals they sponsor, are constitutionally protected and should be spared further irreparable harm during the pendency of this litigation.

Foreign nationals from the banned countries already present in the United States pursuant to lawful spousal, student, employment, and other immigrant and non-immigrant visas also would suffer irreparable harm if the TRO is stayed and the administration is once again allowed to enforce the Executive Order. These foreign nationals are prevented from traveling internationally while the Executive Order is in effect because they will be unable to re-enter despite their valid visas. This ban on travel into the country – effectively operating as a ban on travel ***out*** of the country – prevents students from seeing their families during school breaks and inhibits the ability of employees to do business on a global scale. It similarly prohibits travel to share once in a lifetime events with overseas family, including births, weddings, and funerals, even if the destination is not one of the banned countries.

Likewise, staying the TRO would inflict harm at the organizational level. Non-profit organizations serving refugee communities in the United States, including faith-based organizations, are prevented from fulfilling their missions while the Executive Order is in effect because of its categorical ban on all refugees. For-profit corporations and other enterprises are also harmed by the Executive

Order.[8] These companies rely on skilled foreign workers to fuel their innovation, revenue generation, and job creation. Moreover, these workers must often be able to travel to carry out corporate goals. The interruption to normal immigration processes caused by the Executive Order materially harms these corporations' ability to conduct business, hurting their bottom lines and the local economies they support.

These individual and organizational harms are irreparable. Individuals who are prevented from returning home, traveling for work, and reuniting with family are suffering ongoing harms that can never be adequately redressed. Whether the harms are lost profits and job opportunities, or graver ones such as the threat of bodily harm or death of family members trapped in war-torn countries, the District Court was correct to issue a TRO, and this Court should not reverse that decision.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court deny Appellants' request for a stay.

Dated: February 6, 2017 Respectfully submitted,

/s/ Harrison (Buzz) Frahn

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8 *See generally* Br. of Technology Companies and Other Businesses as *Amici Curiae* in Support of Appellees. ECF No. 19.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(G)(1)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29 and 32(a)(7)(B) because it contains 3159 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and amici have requested leave to file a 16-page brief.

2. 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

/s/ Harrison (Buzz) Frahn
Harrison (Buzz) Frahn
Jonathan Mincer
Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2017, 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/EMF system.

I hereby certify that on February 6, 2017, the foregoing document was served on all parties or their counsel of record through the CM/EMF system.

/s/ Jonathan Mincer
Jonathan Mincer
Counsel for *Amici Curiae*