17-15589

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STATE OF HAWAII; ISMAIL ELSHIKH,

Plaintiffs-Appellees,

ALI PLAINTIFFS; JOSEPH DOE; JAMES DOE;
EPISCOPAL DIOCESE OF OLYMPIA,

Intervenors-Pending,

—v.—

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

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

DANIEL BRAUN
PETER JAFFE
LAUREN KAPLIN
BRENT WIBLE
FRESHFIELDS BRUCKHAUS
DERINGER US LLP
700 13th Street, NW, 10th Floor
Washington, DC 20005
(202) 777-4500

DAVID Y. LIVSHIZ
KAREN WISWALL
FRESHFIELDS BRUCKHAUS
DERINGER US LLP
601 Lexington Avenue, 31st Floor
New York, New York 10022
(212) 277-4000

Attorneys for Amicus Curiae Cato Institute

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29 and Ninth Circuit Local Appellate Rule 26.1.1, amicus curiae the Cato Institute states that it is a nonprofit public policy research foundation dedicated in part to the defense of constitutional liberties secured by law. Cato has no parent corporation and does not issue shares of stock.

CONSENT OF THE PARTIES

The parties have, through counsel, consented to the filing of this brief.

Dated: April 21, 2017

/s/ Peter Jaffe
Peter Jaffe

TABLE OF CONTENTS

Corporate Disclosure Statement ii

Consent of the Parties ii

Table of Contents iii

Table of Authorities v

Interest of Amicus Curiae 1

Introduction 2

Argument 5

I. The Order's actual purpose and effects are material to key legal questions in this case. 5

II. Available evidence suggests that the Order will not advance its stated purposes and supports enjoining the Order. 10

A. The government's stated justifications for the Entry Ban and Refugee Program Suspension are misleading. 10

B. The Entry Ban excludes individuals based on legal nationality rather than any meaningful connection to the six Designated Countries. 14

C. The Entry Ban's stated criteria for designating nationalities are without basis. 15

D. The Entry Ban is based on the false premise that the government needs the cooperation of foreign governments to process visa applications. 21

E. The Refugee Program Suspension is unsupported by evidence. 23

F. The government's failure to pursue its goals consistently undermines its claim that it is pursuing vital interests in the least restrictive manner possible. 24

Conclusion 27

Certificate of Compliance 29

Certificate of Service 30

TABLE OF AUTHORITIES

Page(s)

Cases

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995).....7, 8

Bowen v. Roy,
476 U.S. 693 (1986).....6

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014).....8

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993).....6, 7, 8, 24

City of New Orleans v. Dukes,
427 U.S. 297 (1976).....9

The Florida Star v. B.J.F.,
491 U.S. 524 (1989).....8, 25

Gillette v. United States,
401 U.S. 437 (1971).....6

Goldman Sachs & Co v. City,
747 F.3d 733, 738 (9th Cir. 2014).....2, 9

Hunter v. Underwood,
471 U.S. 222 (1985).....9

Larson v. Valente,
456 U.S. 228 (1982).....6, 7

McCreary Cty. v. Am. Civil Liberties Union of Ky.,
545 U.S. 844 (2005).....6

McGowan v. Maryland,
366 U.S. 420 (1961).....7

Reed v. Town of Gilbert,
135 S. Ct. 2218 (2015) 8, 25

Rodriguez v. Herman,
121 F.3d 1352, 1355 n.3 (9th Cir. 1997) 5

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,
429 U.S. 252 (1977) 9

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008) 9

Statutes

8 U.S.C. § 1361 21

42 U.S.C. § 2000bb–1 ..... 5, 8

Regulations & Executive Orders

Certification of Rescission of North Korea's Designation as a State
Sponsor of Terrorism, 73 Fed. Reg. 37,351 (Jun. 26, 2008) 17

Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017) 25, 26

Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) ..... *passim*

Other Authorities

Alex Nowrasteh, *Guide to Trump's Executive Order to Limit Migration for "National Security" Reasons*, CATO AT LIBERTY (Jan. 26, 2017, 12:03 PM), https://www.cato.org/blog/guide-trumps-executive-order-limit-migration-national-security-reasons . 16, 17, 18, 19

Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, 798 CATO INSTITUTE POLICY ANALYSIS 1 (Sept. 13, 2016), https://www.cato.org/publications/policy-analysis/terrorism-immigration-risk-analysis 18, 23, 24

Ann Louise Bardach, *Our Man's in Miami. Patriot or Terrorist?*, WASH. POST, Apr. 17, 2005, at B3, available at http://www.washingtonpost.com/wp-dyn/articles/A58297-2005Apr16.html 17

David Bier, *Deconstructing Trump's Security Defense of His Immigration Ban*, CATO AT LIBERTY (March 17, 2017, 12:45 PM), https://www.cato.org/blog/deconstructing-trumps-security-defense-immigration-ban 13

Dennis Jett, *One Man's Terrorist*, MIDDLE EAST POLICY COUNCIL, http://www.mepc.org/journal/one-mans-terrorist 17

Glenn Kessler, *Trump's facile claim that his refugee policy is similar to Obama's in 2011*, WASH. POST: FACT CHECKER (January 29, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/01/29/trumps-facile-claim-that-his-refugee-policy-is-similar-to-obama-in-2011/?utm_term=.-c206370aca65 13

KARIN JOHANSON, CHRIS RICKERD & JOANNE LINE, RE: ACLU CONCERNS WITH THE "VISA WAIVER PROGRAM IMPROVEMENT AND TERRORIST TRAVEL PREVENTION ACT OF 2015" (H.R. 158), AMERICAN CIVIL LIBERTIES UNION (Dec. 7, 2015), https://www.aclu.org/sites/default/files/field_document/15_12_7_aclu_concerns_with_hr158_final_1.pdf 15

KRISTIN ARCHICK, U.S.-EU COOPERATION AGAINST TERRORISM, CONGRESSIONAL RESEARCH SERVICE (Dec. 1, 2014), https://fas.org/sgp/crs/row/RS22030.pdf 20

Mehreen Zahra-Malik, *Exclusive: Investigators Piece Together Portrait of Pakistani Woman in Shooting Massacre*, REUTERS (Dec. 4, 2015, 5:29 PM), http://www.reuters.com/article/us-california-shooting-pakistan-idUSKBN0TN1YX20151204 18

Nahal Toosi, *Civil Liberties Groups Slam Obama-Backed Visa Waiver Changes*, POLITICO (Dec. 8, 2015), http://www.politico.com/story/2015/12/obama-visa-waiver-changes-backlash-215875 15

NATIONAL SECURITY DIVISION, DEPARTMENT OF JUSTICE, INTRODUCTION TO THE NATIONAL SECURITY DIVISION'S CHART OF PUBLIC/UNSEALED INTERNATIONAL TERRORISM AND TERRORISM-RELATED CONVICTIONS FROM 9/11/01 TO 12/31/15 (August 26, 2016), https://object.cato.org/sites/cato.org/files/wp-content/-uploads/dojterrorismrelatedconvictions2015.pdf 10, 11, 12

Nicolas Medina Mora & Mike Hayes, *The Big (Imaginary) Black Friday Bombing*, BUZZFEED NEWS (Nov. 15, 2015), https://www.buzzfeed.com/nicolasmedinamora/did-the-fbi-transform-this-teenager-into-a-terrorist?utm_term=.tagpqAxoj-#.yokLOPAZG 12

Nora Ellingsen & Lisa Daniels, *What the Data Really Show about Terrorists Who "Came Here," Part I: Introduction and Overview*, LAWFARE (April 11, 2017, 10:29 AM), https://lawfareblog.com/-what-data-really-show-about-terrorists-who-came-here-part-i-introduction-and-overview 11

Nora Ellingsen & Lisa Daniels, *What the Data Really Show about Terrorists Who "Came Here," Part II: A Country-by-Country Analysis*, LAWFARE (April 11, 2017, 10:30 AM), https://lawfareblog.com/what-data-really-show-about-terrorists-who-came-here-part-ii-country-country-analysis 11

POPULATION DIVISION, DEPARTMENT OF ECONOMIC & SOCIAL AFFAIRS, UNITED NATIONS, INTERNATIONAL MIGRANT STOCK 2015 (Dec. 2015), http://www.un.org/en/development/desa/population/migration/data/estimates2/estimates15.shtml 14

RACHEL MADDOW SHOW, *TRMS Exclusive: DHS Document Undermines Trump Case for Travel Ban*, MSNBC (Mar. 2, 2017), http://www.msnbc.com/rachel-maddow-show/trms-exclusive-dhs-document-undermines-trump-case-travel-ban 26

RUTH ELLEN WASEM, IMMIGRATION: VISA SECURITY POLICIES, CONGRESSIONAL RESEARCH SERVICE (Nov. 18, 2015), https://fas.org/sgp/crs/homesec/R43589.pdf 20

Shane Harris, *Donald Trump Rejects Intelligence Report on Travel Ban—Tension with Intelligence Officials Rises as Homeland Security Contradicts White House on Terror*, WALL ST. J. (Feb. 24, 2017, 8:53 PM), https://www.wsj.com/articles/donald-trump-rejects-intelligence-report-on-travel-ban-1487987629 26

Tristram Korten & Kirk Nielsen, *The Coddled "Terrorists" of South Florida*, SALON (Jan. 14, 2008, 11:00 AM), http://www.salon.com/2008/01/14/cuba_2/ 17

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, PERSONS OF CONCERN, http://popstats.unhcr.org/en/persons_of_concern 14

USA v. Alwan, Waad Ramadan, et ano., INVESTIGATIVE PROJECT ON TERRORISM, http://www.investigativeproject.org/case/545/us-v-alwan-et-ano.....13

U.S. DEPARTMENT OF HOMELAND SECURITY, CITIZENSHIP LIKELY AN UNRELIABLE INDICATOR OF TERRORIST THREAT TO THE UNITED STATES (Feb. 24, 2017), https://fas.org/irp/eprint/dhs-7countries.pdf.....26

U.S. DEPARTMENT OF STATE, CALCULATION OF THE ADJUSTED VISA REFUSAL RATE FOR TOURIST AND BUSINESS TRAVELERS UNDER THE GUIDELINES OF THE VISA WAIVER PROGRAM, https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/refusalratelanguage.pdf.....21, 22

U.S. DEPARTMENT OF STATE, FOREIGN TERRORIST ORGANIZATIONS, https://www.state.gov/j/ct/rls/other/des/123085.htm.....16

U.S. DEP'T OF STATE, REFUGEE PROCESSING CTR., ADMISSIONS & ARRIVALS (last updated 2016), http://www.wrapsnet.org/admissions-and-arrivals/.....23

U.S. DEPARTMENT OF STATE, STATE SPONSORS OF TERRORISM, https://www.state.gov/j/ct/list/c14151.htm.....16

INTEREST OF AMICUS CURIAE

The Cato Institute (***Cato***) is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute believes that those values depend on holding government to rigorous standards of evidence and justification for its actions. Toward those ends, Cato conducts conferences, publishes books and studies, and issues the annual Cato *Supreme Court Review*.

The Cato Institute and its scholars have significant experience studying immigration law and policy in the United States. The Cato Institute therefore believes that it can assist the Court by providing evidence relevant to two key aspects of Executive Order 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (***Executive Order*** or ***Order***): the so-called "Suspension of Entry for Nationals of Countries of Particular Concern" (section 2(c)) (***Entry Ban*** or ***Ban***), and the suspension of U.S. Refugee Admissions Program (***USRAP***) (section 6(a)) (***Refugee Program Suspension***).[1]

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or a party contributed money that was intended to fund preparing or submitting this brief. No person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

INTRODUCTION

The government claims that the Entry Ban and Refugee Program Suspension secure the United States against terrorist attacks. The Cato Institute respectfully disagrees and submits that these justifications do not withstand scrutiny.

As a procedural matter, the Court must consider real-world evidence about the Order's stated justifications and effects because each is part of the prevailing legal tests governing the claims in this case. Under established doctrine, the threshold inquiries for Establishment Clause, Equal Protection Clause, and Religious Freedom Restoration Act (***RFRA***) challenges to government actions require courts to decide whether those actions are motivated by a sincere permissible purpose. If government actions fail that threshold inquiry, then prevailing doctrine requires courts to subject the actions to heightened scrutiny, which requires courts to consider evidence about whether the actions are appropriate means to advance the government's interests. And if the Court concludes that the District Court did not abuse its discretion in finding that Plaintiffs-Appellees are likely to succeed on the merits, *Goldman, Sachs & Co. v. City*, 747 F.3d 733, 738 (9th Cir. 2014), then the well-established test for granting injunctions requires courts to consider the public interest, which, in turn, requires the consideration of the Order's real-world impact. In short, if the Court concludes

that the present case implicates any of these doctrines, it must consider evidence about the Order's purposes and effects. (*See* Part I.)

Should the Court reach any of these questions, it will conclude that real-world evidence supports neither the government's stated justifications for the Order, nor the government's claim that enjoining the Order will harm the public interest. The Entry Ban excludes from the United States persons who are nationals of six Muslim-majority countries: Iran, Syria, Somalia, Sudan, Libya, and Yemen (the ***Designated Countries***). The Refugee Program Suspension excludes persons seeking refugee status regardless of nationality. The government justifies these measures by claiming that individuals from these categories pose a heightened threat of terrorism and that it needs time to identify information necessary to process visa applications. Yet from 2001 to 2015, only four nationals of the Designated Countries were convicted of plotting or attempting a terrorist attack in the United States, and not a single person from these countries has killed anyone in a terrorist attack in the United States in over four decades. Nor does the government need a categorical ban on entry if it cannot gather information to adjudicate visa applications: under the law, visa applicants bear the burden of proof. The government has no obligation to gather its own information to establish applicants' eligibility, and it can—and does—reject anyone who cannot prove that they do not pose a threat. In any event, by the time this Court will be deciding this

case, the 90 days that the government claimed that it needed to improve vetting procedures will have long passed. (*See* Part II.)

ARGUMENT

I. THE ORDER'S ACTUAL PURPOSE AND EFFECTS ARE MATERIAL TO KEY LEGAL QUESTIONS IN THIS CASE.

The Court should consider evidence of the Order's actual purpose and effects—whether presented by those challenging the Order or by the government—because the legal tests in this case require it. The State of Hawai'i and Dr. Ismail Elshikh challenge the Executive Order under the Establishment Clause, Equal Protection Clause, and RFRA, and they obtained a preliminary injunction against the Order.[2] The prevailing doctrines governing these claims and remedies differ, of course, but they share one thing in common: They require courts to consider real-world evidence about some combination of the purposes, operation, or effects of the government actions being challenged.[3]

To illustrate, a court applying prevailing Establishment Clause doctrine to a challenged government action must evaluate the authenticity of the government's articulated secular purpose. The Establishment Clause "'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs,'" even in

---

[2] Although the trial court enjoined the Order based on Establishment Clause grounds and therefore did not reach other arguments, those arguments remain relevant because the Court may affirm the decision below on any grounds in the record. *Rodrigues v. Herman*, 121 F.3d 1352, 1355 n.2 (9th Cir. 1997).

[3] The Cato Institute takes no position on whether the present case implicates the doctrines above, or whether the prevailing doctrinal tests are correct.

facially neutral laws. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971) and *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.)). Courts applying the prevailing Establishment Clause test therefore must evaluate evidence about whether a government measure is motivated by a "secular purpose" that is "genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 864 (2005). Moreover, courts probe the real purpose of state action by considering the operation of the government action, as "the effect of a law in its real operation is strong evidence of its object." *Church of the Lukumi*, 508 U.S. at 535. And when the "openly available data support a commonsense conclusion that a religious objective permeated the government's action," such action is impermissible. *McCreary Cty.*, 545 U.S. at 863.

Here, the government justifies the Executive Order by asserting the need to "protect[] the nation from foreign terrorist entry into the United States." Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) [hereinafter Order]. Cato's research, as set forth below, belies that claim. That evidence therefore bears on the Establishment Clause analysis.

Moreover, the Supreme Court has held that government actions that discriminate among religions require application of strict scrutiny. *Larson v.*

Valente, 456 U.S. 228, 246 (1982). Strict scrutiny requires consideration of whether government action furthers a compelling government interest and whether the action is narrowly tailored to that interest. *Id.* at 246-47; *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Critical to the inquiry is whether the government action "visits 'gratuitous restrictions'" that are unwarranted by the government's claimed interest. Where government action imposes such overinclusive restrictions, "[i]t is not unreasonable to infer, at least when there are no persuasive indications to the contrary, that [such] a law . . . seeks not to effectuate the stated governmental interests," but rather to advance impermissible purposes. *See, e.g.*, *Church of the Lukumi*, 508 U.S. at 538 (quoting *McGowan v. Maryland*, 366 U.S. 420, 520 (1961) (opinion of Frankfurter, J.)); *see also Larson*, 456 U.S. at 248 ("Appellants must demonstrate that the challenged . . . rule is closely fitted to further the interest that it assertedly serves."). On the flip side, when a government action is materially ***under***inclusive by failing to restrict activities "that endanger[] [the government's] interests in a similar or greater degree than" those activities that the action does restrict, the government undermines its claim that it is pursuing a compelling interest and raises the specter that the government is using its stated objective to pursue prohibited discrimination. *Church of the Lukumi*, 508 U.S. at 543. To assess whether a government action's purported purpose is genuine, both law and

common sense require courts to consider the extent to which the government has failed to take less-restrictive actions that would further its purpose. *See, e.g.*, *id.* at 547 ("[A] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.") (quoting *The Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J. concurring in part and concurring in judgment)); *The Florida Star*, 491 U.S. at 540 ("[T]he facial underinclusiveness of [the statute] raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which appellee invokes in support of [the statute]."); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015) (holding a law limiting signage as impermissible under the First Amendment because it left other threats to the town's asserted interests unprohibited).

The evidence presented by Cato below, which demonstrates a complete disconnect between the stated purposes of the Order and its actual operation and effects, bears on precisely these issues.

Similar doctrines apply, with variations not relevant here, to the Equal Protection and RFRA challenges to the Order. *See Adarand Constructors*, 515 U.S. at 227 (as to equal protection under the Fifth Amendment); 42 U.S.C. § 2000bb–1; *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014) (as to RFRA). RFRA governs actions that place burdens on the exercise of religion, 42 U.S.C.

§ 2000bb–1; equal protection doctrine governs government action that draws distinctions based on suspect classifications such as race, religion, or alienage. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Where such distinctions exist, a court may engage in "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *see also Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985).

If, at the end of its analysis, the Court concludes that the District Court did not abuse its discretion in finding that one or more of the challenges brought against the Order is likely to succeed, then it will need to review the appropriateness of the injunction ordered by the District Court,[4] and that too requires the Court to consider real-world evidence about the Order's purposes and effects. To obtain the injunction, Hawaii and Dr. Elshikh had to show, among other things, that enjoining the Order would not harm the public interest—the fourth prong of the test for an injunction. *Winter v. Nat. Res. Def. Council, Inc.* 555 U.S. 7, 20 (1980). Evidence of whether the Entry Ban and Refugee Program Suspension reduce the risk of terrorist attack would be directly relevant to the government's argument that enforcing the Order is in the public interest due to the

[4] In that case, the Court would review for abuse of discretion. *Goldman, Sachs & Co. v. City*, 747 F.3d 733, 738 (9th Cir. 2014).

"unacceptably high" security risk of "erroneously permitting entry of an individual who intends to commit terrorist acts." Defs.'s Mem. in Opp. at 49, *Hawai'i v. Trump*, No. 1:17-cv-00050-DKW-KSC (Mar. 13, 2017).

II. AVAILABLE EVIDENCE SUGGESTS THAT THE ORDER WILL NOT ADVANCE ITS STATED PURPOSES AND SUPPORTS ENJOINING THE ORDER.

If the real purpose of the Order is to protect against an attack in the United States by foreign terrorists, then the Order fails. Its obvious design flaws mean that it will not reduce the risk of terrorism on U.S. soil.

A. The government's stated justifications for the Entry Ban and Refugee Program Suspension are misleading.

The justifications provided in section 1(h) of the Order do not support its sweeping prohibitions. The Order states that "hundreds of persons born abroad" were convicted of "terrorism-related crimes in the United States," including "individuals who first entered the country as refugees." That statement says nothing about whether refugees or nationals of the six Designated Countries are more likely than others to engage in terrorism in the U.S.

The statement is also misleading: the "hundreds" assertion in the Order is likely referencing a list produced by the Department of Justice's National Security Division (***NSD***) that identifies 627 convictions for terrorism-related offenses from 2001 through 2015. NAT'L SEC. DIV., DEP'T OF JUSTICE, INTRODUCTION TO THE NATIONAL SECURITY DIVISION'S CHART OF PUBLIC/UNSEALED INTERNATIONAL

TERRORISM AND TERRORISM-RELATED CONVICTIONS FROM 9/11/01 TO 12/31/15 (August 26, 2016), https://object.cato.org/sites/cato.org/files/wp-content/uploads/-dojterrorismrelatedconvictions2015.pdf [hereinafter NSD List]. The Order's "hundreds" is inflated because the NSD List includes convictions of U.S.-born individuals; convictions for crimes that were not terrorist attacks (such as immigration fraud and lying to investigators), but where the investigation involved a link to international terrorism; and convictions related to terrorism outside of the United States.[5] *See id.*; Nora Ellingsen & Lisa Daniels, *What the Data Really Show about Terrorists Who "Came Here," Part I: Introduction and Overview*, LAWFARE (April 11, 2017, 10:29 AM), https://lawfareblog.com/what-data-really-show-about-terrorists-who-came-here-part-i-introduction-and-overview; Nora Ellingsen & Lisa Daniels, *What the Data Really Show about Terrorists Who "Came Here," Part II: A Country-by-Country Analysis*, LAWFARE (April 11, 2017, 10:30 AM), https://lawfareblog.com/what-data-really-show-about-terrorists-who-came-here-part-ii-country-country-analysis. Based on Cato's review and analysis of the NSD List, only 26 of these were convictions of nationals of the Designated Countries for any kind of terrorism offense (whether or not the offense actually entailed plotting

[5] Convictions for terrorism offenses outside of the United States include convictions for "the use of weapons of mass destruction, conspiracy to murder persons overseas, [and] providing material support to . . .foreign terrorist organizations," among other convictions. NSD List, *supra*.

or attempting an attack).[6] Moreover, during this period, only four nationals from the Designated Countries have been convicted of attempting or plotting a terrorist attack in the United States (including those convicted in state courts), and none of them killed anyone in the United States.[7] Based on Cato's analysis of the NSD List, nationals of 10 other countries had more convictions related to planning terrorist attacks in the United States than the nationals of any of the Designated Countries.

Moreover, the only example in the Order itself of a national of one of the Designated Countries engaging in terrorism could not have been prevented by improved vetting: the Order refers to a Somalian refugee named Mohamed Mohamud who had concocted a plot with an undercover FBI agent to detonate a bomb in Portland (in which no one was ultimately killed); however, Mohamud had entered the United States as a child—a two-year-old. Nicolas Medina Mora & Mike Hayes, *The Big (Imaginary) Black Friday Bombing*, BUZZFEED NEWS (Nov. 15, 2015), https://www.buzzfeed.com/-nicolasmedinamora/-did-the-fbi-transform-this-teenager-into-a-terrorist?utm_term=.tagpqAxoj#.yokLOPAZG [hereinafter Mora & Hayes, *Black Friday Bombing*]. While the claimed purpose of

---

6 These data are based on previously unpublished Cato Institute research and analysis, derived from the convictions on the NSD List.

7 Three of these were federal convictions identified on the NSD List, and the fourth was a state conviction identified by Cato.

the Order is to "improve the screening and vetting protocols and procedures associated with the visa-issuance process and the USRAP," Order § 1(a), no additional procedures could determine which two-year-olds will become terrorists years later.

The only other evidence provided as justification for the Order's Entry Ban and Refugee Program Suspension is similarly inapposite: the Order references two Iraqi refugees who had attempted to support a foreign terrorist organization in Iraq, and who were not, in fact, planning attack in the United States. *USA v. Alwan, Waad Ramadan, et ano.*, INVESTIGATIVE PROJECT ON TERRORISM, http://www.investigativeproject.org/case/545/us-v-alwan-et-ano. Moreover, the Obama Administration improved refugee screening procedures to account for the risk posed by these individuals. David Bier, *Deconstructing Trump's Security Defense of His Immigration Ban*, CATO AT LIBERTY (March 17, 2017, 12:45 PM), https://www.cato.org/blog/deconstructing-trumps-security-defense-immigration-ban; Glenn Kessler, *Trump's facile claim that his refugee policy is similar to Obama's in 2011*, WASH. POST: FACT CHECKER (January 29, 2017), https://www.washingtonpost.com¬/news/fact-checker/wp/2017¬/01/29/trumps-facile-claim-that-his-refugee-policy-is-similar-to-obama-in-2011¬/?utm_term=.-c206370aca65.

B. The Entry Ban excludes individuals based on legal nationality rather than any meaningful connection to the six Designated Countries.

To the extent the Order is based on evidence at all, it is based on evidence regarding ***countries***—more precisely, "conditions in six of the previously designated countries"—rather than ***nationals*** of those countries, who are the actual subjects of the Ban. Order § 1(e). But individuals often have the legal status of "national" of a country even if they have no meaningful connection to it, or a connection that is irrelevant under the circumstances. The converse is also true. A person may have a meaningful connection to a country despite lacking the status of "national." Evidence relating solely to a country itself therefore cannot justify a ban on nationals of that country.

According to the United Nations Population Division, 11.2 million nationals of the Designated Countries were living as migrants in another country in 2015. POPULATION DIV., DEP'T OF ECON. & SOC. AFFAIRS, UNITED NATIONS, INTERNATIONAL MIGRANT STOCK 2015 (Dec. 2015), http://www.un.org/en/-development/desa/population/migration/data/estimates2/estimates15.shtml. According to the United Nations High Commissioner for Refugees, 7.2 million nationals of these six countries were refugees or asylum seekers outside their country of birth in 2015. UNITED NATIONS HIGH COMM'R FOR REFUGEES, PERSONS OF CONCERN, http://popstats.unhcr.org/en/persons_of_concern (last visited Apr. 3,

2017). Nationals from Syria and Iran need not have even been born or lived in the country at all to possess their country's nationality. KARIN JOHANSON, CHRIS RICKERD & JOANNE LINE, RE: ACLU CONCERNS WITH THE "VISA WAIVER PROGRAM IMPROVEMENT AND TERRORIST TRAVEL PREVENTION ACT OF 2015" (H.R. 158), AMERICAN CIVIL LIBERTIES UNION (Dec. 7, 2015), https://www.aclu.org/-sites/default/files/field_document/15_12_7_aclu_concerns_with_hr158_-final_1.pdf; Nahal Toosi, *Civil Liberties Groups Slam Obama-Backed Visa Waiver Changes*, POLITICO (Dec. 8, 2015), http://www.politico.com/story/2015/12/obama-visa-waiver-changes-backlash-215875. Legal nationality is therefore an inappropriately blunt tool for judging whether an individual actually has substantial ties to the country of nationality, let alone whether the individual poses any threat to the United States.

C. The Entry Ban's stated criteria for designating nationalities are without basis.

In any event, the government's selection of those six countries does not appear to be based on any meaningful national security risk when viewed in light of recent history. Rather, there is a total disconnect between the countries chosen and countries whose nationals, historically, have committed acts of terrorism on U.S. soil.

The Order asserts that the six Designated Countries were selected based on conditions within those countries, listing two situations to justify the designation:

first, that the country is in the midst of conflict that involves a U.S.-listed Foreign Terrorist Organization (Somalia, Syria, Libya, and Yemen); and second, that the United States has recognized the government of the country as a State Sponsor of Terrorism (Iran, Sudan, and Syria). Order § 1(d)-(e); U.S. DEP'T OF STATE, FOREIGN TERRORIST ORGANIZATIONS, https://www.state.gov/j/ct/rls/other/des/-123085.htm (last visited Apr. 17, 2017). The government states that either situation "increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States," Order § 1(d), but offers no evidence for that claim.

To the contrary, that a nation is a State Sponsor of Terrorism has not historically correlated with the likelihood of its nationals becoming terrorists in the United States. The United States currently recognizes only Iran, Sudan, and Syria as State Sponsors of Terrorism, and there has not been a single death caused by terrorism on U.S. soil committed by a national of one of these three countries since at least 1975. Alex Nowrasteh, *Guide to Trump's Executive Order to Limit Migration for "National Security" Reasons*, CATO AT LIBERTY (Jan. 26, 2017, 12:03 PM), https://www.cato.org/blog/guide-trumps-executive-order-limit-migration-national-security-reasons [hereinafter Nowrasteh, *Guide*] (showing zero terrorism murders committed by persons born in Iran, Syria, and Sudan); U.S. DEP'T OF STATE, STATE SPONSORS OF TERRORISM, https://www.state.gov/j/ct/list/-

c14151.htm (last visited Apr. 17, 2017). Since the United States began designating countries as State Sponsors of Terrorism in 1979, the United States has recognized a total of eight such countries: Cuba (1982-2015), Iraq (1979-82, 1990-2004), Iran (1984-present), Libya (1979-2006), North Korea (1988-2008), South Yemen (1979-1990), Sudan (1993-present), and Syria (1979-present). Dennis Jett, *One Man's Terrorist*, MIDDLE EAST POLICY COUNCIL, http://www.mepc.org/journal/-one-mans-terrorist (last visited Apr. 14, 2017); Certification of Rescission of North Korea's Designation as a State Sponsor of Terrorism, 73 Fed. Reg. 37,351 (Jun. 26, 2008). From 1975 through 2015, nationals from these countries have killed only three people in the United States in acts of terrorism. Nowrasteh, *Guide*, *supra*. All three murders were committed by Cuban nationals in 1975 and 1976—that is, ***before*** the U.S. government designated Cuba (or any other country) as a State Sponsor of Terrorism. Ann Louise Bardach, *Our Man's in Miami. Patriot or Terrorist?*, WASH. POST, Apr. 17, 2005, at B3, available at http://www.washingtonpost.com/wp-dyn/articles/A58297-2005Apr16.html; Tristram Korten & Kirk Nielsen, *The Coddled "Terrorists" of South Florida*, SALON (Jan. 14, 2008, 11:00 AM), http://www.salon.com/2008/01/14/cuba_2/.

Similarly, that a person is a national of a country in civil war has not predicted whether that person would present a terrorism risk. Research conducted by Cato demonstrates that, since 1975, there has been only one incident of

terrorism on U.S. soil committed by someone whose country was in the midst of a civil war involving a foreign terrorist organization at the time of the offense: the 2015 shooting in San Bernardino, California committed in part by Pakistan-born (but Saudi-raised) Tashfeen Malik. Mehreen Zahra-Malik, *Exclusive: Investigators Piece Together Portrait of Pakistani Woman in Shooting Massacre*, REUTERS (Dec. 4, 2015, 5:29 PM), http://www.reuters.com/article/us-california-shooting-pakistan-idUSKBN0TN1YX20151204. (Pakistan, which has had a long-simmering insurgency in some regions, is not among the Designated Countries.)

Table 1 provides the number of deaths and the historical probability of death on U.S. soil from a terrorist attack by nationals of countries that meet the conditions the Order describes.

Table 1: Risk of Death by Terrorism by Nationality by Country Conditions, 1975-2015

Security Categories and Comparators	Deaths	Historical Annual Chance of Death
Current States Sponsors of Terrorism	Zero	Zero
States in Civil Wars	14	1 in 779.70 million
Other Non-U.S. Countries	3,006	1 in 3.63 million
United States	408	1 in 26.74 million
Six Designated Countries	Zero	Zero

Sources: Cato Institute calculations based on data cited in Nowrasteh, *Guide*, *supra*; Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, 798 CATO INSTITUTE POLICY ANALYSIS 1, 1, 6 (Sept. 13, 2016), https://object.cato.org/sites/-cato.org/files/pubs/pdf/pa798_2.pdf [hereinafter Nowrasteh, *Terrorism and Immigration*].

As noted above, terrorists from State Sponsors of Terrorism did not kill anyone in terror attacks on U.S. soil from 1975 to 2015. In that period, the annual chance of dying at the hands of terrorists from states in civil war involving a foreign terrorist organization was 1 in 779.7 million. By comparison, the annual probability of death in an act of terrorism committed by other foreign nationals was 1 in 3.63 million. In other words, the historical chance of dying in an attack on U.S. soil committed by a foreign-born terrorist from a country that does ***not*** fit the government's criteria was 214 times greater than being killed by one who did.

The government's misguided criteria for designating countries produces a bizarre result: Based on data from 1975 through 2015, ***no one*** has been killed in a terrorist attack on U.S. soil by nationals from any of the six Designated Countries since 1975. Nowrasteh, *Guide*, *supra*. Although 15 nationals of these countries have been convicted of attempting or planning attacks in this timeframe, they caused no deaths, and only four nationals of these countries were convicted of attempting or planning attacks from 2001 to 2015, the time period on which the government appears to rely.

While the future need not replicate the past, the government purports to base its security assessment on evidence of crimes committed in the past. But as discussed above, the historical record undermines, rather than supports, the government's claims. Moreover, there are good reasons to believe that the risk of

terrorism will be managed more effectively in the future: beginning after 9/11, the United States has revamped its visa screening process. To name but a few changes, it expanded and automated terrorist watch lists, instituted biometric identity verification, linked various agency databases, instituted Department of Homeland Security review of visa applications for terrorism links in many consulates worldwide, and expanded intelligence sharing with allied countries around the world. RUTH ELLEN WASEM, IMMIGRATION: VISA SECURITY POLICIES, CONGRESSIONAL RESEARCH SERVICE at 5-6, 13-20 (Nov. 18, 2015), https://fas.org/-sgp/crs/homesec/R43589.pdf, KRISTIN ARCHICK, U.S.-EU COOPERATION AGAINST TERRORISM, CONGRESSIONAL RESEARCH SERVICE (Dec. 1, 2014), https://fas.org/-sgp/crs/row/RS22030.pdf. These changes suggest that a categorical ban is not the least restrictive means to effectuate the government's stated purpose.

Even more telling, however, is a simple fact: The Executive Order does not designate all countries fitting its stated criteria. As noted above, Pakistan is effectively engaged in a civil war involving a Foreign Terrorist Organization, but is not covered by the Order. This implies that the government's stated criteria are not, in fact, a complete statement of its reasons for adopting the Ban.

D. The Entry Ban is based on the false premise that the government needs the cooperation of foreign governments to process visa applications.

The government further justifies the designation of countries for the Entry Ban by claiming that the six countries are "[un]willing[] or [un]ab[le] to share or validate important information about individuals seeking to travel to the United States." Order § 1(d). It further states that the suspension is needed to allow time for the Secretary of Homeland Security to "conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country." *Id.* § 2(a). These explanations rely on a false premise.

It is ***applicants***, and not the government, who bear the burden to produce information showing their eligibility for a visa. The government has no obligation to obtain this information on its own, and may exclude any individual who fails to meet this burden. 8 U.S.C. § 1361. All evidence indicates that consular officers already enforce this burden of proof and have reacted to the changing conditions in each of the Designated Countries on a proper, individualized basis. For the past seven years, the B-1 visa refusal rate (the share of applicants denied a visa for any reason) for the excluded nationalities has been an average of 85 percent higher than for all other nationalities. U.S. DEP'T OF STATE, CALCULATION OF THE ADJUSTED VISA REFUSAL RATE FOR TOURIST AND BUSINESS TRAVELERS UNDER THE

GUIDELINES OF THE VISA WAIVER PROGRAM, https://travel.state.gov/content/dam/-visas/Statistics/Non-Immigrant-Statistics/refusalratelanguage.pdf [hereinafter DEP'T OF STATE, ADJUSTED VISA REFUSAL RATE] (last visited Apr. 17, 2017).

Table 2: B-1 Visa Refusal Rate (% of Applicants) by Country

Country	2010	2011	2012	2013	2014	2015	2016
Somalia	70	67	62	66	52	65	64
Syria	28	33	42	46	60	63	60
Iraq	42	27	33	39	41	53	52
Yemen	54	48	48	44	44	54	49
Iran	39	31	38	48	42	39	45
Libya	14	31	39	34	34	43	41
Sudan	33	41	45	48	42	40	37
Average[8]	*40*	*40*	*44*	*46*	*45*	*51*	*50*
All other countries	*26*	*25*	*24*	*24*	*23*	*24*	*25*

Source: Cato Institute calculations based on data in DEP'T OF STATE, ADJUSTED VISA REFUSAL RATE, *supra*.

These denial rates reflect in part the existing availability of documentary evidence from visa applicants. While the average visa denial rate for all other countries has remained relatively constant in recent years, the average denial rate of the six Designated Countries (plus Iraq) increased from 40% to 50% between 2010 and 2016—a rate increase of 25%. In particular, the conflicts in Libya and Syria resulted in refusal rates that more than doubled. *Id*. Based on Cato's familiarity with the visa-application process, it believes that many of these rejections were likely a consequence of the inability of applicants to access documents and other evidence necessary to prove their eligibility for a visa, indicating that the

[8] Not weighted by number of applicants.

government has no need to exclude nationalities on a categorical basis due to information deficits.

E. The Refugee Program Suspension is unsupported by evidence.

Although the Order suspended the entry of all refugees under the U.S. Refugee Admissions Program—regardless of nationality—there is no clear evidence that refugees pose greater "threats to our national security" than other foreign-nationals in the U.S. Order § 1(h). Indeed, the opposite has historically been true.

If anything, available evidence indicates that refugees have historically been ***less*** likely than other foreign nationals—and even U.S. citizens—to kill in terrorist attacks in the United States. The Cato Institute has produced what it understands to be the only comprehensive analysis of the threat of terrorism based on admission category of foreign-born terrorists. Nowrasteh, *Terrorism and Immigration*, *supra* at 1. From 1975 to 2015, the United States admitted 3.3 million refugees. U.S. DEP'T OF STATE, REFUGEE PROCESSING CTR., ADMISSIONS & ARRIVALS (last updated 2016), http://www.wrapsnet.org/admissions-and-arrivals/. The Cato report finds that only three—each from Cuba— engaged in any deadly acts of terrorism during that time in the United States (0.00009 percent). Nowrasteh, *Terrorism and Immigration*, *supra*, at 5.

Historically, the chance of dying in a terrorist attack on U.S. soil committed by a refugee has been 1 in 3.6 billion a year. (Tbl. 3.) Of the four general categories of admission—permanent residency, temporary nonimmigrant, asylum, and refugee status—the refugee category has been the ***least*** risky. Tourist visa holders were nearly 1,000 times more likely than refugees to kill somebody in a terrorist attack on U.S. soil. U.S.-born persons were a hundred times more likely to kill in a domestic terrorist attack than refugees.

Table 3: Annual Chance of Being Killed in an Attack on U.S. Soil, Based on Immigration Status of Terrorist, 1975-2015

Category	Deaths	Historical Annual Chance Death
Tourist	2,834	1 in 3.9 million
U.S.-Born	408	1 in 26.7 million
Student Visa	159	1 in 68.9 million
Fiancé Visa	14	1 in 779.7 million
Permanent Resident	8	1 in 1.4 billion
Asylee	4	1 in 2.7 billion
Refugee	3	1 in 3.6 billion
USRAP	0	Zero

Source: Cato Institute calculations based on data cited in Nowrasteh, *Terrorism and Immigration*, *supra*, at 5.

F. The government's failure to pursue its goals consistently undermines its claim that it is pursuing vital interests in the least restrictive manner possible.

Finally, the government has failed to take less restrictive steps to protect national security, including steps mandated by the Order itself. That fact bears on whether the Executive Order in fact serves the important purposes that it purports to. *See, e.g.*, *Church of the Lukumi*, 508 U.S. at 547 ("[A] law cannot be regarded

as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." (quoting *Florida Star*, 491 U.S. at 541-42 (Scalia, J. concurring in part and concurring in judgment)); *Florida Star*, 491 U.S. at 540; *Reed*, 135 S. Ct. at 2232. Both the Order and the now-revoked Order, Exec. Order 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (the ***Revoked Order***), suspended entry of refugees and of nationals from certain countries while the Secretary of Homeland Security produced a worldwide report with recommendations to improve vetting and screening protocols. But the government apparently has not made meaningful efforts to improve vetting, as demonstrated by two facts:

First, the duration of the current Order is precisely the same as that of the Revoked Order: 90 days for the Entry Ban. But by the time the second Order would have been made effective, 48 days had passed during which the government should have been working to improve vetting and screening protocols pursuant to the Revoked Order. Therefore, the duration of the current Order should have been reduced by a commensurate 48 days. That the duration has not been reduced suggests that the Government has not made progress improving vetting and screening protocols.

Indeed, by the time the Court hears this case, the original 90-day period will have expired. Assuming that the Government has been improving vetting during

this time, there will be no further reason for the Entry Ban. And if the Government has not made progress, that failure undermines the Government's claims to be pursuing a compelling government interest in a properly tailored manner.

Second, the government apparently has not produced the required vetting reports. The Revoked Order required the Secretary of Homeland Security to submit a report that provides "a list of countries that do not provide adequate information" for vetting "within 30 days of the date of this order." Revoked Order § 3(b). (The new Order requires the same, but within 20 days.) The Department of Homeland Security apparently produced two draft intelligence assessments—finding that "citizenship is an unlikely predictor of terrorism" and that "most foreign-born, U.S.-based violent extremists [are] radicalized after entering." U.S. DEPARTMENT OF HOMELAND SECURITY, CITIZENSHIP LIKELY AN UNRELIABLE INDICATOR OF TERRORIST THREAT TO THE UNITED STATES (Feb. 24, 2017), https://fas.org/irp/eprint/dhs-7countries.pdf; RACHEL MADDOW SHOW, *TRMS Exclusive: DHS Document Undermines Trump Case for Travel Ban*, MSNBC (Mar. 2, 2017), http://www.msnbc.com/rachel-maddow-show/trms-exclusive-dhs-document-undermines-trump-case-travel-ban. But President Trump reportedly dismissed these assessments as "not the intelligence assessment [he] asked for." Shane Harris, *Donald Trump Rejects Intelligence Report on Travel Ban—Tension with Intelligence Officials Rises as Homeland Security Contradicts White House*

on Terror, WALL ST. J. (Feb. 24, 2017, 8:53 PM), https://www.wsj.com/articles/-donald-trump-rejects-intelligence-report-on-travel-ban-1487987629. There is no evidence to indicate that the requested report reviewing screening procedures was ever submitted.

Accordingly, although issued as a means of "protecting the nation from foreign terrorist entry into the United States," Cato's research shows that the Executive Order does not further its purported goal. Should the court apply the prevailing doctrines under the Establishment Clause, Equal Protection, RFRA, and preliminary injunction analysis, it should consider Cato's research, which weighs in favor of upholding the District Court's injunction.

CONCLUSION

The Cato Institute respectfully submits that the Court should consider the foregoing evidence in assessing the statutory and constitutional challenges to the Executive Order and the government's challenge to the preliminary injunction. The Court should affirm the District Court's issuance of the preliminary injunction in this case.

Dated: April 21, 2017
Washington, DC

Respectfully submitted,

By: /s/ Peter Jaffe

FRESHFIELDS BRUCKHAUS DERINGER US LLP

Daniel Braun*
Brent Wible*
Peter Jaffe
Lauren Kaplin*
700 13th Street, NW, 10th Floor
Washington, DC 20005

David Y. Livshiz
Karen Wiswall
601 Lexington Avenue, 31st Floor
New York, NY 10022

Attorneys for Amicus Curiae Cato Institute

* Applications for admission pending.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation under Fed. R. App. P. 29(a)(4) because, excluding items exempted under Fed. R. App. P. 32(f), it contains 5,765 words.

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 uses a proportionally spaced Times New Roman typeface in 14-point size.

Dated: April 21, 2017

/s/ Peter Jaffe

Peter Jaffe
Freshfields Bruckhaus Deringer US LLP

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I, Peter Jaffe, hereby certify that I electronically filed the foregoing motion with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 21, 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.

Executed April 21, 2017,
at Washington, District of Columbia.

/s/ Peter Jaffe

Peter Jaffe
Freshfields Bruckhaus Deringer US LLP

Attorney for Amicus Curiae