No. 17-15589

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAII and ISMAIL ELSHIKH

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawaii, No. 1:17-cv-00050-DKW-KSC
United States District Judge Derrick K. Watson

BRIEF OF *AMICI CURIAE* NATIONAL IMMIGRANT JUSTICE CENTER, ASISTA, AMERICANS FOR IMMIGRANT JUSTICE, FUTURES WITHOUT VIOLENCE, FREEDOM NETWORK USA, AND NORTH CAROLINA COALITION AGAINST DOMESTIC VIOLENCE IN SUPPORT OF AFFIRMANCE AND PLAINTIFFS-APPELLEES

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INTRODUCTION

This case involves a challenge from the State of Hawaii and Ismail Elshikh to Executive Order #13,780 (the "EO"), the second order issued by President Trump purporting to cut off immigrant and nonimmigrant entries from six countries. This is the federal government's appeal from a preliminary injunction entered by the District Court.

Amici write separately for two reasons.[1] First, Amici write to explain additional ways in which the breadth of the EO likely violates the Immigration and Nationality Act, apart from those respects noted by Plaintiffs-Appellees and the District Court. The parties below focused on the EO's impact on immigrant visas generally, and on applicants within the refugee system. However, the EO also appears to affect visas for victims of human trafficking and their families; victims of specified criminal offenses and their families; visas pertaining to spouses of U.S. citizens; and the spouses and children of refugees and

[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. All parties have consented to the filing of this brief.

asylees. Amici would not wish to suggest that the EO is permissible as to other visa categories; Amici are experts in these areas, and can speak to its incompatibility with the statute in these areas of the law. The EO runs contrary to the statutes and regulations that govern these specific visa categories, and to international law governing treatment of refugees and asylees.

Second, the EO's language is not severable as to aspects 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 preliminary injunction 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 the family members of noncitizen victims of human trafficking and other crimes; mixed-status households including marriages where only one spouse is a U.S. citizen, and the families of refugees and asylees. Amici have decades of experience and an interest in ensuring that the laws for adjudicating an immigrant's eligibility for asylum are properly applied.

The National Immigrant Justice Center (NIJC) is a Chicago-based national non-profit organization that provides free legal representation to low-income refugees and asylum seekers. In collaboration with *pro bono* attorneys, NIJC represents hundreds of applicants for U visas, T visas, K-3 visas, asylees, and refugees at any given time, before the Asylum Office, the Immigration Courts, the Board of Immigration Appeals, and the Federal Courts. 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.

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.

Americans for Immigrant Justice ("AI Justice"), formerly Florida Immigrant Advocacy Center, is a non-profit law firm dedicated to promoting and protecting the basic rights of immigrants. Since our founding in 1996, AI Justice has served over 90,000 immigrants from all over the world. Our clients include unaccompanied immigrant children; immigrants who are detained and facing removal proceedings; as well as immigrants seeking assistance with work permits, legal permanent residence, asylum and citizenship. Over the past two decades, AI Justice has served thousands of individual non-citizens who face removal. The deleterious effects of the Executive Order at issue in this case would directly affect the populations we serve and we believe that our organization's extensive experience representing such persons can assist the Court in its deliberative process. Our clients also include survivors of domestic violence, sexual assault, and human trafficking, and their children, who have been irreparably traumatized and victimized by abuse and violence and are seeking refuge. Part of our

mission is to ensure that immigrants are treated justly, and to help bring about a society in which the contributions of immigrants are valued and encouraged. In Florida and on a national level, we champion the rights of immigrants; serve as a watchdog on immigration detention practices and policies; and speak for immigrant groups who have particular and compelling claims to justice. AI Justice is dedicated to advancing and defending the rights of immigrants.

Futures Without Violence (FUTURES), formerly the Family Violence Prevention Fund, is a national nonprofit organization that has worked for over thirty years to prevent and end violence against women and children around the world. FUTURES mobilizes concerned individuals; children's, women's, and civil rights groups; allied professionals; and other social justice organizations to end violence through public education and prevention campaigns, public policy reform, training and technical assistance, and programming designed to support better outcomes for women and children experiencing or exposed to violence.

FUTURES joins with amici because it has a long-standing commitment to supporting the rights and interests of women and

children who are victims of crime regardless of their immigration, citizenship, or residency status. FUTURES co-founded and co-chaired the National Network to End Violence Against Immigrant Women working to help service providers, survivors, law enforcement and judges understand how best to work collaboratively to bring justice and safety to immigrant victims of violence. Using this knowledge FUTURES helped draft legislative recommendations that were ultimately included in the Violence Against Women Act and Trafficking Victims Protection Act to assist immigrant victims of violence. FUTURES currently participates in the Alliance to End Slavery and Trafficking and co-chairs the Coalition to End Violence Against Women and Girls Globally.

The North Carolina Coalition Against Domestic Violence (NCCADV) is a not-for-profit organization incorporated in North Carolina in 1982 (www.nccadv.org) to end domestic violence. NCCADV represents and assists 85 domestic violence service programs which serve victims of domestic violence. In addition, NCCADV has hundreds of individual and organizational members. Working with federal, state and local policymakers and domestic violence advocates throughout the

nation, NCCADV helps identify and promote policies and best practices to assist immigrant survivors of intimate partner violence. NCCADV is deeply concerned that the Executive Order at issue is contrary to the immigration statute and regulations, undermines U Visas for immigrant victims of crime, including domestic violence, and places already vulnerable victims at more risk of harm.

Freedom Network USA (FNUSA) is the nation's largest alliance of experienced organizations and individuals advancing a human rights-based approach to human trafficking in the United States. Our 52 members work directly with over 1,000 survivors of all forms of trafficking annually. Trafficking survivors represented by our members have been forcibly separated from their families for months or years at a time. Many of their family members face continuing threats of harm by traffickers in their home country, which is often unwilling or unable to protect them. Timely reunification with family members is also critical to the mental health and recovery of trafficking survivors who have experienced trauma and violence. FNUSA is also actively engaged in advocacy, and has been involved with the reauthorization of the Trafficking Victims Protection Act in 2003, 2005, 2008, and 2013.

ARGUMENT

The EO is 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. The EO's sweeping language appears to result from the misconception that authority under § 1182(f) supersedes the rest of the immigration statute. The Court should correct this misimpression and uphold the preliminary injunction.

I. The EO Is Contrary to the Immigration Statute and Regulations.

Plaintiffs appropriately focused their arguments on those aspects of the EO which are without legal support and would result in substantial harm to them. Amici write to explain additional ways in which the breadth of the EO likely violates the Immigration and Nationality Act (INA) and, if allowed to take effect, would harm others. Other submissions to this Court correctly argue 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 prevent noncitizens from obtaining visas as spouses or children of victims of human trafficking (T visas) or victims of specified criminal offenses (U visas), as spouses and children of U.S. citizens (K-3 and K-4

visas), and as spouses and children of admitted refugees and asylees. By suspending the issuance of visas and travel documents, the EO undermines these programs, runs afoul of the statutory and regulatory regimes governing them, and conflicts with international law. The general grant of authority at 8 U.S.C. § 1182(f) can and should be read harmoniously with the rest of the INA. This Court should not read § 1182(f) to authorize the effective unilateral Presidential repeal of much of the INA, even temporarily. 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 Consistently with the Rest of the INA.

Courts must interpret a statute, where possible, so as to give meaning to all of the statutory text. *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). A court construing a statute must attempt to "fit . . . all parts into a harmonious whole." *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1145 (9th Cir. 2013) (citations omitted).

The federal government contends that the broad authority at 8 U.S.C. § 1182(f) should be understood to override all other provisions of the INA. (*E.g.*, Dkt. 36, Br. for Appellants, at 27-28.) That contention is inconsistent with the requirement that the immigration statute be

read as a harmonious whole. The INA is a complex, multi-faceted statute that 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 need not and should not be read to conflict with other provisions of the INA. Section 1182(f) authority must be implicitly limited by other portions of the INA, both the anti-discrimination provision of 8 U.S.C. § 1152(a)(1)(A) and statutory provisions protecting the issuance of visas to particularly vulnerable aliens. Section 1182(f) authority should be understood to be in service of the various other aims and policies of Congress, such as exclusion of terrorists, 8 U.S.C. § 1182(a)(3)(B), exclusion of persecutors and participants in genocide, 8 U.S.C. § 1182(a)(3)(E), and the various other statutory rules set forth by Congress. *See generally* 8 U.S.C. § 1182(a). Reading § 1182(f) authority to override the statutory rules would render various parts of the statute unnecessary or duplicative. *See* 8 U.S.C. § 1182(a)(3)(C)(i).

By contrast, § 1182(f) retains its viability even when read consistently with other provisions of the INA. Such an approach to the statute preserves the efficacy of the INA in its entirety. The President

must exercise § 1182(f) authority in ways tethered to Congressional objectives, as codified into statute.

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

The EO implicates a host of visas in a wide variety of circumstances. The EO is inconsistent with the text, structure, intent, and purpose of the statute in various respects.

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* human trafficking, 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). Congress created the U visa program to protect immigrant "women and children who are victims of [qualifying] crimes." *United States v. Cisneros-Rodriguez*, 813 F.3d 748, 762 (9th Cir. 2015) (citation omitted). *See also* Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1533, § 1513(a)(1)(B) (codified at 8 U.S.C. § 1101 et. seq.) ("All women and children who are victims of these crimes committed against them in the United States must be able

to report these crimes to law enforcement and fully participate in the investigation of the crimes committed against them and the prosecution of the perpetrators of such crimes."). The legislative history demonstrates Congressional intent to "make it easier for abused women and their children to become lawful permanent residents" and to ensure that "battered immigrant women should not have to choose to stay with their abusers in order to stay in the United States." *See* 146 Cong. Rec. S10185 (Oct. 11, 2000) (statement of Sen. Patrick Leahy). Congress intended to support this effort by affording such victims a broad and generous opportunity to find safety for themselves and their children, and to encourage immigrants to report crimes to law enforcement in order to protect all Americans.

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").

The EO, however, bars all noncitizens from six countries from obtaining a U visa abroad. It also bars issuance of derivative U visas to specified family members of noncitizens granted U visa status.

The U visa statute itself permits family members to reunite with the principal applicant. Where the U visa victim is under 21, the statute permits derivative status to the "spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien." 8 U.S.C. § 1101(a)(15)(U)(ii)(I). Where the U visa victim was over 21, the statute permits derivative status to the spouse or child of the principal applicant. 8 U.S.C. § 1101(a)(15)(U)(ii)(II).

Indeed, the regulations mandate parole for many U nonimmigrant applicants. Due to a Congressional limit on the annual number of U visa grants, some U applicants are provisionally granted that status, but must wait on a waiting list. When such a backlog is in effect, the U visa regulations provide in mandatory terms that "USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list." 8 C.F.R.

§ 214.14(d)(2). However, the EO bars parole, just as it bars U visa adjudication, absent some kind of waiver.

Many U visa derivatives abroad are in situations of great vulnerability. *See* USCIS Ombudsman, "Parole for Eligible U Visa Principal and Derivative Petitioners Residing Abroad" (June 16, 2016). Immigrant crime victims, as well as their children and family abroad, may be vulnerable to retaliation due to testimony that helped put someone into jail. The U Visa is limited to immigrant crime victims who have collaborated in the investigation or prosecution of the underlying crime, which often creates a very real danger of retaliation. These abusers and traffickers are often part of complex family, community, or criminal networks that enforce their threats against family members of their victims. Children may face additional vulnerability from difficult economic, political, and security conditions in their home country, compounded by their separation from parent(s) living in the United States.

The intent of the U visa statute is to protect vulnerable noncitizens in this situation; the statute is structured accordingly. The regulations mandate parole issuance for U visa applicants abroad, and

their family members. A full freeze of U visa applications is inconsistent with the intent and structure of the statute.

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, the INA specifies a process for the grant of T visas, the length of T visa status as well as any extensions of T visa status. *See* 8 U.S.C. § 1101(a)(15)(T) (process for T visa application for trafficking victim and derivative beneficiaries); 8 U.S.C. §§ 1184(o)(7)(A) (length of status); (o)(7)(C) (automatic extension); (o)(4) (continued classification of children).

The T visa statute itself permits family members to reunite with the principal applicant. Where the victim is under 21, the statute permits derivative status to the "spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien." 8 U.S.C. § 1101(a)(15)(T)(ii)(I). Where the victim is over 21, the statute permits

derivative status to the spouse or child of the principal applicant, 8 U.S.C. § 1101(a)(15)(T)(ii)(II), as well as "any parent or unmarried sibling under 18 years of age, or any adult or minor children of a derivative beneficiary of the alien … [who] faces a present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement." 8 U.S.C. § 1101(a)(15)(T)(ii)(III).

Noncitizens seeking T status abroad are generally derivative family members of the victim of severe human trafficking. 9 Foreign Affairs Manual 402.6-5(E)(1). Traffickers are often part of complex networks that may include families, communities, political parties, or criminal enterprises. These trafficking networks enforce the threats issued by the traffickers, in order to enslave their victims and ensure their silence. Once victims have reported the crime to law enforcement, derivative beneficiaries may be in situations of great danger. This extreme danger was recognized by Congress in 2008 when it extended protection to even more family members facing retaliation. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008,

Pub. L. 110-457, § 201 (Protecting Trafficking Victims Against Retaliation).

The EO de facto terminates T visa derivative status for any T visa-eligible family members seeking to join the individual found to have been a victim of severe forms of human trafficking, including those fleeing retaliation from traffickers.

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

Worried by lengthy visa 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.").

The purpose of the K-3 visa was explained in a Joint Memorandum entered into the Congressional Record:

> The purpose of the . . . "K" visa[] is to provide a speedy mechanism by which family members may be reunited.... Like the existing [Fiancée] visa, the new "K" visa is not intended to be a prerequisite for the admission of citizen spouses, but a speedy mechanism for the spouses and minor children of U.S. citizens to obtain their immigrant visas in the U.S., rather than wait for long periods of time outside the U.S.

146 Cong. Rec. S11851 (Dec. 15, 2000). The entire point of the K-3 visa (and the K-4 visa for children of K-3 applicants) is to permit a "speedy mechanism" to reunite U.S. citizens with family members abroad. A months-long suspension of K-3 issuance—which could be extended—is plainly inconsistent with the purpose and structure of the K-3 visa.

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] 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 six 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 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 made any showing of facts common to all spouses from the six specified countries (it does not), the EO itself and the various statements of President Trump and others 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

[2] In *Kerry v. Din*, 135 S. Ct. 2128 (2015), 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).

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."

Amici submit that the Court need not reach the constitutional arguments because the statute is amenable to an interpretation which would avoid grave doubts as to these constitutional issues. *See Kim Ho Ma v. Reno*, 208 F.3d 815, 822 (9th Cir. 2000), *vacated and remanded on other grounds*, *Zadvydas v. Davis*, 533 U.S. 678 (2001) ("[C]ourts should interpret statutes in a manner that avoids deciding substantial constitutional questions…. In the immigration context, courts have often read limitations into statutes that appeared to confer broad power on immigration officials in order to avoid constitutional problems.") (citation omitted). Requiring § 1182(f) to be read harmoniously with other parts of the INA would confine Presidential authority within statutory limits, and would thereby avoid the grave constitutional issues otherwise presented by the case.

4. The EO Precludes Travel by Children of Admitted Refugees and Asylees, Contrary to Regulation and International Treaty Obligations.

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 current EO. However, the EO clearly does preclude derivative refugees and asylees (i.e., spouses and children) from entering the United States, in violation of statute.

By statute, a spouse or child (defined as children who are unmarried and under age 21, 8 U.S.C. § 1101(b)) of an admitted refugee is entitled to derivative refugee status. Specifically, the statute provides that a spouse or child of the refugee "shall… be entitled to the same admission status" as the principal refugee. 8 U.S.C. § 1157(c)(2). However, the EO purports to preclude all noncitizens from all countries in the world from obtaining refugee status to enter the United States, except where the refugee grant had already occurred. EO §§ 2(c), 3(b)(vi). Thus, any child or spouse of a refugee is blocked by the EO but entitled under statute—in mandatory terms—to "the same admission status," i.e., refugee status, as the admitted refugee.

Likewise, an asylee is entitled to request derivative asylee status for a child or spouse. 8 U.S.C. § 1159(b)(3). The only basis under regulation for denial of such an application is that "the spouse or child is found to be ineligible for the status." 8 C.F.R. § 208.21(e).[3]

Under the EO, a child or spouse of an admitted refugee or asylee would no longer be able to enter the U.S. to be with their spouse or parent. This not only runs afoul of the regulations and statutes discussed above, but also violates international law. Treaty obligations undertaken by the United States require the federal government to issue travel authorization to refugees and asylees. *See* Convention Relating to the Status of Refugees, art. 28(1), 19 U.S.T. 6259, 189 U.N.T.S. 150 (July 28, 1951); see also annex at para. 2.[4]

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[3] It is unclear whether entry as a refugee or asylee would be considered 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). If the former, the EO also violates the anti-discrimination language of § 1152(a)(1)(A).

[4] 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, 118 (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

II. Assuming Severability Applies, a Court Should Hesitate to Rewrite the EO to Cure an Overarching Incorrect Legal Analysis.

It is unclear whether severability analysis should apply to executive orders, although this Circuit has held that the test for severability with respect to executive orders is the same as that for statutes. *See 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." *Bd. of Nat. Res. v. Brown*, 992 F.2d 937, 948 (9th Cir. 1993) (citation omitted).

The EO contains a severability clause. EO § 15(a). However, severability analysis does not permit courts to rewrite statutes. *See*

United Nations Protocol Relating to the Status of Refugees." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987).

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."); *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.").

As demonstrated above, the application of Section 3(c) to multiple classes of family members of visa holders is unlawful or improper, as are the restrictions on family members of refugees and asylees in Section 6. Any revision of the EO to resolve these problems would require rewriting the EO, which was drafted to apply across broad categories of such entrants to the United States. Moreover, as Amici argue above, Section 1182(f) must be read harmoniously with the rest of the immigration statute. Excising or limiting the EO's applicability to some visa categories would not cure the larger failure of the President to exercise the authority of § 1182(f) with conscious awareness of his legal obligations under the rest of the immigration statutes. Severability is unavailable absent evidence that the President would have enacted a narrower, rewritten travel ban despite the intended—

but unlawful—objective of a "total and complete shutdown of Muslims entering the United States." *See Brown*, 992 F.2d at 948.

In any event, it is doubtful that severability analysis permits courts to engage in revision and modification of discretionary assertions of executive authority, as was invoked in the Executive Order at issue. 8 U.S.C. § 1182(f). Once the Court determines that the Executive's analysis was flawed, the Court should enjoin the EO, rather than rewriting it in the first instance. *See INS v. Ventura*, 537 U.S. 12, 16-18 (2002). As with review of other agency decisions, "judicial judgment cannot be made to do service" for the decision of the Executive. *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). Nor can an "appellate court . . . intrude upon the domain which Congress has exclusively entrusted" to the President. *Id.* *See also Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); 8 U.S.C. § 1252(a)(2)(B)(ii).

Thus, even if additional exclusions or limitations on the EO would eliminate some of the legal problems identified above, it would be inappropriate for the Court to enact those in the first instance. The EO should remain enjoined pending further proceedings in the case.

CONCLUSION

For these reasons, and for the reasons stated in the various other briefs presented to the Court, Amici request that this Court affirm the decision of the court below.

April 21, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with FED. R. APP. P. 29(a)(5) and the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 4,933 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii);

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 Century Schoolbook, 14-point font.

Date: April 21, 2017

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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 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.

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