

17-17168

United States Court of Appeals
for the
Ninth Circuit

STATE OF HAWAII; ISMAIL ELSHIKH; JOHN DOES, 1 & 2;
MUSLIM ASSOCIATION OF HAWAII, INC.,
Plaintiffs-Appellees,

STATE OF CALIFORNIA; STATE OF MARYLAND;
STATE OF MASSACHUSETTS; STATE OF NEW YORK; STATE OF OREGON;
STATE OF WASHINGTON,
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 (HONOLULU)
CASE NO. 1:17-cv-00050-DKW-KSC

**BRIEF OF AMICUS CURIAE INTERNATIONAL BAR
ASSOCIATION'S HUMAN RIGHTS INSTITUTE IN SUPPORT
OF PLAINTIFFS-APPELLEES AND AFFIRMANCE**

Ilana H. Eisenstein*
John M. Leitner*
Ryan S. Macpherson
DLA PIPER LLP (US)
One Liberty Place
1650 Market Street, Suite 4900
Philadelphia, Pennsylvania 19103
(215) 656-3300

Donald Francis Donovan
David W. Rivkin*
Jennifer R. Cowan*
Elizabeth Nielsen*
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

Attorneys for Amicus Curiae International Bar Association's Human Rights Institute

*Not Admitted to the Ninth Circuit Bar

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *amicus curiae* certifies that it has no parent corporations or any publicly held corporations owning 10% or more of its stock.

/s/ Donald Francis Donovan
Donald Francis Donovan
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
(212) 909-6000
dfdonovan@debevoise.com

Counsel for Amicus Curiae

Dated: November 22, 2017

TABLE OF CONTENTS

I. RULE 29 STATEMENT OF INTEREST OF *AMICUS CURIAE*1

II. INTRODUCTION.....1

III. ARGUMENT2

 A. International Law Principles Should Be Considered In Assessing
 The Proclamation.2

 B. Judicial Independence3

 1. Judicial Independence Is a Fundamental Principle of International
 Law.....3

 2. Judicial Independence Is Enshrined in U.S. Domestic Law.....5

 3. Recent Actions by Defendants-Appellants Violate Core
 Principles of Judicial Independence.7

 C. Due Process Rights Of Refugees12

 1. The United States Treatment Of Refugees Within U.S. Borders Is
 Bound By International Law Obligations.....12

 2. The Proclamation Violates the Principle of Non-Discrimination
 against Refugees13

 3. The Proclamation Violates the Due Process Rights of Refugees
 Within U.S. Borders.....14

 4. The Proclamation Effectively Eliminates the Right to Petition for
 Asylum.....16

IV. CONCLUSION16

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>Augustin v. Sava</i> , 735 F.2d 32 (2d Cir. 1984)	16
<i>Haitian Refugee Center v. Smith</i> , 676 F.2d 1023 (5th Cir. 1982)	16
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	12
<i>Matthews v. Diaz</i> , 426 U.S. 67 (1976)	15
<i>Murray v. Schooner Charming Betsy</i> , 6 U.S. 64 (1804)	3
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982)	15
<i>United States v. Schooner Peggy</i> , 5 U.S. (1 Cranch) 103 (1801)	3
<i>Wong Wing v. United States</i> , 163 U.S. 228 (1896)	15
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886)	15
<i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001)	15
United States Constitution:	
Art. II, § 3	5
Art. III	5
Art. VI, cl. 2.	2, 3
Fourteenth Amendment	6
Sixth Amendment	6

Statutes:

8 U.S.C. § 1158.....16

8 U.S.C. § 1229a.....15

Rules:

Fed. R. App. P. 29(a)1

Fed. R. App. P. 29(a)(4)(E).....1n.1

International Materials:

American Convention on Human Rights, Nov. 21, 1969,
1144 U.N.T.S. 143.....6

Convention Against Torture and Other Cruel, Inhuman or Degrading
Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.,
[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I
V-9&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I
V-9&chapter=4&lang=en).....13n.9

Convention Relating to the Status of Refugees, July 28, 1951,
189 U.N.T.S. 137.....12, 13, 14

G.A. Res. 40/146 (Dec. 13, 1985).....4

G.A. Res. 40/32 (Nov. 29, 1985).....4

International Covenant on Civil and Political Rights,
Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967),
999 U.N.T.S. 171.....6

OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS & THE INT’L BAR
ASS’N, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE:
A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS
AND LAWYERS 120 (2003),
www.ohchr.org/Documents/Publications/training9chapter4en.pdf4, 5

Protocol Relating to the Status of Refugees, Jan. 31, 1967,
60 U.N.T.S. 267.....12, 13

Universal Declaration of Human Rights, Article 106

News Articles:

Ann E. Marimow & Robert Barnes, *Federal Appeals Court Maintains Freeze Of Trump's Travel Ban. Attorney General Vows Supreme Court Appeal*, WASH. POST (Apr. 18, 2017), https://www.washingtonpost.com/local/public-safety/federal-appeals-court-largely-maintains-freeze-of-trumps-travel-ban/2017/05/25/395aa394-365b-11e7-b4ee-434b6d506b37_story.html?utm_term=.5744a41049b0 10n.8

Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict,'* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442> 8n.3

Face the Nation Transcript February 12, 2017: Schumer, Flake, Miller, CBS NEWS (Feb. 12, 2017), <https://www.cbsnews.com/news/face-the-nation-transcript-february-12-2017-schumer-flake-miller/> 9n.6

Full Transcript and Video: Trump News Conference, N.Y. TIMES (Feb. 16, 2017), https://www.nytimes.com/2017/02/16/us/politics/donald-trump-press-conference-transcript.html?_r=0 8n.2, 9, 9n.5

John Bowden, *Trump Says He May Break Up 9th Circuit Court After Rulings Go Against Him*, THE HILL (Apr. 26, 2017, 5:32PM), <http://thehill.com/blogs/blog-briefing-room/330757-trump-says-hes-absolutely-considering-breaking-up-court-that-blocked> 11

Jordan Fabian, *Trump Attacks Judges Weighing Travel Ban*, THE HILL (Feb. 8, 2017, 9:45AM) <http://thehill.com/homenews/administration/318451-trump-attacks-judges-weighing-travel-ban> 8n.2, 8-9n.4

Kristine Phillips, *All the Times Trump Personally Attacked Judges - And Why His Tirades Are 'Worse Than Wrong,'* WASH. POST (Apr. 26, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/04/26/all-the-times-trump-personally-attacked-judges-and-why-his-tirades-are-worse-than-wrong/?utm_term=.8b84ddb3528d 10n.7

Matt Zapposky, Kalani Takase & Maria Sacchetti,
Federal Judge in Hawaii Freezes President Trump's New Entry Ban,
WASH. POST (Mar. 16, 2017),
https://www.washingtonpost.com/local/social-issues/lawyers-face-off-on-trump-travel-ban-in-md-court-wednesday-morning/2017/03/14/b2d24636-090c-11e7-93dc-00f9bdd74ed1_story.html?tid=a_inl&utm_term=.8b84ddb3528d10n.7

Maureen Groppe, *What Trump has said about Judge Curiel*,
INDIANAPOLIS STAR (June 11, 2016),
<https://www.indystar.com/story/news/2016/06/11/what-trump-has-said-judge-curiel/85641242/>8n.3

Philip Rucker, *Stephen Miller says White House will fight for travel ban, advances false voter fraud claims*, WASH. POST (Feb. 12, 2017)
https://www.washingtonpost.com/news/powerpost/wp/2017/02/12/stephen-miller-says-white-house-will-fight-for-travel-ban-advances-false-voter-fraud-claims/?utm_term=.9c4e3cc7459b9n.6

Other Authority:

Donald J. Trump (@realDonaldTrump),
TWITTER (Feb. 2, 2017, 4:03 AM),
<https://twitter.com/realDonaldTrump/status/829299566344359936>8n.4

Donald J. Trump (@realDonaldTrump),
TWITTER (Feb. 4, 2017, 9:12 AM),
<https://twitter.com/realDonaldTrump/status/827867311054974976>7

Donald J. Trump (@realDonaldTrump),
TWITTER (Feb. 5, 2017, 12:39 PM),
<https://twitter.com/realDonaldTrump/status/828342202174668800>8

Donald J. Trump (@realDonaldTrump),
TWITTER (June 2, 2016, 9:54 AM)
<https://twitter.com/realDonaldTrump/status/738413456118841345>8n.3

Donald J. Trump (@realDonaldTrump),
TWITTER (May 30, 2016, 2:45 PM),
<https://twitter.com/realDonaldTrump/status/737399475509985280>8n.3

Donald J. Trump (@realDonaldTrump),
TWITTER (May 30, 2016, 2:55 PM),
<https://twitter.com/realDonaldTrump/status/737402123453878272>8n.3

Office of the Press Secretary, *Statement on Sanctuary Cities Ruling*,
WHITEHOUSE.GOV (Apr. 25, 2017),
<https://www.whitehouse.gov/the-press-office/2017/04/25/statement-sanctuary-cities-ruling>10

Office of the Press Secretary, *Statement Regarding Court Action Affecting the President’s Proclamation Regarding Travel to the United States by Nationals of Certain Countries*, WHITEHOUSE.GOV (Oct. 17, 2017), <https://www.whitehouse.gov/the-press-office/2017/10/17/statement-regarding-court-action-affecting-presidents-proclamation>11

Proclamation and Executive Order, October 24, 201713, 14

I. RULE 29 STATEMENT OF INTEREST OF *AMICUS CURIAE*¹

Amicus, the International Bar Association's Human Rights Institute is the human rights arm of the International Bar Association, the world's leading organization of international legal practitioners, bar associations, and law societies with a membership of more than 80,000 individual lawyers spanning over 160 countries. *Amicus* helps to promote, protect and enforce human rights under a just rule of law, and works to preserve the independence of judiciaries and the legal profession worldwide. *Amicus* submits this brief in support of Plaintiffs-Appellees in this matter in order to vindicate the public interest in ensuring a proper understanding and application of international legal principles relevant to this case.

Pursuant to Federal Rule of Appellate Procedure 29(a), *amicus* submits this brief without an accompanying motion for leave to file or leave of court because all parties have consented to its filing.

II. INTRODUCTION

This brief addresses international law principles that bear on the legality of the Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-

¹No counsel for a party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus* or their counsel has made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

Safety Threats of September 24, 2017 (the “Proclamation”), apparently superseding Executive Order 13780 of March 6, 2017 (“EO2”), which replaces the now-rescinded Executive Order dated January 27, 2017 (“EO1”) (collectively, the “Travel Bans”). Specifically, the Proclamation and Defendants-Appellants’ treatment of this case threaten judicial independence, the principle of non-discrimination on the basis of national origin and religion, and due process rights of refugees and aliens within U.S. borders, which are core principles of the international law that are directly incorporated into U.S. law and which *amicus* exists to support.

III. ARGUMENT

A. International Law Principles Should Be Considered In Assessing The Proclamation.

International law, which includes treaties ratified by the United States as well as customary international law, is part of United States law and must be faithfully executed by the President and enforced by United States courts except when clearly inconsistent with the United States Constitution or subsequent acts of Congress. International law is relevant to resolving the legality of the Executive Order.

Under the Supremacy Clause of the Constitution, “treaties made ... under the authority of the United States, shall be the supreme law of the land; and the judges of every state shall be bound thereby.” U.S. CONST. art. VI, cl. 2. As

acknowledged by the Supreme Court in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801), Article VI of the Constitution therefore makes treaties the supreme law of the land. In addition, the Supremacy Clause of the Constitution and long-established principles of statutory construction require acts of Congress to be interpreted in a manner consistent with international law, whenever such a construction is reasonably possible. *See, e.g., Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804).

The United States is a party to and bound by several international human rights treaties relevant to the subject matter of the Proclamation. In assessing the legality of the Proclamation, the Court should be cognizant of those treaty obligations, and of customary international law, which should influence constructions of the Constitution and statutes that protect judicial independence, prohibit discrimination based on religion or national origin, and protect the due process rights of refugees within the United States.

B. Judicial Independence

1. Judicial Independence Is a Fundamental Principle of International Law.

Judicial independence is a fundamental legal principle recognized in numerous international treaties. International human rights treaties and declarations routinely incorporate a right to a fair trial before an independent and

impartial court or tribunal, which derives from the basic principles of the rule of law and the separation of powers.

In 1985, the UN General Assembly unanimously endorsed the Basic Principles on the Independence of the Judiciary (hereinafter the “Basic Principles”). G.A. Res. 40/32 (Nov. 29, 1985), G.A. Res. 40/146 (Dec. 13, 1985). These principles represent “universally accepted views on this matter by the States Members of the United Nations.” In adopting the Basic Principles, UN member states recognized the importance of enshrining the integrity of the judiciary within their countries’ law and culture through legislation, administrative action, and public education. While the Basic Principles are viewed as only persuasive authority, the United States has committed to respect them as a UN member state.

At its core, judicial independence means that “the Judiciary has to be independent of the other branches of government, namely the Executive and Parliament.” OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS & THE INT’L BAR ASS’N, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS 120 (2003), *available at* www.ohchr.org/Documents/Publications/training9chapter4en.pdf. The Basic Principles place judicial independence at their forefront, mandating in Principle 1 that the “independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all

governmental and other institutions to respect and observe the independence of the judiciary.” *Id.* at 120. Principle 2 of the Basic Principles introduces the importance of “non-interference,” which requires that judges be permitted to decide matters before them on the merits and without restrictions, improper influences, inducements, pressures, threats or other interferences from any quarter and for any reason.

Judges “have both a right and a duty to decide the cases before them according to the law, free from fear of personal criticism or reprisals of any kind, even in situations where they are obliged to render judgments in difficult and sensitive cases.” *Id.* at 119. If individual judges are unable to make decisions without interference from other branches of government, a judiciary that is *pro forma* independent will be compromised.

2. *Judicial Independence Is Enshrined in U.S. Domestic Law.*

Respect for the internationally-recognized principle of judicial independence lies at the heart of the U.S. constitutional system. Indeed, the President, vested with a constitutional obligation to faithfully execute the law, is himself obligated to act in accordance with it. U.S. CONST. art. II, § 3. The principle of separation of powers requires an independent judiciary. Article III of the United States Constitution establishes the federal judiciary as a branch independent of both the legislature and the executive. The Bill of Rights similarly relies upon an

independent judiciary for its guarantees: the right to a fair trial established for criminal defendants in the Sixth Amendment and extended to all criminal prosecutions in the states through the Due Process Clause of the Fourteenth Amendment demands an independent and impartial judiciary.

The principle of judicial independence and impartiality is further enshrined in a number of treaties to which the United States is a signatory. For example, Article 10 of the Universal Declaration of Human Rights, adopted by the United Nations (UN) General Assembly in 1948 and portions of which have been accepted as customary international law, recognizes that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal.” The International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in 1992, stipulates that “in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171. Regionally, Article 8(1) of the American Convention on Human Rights provides that “every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal.” American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143.

3. *Recent Actions by Defendants-Appellants Violate Core Principles of Judicial Independence.*

Defendants-Appellants' actions with regards to the Travel Bans threaten judicial independence and seriously undermine the basic principles of the rule of law and the separation of powers. In response to judicial decisions concerning the Travel Bans, President Donald J. Trump and other Executive Branch officials have questioned the validity of judicial rulings, denigrated the motives and integrity of U.S. federal judges, and issued veiled threats which may be seen as having the potential to influence future rulings.

There is a clear pattern of the Executive Branch appearing to interfere in judicial rulings regarding the Travel Bans. On February 4, 2017, after U.S. District Judge James L. Robart issued a stay temporarily blocking the enforcement of EO1, President Trump unleashed a torrent of tweets questioning Judge Robart's legitimacy, including a statement that: "The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!" Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 9:12 AM), <https://twitter.com/realDonaldTrump/status/827867311054974976>. After Judge Robart made the stay permanent, President Trump issued a veiled threat on Twitter that Judge Robart would be held responsible for putting the country's security at risk, stating: "Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!"

Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 5, 2017, 12:39 PM), <https://twitter.com/realDonaldTrump/status/828342202174668800>.² In a statement that was reminiscent of his prior personal attacks on another federal judge following an adverse ruling in a private lawsuit,³ President Trump also questioned Judge Robart's integrity by asking whether his decision was motivated by political considerations,⁴ stated that Judge Robart's decision came from a "bad court" and

² See also Jordan Fabian, *Trump Attacks Judges Weighing Travel Ban*, THE HILL (Feb. 8, 2017, 9:45AM), <http://thehill.com/homenews/administration/318451-trump-attacks-judges-weighing-travel-ban>. ("I think our security is at risk today. And it will be at risk until such time that we are entitled and get what we are entitled to as citizens of this country. We want security."); *Full Transcript and Video: Trump News Conference*, N.Y. TIMES (Feb. 16, 2017), https://www.nytimes.com/2017/02/16/us/politics/donald-trump-press-conference-transcript.html?_r=0. ("We had a court that gave us what I consider to be, with great respect, a very bad decision. Very bad for the safety and security of our country.")

³ Donald J. Trump (@realDonaldTrump), TWITTER (May 30, 2016, 2:45 PM), <https://twitter.com/realDonaldTrump/status/737399475509985280>; Donald J. Trump (@realDonaldTrump), TWITTER (May 30, 2016, 2:55 PM), <https://twitter.com/realDonaldTrump/status/737402123453878272>; Donald J. Trump (@realDonaldTrump), TWITTER (June 2, 2016, 9:54 AM), <https://twitter.com/realDonaldTrump/status/738413456118841345>; Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict,'* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>. Maureen Groppe, *What Trump has said about Judge Curiel*, INDIANAPOLIS STAR (June 11, 2016), <https://www.indystar.com/story/news/2016/06/11/what-trump-has-said-judge-curiel/85641242/>.

⁴ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 2, 2017, 4:03 AM), <https://twitter.com/realDonaldTrump/status/829299566344359936> ("If the U.S. does not win this case as it so obviously should, we can never have the security and safety to which we are entitled. Politics!"); Jordan Fabian, *Trump Attacks Judges Weighing Travel Ban*, THE HILL (Feb. 8, 2017, 9:45AM),

from a circuit that was “in chaos” and “overturned 80 percent of the time”,⁵ and implied that respect for the judicial system depended on the court’s support of EO1. *Full Transcript and Video: Trump News Conference*, N.Y. TIMES (Feb. 16, 2017), https://www.nytimes.com/2017/02/16/us/politics/donald-trump-press-conference-transcript.html?_r=0.

Other Executive Branch officials similarly rejected Judge Robart’s decision staying EO1, going so far as to question whether the judiciary should serve as a check on Executive power. For example, Stephen Miller, a senior advisor to President Trump, stated that: “the whole world will soon see, as we begin to take further actions, that the powers of the president to protect our country are very substantial and will not be questioned.”⁶

On March 16, 2017, following the issuance of a nationwide injunction blocking the revised EO2 by U.S. District Judge Derrick K. Watson of Hawaii,

<http://thehill.com/homenews/administration/318451-trump-attacks-judges-weighing-travel-ban>. (“Courts seem to be so political and it would be so great for our justice system if they could read a statement and do what’s right.”).

⁵ *Full Transcript and Video, Trump News Conference*, N.Y. TIMES (Feb. 16, 2017), https://www.nytimes.com/2017/02/16/us/politics/donald-trump-press-conference-transcript.html?_r=0.

⁶ *Face the Nation Transcript February 12, 2017: Schumer, Flake, Miller*, CBS NEWS (Feb. 12, 2017), <https://www.cbsnews.com/news/face-the-nation-transcript-february-12-2017-schumer-flake-miller/>. *See also* Philip Rucker, *Stephen Miller says White House will fight for travel ban, advances false voter fraud claims*, WASH. POST (Feb. 12, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/02/12/stephen-miller-says-white-house-will-fight-for-travel-ban-advances-false-voter-fraud-claims/?utm_term=.9c4e3cc7459b

President Trump called the ruling “terrible” and suggested that it was “done by a judge for political reasons.”⁷ Attorney General Jefferson B. Sessions, III, similarly condemned and marginalized the ruling, stating: “I really am amazed that a judge sitting on an island in the Pacific can issue an order that stops the president of the United States from what appears to be clearly his statutory and constitutional power.”⁸ In April 2017, the White House issued a statement condemning another federal court decision as “yet one more example of egregious overreach by a single, unelected district judge,” by which “the rule of law suffered another blow”. Office of the Press Secretary, *Statement on Sanctuary Cities Ruling*, WHITEHOUSE.GOV (Apr. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/04/25/statement-sanctuary-cities-ruling>. President Trump also

⁷ Kristine Phillips, *All the Times Trump Personally Attacked Judges - And Why His Tirades Are ‘Worse Than Wrong,’* WASH. POST (Apr. 26, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/04/26/all-the-times-trump-personally-attacked-judges-and-why-his-tirades-are-worse-than-wrong/?utm_term=.8b84ddb3528d; Matt Zaptosky, Kalani Takase & Maria Sacchetti, *Federal Judge in Hawaii Freezes President Trump's New Entry Ban*, WASH. POST (Mar. 16, 2017), https://www.washingtonpost.com/local/social-issues/lawyers-face-off-on-trump-travel-ban-in-md-court-wednesday-morning/2017/03/14/b2d24636-090c-11e7-93dc-00f9bdd74ed1_story.html?tid=a_inl&utm_term=.8b84ddb3528d.

⁸ Ann E. Marimow & Robert Barnes, *Federal Appeals Court Maintains Freeze Of Trump's Travel Ban. Attorney General Vows Supreme Court Appeal*, WASH. POST (Apr. 18, 2017), https://www.washingtonpost.com/local/public-safety/federal-appeals-court-largely-maintains-freeze-of-trumps-travel-ban/2017/05/25/395aa394-365b-11e7-b4ee-434b6d506b37_story.html?utm_term=.5744a41049b0.

indicated that he was considering restructuring the U.S. Court of Appeals for the Ninth Circuit. John Bowden, *Trump Says He May Break Up 9th Circuit Court After Rulings Go Against Him*, THE HILL (Apr. 26, 2017, 5:32PM), <http://thehill.com/blogs/blog-briefing-room/330757-trump-says-hes-absolutely-considering-breaking-up-court-that-blocked>.

The Executive Branch has continued this pattern with the present Proclamation. After Judge Watson issued a temporary restraining order on October 17, 2017 the White House issued a statement saying that: “Today’s dangerously flawed district court order undercuts the President’s efforts to keep the American people safe and enforce minimum security standards for entry into the United States.” Office of the Press Secretary, *Statement Regarding Court Action Affecting the President’s Proclamation Regarding Travel to the United States by Nationals of Certain Countries*, WHITEHOUSE.GOV (Oct. 17, 2017), <https://www.whitehouse.gov/the-press-office/2017/10/17/statement-regarding-court-action-affecting-presidents-proclamation>.

The cumulative impact of these statements has been to undermine judicial independence by creating an appearance of attempted political interference or intimidation of the judiciary by the Executive Branch.

C. Due Process Rights Of Refugees

1. *The United States Treatment Of Refugees Within U.S. Borders Is Bound By International Law Obligations.*

In the wake of World War II, a series of international law instruments standardized, codified, and advanced the recognition and humane treatment of refugees around the world. Most notable is the Convention Relating to the Status of Refugees (the “Refugee Convention”), to which 145 nations are party. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137. While the United States is not a party to the Refugee Convention, it later assumed the obligations set forth in the Refugee Convention by ratifying the United Nations Protocol Relating to the Status of Refugees (the “Protocol”), which incorporates the Refugee Convention’s key terms. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 60 U.N.T.S. 267. The United States Refugee Act of 1980 (the “Refugee Act”) provided the domestic statutory basis by which the United States simultaneously affirmed and complied with its obligations under the Protocol (and, by extension, the Refugee Convention) by acting “to bring United States refugee law into conformance with the [Protocol].” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987).

The Refugee Convention and other international law agreements commit the United States to providing due process protections to refugees within its borders, and prohibit the United States from discrimination against refugees wherever they

may be found on the basis of national origin or religion.⁹ Moreover, our treaty obligations and federal law requires refugees, once present in the United States, to be accorded due process.

2. *The Proclamation Violates the Principle of Non-Discrimination against Refugees*

Article 3 of the Refugee Convention and Protocol bars discrimination against refugees on the basis of race, religion or country of origin. That non-discrimination provision applies to refugees both within and outside a signatory's borders. Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137. Likewise, states-parties agree that refugees within their territorial limits will be treated "at least as favourabl[y]" as their nationals "with respect to freedom to practice their religion" and religious education for their children. *Id.*, Art. 4.

The Proclamation and the Executive Order of October 24, 2017 ("EO 13815") violate the letter and spirit of those international commitments by imposing stringent restrictions on refugee admissions in a manner that discriminates on the basis of national origin and religion. Although it does not

⁹ The treatment of refugees may implicate other international rules as well. *See e.g.* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85., *available at* https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en.

continue the suspension of the refugee admissions program, the Proclamation, along with the recent EO 13815, subjects refugees to “enhanced vetting,” based on their national origin and religion. The discriminatory intent and effect of the Proclamation and EO 13815 violate the commitment of the United States under the Refugee Convention and Protocol not to discriminate against refugees on those bases.

3. *The Proclamation Violates the Due Process Rights of Refugees Within U.S. Borders*

Under the Refugee Convention, as incorporated and amended by the Protocol to which the United States is a party, signatories agree to afford refugees within their borders rights of access to courts and due process regarding any decision to expel refugees. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137. In particular, Article 32 delineates the due process requirements for refugees facing expulsion from a country and provides that (1) a decision to expel a refugee “shall be reached in accordance of due process of law;” (2) except where reasons of national security require otherwise, a refugee must be allowed to submit evidence to clear himself and to appeal to and be represented before competent authority; and (3) once a decision has been made to expel a refugee, a refugee must be given “a reasonable period within which to seek legal admission into another country.”

Moreover, it is well-settled that aliens within the territorial jurisdiction of the United States are entitled to due process protections, including in deportation proceedings. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (“These provisions [in the Fourteenth Amendment] are universal in their application, to all persons within the territorial jurisdiction, without regarding to any differences of race, or color, or of nationality.”); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (concluding that “all persons within the territory of the United States” are entitled to the protections guaranteed by the Fifth Amendment and “even aliens shall not ... be deprived of life, liberty, or property without due process of law”); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (due process “applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, or permanent”); *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Matthews v. Diaz*, 426 U.S. 67, 77 (1976). The Immigration and Nationality Act (INA), which provides procedures for the admission and exclusion of aliens, also provides aliens with certain due process rights. *See, e.g.*, 8 U.S.C. § 1229a (setting forth the procedures for immigration proceedings and the affirmative rights for aliens subject to removal proceedings).

By placing a blanket ban on all aliens from certain countries, the Proclamation effectively eliminates the right to due process guaranteed by the Constitution and the INA to all aliens within the United States.

4. *The Proclamation Effectively Eliminates the Right to Petition for Asylum*

The Refugee Act established a statutory right to seek asylum in the United States. 8 U.S.C. § 1158. Although the Refugee Act does not address an asylum seeker's due process rights explicitly, and although the decision to grant asylum remains discretionary, courts have held that the Refugee Act created a substantive right to petition for asylum. *See Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984). Courts have held that this right to petition for asylum is a sufficient interest to "invoke the guarantee of due process." *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1039 (5th Cir. 1982).

By placing a blanket ban on all aliens from certain countries, the Proclamation effectively eliminates the right to petition for asylum provided by Congress in the Refugee Act. Thus, the Proclamation violates the due process rights bestowed upon all aliens present in the United States.

IV. CONCLUSION

For the foregoing reasons, *amicus* urges this Court to consider U.S. obligations under international law, which form part of U.S. law, in evaluating the legality of the Proclamation.

RESPECTFULLY SUBMITTED this 22nd day of November, 2017.

Ilana H. Eisenstein*
John M. Leitner*
Ryan S. Macpherson
DLA PIPER LLP (US)
One Liberty Place
1650 Market Street, Suite 4900
Philadelphia, PA 19103-7300
(212) 335-4500
ilana.eisenstein@dlapiper.com
John.Leitner@dlapiper.com
Ryan.Macpherson@dlapiper.com

/s/ Donald Francis Donovan
Donald Francis Donovan
David W. Rivkin*
Jennifer R. Cowan*
Elizabeth Nielsen*
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
(212) 909-6000
dfdonovan@debevoise.com
dwrivkin@debevoise.com
jrcowan@debevoise.com
enielsen@debevoise.com

Counsel for Amicus Curiae

* Not admitted to Ninth Circuit Bar

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rules of Appellate Procedure 29, 32(a)(5), and 32(a)(7), the foregoing *amicus curiae* brief is proportionally spaced, has a typeface of 14 point Times New Roman, and contains 3,490 words, excluding those sections identified in Fed. R. App. P. 32(f).

/s/ Donald Francis Donovan
Donald Francis Donovan
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
(212) 909-6000
dfdonovan@debevoise.com

Counsel for Amicus Curiae

Dated: November 22, 2017

CERTIFICATE OF SERVICE

I certify that on November 22, 2017, the foregoing amicus curiae brief was served on all parties or their counsel of record through the CM/ECF system.

/s/ Donald Francis Donovan
Donald Francis Donovan
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
(212) 909-6000
dfdunovan@debevoise.com

Counsel for Amicus Curiae