No. 17-1351

**IN THE U.S. COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself; HIAS, INC., on behalf of itself and its clients; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; JOHN DOES #1 & 3; JANE DOE #2,
Plaintiffs – Appellees,
v.
DONALD J. TRUMP, in his official capacity as President of the U.S.; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; DANIEL R. COATS, in his official capacity as Director of National Intelligence,
Defendants – Appellants.

On Appeal from the U.S. District Court
for the District of Maryland (8:17-cv-00361-TDC)

**BRIEF IN SUPPORT OF APPELLEES BY AMICI CURIAE
THE AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE
TO DENY THE APPELLANTS MOTION
TO STAY PENDING EXPEDITED TRIAL
AND IN SUPPORT OF AFFIRMANCE OF THE DECISION BY THE
U.S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND**

YOLANDA C. RONDON , ESQ.
STAFF ATTORNEY
AMERICAN-ARAB
ANTI-DISCRIMINATION COMMITTEE
1705 DeSales Street NW, Suite 500
Washington, DC 20036
Telephone: (202) 244-2990
Facsimile: (202) 333-6470
Email: yrondon@adc.org
Counsel of Record for Amici Curiae

April 19, 2017

CORPORATE DISCLOSURE STATEMENT

The Amicus does not have a parent corporation. No publicly held company owns more than 10% of stock in the Amicus.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The American-Arab Anti-Discrimination Committee ("ADC") is a nonprofit grassroots civil rights organization that seeks to preserve and defend the rights of those whose Constitutional and federal rights are violated. Founded in 1980 by U.S. Senator James Abourezk, ADC is non-sectarian and non-partisan, with members from all fifty states and chapters nationwide. ADC protects the Arab-American and immigrant community against discrimination, racism, and stereotyping. ADC vigorously advocates for immigrant rights and civil rights.

ADC's interest in this Case arises from the infringement on the Appellees Constitutional rights by the Appellant, included but not limited to fundamental rights to Due Process and Equal Protection under the Fourteenth Amendment, and religious freedom, motivated by anti-Arab and/or anti-Muslim animus. ADC worked with thousands of individuals from across the world directly impacted by the Executive Order travel bans. Individuals' lives hang in the balance and immediate future will be determined by the Court's decision. The rights of ADC's constituents will be fundamentally affected by the Court's determination on the Appellants' Motion to Stay the Temporary Restraining Order, and the U.S. District Court for the District of Maryland's ("district court") decision in this Case.

[1] The parties have consented to the filing of this brief pursuant to Rule 29(a)(2) and amici curiae file this brief pursuant to that authority. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission of this brief.

SUMMARY OF ARGUMENT

Executive Order 13780 ("EO")[2] imposes substantial, irreparable harm on the Appellees and similarly situated individuals, the U.S., and the public, that outweigh a motion for stay and the Appellants proffered reasons for the EO.

The EO alters the lives of thousands of individuals, and continues to disrupt the legal order and protections of these individuals. The EO has an adverse impact on families, students, and poor nationals from the designated countries. A majority of those impacted have invested months to years of their life, and money that they cannot get back. A majority have used their limited resources to apply for a U.S. visa, only to be denied solely based on their national origin and religion.

The *Amicus* articulates the substantial harm that will be caused by the removal of the TRO and reversal of the district court's decision, and the impact of the EO on families, refugees, students and professionals.[3] The EO is unconstitutional because it subjects Arab and Muslim nationals based on their identity alone to meet hardship burdens that they would not otherwise have to satisfy to travel to the U.S. The EO waiver scheme is a pretext for discrimination, and to exclude persons based on national origin and religion. This is done by

[2] Exec. Order No. 13,780 (Mar. 6, 2017), 82 Fed. Reg. 13,209 (Mar. 9, 2017).

[3] This *amicus* describes a few accounts from individuals who were affected by the EO and articulates why the Court must affirm the district court's decision ADC AND PENN STATE LAW, SUMMARY OF THE EXECUTIVE ORDER, REFUGEE/MUSLIM BAN 2.0 (2017), https://pennstatelaw.psu.edu/sites/default/files/MuslimBan2%200ADCPSU_Final_0.pdf. ADC documented intakes conducted by ADC Attorneys, volunteer attorneys, and volunteers supervised by attorneys from January 27, 2017 through March 31, 2017.

imposing a hardship burden that applicants cannot meet, and that is only required because of their identity.

ARGUMENT

I. THE EXECUTIVE ORDER SUBSTANTIALLY IMPACTS FAMILIES AND REFUGEES.

Mothers and fathers, daughters and sons will be directly impacted and continue to suffer if the Court grants Appellant's Motion for Stay and allows the EO to go into effect. K.S. is a legal permanent resident, but his wife is not. His wife is Iranian. K.S. has applied for green card for her, but processing can take up to five years. A practical aspect and reality of the immigration system, is that spouses of green card holders can only see their husband or wife and their children, in six-month increments under a B-2 tourist visa. K.S.'s wife came to see him in November 2016, but her six month allotment and visa expired in March 2017. K.S.'s wife requested a visa extension but was denied. Under the EO, K.S.'s application for a B-2 visa and/or V-visa will probably be denied because his wife is Iranian. K.S. life is in limbo, he does not know when he will see his wife again.

On January 30, 2017, S.K. was denied entry into the U.S. even though she had a valid K-1 visa because she is a national of Sudan. Not only was S.K. denied entry, S.K. was interrogated and sequestered for hours by Customs and Border Patrol ("CBP") at Dulles Airport based solely on her national origin. CBP stamped

"Cancel" on S.K.'s visa and deported her to Ethiopia, where her passport was confiscated. She was held at the Ethiopian airport until she could come up with the money to pay for the plane ticket for her own removal. S.K. was coming to the U.S. to marry her fiancé O.N. whom lives in Colorado. They had saved up thousands of dollars for them to be able to afford the visa application costs and a plane ticket. Per the Administration's directive, reinstating all cancelled visas, S.K. attempted to travel on her K-1 visa. However, she was not allowed to purchase a ticket or board a plane. S.K. attempted to have her K-1 visa reissued by the consulate and/or receive a waiver, but was informed that she would have to reapply for the K-1 visa, submit the fees and go through the process again. Under the EO, S.K.'s K-1 visa application will be denied because she is Sudanese.

S.A. is a legal permanent resident living in New York. S.A. is a national of Yemen. Her family is currently living in Egypt. Based on their national origin as Yemeni, her families' visa interviews were cancelled because the EO prohibits visa issuance to Yemeni nationals outside the U.S. Their visa applications are effectively denied in actual practice under the EO, because they are denied the required visa interview for an indefinite period, which they are otherwise qualify but for their identity. The delay of a few months now can add months to years for processing their actual visa, costing them significant harm, both psychologically

and financially due to extensive family separation.

E.M is a U.S. citizen living in the District of Columbia. Her fiancé is Syrian. His K-1 visa interview scheduled for February 2017 at the U.S. consulate in Turkey was cancelled. Under the EO, a K-1 visa will not be issued to E.M.'s fiancé and she will not be able to marry the man that she loves. A.S. is in a similar situation, a Syrian national, whose interview for a green card at the consulate in Turkey was cancelled. The interview is required for the i551 issuance and the i551 has to be stamped for the visa to actually be executed. Thus, A.S. is also subject to the EO and will be denied a visa.

The EO's institution of a one-hundred and twenty day ban on the entry of refugees, which can be extended, unequivocally subjects persons to immediate direct harm. As declared by the U.N. High Commissioner for Refugees, we are living during a period which is the world's largest international refugee and humanitarian crisis.[5] To shut down refugee admission to the U.S. for any period of time will inevitably cause suffering.

Within hours of the EO signed on January 27, 2017 ("First EO"), the Department of Homeland Security suspended refugee resettlement interviews

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[5] As of 2016 there are nearly 60 million displaced people in the world, 20 million of whom are registered refugees and have fled their countries. Out of the 20 million refugees, there are nearly 5 million Syrian refugees. Almost 1 million are Somalia refugees. There are over 500,000 Sudanese refugees, and nearly 500,000 Iraqi refugees. *See* UNHCR, Figures at a Glance, Global Trends 2015, Statistical Yearbook, http://www.unhcr.org/en-us/figures-at-a-glance.html.

abroad.[6] Since each part of the refugee screening process has narrow validity period, refugees only have about a two-month travel window during which all their security checks are completed. Thus, all refugees approved when the suspension begins will see at least one of their checks expire. During the time that it takes to repeat that check and reprocess an interview date, another check could expire, creating a domino effect of expiring validity periods.[7] The EO's one-hundred and twenty day refugee ban places these same individuals, who are fleeing persecution and violence based on their identity, religion and national origin, in danger. Refugees are one of the most vulnerable populations to violence, abuse, rape, kidnapping, sex and human trafficking.[8] Many of them are forced back to the country that persecuted them, while they wait for resettlement. This is contrary to the purpose of *non-refoulment.*

K.N. is a legal permanent resident, who was granted asylum. K.N. is also a mother of two children, who she filed I-730 Refugee/Asylee Relative Petition over two years ago. In December 2014, the petitions were approved and submitted to the U.S. Embassy in Yemen. Their applications were lost and processing did not

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[6] Yeganeh Torbati, *Homeland Security Department suspends refugee resettlement interviews*, REUTERS, Jan. 26, 2017, http://www.businessinsider.com/homeland-security-department-suspends-refugee-resettlement-interviews-2017-1.

[7] Erol Kekic, *Homeland Security Chief John Kelly Says Waiting 120 Days Won't Hurt Refugees. He's Wrong,* TIME, Feb. 10, 2017, http://time.com/4666828/refugees-john-kelly-president-trump/.

[8] *See* REFUGEE RIGHTS DATA PROJECT, LIFE IN LIMBO, http://refugeerights.org.uk/wp-content/uploads/2017/03/RRDP_LifeInLimbo.pdf;
REFUGEE RIGHTS DATA PROJECT, UNSAFE BORDERLANDS, http://refugeerights.org.uk/wp-content/uploads/2016/06/RRDP_UnsafeBorderlands.pdf.

begin until October 2016. In November 2016, K.N.'s children completed their interviews in Djibouti, but their applications are still in administrative processing. Her children have not been issued a visa. If the TRO is lifted and the district court's decision not upheld, K.N.'s children will probably be denied a visa because they are Yemeni. K.N. has not seen her children in seven years, and her children are alone in Djibouti without their mother and no family in a foreign country. The psychological impact and risk of physical harm to K.N.'s children is unfathomable.

II. THE EXECUTIVE SUBSTANTIALLY IMPACTS STUDENTS AND PROFESSIONALS.

Individuals from the six countries who are currently in the U.S. on student and work visas face an articulable uncertainty. Students, research scholars, and experts in vital fields are subject to the EO, and represent one of the largest populations directly and immediately impacted by the EO.[9] Students accepted into universities will have their acceptances revoked and their visas not issued.[10] Students on F-1 visas that expire before the end of the EO's suspension might not be able to renew or extend their visa for studies. They risk being denied re-entry

[9] Jennifer Adaeze, *Trump Immigration Order Could Stop Medical Careers Before they Begin*, STAT, Jan. 29, 2017, https://www.statnews.com/2017/01/29/trump-immigration-medical-careers/.

[10] "At a major teaching hospital in Ohio, one official said he had sent instructions to administrators telling them to cancel offers of residency to medical students from some countries. 'We are literally going to look at 'Country of origin' and remove the applicant based on [that].'" Shashank Bengali, Nabih Bulos and Ramin Mostaghim, Families hoping to make the U.S. their home scramble to rearrange their lives, LA TIMES, Jan. 27, 2017, http://www.latimes.com/world/la-fg-refugees-order-reaction-20170127 story.html?utm_source=dlvr.it&utm_medium=twitter; *see also* Collin Binkley, *Iranians, Engines of U.S. University Research , Wait in Limbo*, U.S. NEWS, Mar. 29, 2017, https://apnews.com/ecc587ee721c4f73814660d1a269a4f6/Iranians,-engines-of-US-university-research,-wait-in-limbo.

into the U.S. from a visit home. Thousands of students would not be subject to disparate treatment but for their nationality.[11] Universities also face economic harm and logistical hardship due to the travel ban because they depend on access to boundary-less talent, intelligence, and research.[12]

Skilled workers on various types of visas and companies will be harmed. Companies have expressed the irreparable harm the EO will cause on the science and technology sector and U.S. consumers.[13] Engineers and scientists who contribute to research and support the U.S. position as the leader in the information and tech industry are impacted by the ban. Doctors and neurologists who save lives and contribute to our medical system are impacted by the ban. "The U.S. physician workforce includes more than 7,000 doctors who attended medical school in Iran, Libya, Somalia, Sudan, Syria, and Yemen" are subject to the ban.[14] Their investment into their education, career, and livelihood will be lost because of their country of national origin.

In December 2016, M.S. was accepted into the University of Pittsburgh and

[11] "If the ban stays in place, these students could be impacted. Some experts warn that the effect on foreign enrollment in US schools could be far greater than just adjusting for the seven banned countries." Skye Gould & Abby Jackson, *Trump temporarily banned immigration from 7 countries — here's how many students from each attend college in the US,* BUSINESS INSIDER, Feb. 6, 2017, http://www.businessinsider.com/trump-travel-ban-foreign-students-2017-2.

[12] *See* Binkley *supra* note 7.

[13] Emily Dreyfuss, *Trump's New Travel Ban Still Sabotages Science and Tech*, WIRED Mar. 6, 2017, https://www.wired.com/2017/03/trumps-new-travel-ban-still-sabotages-science-tech/.

[14] Felice J. Freyer, *Doctors from banned countries serve millions of Americans, analysis finds*, THE BOSTON GLOBE Mar. 6, 2017, https://www.bostonglobe.com/metro/2017/03/06/doctors-from-banned-countries-serve-millions-americans-analysis-finds/wqvN01IEORXh6ZduHydQrL/story.html.

is supposed to begin classes for the 2017 summer semester on May 8, 2017. M.S. is a national of Iran. In December 2016, M.S. applied to change her status from B-2 visa to an F-1 student visa. As of March 2017, M.S. has yet to receive a decision on her F-1 visa application. If the Court fails to keep the TRO in place and uphold the district court's decision, M.S.'s application for her F-1 visa may be denied because she is Iranian.

In July 2016, Virginia Commonwealth University accepted S.M. as a J-1 research scholar to continue research on credit risk assessment using data mining techniques with the School of Business. S.M. is a software engineer, programmer and analyst. S.M. is a national of Iran. On January 20, 2017, S.M. received her J-1 visa. S.M. booked a plane ticket to depart Iran to the U.S. for January 29, 2017. The airline refused to issue S.M.'s boarding pass and her ticket was cancelled due to the First EO. S.M. was prohibited from purchasing a ticket and boarding a plane. S.M. was scheduled to begin her research program at the university on January 30, 2017. However, S.M.'s DS-2019 Certificate of Eligibility, which must be presented upon entry with the J-1 visa and allows a visiting scholar to actually enter the U.S. for a limited period, expired on February 3, 2017. S.M. was unable to board a plane or enter the U.S. by February 3, 2017 due to the First EO.

On February 13, 2017, the university informed S.M. not to travel to the

university and that they could not renew or issue another DS-2019. S.M. is in Iran and her J-1 visa will expire on April 20, 2017. The university is looking into options to have S.M. complete her research as a J-1 visiting scholar with another professor for the summer 2017. However, if the TRO is removed and the district court's decision not upheld, the EO would prohibit the reinstatement and issuance of a J-1 visa to S.M. because she is Iranian.

III. THE CASE BY CASE WAIVERS AND EXEMPTIONS ARE PRETEXT FOR DISCRIMINATION AND TO EXCLUDE PERSONS BASED ON NATIONAL ORIGIN AND RELIGION, BY IMPOSING A HARDSHIP BURDEN THAT CANNOT BE SATISFIED.

The Appellants' position is that the EO does not cause substantial harm because "the [EO] includes a non-exhaustive list of examples where waivers may be appropriate."[15] The EO lists case-by-case circumstances and examples that may be considered for a waiver, such as the applicant's significant contacts, close family members, and other limited instances. However, individuals with strong ties to the U.S. continue to have issues traveling and obtaining visas under the EO.

EO Section (c)(i) provides that nationals may be eligible for a waiver to resume a "continuous period of work, study, or other long-term activity."[16] Additionally, EO Section (c)(iii) provides that nationals with "significant business

[15] *Int'l Refugee Assistance Project v. Trump,* No. 17-1351, Motion for Stay, at 10–11 (4th Cir. filed Mar. 24, 2017).
[16] Exec. Order No. 13,780 (Mar. 6, 2017), 82 Fed. Reg. 13,209 (Mar. 9, 2017).

or professional obligations, and the denial of entry during the suspension period would impair those obligations," may be eligible for a waiver. However, these waivers do not provide clarity for the numerous researchers, professors, engineers, and other professionals with pending visas. These waivers also fail to address whom would qualify and what constitutes a significant impairment to employment. There is no indication whether loss of wages, investment and business hours, demotion and loss of work opportunities, suspension and probation, and/or the ability to work is enough to satisfy the waiver category.

EO Section (c)(ii) and (c)(iv) waivers apply to individuals with "significant contacts" or "close family members," respectively.[17] The phrase "significant contacts" is vague and not readily defined under immigration law. Moreover, the term "close family members" only applies to children, spouses, and parents. Under the EO, "close family members" does not include individuals with strong familial ties to other individuals in the U.S., such as grandparents, fiancés, or other relative's seeking to obtain a visitor visa to visit family. Under this waiver, individuals who would want to visit their siblings or great-grandchildren would not be eligible.

The EO examples are merely illustrations and do not guarantee visa issuance, as waivers are discretionary. This means that two individuals with

[17] *Id.*

similarly relevant facts may achieve different results. Furthermore, the language is vague and there is no sufficient guidance or regulations that expand on how these waivers will be implemented or processed.[18] There is no guidance as to a specific application or designated form for an affirmative request of such waivers, evidence requirements, and other important questions.[19]

The EO also requires that visa applicants seeking a waiver are required to show that their entry is in the national interest, they do not pose a national security threat, and that the denial of a waiver would impose "undue hardship."[20] "Undue hardship" is not defined in immigration statutes – Immigration and Nationality Act – or regulations. Under current immigration law, the burdens of "exceptional hardship," "extreme hardship," and "exceptional and extremely unusual hardship" for certain waivers and applications for relief impose an unduly high standard.[21]

"Exceptional hardship" has been interpreted to mean more than persona

l hardship, and would impose extraordinary hardship on the individual's U.S.

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[18] DHS Q&A on the EO merely provides that waivers will be adjudicated by the Department of State with the visa application, but none of the details and processing procedures that are necessary. *See* U.S. Dep't. of Homeland Security, Q&A: Protecting the Nation From Foreign Terrorist Entry To The United States, Mar. 6, 2017, https://www.dhs.gov/news/2017/03/06/qa-protecting-nation-foreign-terrorist-entry-united-states.

[19] *See* SHOBA S. WADHIA, PENN STATE LAW, UNTANGLING THE WAIVER SCHEME IN PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES (2017), https://pennstatelaw.psu.edu/sites/default/files/WaiverDocFinal%203.28.17.pdf.

[20] Exec. Order No. 13,780 (Mar. 6, 2017), 82 Fed. Reg. 13,209 (Mar. 9, 2017).

[21] These standards are generally applicable to relief sought in immigration proceedings. "Extreme hardship" is the standard in proceedings for waiver inadmissibility or excludability to admission, and suspension of deportation. "Exceptional and extremely unusual hardship" is the standard in proceedings for cancellation of removal.

citizen or legal permanent resident spouse or child.[22] The "exceptional hardship" standard is generally applied in cases where waiver of foreign residency requirements is sought by exchange visitors entering the U.S. to study or teach. The exceptional hardship burden is rarely satisfied in these immigration matters where family separation[23] and professional livelihood[24] is the hardship

Immigration case law has also found that hardship from family separation, relocation, and lost educational opportunities, which will be part of the harm suffered by applicants subject to the EO, does not satisfy the "extreme hardship" burden. [25] "Extreme hardship" is construed narrowly.[26] Extreme hardship has been defined as encompassing more than the hardship caused by family separation, and must cause "great actual or prospective injury" to the U.S. citizen or legal permanent resident family member.[27]

For example in *Ramirez v. INS,*[28] the extreme hardship burden was not satisfied although the circuit court acknowledged that Ramirez's U.S. citizen son

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[22] *See Avellaneda v. U.S. Atty. Gen.*, 143 Appx. 252, 254 (11th Cir. 2005); *see Al-Khayyal v. I.N.S.*, 630 F. Supp. 1162, 1165 (N.D. Ga. 1986), *affm'd Al-Khayyal v. U.S. I.N.S.*, 818 F.2d 827 (11th Cir. 1987).
[23] *See e.g., Volynsky v. Clinton,* 778 F. Supp.2d 545 (E.D. Pa. 2011); *see also Singh v. Moyer,* 867 F.2d 305 (7th Cir. 1989).
[24] *See e.g., Chong v. Director, U.S. Information Agency*, 821 F.2d 171, 174 (3d Cir. 1987).
[25] U.S. Citizenship & Immigration Services, Policy Manual, Vol. 9, Part. B, Ch. 2, https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume9-PartB-Chapter2.html (current as Jan. 5, 2017); *see also Flores v. I.N.S.*, 122 F.3d 1070 (9th Cir. 1997); *see also Tizhe v. U.S. I.N.S.*, 883 F. 2d 70, n. 15 (4th Cir. 1989), *citing Chiramonte v. I.N.S.*, 626 F. 2d 1093, 1101 (2d Cir. 1980).
[26] *I.N.S. v. Jong Ha Wang*, 450 U.S. 139, 145 (1981).
[27] *Id.*; *Hassan v. I.N.S.,* 927 F.2d 465, 467–68 (9th Cir.1991).
[28] *Ramirez v. I.N.S.*, 794 F.2d 491, 498–99 (9th Cir. 1986) (suspension of deportation); *see also Iturribarria v. I.N.S.*, 321 F.3d 889, 902 (9th Cir. 2003) (suspension of deportation).

would suffer loss of educational opportunities upon his removal from the U.S. Ramirez removal would forcefully compel his U.S. Citizen son's removal. Another example is *Matter of H*,[29] where prior to an appeal determination, extreme hardship was not found for a U.S. citizen spouse separated from her husband. The citizen spouse was forced to move to Mexico to be with his wife, he was effectively excluded from residing in the U.S. for fifth-teen years in order to live with his wife. Nevertheless, the immigration officer reviewing his waiver application did not find extreme hardship. In *U.S. v. Mendez-Maldonado*, extreme hardship was not found where testimony was provided that Mendez's U.S. Citizen Mother was subject to domestic violence which had long lasting psychological impact. Mendez had also provided his mother with care and protection related to the domestic violence.[30]

In some cases, the "extreme hardship" burden cannot be met by showing of medical and health issues,[31] or financial dependence[32] – not just financial

[29] *Matter of H,* 14 I. & N. Dec. No. 185, Interim Decision 2161 (1972) (inadmissibility waiver case).
[30] *U.S. v. Mendez-Maldonado,* 2011 WL 5403350 (W.D. N.Y. 2011).
[31] *See e.g., Alcocer v. I.N.S.*, 49 Fed. Appx. 161, 163–64 (9th Cir. 2002) (dissent) ("Here, the BIA simply did not consider the factor of family separation, instead holding, irrelevantly, that because Alcocer's son was still an infant, he could adjust to life in Mexico. Similarly, the BIA failed to consider the impact of Alcocer's work-related injury on his ability to work at his trade. Instead it stated, again irrelevantly, that there were doctors in Mexico capable of providing medical care. Because Alcocer's ability to work as a machine operator formed a critical part of the BIA's initial decision, the BIA should not have rejected the motion to reopen without considering the fact that he can no longer perform this work"); *see e.g.*, *Bueno v. I.N.S.*, 578 F.Supp. 22, 25–26 (N.D. Ill. 1983) (U.S. citizen child received treatment for serious gastric illness but found insufficient support for medical necessity because did not show treatment could not be provided in native country).
[32] *See e.g., U.S. v. Arce–Hernandez*, 163 F.3d 559 (9th Cir.1998) (economic hardship posed by the bread-winner's deportation, and the problems related to the family relocation was insufficient to satisfy extreme hardship burden). "The allegation that the wife suffers from poor health and would have difficulty working in Mexico, if true,

difficulties.[33] In practice immigration officials merely have to just state it has considered all factors relevant to the hardship determination, and the reasons for denying the requested relief.[34] Whether the hardship factors – including but not limited to family separation, non-economic familial support – are actually considered in the evaluation of a waiver application or not under the EO remains a problematic issue.[35]

According to the EO as mentioned earlier, visa applicants subject to the EO must demonstrate "undue hardship" to obtain a waiver.[36] In *Singh v. Holder* and *Magallon-Almanza v. Holder*, the term "undue hardship" identified under the EO is used. However, these "undue hardship" cases still apply the "exceptional and extremely unusual hardship" standard.[37] "Exceptional and extremely unusual hardship" is defined as harm "substantially different from, or beyond, that which would normally be expected from the deportation of an alien with close family members."[38] Since applicants subject to the EO would not be able to meet the

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would constitute hardship to a wife and her children, but we cannot say, as a matter of law, that these hardships would be extreme and beyond the common results of the deportation." *Id.*

[33] "While 'extreme hardship' has no precise definition, the cases are consistent in finding it lacking where the deportation would result in nothing more than the emotional or even financial tribulations which generally follow the separation of a family." *Chiramonte,* 626 F. 2d at 1101.

[34] *See Zavala-Bonilla v. I.N.S.*, 730 F.2d 562, 567 (9th Cir. 1984).

[35] *See e.g., Salcido–Salcido v. I.N.S.,* 138 F.3d 1292, 1293–94 (9th Cir.1998) (failed to consider impact that separation would have on one year old child); *see also Perez v. I.N.S.*, 96 F.3d 390 (9th Cir. 1998) (finding that the BIA inappropriately attributed hardship posed by family separation to parental choice, not deportation); *see also Gutierrez–Centeno v. I.N.S.,* 99 F.3d 1529, 1533 (9th Cir. 1996).

[36] Exec. Order No. 13,780 (Mar. 6, 2017), 82 Fed. Reg. 13,209 (Mar. 9, 2017).

[37] *Singh v. Holder*, 448 Fed. Appx. 619 (7th Cir. 2011) (cancellation of removal case); *see also Magallon-Almanza v. Holder*, 450 Fed.Appx. 779 (10th Cir. 2011).

[38] *Matter of Monreal*, 23 I&N Dec. 56, 65 (BIA 2001) (unusual, unique, or exceptional).

"extreme hardship" standard, they will not be able to satisfy the even more burdensome "exceptional and extremely unusual hardship."

The Board of Immigration Appeals ("BIA") found in *re Martha Andazola–Rivas*,[39] that the removal of the parent from a single parent home, with children under the age of twelve years old would not be "exceptional and extremely unusual" hardship. The BIA characterized the discrimination Rivas would face in Mexico as a single unmarried mother with no family support, as a common hardship. The strong possibility that Rivas children will not receive education as undocumented persons in Mexico, and endure readjustment issues due to relocation, was also deemed common hardship. The BIA made this ultimate determination while acknowledging the impact of these hardships on the ability of Rivas to support her children.

Additionally, as articulated above in this section, a majority of visa applicants subject to the EO will not qualify and/or be granted a waiver, because the hardship burdens cannot be satisfied. The Appellants' know and/or should know that applicants subject to the EO will not be able to meet the burdens for a waiver as set under immigration law. Even in a theoretical scenario where demonstrating a hardship burden may be feasible, Arab and Muslim applicants will not be able to travel to the U.S. because of their identity. The undue, selective

[39] *In re Martha Andazola-Rivas,* 23 I. & N. Dec. 319, 324 (BIA 2002).

hurdles and barriers imposed solely on Arab and Muslim nationals by the EO, coupled with the likely imposition of indefinite processing times for EO waivers and/or exemptions, effectively amounts to visa denials because they are not authorized to travel. As such, there are serious concerns regarding the EO waiver scheme being used as a pretext for discrimination, to give the façade of neutrality, but applicants cannot qualify for the waiver, and are effectively denied based on their national origin and religion. As they would otherwise not be subject to burden but for their national origin and religion.

IV. THE EXECUTIVE ORDER IS SUBJECT TO STRICT SCRUTINY BY THE COURT.

In *Bolling v. Sharpe*, the U.S. Supreme Court held that the Fifth Amendment Due Process Clause embodies the rights guaranteed by the Equal Protection Clause, making the federal government subject to judicial review for discrimination.[40] The EO is subject to strict scrutiny because it involves the suspect classification of national origin and/or ethnicity –Arabs,[41] and constitutes government action out of animus toward a particular group – Arabs and Muslims.[42] The Appellants' are attempting to evade strict scrutiny review as to the discriminatory and unconstitutional nature of the EO. However, the fact is that the

[40] *Bolling v. Sharpe,* 347 U.S. 497 (1954).
[41] *Id.*
[42] *See Romer v. Evans*, 517 U.S. 620 (1996) (sexual orientation); *see Cleburn v. Cleburn Living Center, Inc.,*`473 U.S. 432 (1985) (developmental disability).

EO was implemented with discriminatory intent, motive and purpose, and has a discriminatory effect.[43]

Here, discriminatory intent and purpose is demonstrated by the Executive's policy statements and actions prior to, during, and after implementation of the EO travel bans. The Executive made it clear of its intent, plan and desire to ban Arabs and Muslims.[44] The Executive Branch and its agencies through its statements, policy changes, actions and practices, clearly demonstrated leading up to the issuance and implementation of the first EO travel ban and reissuance of the second EO travel ban, its intent to target the Arab and Muslim community and employ profiling tactics like in the EO against the communities.[45] ADC documented numerous incidents of profiling tactics being employed under the EO travel bans. South Asians and Arabs not on the designated country list, such as nationals of Palestine, Jordan, Sri Laken, India, Egypt, Lebanon, among others were prohibited from traveling and boarding planes.[46]

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[43] *See Hawai'i v. Trump,* No. 1:17-CV-00050-DKW-KSC, Order Granting Motion for Temporary Restraining Order, 2017 WL 1011673, (D. Haw. Mar. 16, 2017). In reviewing the anti-Muslim statements made by the President in months leading up to the signing of the EO, the court remarked "These plainly worded statements…. betray the Executive Order's stated secular purpose."

[44] See *Aziz v. Trump*, No. 1:17-CV-116-(LMB/TCB), 2017 WL 580855, at *4 (E.D. Va. Feb. 13, 2017).

[45] There were expressed support and demands to require Arabs and Muslims in the United States to register and be subject to indefinite monitoring. *See* Arjun Singh Sethi, *What the Trump Camp Gets Wrong on Immigrant Registry*, CNN, Nov. 18, 2016; http://www.cnn.com/2016/11/18/opinions/trump-kobach-wrong-nseers-sethi-opinion/; *see* Emily Flitter, *Glitch Briefly Removes the Muslim Ban Proposal from Trump Website*, REUTERS, Nov. 10, 2016, http://www.reuters.com/article/us-usa-trump-immigration-idUSKBN135284

[46] ADC Testimony at Inter-American Commission on Human Rights Hearing, Mar. 21, 2017, http://www.adc.org/2017/03/adc-to-provide-testimony-at-inter-american-commission-on-human-rights-hearing/.

The discriminatory purpose and effect of the EO is also demonstrated in the EO itself. Visa applicants subject to the EO have to apply for a waiver and are only subject to these special requirements, treatment, and burdensome hardship standards, solely based on their national from one of the Arab and Muslim-Majority countries. Similar to the long regretted 'cautionary tales' of *Korematsu, Hirabayashi, and Yasui* cases, regarding the Executive Order 9066 curfews imposed and the internment of Japanese Americans based on their national origin,[47] there is no individualized specific threat assessment that each individual subject to the EO poses a risk outside of their Arab identity.[48] This constitutes intentional discrimination subject to strict scrutiny by treating a select class of individuals differently because of their national origin and imputed religion.

Criminalization of an entire population to "justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights."[49] Justices Roberts, Justice Jackson and Justice Murphy warned in their dissent and concurrent opinions in *Korematsu* and the accompanying cases, of unquestioned and unchecked government action behind the veil of national security. As articulated by the U.S. Supreme Court Justices in those cases, national security is not a blank check for the government to

[47] *Korematsu v. U.S.,* 323 U.S. 214, 225–48 (1944).
[48] *See id.* at 226.
[49] *See Korematsu,* 323 U.S. at 240.

do what it wants; there are constitutional limits.[50]

Under strict scrutiny, a racial classification is only allowed where the government meets the burden of demonstrating that discrimination is necessary to achieve a compelling state interest. Simply put, the government must have an important interest that cannot be achieved through alternative means. The EO is not necessary to achieve a compelling government interest and is not the least restrictive means. As revealed in an U.S. Department of Homeland Security report, citizenship – national origin is an unlikely indicator of terrorism.[51] Furthermore, terrorism and violence is an global issue, not confined to an particular country, population, religion or ethnicity. The Court must heed the warning of *Korematsu* in this Case. National Security is not a pass for the Executive to discriminate, and violate the Constitution and federal law.

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[50] *Id.*; Minoru Yasui v. U.S., 320 U.S. 115 (1943); Hirabayashi v. U.S., 320 U.S. 81, 110–13, 126 (1943).

[51] Vivian Salma & Alicia Caldwell, *AP Exclusive: DHS Report Disputes Threat From Banned Countries* ASSOCIATED PRESS, Feb. 24, 2017, http://bigstory.ap.org/article/39f1f8e4ceed4a30a4570f693291c866/dhs-intel-report-disputes-threat-posed-travel-ban-nations; *see* Rick Jervis, *DHS Memo Contradicts Threats Cited by Trump's Travel Ban*, USA TODAY Feb. 24, 2017, http://www.usatoday.com/story/news/2017/02/24/dhsmemo-contradict-travel-ban-trump/98374184/; *see* Phil Helsel, *DHS Draft Report Casts Doubt on Extra Threat From 'Travel Ban' Nationals in the U.S.,* NBC NEWS, Feb. 24, 2017, http://www.nbcnews.com/politics/politics-news/dhs-draft-report-casts-doubt-extra-threat-travel-ban-nation-n725511.

CONCLUSION

For the reasons stated herein, *amici* respectfully request the Court to affirm the decision by the U.S. District Court for the District of Maryland and uphold the preliminary injunction.

Dated: April 19, 2017

Respectfully submitted,

/s/ Yolanda C. Rondon

YOLANDA C. RONDON
STAFF ATTORNEY
AMERICAN-ARAB
ANTI-DISCRIMINATION
COMMITTEE

ATTORNEY FOR AMICI CURIAE

CERTIFICATE OF COMPLIANCE

I, Yolanda C. Rondon, counsel for *amici* herein, certify that the ***Amicus* brief in Support of the Appellees by the American-Arab Anti-Discrimination Committee,** uses a proportionally spaced Times New Roman typeface of 14 points or more and text is comprised of 4,957 words.

Date: April 19, 2017

/s/ Yolanda C. Rondon

YOLANDA C. RONDON
Staff Attorney
AMERICAN-ARAB
ANTI-DISCRIMINATION
COMMITTEE

Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

I, Yolanda C. Rondon, hereby certify that I electronically filed the following amicus brief with the Clerk of the Court for the U.S. Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on April 19, 2017.

AMICUS BRIEF OF THE AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE IN SUPPORT OF THE APPELLEES TO DENY APPELLANTS MOTION TO STAY TEMPORARY RESTRAINING ORDER AND AFFIRM THE DECISION BY THE U.S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

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 19, 2017, at Washington, District of Columbia.

/s/ Yolanda C. Rondon

YOLANDA C. RONDON
Staff Attorney
AMERICAN-ARAB
ANTI-DISCRIMINATION
COMMITTEE

Attorney for *Amici Curiae*