Nos. 16-1436, 16-1540

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

—v.—

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

—v.—

HAWAII, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF FOR *AMICUS CURIAE* THE CATO INSTITUTE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

The questions presented in Nos. 16-1436 and 16-1540 include "whether Section 2(c)'s temporary suspension of entry violates the Establishment Clause," and whether the injunctions are impermissibly overbroad.

This brief presents the Court with an evidence-based policy analysis regarding the intersection of immigration and national security. *Amicus* hopes that this material is useful to the Court as it considers the justifications for the "travel ban," to the extent that those justifications are relevant to legal claims in this case and to the interests at issue.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato believes that those values depend on holding government to rigorous standards of evidence and justification for its actions.

Its scholars have significant experience studying immigration law and policy. *Amicus* therefore believes that it can assist the Court by providing evidence relevant to two key aspects of Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) [hereinafter *Executive Order* or *Order*], the so-called "Suspension of Entry for Nationals of Countries of Particular Concern" (Section 2(c)) [hereinafter *Entry Ban* or *Ban*], and the suspension of U.S. Refugee Admissions Program (*USRAP*) (Section 6(a)) [hereinafter *Refugee Program Suspension*].

INTRODUCTION AND SUMMARY OF ARGUMENT

The government claims that the Entry Ban and Refugee Program Suspension secure the United States against terrorist attacks. *Amicus* respectfully disagrees and submits that these justifications do not withstand scrutiny as a matter of policy.

As a procedural matter, the Court may consider real-world evidence about the Order's stated

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[1] No party's counsel authored any part of this brief and no person other than *Amicus* funded its preparation and submission. Parties were timely notified and petitioner has filed blanket consent. Respondents have provided their consent.

justifications and effects because each is part of the prevailing legal tests governing the claims here. Even under the government's view that *Kleindienst v. Mandel*, 408 U.S. 753 (1972), governs this Court's assessment of Respondents' challenges to the Executive Order, it is appropriate for a court entertaining an Establishment Clause challenge to an exclusion order to probe whether there is a "bona fide reason" for the exclusion (Br. for Petitioners at 63 (quoting *Mandel*, 408 U.S. at 770)) and to consider whether the government "rationally could have believed" in the purposes for the exclusion (Br. for Petitioners at 64 (quoting *Western & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 671-72 (1981))). And to the extent that the Court reaches the substance of the challenges, the threshold inquiries for Establishment Clause challenges to government actions, in addition to those of the Equal Protection Clause and the Religious Freedom Restoration Act (*RFRA*), require courts to decide whether those actions are motivated by a sincere permissible purpose. If government actions fail that threshold inquiry, then prevailing doctrine requires courts to subject the actions to heightened scrutiny, which requires courts to consider evidence about whether the actions are appropriate means to advance the government's interests. In short, if the Court concludes that the present case implicates any of these doctrines, it must consider evidence about the Order's purposes and effects. *See* Part I.

Should the Court reach any of these questions, it should conclude that real-world evidence supports neither the government's stated justifications for the Order, nor the government's claim that enjoining the Order will harm the public interest. The Entry Ban

excludes from the United States persons who are nationals of six Muslim-majority countries: Iran, Syria, Somalia, Sudan, Libya, and Yemen (the "Designated Countries"). The Refugee Program Suspension excludes persons seeking refugee status regardless of nationality. The government justifies these measures by claiming that individuals from these categories pose a heightened threat of terrorism and that it needs time to identify information necessary to process visa applications. Yet not a single person from these countries has killed anyone in a terrorist attack in the United States in over four decades, and no refugee admitted since 1980 has killed anyone in a terrorist attack on U.S. soil. Nor does the government need a categorical ban on entry if it cannot gather information to adjudicate visa applications. Under the law, visa applicants bear the burden of proof. The government has no obligation to gather its own information to establish applicants' eligibility, and it can—and does—reject anyone who cannot prove that they do not pose a threat. In any event, by the time this Court will be deciding this case, the 90 days that the government claimed it needed to improve vetting procedures will have long passed.

ARGUMENT

I. THE CATO INSTITUTE'S ORIGINAL IMMIGRATION RESEARCH BEARS ON THE ORDER'S BASIS, WHICH IS MATERIAL TO KEY LEGAL QUESTIONS IN THIS CASE

The Court should consider evidence of the Order's actual purpose and effects—whether presented by

those challenging the Order or by the government—because the legal tests in this case require it. Respondents have challenged the Executive Order under the Establishment Clause, Equal Protection Clause, and RFRA, and they obtained preliminary injunctions against the Order.[2] The prevailing doctrines governing these claims and remedies differ, of course, but they share one thing in common: They require courts to consider real-world evidence about some combination of the purposes, operation, or effects of the government actions being challenged.[3]

Even under the government's view that *Mandel* governs this Court's assessment of Respondents' challenges to the Executive Order, that case would require the Court to probe whether there is a "bona fide reason" for the exclusion (Br. for Petitioners at 63 (quoting *Mandel*, 408 U.S. at 770)) and to consider whether the government "rationally could have

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[2] The Fourth Circuit upheld the injunction against the Order on Establishment Clause grounds, and the Ninth Circuit upheld the injunction based on other statutory grounds. Nevertheless, Equal Protection and RFRA arguments remain relevant because the Court may affirm the decision below on any grounds in the record, including those upon which the lower court did not rely. *U.S. v. American Ry. Exp. Co.*, 265 U.S. 425, 435 (1924) ("[I]t is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."). Further, the Court has also considered arguments not pursued by the respondents, but rather argued by an *amicus curiae*. *Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961).

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

believed" in the purposes for the exclusion (Br. for Petitioners at 64 (quoting *Western & S. Life*, 451 U.S. at 671-72)). Thus, even under that deferential standard of review, the Court still must determine whether the government's stated reason for its action may be credited.

If this Court reaches the substance of Respondents' claims, prevailing Establishment Clause doctrine calls for an assessment of the authenticity of the government's articulated secular purpose. The Establishment Clause "'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs,'" even in facially neutral laws. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (citations omitted) (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971) and *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.)). Courts applying the prevailing Establishment Clause test therefore must evaluate evidence about whether a government measure is motivated by a "secular purpose" that is "genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 864 (2005). Moreover, courts probe the real purpose of state action by considering the operation of the government action, as "the effect of a law in its real operation is strong evidence of its object." *Church of Lukumi Babalu Aye*, 508 U.S. at 535. And when the "openly available data support[s] a commonsense conclusion that a religious objective permeated the government's action," such action is impermissible. *McCreary Cty.*, 545 U.S. at 863.

Here, the government justifies the Executive Order by asserting the need to "protect[] the nation from foreign terrorist entry into the United States." Cato's research, as set forth below, belies that claim. That evidence therefore bears on the Establishment Clause analysis.

Moreover, the Supreme Court has held that government actions that discriminate among religions require application of strict scrutiny. *Larson v. Valente*, 456 U.S. 228, 246 (1982). Strict scrutiny requires consideration of whether government action furthers a compelling government interest and whether the action is narrowly tailored to that interest. *Id.* at 246-247; *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Critical to the inquiry is whether the government action "visits 'gratuitous restrictions'" that are unwarranted by the government's claimed interest. *Church of Lukumi Babalu Aye*, 508 U.S. at 538 (quoting *McGowan v. Maryland*, 366 U.S. 420, 520 (1961) (opinion of Frankfurter, J.)). Where government action imposes such overinclusive restrictions, "[i]t is not unreasonable to infer, at least when there are no persuasive indications to the contrary, that [such] a law . . . seeks not to effectuate the stated governmental interests," but rather to advance impermissible purposes. *Id.*; *see also Larson*, 456 U.S. at 248 ("Appellants must demonstrate that the challenged . . . rule is closely fitted to further the interest that it assertedly serves."). On the flip side, when a government action is materially ***under***inclusive by failing to restrict activities "that endanger[] [the government's] interests in a similar or greater degree than" those activities that the

action does restrict, the government undermines its claim that it is pursuing a compelling interest and raises the specter that the government is using its stated objective to pursue prohibited discrimination. *Church of Lukumi Babalu Aye*, 508 U.S. at 543. To assess whether a government action's purported purpose is genuine, both law and common sense require courts to consider the extent to which the government has failed to take less-restrictive actions that would further its purpose. *See, e.g.*, *id.* at 547 ("[A] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.") (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J. concurring in part and concurring in judgment)); *Florida Star*, 491 U.S. at 540 ("[T]he facial underinclusiveness of [the statute] raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which appellee invokes in support of [the statute]."); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015) (holding a law limiting signage as impermissible under the First Amendment because it left other threats to the town's asserted interests unprohibited).

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

Similar doctrines apply, with variations not relevant here, to the Equal Protection and RFRA challenges to the Order. *See Adarand Constructors*, 515 U.S. at 227 (as to equal protection under the

Fifth Amendment); 42 U.S.C. § 2000bb–1; *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014) (as to RFRA). RFRA governs actions that place burdens on the exercise of religion, 42 U.S.C. § 2000bb–1; equal protection doctrine governs government action that draws distinctions based on suspect classifications such as race, religion, or alienage, *see City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Where such distinctions exist, a court may engage in "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *see also Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985).

Under any of these doctrines of judicial review, there is ample evidence of a poor fit between the purpose of the Order and its effects.

II. THE CATO INSTITUTE'S ORIGINAL RESEARCH INTO THE RELATIONSHIP BETWEEN IMMIGRATION AND TERRORISM SUGGESTS THAT THE ORDER WILL NOT ADVANCE ITS STATED PURPOSES

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

A. The Entry Ban Is Based on the False Premise that the Government Needs the Cooperation of Foreign Governments to Process Visa Applications.

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

It is ***applicants***, and not the government, who bear the burden to produce information showing their eligibility for a visa. The government has no obligation to obtain this information on its own, and may exclude any individual who fails to meet this burden. 8 U.S.C. § 1361. All evidence of which Cato is aware indicates that consular officers already enforce this burden of proof and have reacted to the changing conditions in each of the Designated Countries on a proper, individualized basis. For the past seven years, the B visa refusal rate (the share of applicants denied a business and/or tourism visitor visa for any reason) for the excluded nationalities has been an average of 79 percent higher than for all other nationalities. U.S. Dep't of State, *Calculation of the Adjusted Visa Refusal Rate for Tourist and Business Travelers Under the Guidelines of the Visa Waiver Program*, https://travel.state.gov/content/dam/

visas/Statistics/Non-Immigrant-Statistics/refusalratelanguage.pdf [hereinafter Dep't of State, *Adjusted Visa Refusal Rate*] (last visited Aug. 30, 2017); U.S. Dep't of State, *Visitor Visa*, https://travel.state.gov/content/visas/en/visit/visitor.html (last visited Sept. 6, 2017).

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

Country	2010	2011	2012	2013	2014	2015	2016
Somalia	70	67	62	66	52	65	64
Syria	28	33	42	46	60	63	60
Iraq	42	27	33	39	41	53	52
Yemen	54	48	48	44	44	54	49
Iran	39	31	38	48	42	39	45
Libya	14	31	39	34	34	43	41
Sudan	33	41	45	48	42	40	37
Average[4]	*40*	*40*	*44*	*46*	*45*	*51*	*50*
All other countries[5]	*26*	*25*	*24*	*25*	*25*	*26*	*27*

[4] Average based on the simple arithmetic mean of the data for the seven countries shown in the table and not weighted by number of applicants.

[5] Average based on the arithmetic mean of the data for all countries excluding the seven shown in the table; data includes stateless persons.

Source: Cato Institute calculations based on data in Dep't of State, *Adjusted Visa Refusal Rate*, *supra*.

These denial rates reflect in part the existing availability of documentary evidence from visa applicants. While the average visa denial rate for all other countries has remained relatively constant in recent years, the average denial rate of the six Designated Countries (plus Iraq) increased from approximately 40% to 50% between 2010 and 2016—a rate increase of 25%. In particular, the conflicts in Libya and Syria coincided with refusal rates that more than doubled. *See supra* Table 1. Based on Cato's familiarity with the visa-application process, it believes that many of these rejections were likely a consequence of the inability of applicants to access documents and other evidence necessary to prove their eligibility for a visa, indicating that the government has no need to exclude nationalities on a categorical basis due to information deficits.

B. Visa Vetting Failures of Terrorists Are Very Rare and Have Not Occurred Primarily in the Designated Countries.

Even if the premise of the Order were valid, the security justifications provided in Section 1(h) of the Order for the purported necessity of revamping security screening do not support its sweeping prohibitions. The Order's central evidentiary assertion is that "[r]ecent history shows that some of those who have entered the United States through our immigration system have proved to be threats to our national security," citing "hundreds of persons born abroad" who were convicted of "terrorism-related crimes in the United States" since 2001.

Order § 1(h). But it is factually inaccurate to claim that hundreds of people born abroad who were convicted of terrorism offenses entered "through our immigration system."

The Order inflates the number of crimes by including "terrorism-related" offenses and falsely implying that the offenders all entered the United States as a result of vetting failures in recent years. The below analysis reveals that since 2001, likely only four people from the six Designated Countries have improperly entered the U.S. due to vetting failures and gone on to commit terrorism offenses in the United States. Those four persons represent less than two percent of all terrorism offenders since September 11, 2001.

According to a list compiled by the Department of Justice's National Security Division, "terrorism-related" convictions include those for non-terrorism offenses if there was a link to a terrorism investigation. Nat'l Sec. Div., Dep't of Justice, *Introduction to the National Security Division's Chart of Public/Unsealed International Terrorism and Terrorism-related Convictions From 9/11/01 to 12/-31/15* (Aug. 26, 2016), https://object.cato.org/sites/cato.org/files/wp-content/uploads/dojterrorismrelatedconvictions2015.pdf [hereinafter *NSD List*]. Almost half—approximately 45 percent—of the NSD List's "terrorism-related" convictions from 2001 to 2015 were for non-terrorism offenses. *Id.*; David Bier, *Very Few Immigration Vetting Failures of Terrorists Since 9/11*, *Cato Institute: Cato at Liberty* (Aug. 31, 2017), https://www.cato.org/blog/very-few-immigration-vetting-failures-terrorists-911 [hereinafter Bier, *Few*

Vetting Failures]. The non-terrorism offenses on the NSD List mainly include false statements to investigators, immigration violations, identity fraud, and drug convictions. *Id*.

As of March 2017 when the President signed the Order, less than two hundred foreigners had entered the United States legally through the immigration system and were convicted of or killed during terrorism offenses here. *Id*. Rather, a majority of U.S. terrorism offenders were either born in the United States or brought into the country by U.S. law enforcement for arrest or prosecution. *Id*. These individuals did not enter "through the immigration system." The "hundreds of persons" claim is therefore exceptionally misleading in context.

The Order further asserts that these "hundreds" entered the country in "recent history," particularly since September 11, 2001—that is, after the U.S. government substantially upgraded its immigration vetting processes. Order § 1(h). In fact, only 34 terrorism offenders entered through the immigration system since then. Bier, *Few Vetting Failures*, *supra* (reporting findings following a review of the NSD List, the Department of Justice web site, the George Washington University Program on Extremism, and the New America Foundation International Security Program). Again, this is far fewer than the "hundreds" claimed in the Order. These 34 offenders were born in 22 different countries, including eight countries that are non-majority Muslim. Three of the Order's Designated Countries—Yemen, Libya, and Syria—are not among those 22 countries, and 80 percent of the offenders came from non-designated

countries. *Id.* This reinforces the conclusion that the Order's designations are not reflective of the best evidence on terrorism threats, and that nationality is not a useful predictor of terrorist activity.

Moreover, not all of these 34 offenders entered the country as a result of vetting failures. In publicly-available statements, the government has indicated that 11 of the 34 were radicalized prior to entry. Bier, *Few Vetting Failures*, *supra*. Many of the remaining 23 appear to have radicalized after entry. *Id*. Fourteen entered as juveniles, including nine children who were 15-years old or younger when they entered. *Id.* Six converted to Islam after their entry. There is direct evidence that others radicalized after entry, including Tamerlan Tsaernaev, one of the Boston bombers, who entered as a 16-year-old and who, according to the House Homeland Security Committee, likely radicalized during a brief trip to Russia after nearly a decade in the United States. Majority Staff of the Comm. on Homeland Sec., U.S. H.R. Comm. on Homeland Sec., *The Road to Boston: Counterterrorism Challenges and Lessons from the Marathon Bombings*, at 9-10, 15 (Mar. 2014), https://homeland.house.gov/files/documents/Boston-Bombings-Report.pdf. Defining "vetting failure" very broadly and including all of the uncertain cases, only 18 offenders who entered the United States "through the immigration system" after September 11 were likely radicalized prior to their admission to the United States, such that one could conclude that the terrorism vetting system failed to identify information that may have excluded them from entry. Bier, *Few Vetting Failures*, *supra*. This is again far fewer than the "hundreds" asserted in the Order.

The 18 likely vetting failures involved immigrants from 13 different countries. *Id.* Four of the six Designated Countries—Yemen, Libya, Syria, and Iran—had no vetting failures at all after 9/11. *Id.* Only four of the 18 likely vetting failures came from the Designated Countries, while 78 percent came from non-designated nations. The four vetting failures from the Designated Countries represent less than two percent of all terrorism offenders since 9/11. *Id.* This again reinforces the futility of attempting nationality-based discrimination as a form of visa security and highlights the disconnect between the Order and the reality of terrorism threats.

The threat posed by these 18 offenders hardly justifies a broad entry ban based on nationality. Only half of these 18 even planned an attack targeting Americans in the United States, and only one, Pakistani national Tashfeen Malik, killed anyone in the United States. Bier, *Few Vetting Failures, supra.* Thus, a vetting failure has allowed a single deadly terrorist to enter the country legally in more than a decade and a half—during a time when more than 360 million foreigners were granted visas or authorized to enter without visas—and this terrorist was not even a person from one of the Designated Countries. U.S. Dep't of Homeland Sec., *2015 Yearbook of Immigration Statistics* (last updated May 16, 2017), https://www.dhs.gov/immigration-statistics/yearbook/2015; Bureau of Consular Affairs, U.S. Dep't of State, *Report of the Visa Office: 2002-2016* (2017), https://travel.state.gov/content/visas/en/law-and-policy/statistics/annual-reports.html.

Far from contradicting these conclusions, the Order's specific examples of foreign-born terrorism offenders confirm them. The only example in the Order itself of a national of one of the Designated Countries engaging in terrorism could not have been prevented by improved vetting: The Order refers to a Somali refugee named Mohamed Mohamud who had concocted a plot with an undercover FBI agent to detonate a bomb in Portland (in which no one was ultimately killed); however, Mohamud had entered the United States as a toddler. *United States v. Mohamud*, 843 F.3d 420, 423 (9th Cir. 2016). Although the claimed purpose of the Order is to "improve the screening and vetting protocols and procedures associated with the visa-issuance process and the USRAP," Order § 1(a), no additional procedures could determine which toddlers will become terrorists years later.

The only other evidence provided as justification for the Order's Entry Ban is similarly inapposite: The Order references two Iraqi refugees who had attempted to support a foreign terrorist organization in Iraq, and who were not planning an attack in the United States. Indictment, *United States v. Alwan*, No. 1:11-cr-00013 (W.D. Ky. May 26, 2011). Moreover, the Obama Administration already modified refugee screening procedures to account for the risk posed by these individuals. David Bier, *Deconstructing Trump's Security Defense of His Immigration Ban*, *Cato Institute: Cato at Liberty* (Mar. 9, 2017), https://www.cato.org/blog/deconstructing-trumps-security-defense-immigration-ban. Following this case, the Obama administration imposed more extensive background checks on Iraqi refugees, in

addition to reviewing the records of Iraqis who had already settled in the United States. Glenn Kessler, *Fact Checker: Trump's facile claim that his refugee policy is similar to Obama's in 2011*, Wash. Post (Jan. 29, 2017) https://www.washingtonpost.com/news/fact-checker/wp/2017/01/29/trumps-facile-claim-that-his-refugee-policy-is-similar-to-obama-in-2011/?tid=a_inl&utm_term=.c5f6a065c41c.

C. The Designated Countries Are Not the Countries Whose Nationals Have Been Most Likely to Commit Lethal Acts of Terrorism on U.S. Soil.

In any event, the government's selection of the Designated Countries is not based on any meaningful national security risk when viewed in light of the "recent history" suggested by the Order. To the contrary, there is a total disconnect between the countries chosen and countries whose nationals, historically, have committed acts of terrorism on U.S. soil.

The Order asserts that the six Designated Countries were selected based on conditions within those countries, listing two situations to justify the designation: first, that the country is in the midst of conflict that involves a U.S.-listed Foreign Terrorist Organization (Somalia, Syria, Libya, and Yemen); and second, that the United States has recognized the government of the country as a State Sponsor of Terrorism (Iran, Sudan, and Syria). Order §§ 1(d)-(e); Bureau of Counterterrorism, U.S. Dep't of State, *Foreign Terrorist Organizations*, https://www.state.gov/j/ct/rls/other/des/123085.htm (last visited Aug. 30,

2017). The government states that either situation "increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States," Order § 1(d), but offers no evidence for that claim.

To the contrary, despite hundreds of thousands of visas issued to nationals of these countries, the fact that a nation is a State Sponsor of Terrorism has not historically correlated with the likelihood of its nationals becoming terrorists in the United States. Bureau of Consular Affairs, U.S. Dep't of State, *Non-immigrant Visa Statistics, FY1997-2016 NIV Detail Table*, https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FYs97-16_NIVDetailTable.xls (last visited Aug. 30, 2017) (reporting 655,463 non-immigrant visas issued to nationals of Iran, Sudan and Syria from fiscal year 1997 through 2016); Bureau of Consular Affairs, U.S. Dep't of State, *2016 Annual Report: Table XIV: Immigrant Visas Issued at Foreign Service Posts (by Foreign State of Chargeability)*, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableXIV.pdf (last visited Aug. 30, 2017) (reporting 104,245 visas issued to individuals chargeable to Iran, Sudan and Syria from fiscal years 2007 through 2016). The United States currently recognizes only Iran, Sudan, and Syria as State Sponsors of Terrorism, and there has not been a single death caused by terrorism on U.S. soil committed by a national of one of these three countries since at least 1975. Alex Nowrasteh, *Guide to Trump's Executive Order to Limit Migration for "National Security" Reasons*, Cato Institute: Cato At

Liberty (Jan. 26, 2017), https://www.cato.org/blog/guide-trumps-executive-order-limit-migration-national-security-reasons [hereinafter Nowrasteh, *Guide*] (showing zero terrorism murders committed by persons with national origins in Iran, Syria, and Sudan); U.S. Dep't Of State, *State Sponsors of Terrorism*, https://www.state.gov/j/ct/list/c14151.htm (last visited Sept. 7, 2017).

Since the United States began designating countries as State Sponsors of Terrorism in 1979, the United States has recognized a total of eight such countries: Cuba (1982–2015), Iraq (1979–1982, 1990-–2004), Iran (1984–present), Libya (1979–2006), North Korea (1988–2008), South Yemen (1979–1990), Sudan (1993–present), and Syria (1979–present). Certification Permitting Rescission of Iraq as a Sponsor of Terrorism, 69 Fed. Reg. 58,793 (Sept. 24, 2004); Certification on Rescission of Libya's Designation as a State Sponsor of Terrorism, 71 Fed. Reg. 30,551 (May 26, 2006); Certification of Rescission of North Korea's Designation as a State Sponsor of Terrorism, 73 Fed. Reg. 37,351 (Jun. 26, 2008); Rescission of Determination Regarding Cuba, 80 Fed. Reg, 31,945 (Jun. 4, 2015); Jimmy Carter, *Export Controls for Foreign Policy Purposes Letter to the Speaker of the House and the President of the Senate* (Dec. 29, 1979), *online by* Gerhard Peters and John T. Woolley, The American Presidency Project http://www.presidency.ucsb.edu/ws/index.php?pid=31886; U.S. Dep't Of State, *State Sponsors of Terrorism*, https://www.state.gov/j/ct/list/c14151.htm (last visited Sept. 7, 2017). From 1975 through 2016, nationals from these countries have killed only three people in

the United States in acts of terrorism. Nowrasteh, *Guide*, *supra*; National Consortium for the Study of Terrorism and Responses to Terrorism, *Global Terrorism Database*, [Data file], https://www.start.umd.edu/gtd (last visited Sept. 1, 2017) [hereinafter, *Global Terrorism Database*]. All three murders were committed by Cuban nationals in 1975 and 1976—that is, ***before*** the U.S. government designated Cuba (or any other country) as a State Sponsor of Terrorism. Nat'l Sec. Research Div., RAND Corp., *RAND Database of Worldwide Terrorism Incidents*, https://www.rand.org/nsrd/projects/terrorism-incidents/download.html (last visited Sept. 1, 2017); *Global Terrorism Database*, *supra*.

Similarly, that a person is a national of a country in civil war has not predicted whether that person would present a terrorism risk. Cato's analysis of data regarding intra-state wars indicates that, of the foreign-born terrorists who have committed attacks on U.S. soil since 1975, only one was committed by someone whose country was in the midst of a civil war involving a foreign terrorist organization at the time of the offense: the 2015 shooting in San Bernardino, California, committed in part by Pakistan-born (but Saudi-raised) Tashfeen Malik. Mehreen Zahra-Malik, *Exclusive: Investigators Piece Together Portrait of Pakistani Woman in Shooting Massacre*, Reuters (Dec. 4, 2015), http://www.reuters.com/article/us-california-shooting-pakistan-idUSKBN0TN1YX20151204; Meredith Reid Sarkees & Frank Wayman, *Resort to War: 1816–2007*, Washington DC: CQ Press (Oct. 28, 2010), http://cow.dss.ucdavis.edu/data-sets/COW-war (last visited Sept. 1, 2017); Global Conflicts Tracker, *Islamist Militancy in*

Pakistan, Council on Foreign Relations, https://www.cfr.org/interactives/global-conflict-tracker#!/conflict/islamist-militancy-in-pakistan (updated Sept. 7, 2017) (describing Pakistan's offensive against militants in North Waziristan from 2014-2016). Pakistan, which has had a long-simmering insurgency in some regions, is not among the six Designated Countries.

Table 2 provides the number of deaths and the historical probability of death on U.S. soil from a terrorist attack by nationals of countries that meet the conditions the Order describes.

Table 2: Risk of Death by Terrorism by Nationality by Country Conditions, 1975-2016

Security Categories and Comparators	Deaths	Historical Annual Chance of Death
Current State Sponsors of Terrorism	Zero	Zero
States in Civil Wars[6]	14	1 in 802.55 million
Other Non-U.S. Countries	3,010	1 in 3.73 million
United States and unknown	429	1 in 26.19 million
Six Designated Countries	Zero	Zero

[6] Sarkees & Wayman, *supra* (the intra-state wars dataset "encompasses wars that predominantly take place within the recognized territory of a state" and further classifies wars as civil wars when they involve the government of the state against a non-state entity).

Sources: Cato Institute calculations based on data cited in Nowrasteh, *Guide*, *supra*; Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, 798 *Cato Institute Policy Analysis* 1, 3, 6 (Sept. 13, 2016), https://object.cato.org/sites/cato.org/files/pubs/pdf/pa798_2.pdf [hereinafter Nowrasteh, *Terrorism and Immigration*]. *Amicus* updated the calculations in Nowrasteh, *Terrorism and Immigration* and Nowrasteh, *Guide* through the end of 2016 by including the six deadly terrorist attacks in 2016, none of which was known to be committed by foreign-born terrorists, as listed in *Global Terrorism Database*, *supra*. Annual chance of death was calculated according to the methodology used in Nowrasteh, *Terrorism and Immigration*, *supra*, at 2-4.

As noted above, terrorists from State Sponsors of Terrorism did not kill anyone in terror attacks on U.S. soil from 1975 to 2016. In that period, the annual chance of dying at the hands of terrorists from states in civil war involving a foreign terrorist organization was 1 in 802.55 million. By comparison, the annual probability of death in an act of terrorism committed by other foreign nationals was 1 in 3.73 million. In other words, the historical chance of dying in an attack on U.S. soil committed by a foreign-born terrorist from a country that does ***not*** fit the government's criteria, and is not included on the list of Designated Countries, was 215 times greater than being killed by one who did.

The government's misguided criteria for designating countries produces a bizarre result: Based on data from 1975 through 2016, ***no one*** has been killed in a terrorist attack on U.S. soil by

nationals from any of the six Designated Countries. Nowrasteh, *Guide*, *supra*. Once again, this is compelling evidence that nationality is simply not a useful predictor of terrorism threats.

While the future need not replicate the past, the government purports to base its security assessment in part on evidence of crimes committed in the past. Order § 1(h). But as discussed above, the historical record undermines, rather than supports, the government's claims. Moreover, there are good reasons to believe that the risk of terrorism will be managed more effectively in the future: beginning after 9/11, the United States has revamped its visa screening process. To name but a few changes, it expanded and automated terrorist watch lists, instituted biometric identity verification, linked various agency databases, instituted Department of Homeland Security review of visa applications for terrorism links in many consulates worldwide, and expanded intelligence sharing with allied countries. Ruth Ellen Wasem, Cong. Research Serv., R43589, *Immigration: Visa Security Policies* 5-6, 13-20 (Nov. 18, 2015), https://fas.org/sgp/crs/homesec/R43589.pdf; *see generally*, Kristin Archick, Cong. Research Serv., RS22030, *U.S.-EU Cooperation Against Terrorism* (Dec. 1, 2014), https://fas.org/sgp/crs/row/RS22030.pdf. These changes suggest that a categorical ban is not the best way to effectuate the government's stated purpose.

As telling, however, is the simple fact that the Order does not designate all countries fitting its stated criteria. As noted above, Pakistan is effectively engaged in a civil war involving a Foreign

Terrorist Organization, and individuals born in Pakistan have committed terrorist attacks on U.S. soil, but Pakistan is not covered by the Order. This implies that the government's stated criteria are not, in fact, a complete statement of its reasons for adopting the Ban.

D. The Entry Ban Excludes Individuals Based on Legal Nationality Rather than Any Meaningful Connection to the Six Designated Countries.

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

According to the United Nations Population Division, 11.2 million nationals of the Designated Countries were living as migrants in another country in 2015. Population Div., U.N. Dep't of Econ. & Soc. Affairs, *By Destination and Origin: Table 16*, International Migrant Stock 2015 (Dec. 2015), http://www.un.org/en/development/desa/population/migration/data/estimates2/estimates15.shtml (last visited Sept. 1, 2017). According to the United

Nations High Commissioner for Refugees, 7.1 million nationals of these six countries were refugees or asylum seekers outside their country of birth in 2015. U.N. Refugee Agency, U.N. High Comm'r for Refugees, *Persons of Concern*, http://popstats.unhcr.org/en/persons_of_concern (last visited Aug. 30, 2017). Nationals from Syria and Iran need not have even been born or lived in the country at all to possess their country's nationality. Legislative Decree No. 276, of 24 Nov. 1969 (Nationality Law), Ch. 2 (Syria), http://www.refworld.org/pdfid/4d81e7b12.pdf; Civil Code No. 976 (On Nationality) (Iran), *available online at* Iran Data Portal (last modified Apr. 1, 2013) http://irandataportal.syr.edu/nationality-law. Likewise, an individual need not be a national of a country to reside in, identify with, or integrate into conflicts in that country. Indeed, the United Nations has recognized the threat posed by foreign terrorist fighters who leave their home countries and travel to conflict zones. S.C. Res. 2178, U.N. Doc. S/RES/2178, at 2 (Sept. 24, 2014). Legal nationality is therefore an inappropriately blunt tool for judging whether an individual actually has substantial ties to the country of nationality, let alone whether the individual poses any threat to the United States.

E. The Refugee Program Suspension is Unsupported by Evidence.

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

If anything, available evidence indicates that refugees have historically been ***less*** likely than other foreign nationals—and even U.S. citizens—to kill in terrorist attacks in the United States. The Cato Institute has produced what it understands to be the only comprehensive analysis of the threat of terrorism based on admission category of foreign-born terrorists. Nowrasteh, *Terrorism and Immigration*, *supra*, at 2. From 1975 through 2016, the United States admitted more than 3.2 million refugees. U.S. Dep't Of State, *Refugee Processing and Screening System* (Jan. 20, 2017), https://www.state.gov/j/prm/ra/266458.htm (last visited Aug. 30, 2017). The Cato report finds that only three—each from Cuba—engaged in any deadly acts of terrorism during that time in the United States (0.00009 percent). Nowrasteh, *Terrorism and Immigration*, *supra*, at 13.

Historically, the chance of dying in a terrorist attack on U.S. soil committed by a refugee has been 1 in 3.8 billion a year. *See infra* Table 3. Of the four general categories of admission—permanent residency, temporary nonimmigrant, asylum, and refugee status—the refugee category has been the ***least*** risky. U.S. residents were nearly 1,000 times more likely to be killed in a terrorist attack by tourists than by refugees on U.S. soil. U.S. residents were 100 times more likely to be killed by a US-born person in a domestic terrorist attack than by a refugee.

Table 3: Annual Chance of Being Killed in an Attack on U.S. Soil, Based on Immigration Status of Terrorist, 1975-2016

Category	Deaths	Annual Chance of Being Killed
Tourist	2,834	1 in 3.96 million
U.S.-Born or unknown	429	1 in 26.19 million
Student Visa	159	1 in 70.67 million
Fiancé Visa	14	1 in 802.55 million
Permanent Resident	8	1 in 1.41 billion
Asylee	4	1 in 2.81 billion
Refugee	3	1 in 3.75 billion
USRAP	0	Zero

Sources: Cato Institute calculations based on data cited in Nowrasteh, *Terrorism and Immigration*, *supra*, at 4-5; *Global Terrorism Database*, *supra*.

F. The Government's Failure to Pursue Its Goals Consistently Undermines Its Claim that It Is Pursuing Vital Interests in the Least Restrictive Manner Possible.

Finally, the government has failed to take less restrictive steps to protect national security, including steps mandated by the Order itself. That fact bears on whether the Executive Order in fact serves the important purposes that it purports to.

See, e.g., *Church of Lukumi Babalu Aye*, 508 U.S. at 547 ("[A] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." (quoting *Florida Star*, 491 U.S. at 541-42 (Scalia, J. concurring in part and concurring in judgment)); *Florida Star*, 491 U.S. at 540; *Reed*, 135 S. Ct. at 2232. Both the Order and the now-revoked order, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter *Revoked Order*], suspended entry of refugees and of nationals from certain countries while the Secretary of Homeland Security produced a worldwide report with recommendations to improve vetting and screening protocols. But the government apparently has not made meaningful efforts to improve vetting, as demonstrated by two facts:

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

Indeed, by the time the Court hears this case, the original 90-day period will have long expired, as will have the 90-day period from the issuance of the stay. *Trump et al. v. Int'l Refugee Assistance Project, et al.*,

137 S. Ct. 2080 (Jun. 26, 2017); Effective Date in Executive Order 13,780, 82 Fed. Reg. 27,965 (Jun. 14, 2017) (changing the effective date of the Order from March 16, 2017 until injunctions against Sections 2 and 6 are "lifted or stayed"). Assuming that the government has been improving vetting during this time, there will be no further reason for the Entry Ban. And if the government has not made progress, that failure undermines the government's claims to be pursuing a compelling government interest in a properly tailored manner.

Second, the government apparently has not produced the required vetting reports. The Revoked Order required the Secretary of Homeland Security to submit a report that provides "a list of countries that do not provide adequate information" for vetting "within 30 days of the date of this order." Revoked Order § 3(b). (The new Order requires the same, but within 20 days. Order § 2(b).) The Department of Homeland Security apparently produced two draft intelligence assessments—finding that "citizenship is an unlikely predictor of terrorism" and that "most foreign-born, U.S.-based violent extremists [are] radicalized after entering." U.S. Dep't of Homeland Sec., *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States*, 1 (Feb. 24, 2017), https://fas.org/irp/eprint/dhs-7countries.pdf; U.S. Dep't of Homeland Sec., *Most Foreign-born, US-based Violent Extremists Radicalized after Entering Homeland*; *Opportunities for Tailored CVE Programs Exist*, (Mar. 1, 2017), http://i2.cdn.turner.com/cnn/2017/images/03/03/dhs.intell.assessment.pdf. But President Trump reportedly dismissed these assessments as "not the intelligence assessment [he]

asked for." Shane Harris, *Donald Trump Rejects Intelligence Report on Travel Ban—Tension with Intelligence Officials Rises as Homeland Security Contradicts White House on Terror*, Wall St. J. (Feb. 24, 2017, 8:53 PM), https://www.wsj.com/articles/donald-trump-rejects-intelligence-report-on-travel-ban-1487987629. There is no evidence to indicate that the requested report reviewing screening procedures was ever submitted.

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

CONCLUSION

Amicus respectfully submits that the Court should consider the foregoing evidence in assessing the statutory and constitutional challenges to the Executive Order and the government's challenge to the preliminary injunction.

Respectfully submitted,

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