No. 17-17168

In the
United States Court of Appeals for the Ninth Circuit

STATE OF HAWAII, ISMAIL ELSHIKH,
Plaintiffs-Appellees,
v.
DONALD J. TRUMP,
President of the United States, *et al*.
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawaii

Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, Conservative Legal Defense and Education Fund, U.S. Justice Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Public Advocate of the United States, Restoring Liberty Action Committee, English First, English First Foundation, and Policy Analysis Center in Support of Defendants-Appellants and Reversal

JOSEPH W. MILLER
Fairbanks, AK 99708
Attorney for Amici Curiae
RLAC & USJF

HERBERT W. TITUS*
WILLIAM J. OLSON
ROBERT J. OLSON
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, VA 22180-5615
(703) 356-5070

Attorneys for Amici Curiae

*Attorney of Record
November 22, 2017

DISCLOSURE STATEMENT

The *amici curiae* herein, Citizens United, Citizens United Foundation, Conservative Legal Defense and Education Fund, U.S. Justice Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Public Advocate of the United States, Restoring Liberty Action Committee, English First, English First Foundation, and Policy Analysis Center, through their undersigned counsel, submit this Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1, 29(c). All of these *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them. The *amici curiae* are represented herein by Herbert W. Titus, who is counsel of record, William J. Olson, Robert J. Olson, and Jeremiah L. Morgan of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, Virginia 22180-5615. *Amici* Restoring Liberty Action Committee and United States Justice Foundation are also represented herein by Joseph W. Miller, P.O. Box 83440, Fairbanks, Alaska 99708.

s/ Herbert W. Titus
Herbert W. Titus

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INTEREST OF *AMICI CURIAE*[1]

Amici Citizens United, Citizens United Foundation, Conservative Legal Defense and Education Fund, U.S. Justice Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Public Advocate of the United States, English First, English First Foundation, and Policy Analysis Center are nonprofit organizations, exempt from federal income tax under IRC section 501(c)(3) or 501(c)(4). Restoring Liberty Action Committee is an educational organization. Each is dedicated to the correct construction, interpretation, and application of law. Many of these *amici* have filed *amicus* briefs in support of President Trump's immigration policies: (i) an *amicus* brief to the Ninth Circuit (Feb. 6, 2017); (ii) an *amicus* brief in the Ninth Circuit (Feb. 16, 2017); (iii) an *amicus* brief in the Fourth Circuit (Mar. 31, 2017); (iv) an *amicus* brief in the Ninth Circuit (Apr. 21, 2017); and (v) two *amicus* briefs in the U.S. Supreme Court, one at the petition stage and one at the merits stage (June 12 and Aug. 17, 2017).

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[1] *Amici* requested and received the consents of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF THE CASE

Plaintiffs grounded their challenge to the Presidential Proclamation[2] No. 9645, 82 *Fed. Reg*. 45161 (Sept. 24, 2017) (hereinafter "Proclamation"), in a hodge-podge of constitutional claims (*e.g.,* Free Exercise Clause, Establishment Clause, Fifth Amendment Due Process, the so-called equal protection component of the Fifth Amendment) as well as statutory claims (8 U.S.C. §§ 1152(a)(1)(A), 1182(f), 1185(a), 1157(a), the Religious Freedom Restoration Act, and the Administrative Procedure Act). *See* Hawaii v. Trump, 2017 U.S. Dist. LEXIS 171242 (D. Haw., Oct. 17, 2017) at *19, n.8.

After expedited briefing and, remarkably, without even allowing argument (*see* Brief for Appellants ("Gov't Br.") at 12), the district court issued a worldwide Temporary Restraining Order, and then a Preliminary Injunction, of the Proclamation's Sections 2(a) (Chad), 2(b) (Iran), 2(c) (Libya), 2(e) (Syria), 2(g) (Yemen), and 2(h) Somalia.

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[2] The district court loosely, and somewhat inaccurately, describes the Proclamation as an Executive Order (referring to it as "EO-3"). Section 1182(f) describes the presidential directive to be utilized to suspend entry of aliens as a "proclamation." The President issued such a "Proclamation" on September 24, 2017. *See generally* W. J. Olson and A. Woll, "Executive Orders and National Emergencies," CATO Policy Analysis, No. 358 (Oct. 28, 1999) at 8.

ARGUMENT

I. The District Court Claims to Resolve this Case on Statutory Grounds, yet Grants Standing Based on Establishment Clause Principles, then Analyzes the Issue Using First Amendment Tests.

A. The District Court Gratuitously Repeats Allegations of Animus.

The district court claimed that its ruling was based exclusively on statutory grounds — that the President's Proclamation violates specific sections of the Immigration and Naturalization Act ("INA"). *See* Hawaii at *36.

EO-1 and EO-2 were actions taken by the President himself — prompting certain judges on the Fourth and Ninth Circuits to take every opportunity to malign the President's motivations and intentions — claiming that his Executive Orders were motivated by religious intolerance and animus, rather than a desire to protect the nation from terrorism. *See* Hawaii v. Trump, 859 F.3d 741, 761 (9th Cir. 2017); *see also* IRAP v. Trump, 857 F.3d 554, 572, *et seq.* (4th Cir. 2017). Such allegations of animus were said to relate to an Establishment Clause claim. However, in the present case, unlike prior litigation, there was no Establishment Clause ruling.

The September Proclamation was cut from a wholly different cloth than the previous Executive Orders, and even the district court noted that the

Proclamation is "a result of the global reviews undertaken by the Secretary of Homeland Security in consultation with the Secretary of State and the Director of National Intelligence." Hawaii at *17. The district court clearly understood that it was these officials, not President Trump, who "recommend[ed] restrictions on the entry of nationals from specified countries." *Id.* at 18. Yet, even though completely irrelevant to the statutory claims, the district court repeats statements by Plaintiffs continuing to malign the President, and asserting that the Proclamation "suffer[s] from the same infirmities as the enjoined provisions of EO-2," that "the President 'has never renounced or repudiated his calls for a ban on Muslim immigration,'" and that "the record has only gotten worse." Hawaii at *19.[3] *See also id.* at *19 n.9.

B. The District Court's Finding of Standing Recites the Establishment Clause Arguments.

Although the court below purported to assess statutory standing under a more neutral "zone of interests" test — unconnected to the Establishment Clause

[3] Apparently, plaintiffs impute what they believe to be President Trump's personal animus to the entire Executive Branch. They apparently now believe that not only President Trump — but also anyone in his Administration — should be judicially barred from taking action to guard against threats raised by immigrants from Muslim majority nations.

analysis as in its prior opinion[4] — the court nevertheless used an Establishment Clause basis to conclude that many of the Plaintiffs had standing. *See* Hawaii at *23-28. But the court's conclusion was not based upon any claim of injury to the Elshikh family, in relation to the INA-based statutory claim, but upon injury to their citizenship, in relation to an Establishment Clause claim. *See* IRAP at 585.

Thus, respecting Dr. Elshikh, the court found standing because "his family will be denied the company of close relatives solely because of their nationality and religion, which denigrates their faith and makes them feel they are **second-class citizens** in their own country." *Id.* at *24-25 (emphasis added). Likewise, with respect to John Doe 1, the court found standing on the ground that, "'[b]y singling [his] family out for special burdens,'" the Proclamation "'denigrates [them] because of [their] faith and sends a message that Muslims are **outsiders** and are not welcome in this country." *Id.* at *26 (emphasis added). As for John Doe 2, the court concluded that "[b]ecause his family cannot visit him in the United States, Doe 2's life has been more difficult, and he feels like an **outcast** in his own country." *Id.* at *28 (emphasis added). In short, the court ruled that

[4] *Compare* Hawaii at *31-32 *with* Hawaii v. Trump, 859 F.3d 741, 761 (9th Cir. 2017).

the individual plaintiffs had Establishment Clause standing — yet the court denied grounding its decision on that Clause. *See id.* at *36.

C. Even the Court's Statutory Analysis Is Replete with Constitutional Tests and Standards.

The court claimed that "the Court begins with Plaintiff's statutory claims," and "declines to reach the constitutional claims…." *Id.* However, the court then conducted a constitutional analysis masquerading as a statutory analysis.

The court claimed that, when it comes to the Executive's authority under §§ 1182(f) and 1185(a), the President must provide "'*findings support[ing] the conclusion* that entry of all nationals from'" a country "'would be harmful to the national interest.'" *Id*. at *37. Of course, as is typical of that court's opinion, the only authority cited for its statement is this Court and its since vacated opinion. *Id*. at *37-38.

Seemingly believing that the President should run his national security determinations by a federal district court judge in Hawaii for judicial preclearance, the district court analyzed the Proclamation's findings, concluding that they do not meet the following tests:

- First, the court claimed that EO-3 is "**overbroad** *and* **underinclusive**." *Id*. at *39 (emphasis added). *See* Broadrick v. Oklahoma, 413 U.S. 601 (1973).

- Second, the court admitted that "national security is an important objective," but claimed that "EO-3 does not reveal why existing law is insufficient" and "omit[s] any explanation of the inadequacy of individual vetting…." *Id*. at *40, 43-44. Apparently, the court's argument is that the Proclamation is not the **least restrictive means** to keep the nation safe. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014).

- Third, the court claimed that"[n]umerous countries fail to meet one or more of the … criteria … yet are not included in the ban," and also notes that, while "meeting the information-sharing baseline … Somalia and its nationals were rewarded by being included in the ban." *Id*. at *40-41. In other words, the court decided that the Proclamation is not **narrowly tailored**. *See* Ward v. Rock Against Racism, 491 U.S. 781 (1989).

- Fourth and finally, the court claimed that EO-3 is "unsupported by verifiable evidence," even though it "categorically ban[s] the entry of millions." *Id*. at *42. In other words, the court does not believe that the September Proclamation **furthers a significant government interest**. *See* Ward.

Without exception, each part of the district court's "statutory" analysis is grounded in constitutional jurisprudence or a constitutional analog. It is as if the court used some sort of unstated mix of a strict and intermediate scrutiny to resolve a statutory issue. Judge Watson's claim of a statutory analysis is nothing more than a thin cover to mask what he is really doing: whatever he wants.

As these *amici* have previously noted, "It is not the role of federal judges to operate 'behind enemy lines' as a left-behind army tasked with impugning the

President and impeding his agenda."[5] The Supreme Court has never approved of a special "Trump Standard of Review" — whereby anything the President does is overturned as a matter of "law." The Trump Standard of Review was well demonstrated during oral argument in IRAP v. Trump, No. 17-1351 (4th Cir.), May 8, 2017, when counsel for plaintiffs stated that, if another president had issued the same executive order, then the courts should uphold it.[6]

II. Hawaii and the Individual Plaintiffs Do Not Have Standing.

A. The State of Hawaii Does Not Have Standing.

In a previous brief before this Court, these *amici* noted that the only authority for Hawaii's standing to bring suit was this Court's prior decision in Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017). *See* Brief *amicus curiae* of USJF, *et al.*, at 9 (Apr. 21, 2017). It would seem that the district court still relied on Washington, since this Court's prior opinion in Hawaii has been vacated. *See* Section V, *infra*. However, Hawaii's newest theory of standing

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[5] *Amicus* Brief of Citizens United, *et al.* in Trump v. IRAP, U.S. Supreme Court (Aug. 17, 2017).

[6] *See* "ACLU Lawyer Says Travel Ban 'Could Be Constitutional' if Enacted by Hillary Clinton," NTK Network (May 8, 2017).

(adopted by the district court below) is even more strained than the one previously sanctioned by this Court.

Previously, Hawaii had claimed that it would not be able to obtain "tuition" from potential students from the EO-2 countries but, as *amici* explained, "potential students are not a finite commodity." *See* USJF *Amicus* Br. at 9-10. There was simply no reason to believe that qualified students are anything but fungible and replaceable. Now Hawaii claims more generally that the Proclamation "will hinder the University from recruiting and retaining a world-class faculty and student body." Hawaii at *21. It is also not at all obvious how the University's faculty or student body will be seriously harmed due to its not being able to draw from six small developing countries.

The University cleverly claims that its faculty and students are "nationals of the … designated countries" (Straney Decl. ¶ 8), but does not allege that any of these people actually came to the University directly from those countries. On the contrary, it is highly likely that many of the faculty (and perhaps students) the University includes in its figures had already emigrated to other western countries, and from there came to the University. If that is the case for any of

the University's students or faculty, then such persons are irrelevant for purposes of this case.

Relatedly, and as was the case previously, "the University provides no country-specific figures" (*see* USJF *Amicus* Br. at 13-15) regarding from where its current and prospective faculty and students come. For example, the University claims that it has 20 students "from the 8 designated countries, specifically from Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, **or** Yemen." Straney Decl. ¶ 12 (emphasis added). The subtle use of the word "**or**" in that sentence makes it entirely ambiguous as to whether the University actually has students from **each** of the designated countries, instead of simply from **some**, or even one, of the designated countries. Apparently, the district court did not seek clarification. Indeed, the University then follows up with the claim that for the next calendar year it has "5 graduate applications from individuals from the eight affected countries." Straney Decl. ¶13. Clearly, five people cannot be from eight countries.

At every turn, the University is careful to veil its allegations — making it appear it has current or potential students and/or faculty from **each** of the EO-3 countries, while it appears that is not the case in reality. It seems obvious that if

the University actually had students or faculty from all eight countries, that it would say so clearly. These *amici* specifically faulted the University for ambiguity last time, but the University's allegations have only become more obtuse.

B. Plaintiff Elshikh Still Does Not Have Standing.

As for Plaintiff Elshikh's standing, the district court claimed that "his family will be denied the company of close relatives solely because of **their** nationality and religion, which denigrates **their** faith and makes **them** feel **they** are second-class citizens in **their** own country." Hawaii at *24-26 (emphasis added). That pronoun-laced statement certainly serves, at a minimum, to obfuscate the meaning of the sentence. It appears that, in this sentence, the district court switches back and forth from Elshikh's immediate family, to his relatives, and back again to his family — all without using a single proper noun.

It appears that Elshikh, his wife, and his children are all now Americans. Elshikh himself is originally from Egypt, which was not covered either by EO-1, EO-2, or the Proclamation. Indeed, Elshikh's children were all born in the United States, presumably are Americans, and may never even have been to

Syria.[7] It is thus hard to understand how American citizens (one of Egyptian descent) can be made to feel like second-class citizens in the United States — because the Proclamation targets Syrian citizens in Syria.

C. The District Court's Injunction Applies Beyond the Plaintiffs.

Plaintiff Elshikh's family is from Syria. Hawaii at *24. John Doe 1 is from Yemen. *Id.* at *25. John Doe 2 is from Iran. *Id.* at *27. The Muslim Association of Hawaii alleges that it has members from Syria, Somalia, Iran, Yemen, and Libya. *Id.* at *29. The University has entirely failed to allege that it has either current or prospective faculty or students from any country in particular. There does not appear to be any connection between any plaintiff and Chad, but the injunction runs against Chad. Proclamation § 2(a); Hawaii at *49. Only North Korea and Venezuela were not covered by the injunction, as the plaintiffs did not seek to enjoin the President as to those two non-Muslim countries. *Id.* at *20 n.10. Clearly, the district court's injunction — at a bare minimum — should not apply to Chad.

In truth, no injunction in such a case should not have applied to anyone other than the parties. In such a case, the court's injunction should not exceed

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[7] *See* Declaration of Ismail Elshikh in 17-cv-50, ECF # 66-1, Mar. 8, 2017.

the scope of the specific case or controversy. For example, if someone sues his neighbor asking for an injunction to keep him from cutting down certain trees, the court has no authority to enjoin the entire county from all arboriculture based on wholly speculative injury, lacking any concrete conflict.

III. The District Court Injunction and Opinion Exceeds the Scope of the Judicial Power.

According to the text of § 1182(f), it is the President, not the Ninth Circuit, who is authorized to make a finding as to "the entry of any aliens or of any class of aliens into the United States." Indeed, it is the President, not the Ninth Circuit, who "**may by proclamation**, and for such period as he shall deem necessary" exclude aliens. 8 U.S.C. § 1182(f) (emphasis added). And it is the President, not the Ninth Circuit, who **may** suspend the entry of all aliens, **or** any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions as he **may** deem appropriate.

These statutory words bespeak discretion, not obligation. And even if the statutory provision may be read to deny the President from exercising "unbridled discretion," as the district court maintains (Hawaii at *37), it does not mean that the Courts are thereby empowered to rein in the President. The federal judiciary

is not the watchdog over the entire federal government, and the President is not accountable to the Ninth Circuit.

As Chief Justice John Marshall observed in Marbury v. Madison, 5 U.S. 137 (1803):

> By the constitution of the United States, the **President is invested with certain important political powers**, in the exercise of which he is to use **his own discretion**, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. [*Id.* at 165-66 (emphasis added).]

Judge Watson, however, would usurp the President's authority, presuming without justification to weigh the costs and benefits of the current proclamation, subjecting the proclamation to his own assessments of the immigration policy's efficacy and design, as if he were the Secretary of State. Thus the district court opined that the proclamation is: (i) a "poor fit for the issues regarding the sharing of 'public-safety and terrorism-related information'"; (ii) unnecessary to strengthen the screening process; (iii) internally inconsistent including some in the ban that merit exclusion, and excluding others that merit inclusion; and (iv) aspirational, rather than effectual, to reach the declared foreign-relations goals. *See* Hawaii at *39-43. However, as Chief Justice Marshall observed:

> [W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. **The subjects are political. They respect the nation**, not individual rights, and **being entrusted to the executive, the decision of the executive is conclusive**. [Marbury at 166 (emphasis added).]

This distinction between **political** and **legal** accountability is reflected in the Government's treatment of the § 1152(a)(1)(A) prohibition against "nationality-based discrimination 'in the issuance of an immigrant visa.'" *See* Gov't Br. at 43-49. Recognizing that, in the enactment of the prohibition, Congress had created a legally binding rule, the Government responded on the merits of the claim that the statute created an individual legal right. It denied the claim, not on the ground of executive discretion, but on the ground that the statute prohibiting "nationality-based discrimination" applied only to immigrants who were otherwise eligible to receive a visa to immigrate to the United States, not to a person who "is ineligible to receive one as someone barred from entering the country under Section 1182(f)." Gov't Br. at 44.

The district court below rejected this contention, in large part because it agreed with the Ninth Circuit decision that there was no distinction between § 1182(f), the discretionary authority upon which the president's proclamation rested, and the obligatory mandate of § 1152(a)(1)(A) — believing both subject

to judicial review, enabling the two courts to harmonize the two provisions into one "'overall statutory scheme intended by Congress.'" *See* Hawaii at *46. By conflating the two issues as if they were equally susceptible to the same standard of judicial review, the court below, enabled by the Ninth Circuit before it, thrust itself into the foreign affairs arena. This action is both in violation of a statute deferring to the discretion of the President and in direct conflict with the rule of law limiting judicial power to expound on rules of individual rights, leaving policy matters to the people and their elected officials. As Chief Justice Marshall put it in Marbury:

> The province of **the court** is, solely, to decide on the rights of individuals, **not to enquire how the executive, or executive officers, perform duties in which they have a discretion**. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court. [Marbury at 170 (emphasis added).]

IV. The District Court Determined that the Proclamation Violated the President's Statutory Authority, without ever Addressing the President's Inherent Constitutional Authority over Immigration.

A. The INA Is Devoid of Limitations on Presidential Constitutional Authority to Exclude Aliens.

Injunctive relief allegedly was predicated only on statutory claims grounded in three sections of the INA, entirely "declin[ing] to reach the constitutional claims…" Hawaii at *36.

Section 1182(f) was both the primary statute relied on in the Proclamation (see Proclamation, Introduction) and the primary statute relied on by the district court to enjoin the President's actions (*see id.* at *36-44):

> (f) Suspension of entry or imposition of restrictions by President. **Whenever the President finds** that the entry of any aliens or of any class of aliens into the United States would be **detrimental** to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, **suspend** the entry of **all** aliens or **any class** of aliens as immigrants or nonimmigrants, or impose on the entry of aliens **any restrictions** he may deem to be appropriate. [8 U.S.C. § 1182(f) (emphasis added).][8]

[8] Although this statute was the primary basis for the district court's injunction, when the First Executive Order was before this Court, its opinion never even mentioned, to say nothing of having analyzed, this statute — an omission which caused this Court to come under justifiable criticism from commentators across the political spectrum. *See Amicus* Brief of USJF, *et al.* in Washington v. Trump (Feb. 16, 2017) at 5-9 (setting out criticism of this Court by commentator Jeffrey Toobin and others). Although the Ninth Circuit discussed this statute in Hawaii v. Trump, that opinion has been vacated. *See* Section IV, *infra*. Accordingly, the district court could in no way have relied on either decision of the Ninth Circuit.

Section 1185(a) authorizes the President to issue rules and regulations to implement his authority over immigration, with no indication of any limitations or requirement of a "predicate finding." See Gov't Br. at 29.[9]

Neither of these two relevant INA sections demonstrate that there are any limitations on the authority of the President to exclude aliens. Neither section gives any indication that an exercise of the President's authority is reviewable by a federal court. Indeed, both are entirely consistent with the historic understanding that the President of the United States has an inherent authority to exclude aliens — an issue never addressed by the District Court.

B. The President Has Constitutional Authority to Exclude Aliens.

It is commonly assumed that regulation of immigration is one of the federal government's enumerated powers in the Constitution. But this is not so. Article I, Section 8, Clause 4 authorizes the national government "To establish an uniform Rule of Naturalization … throughout the United States." The word "immigration" does not appear in the Constitutional text. Thus, the constitution vested in the national government power over naturalization, which is the process by which a person becomes a citizen — not immigration, which is the process by

[9] Section 1152(a), even though relied on by the district court, is inapposite. *See* discussion in Section III, *supra*. *See* Gov't Br. at 42-48.

which a non-citizen enters the United States. Such power to exclude is possessed because it is inherent in its very nature as a sovereign political entity.[10] Indeed, as Emer de Vattel's 1758 treatise on the Law of Nations states:

> The sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state. There is nothing in all this, that does not flow from the rights of domain and sovereignty: every one is obliged to pay respect to the prohibition.... [E. de Vattel's The Law of Nations, bk. II, ch. VII, § 94, p. 309 (B. Kapossy & R. Whatmore, eds. 2008).]

The U.S. Government's power over immigration was inherent in the nature of the new nation, and not required to be specified in the Constitution. As the Supreme Court itself has ruled:

> [I]t is an "'accepted maxim of international law, that every sovereign nation has the power, as **inherent in sovereignty**, and essential to self-preservation, to forbid the entrance of foreigners within its dominions.'" [Arizona v. United States, 567 U.S. 387, 422 (Scalia, J., dissenting), citing Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893) (emphasis added).]

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[10] *See, e.g.,* Brief for the United States, Arizona v. United States, Supreme Court No. 11-182 (Mar. 2012) at 13 ("Under the Constitution, the National Government has **plenary authority** to admit aliens to this country, to prescribe the terms under which they may remain, and if necessary, to remove them." (emphasis added)).

It is the political branches, and especially the President of the United States, who exercises this power on behalf of the national government. Confirming that fact is a long string of presidents from both political parties have exercised broad authority over decisions to exclude aliens, including President Carter's Executive Order 12172 (Nov. 26, 1979), President Reagan's Proclamation No. 4865 (Sept. 29, 1981), President Reagan's Proclamation No. 5377 (Oct. 4, 1985), and President Obama's Proclamation No. 8697 (Aug. 4, 2011). *See* Gov't Br. at 30-31 n.3.[11]

V. The Preliminary Injunction Is Wholly Reliant on a Vacated Opinion of this Court.

The temporary restraining order issued by the district court below on October 17, 2017, is entirely derivative of a June 12, 2017 opinion of this Court, which subsequently was vacated on November 2, 2017. *See* Hawaii v. Trump, 2017 U.S. App. LEXIS 21956 (9th Cir. Nov. 2, 2017) ("In view of the Supreme Court order dated October 24, 2017, the court's opinion filed June 12, 2017, is vacated…."). Yet the district court cited that now-vacated opinion 37 times, relying on it for everything from the standing of plaintiffs to characterizations of

[11] *See also* "A Legal Analysis of New Proposals to Limit Immigration from Muslim Countries into the United States," USJF Legal Policy Paper (Feb. 12, 2016) at 2-4.

irreparable harms to the plaintiffs. *See, e.g.*, Hawaii at *13 ("a precondition that the Ninth Circuit determined must be satisfied") and *34 ("binding precedent").

The opening brief of the Government, filed the same day that the order of vacatur was issued, pointed out the fact that this opinion had been vacated. *See, e.g.*, Gov't Br. at 20. Nevertheless, Hawaii's answering brief attempts to revive this Court's June 12 opinion: "Although this panel's prior opinion was vacated because of mootness, the Supreme Court 'express[ed] no view on the merits,' *Hawaii*, 2017 WL 4782860, at *1, and the opinion therefore retains 'informational and **perhaps** even persuasive or **precedential** value….'" Hawaii Br. at 13 n.3 (emphasis added).

Hawaii's attempt at rehabilitating the vacated decision would lead this Court into error. At most, a vacated opinion could be persuasive. But this Court has consistently held that vacated opinions are not binding precedents. *See*, *e.g.*, Frank v. United Airlines, Inc., 216 F.3d 845, 862-63 (9th Cir. 2000) (O'Scanlain, J., concurring in part) (noting that a vacated opinion "is utterly devoid of legal force"); O'Connor v. Donaldson, 422 U.S. 563, 577 n.12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect…."); Durning v. Citibank,

N.A., 950 F.2d 1419, 1424 n.2 (9th Cir. 1991) ("a decision that has been *vacated* has no precedential authority whatsoever."). The district court's description of the decision as "binding" is flat wrong. *See* Hawaii at *34.

To a much lesser degree, the district court cited this Court's opinion in Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017). Hawaii asserts that that decision "remains binding precedent." Hawaii Br. at 13 n.3. Insofar as the Government did not petition for review of that decision, that may be so as a technical matter, but Washington certainly should be treated by this Court as a weak precedent. First, the litigation based on the first Executive Order was mooted during the litigation, and Supreme Court review was not pursued when the second Executive Order replaced the first. Second, a significant number of members of this Court strongly disagreed with the panel's rushed opinion on a temporary restraining order, believing it to contain serious flaws, and believing that the opinion should be vacated:

> We should have exercised that discretion [to vacate the panel opinion] in this case because the panel made a **fundamental error**. It **neglected or overlooked critical cases by the Supreme Court and by our court** making clear that when we are reviewing decisions about who may be admitted into the United States, we must defer to the judgment of the political branches. That does not mean that we have no power of judicial review at all, but it does mean that our authority to second guess or to probe the decisions of

those branches is carefully circumscribed. **The panel's analysis conflicts irreconcilably with our prior cases**. We had an obligation to vacate the panel's opinion in order to resolve that conflict and to provide consistent guidance to district courts and future panels of this court. [Washington v. Trump, 858 F.3d 1168, 1177-78 (9th Cir. Mar. 17, 2017) (footnotes omitted) (Bybee, J., joined by Kozinski, Callahan, Bea, and Ikuta, dissenting from denial of reconsideration *en banc*) (emphasis added).]

VI. The District Court Opinion Completely Ignored President Trump's Focus on Protecting the American People from "Public-Safety" Threats Posed by Immigrants from the Designated Countries.

As revealed by its Title, the President's September Proclamation addressed two threats to the nation's security: "Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by **[i] Terrorists or [ii] Other Public-Safety Threats**." (Emphasis added.) Thoroughly discussing both of these threats, the Proclamation explained how the new immigration vetting would address the "public-safety" risk to Americans, having mentioned "public safety" no fewer than 28 times.

The district court opinion virtually ignored the Proclamation's second purpose. Indeed, other than the words "public safety" appearing in the three places where the Proclamation's title was referenced and quoted from (*see* Hawaii at *14, *17, *49) and one reference in passing to current restrictions (*id.* at *39), the court's lone discussion of safety was its assertion that:

> the categorical restrictions on entire populations of men, women, and children, based upon nationality, are a poor fit for the issues regarding the sharing of "public-safety and terrorism-related information" that the President identifies. [*Id.* at *39.]

Even then, the district court offered nothing in support of its "poor fit" conclusion, simply rejecting out of hand the views of the U.S. Department of State, the U.S. Department of Homeland Security, and the President of the United States. The district court had no regard for the view that the countries subject to its preliminary injunction (Chad, Iran, Libya, Syria, Yemen, and Somalia) are countries identified as having "'inadequate' identity-management protocols, information-sharing practices, and risk factors." Proclamation, § 1(g). Nor does the court give any credit to the Trump administration for having conducted:

> a **worldwide review** of whether, and if so what, additional information would be needed from each foreign country to **assess** adequately whether their nationals seeking to enter the United States pose a **security or safety threat**. This was the **first such review** of its kind in United States history. [Proclamation, Introduction (emphasis added).]

One cannot help but conclude that Judge Watson rendered a political[12] decision, seeking to preserve the policies of President Trump's predecessor, his Harvard Law School classmate Barack Obama, who appointed him to the district branch, blithely averring that:

> Defendants … are not likely harmed by having to adhere to immigration procedures that have **been in place for years**…. [Hawaii at *47 (emphasis added).]

"Not likely harmed?" This is an astounding statement. One is led to believe that Judge Watson's politics make him completely oblivious to the "public-safety" threat posed by allowing immigrants into the United States without adequate confidence of their law-abiding nature. Judge Watson is terribly wrong, as evidenced by even a brief review of the consequences of allowing unvetted immigration from certain Muslim countries into the West. The policies that Judge Watson embraces have littered other nations with victims of violence and sexual abuse, and now endanger Americans, particularly women

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[12] Judge Derrick Kahala Watson, a native of Hawaii, issued his decision from the U.S. District Court for the State of Hawai'i. However, the name of the State of Hawaii is Hawaii. *See* Admission Act, 73 STAT. 4. It appears that in recent years, some have come to urge that the State of Hawaii be renamed as "Hawai'i" are part of a movement to reassert a cultural spelling over what was legislated by Congress. In renaming the court to which he was appointed, Judge Watson apparently is part of this movement, which reasonably could be described as "political correctness."

and children. The threat posed by uncontrolled immigration from Muslim countries into Western countries is severe and growing, yet the establishment power structure in the United States resists change.

The district court opinion did not take seriously that there are threats posed by certain immigrants from Muslim majority countries. Hawaii at *36-39. In 2015, in Mapleton, North Dakota, a Muslim immigrant apparently from Somalia beat and raped a woman working at a gas station while shouting Allahu Akbar ("God is the Greatest" in Arabic). He was charged with rape, kidnapping, assault, and terrorizing. *See* KVLY 11 Valley News Live Report (Fargo, N.D.).[13] *See also* L. Hohmann, "Move Over Europe: Muslims 'Raping U.S. Women,'" World Net Daily (Mar. 21, 2016) detailing a long list of rapes by Somalis, Moroccans, and others.

Actually, a persuasive argument could be made that the Proclamation should apply to more countries. For example, on September 24, 2017, a 25-year-old male who immigrated to the United States from Sudan, Emanuel Kidega Samson, opened fire at the Burnette Chapel Church of Christ in Antioch,

[13] *See* https://www.youtube.com/watch?v=n8iNJzy0e6w.

Tennessee, killing and maiming parishioners.[14] The person who killed eight people in New York in the name of the Islamic State, Sayfullo Saipov, was an immigrant from Uzbekistan.[15] In Colorado Springs, Colorado, police arrested five Iraqi men for a "horrific" sexual assault on a woman. M. Steiner & R.M. Handy, "5 Iraqis arrested in connection with Springs sexual assault," The Gazette (Aug. 14, 2012).

The most comprehensive list of Muslim attacks worldwide appears to be maintained by a website, TheReligionOfPeace.com. That listing now identifies 158 Americans killed in 53 separate acts of deadly Islamic terror or Islam-related honor killings in the United States since 9/11 when 2,996 persons were killed by radical Muslims.[16] The district court injunction allows poorly vetted or even unvetted immigration from the six countries covered in the Proclamation, which would open the country to the type of threat that exists worldwide. Indeed, in

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[14] *See* "Deadly Tennessee church shooting," Fox News (Sept. 24, 2017).

[15] *See* "NY attack suspect faces expanded 22-count indictment," Yahoo News (Nov. 21, 2017).

[16] *See* Islamic Terror Attacks on American Soil, www.thereligionofpeace.com (viewed November 22, 2017).

just the last 30 days, worldwide there have been 119 Islamic attacks in 21 countries in which 1,346 people were killed and 913 injured.[17]

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

Respectfully submitted,

/s/ Herbert W. Titus

JOSEPH W. MILLER
LAW OFFICES OF JOSEPH MILLER, LLC
P.O. Box 83440
Fairbanks, AK 99708
Co-Counsel for Amici Curiae
Restoring Liberty Action Committee
and U.S. Justice Foundation

*HERBERT W. TITUS
WILLIAM J. OLSON
ROBERT J. OLSON
JEREMIAH L. MORGAN
Attorneys for Amici Curiae
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, VA 22180-5615
(703) 356-5070

*Attorney of record

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[17] *See* "List of Killings in the Name of Islam: Last 30 Days," www.thereligionofpeace.com (viewed November 22, 2017).

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Citizens United, *et al*. in Support of Defendants-Appellants and Reversal complies with the limitation set forth by Fed. R. App. P. 29(a)(5), because this brief contains 6,052 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 18.0.0.200 in 14-point CG Times.

/s/ Herbert W. Titus

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Herbert W. Titus
Attorney for *Amici Curiae*
Dated: November 22, 2017

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Citizens United, *et al.*, in Support of Defendants-Appellants and Reversal was made, this 22nd day of November 2017, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

/s/ Herbert W. Titus

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Herbert W. Titus
Attorney for *Amici Curiae*