UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HAMEED KHALID DARWEESH, et al., on behalf of themselves and others similarly situated,	:	
Petitioners,	:	No. 17-cv-00480 (CBA)
v.	:	**ECF CASE**
DONALD TRUMP, President of the United States, et al.,	:	**Electronically Filed**
Respondents.	:	

BRIEF FOR *AMICUS CURIAE* HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Harvard Immigration and Refugee Clinical Program ("HIRC") is a clinical program at Harvard Law School that is dedicated to the representation of individuals applying for U.S. asylum and related protections, as well as the representation of individuals who have survived domestic violence and other crimes and are seeking avoidance of forced removal in immigration proceedings. HIRC was founded in 1984 by Clinical Professor Deborah Anker. Among its clients are victims of human rights abuses applying for U.S. refugee protection from all over the world, including from the countries referenced in the President's January 27, 2017 Executive Order at issue in this litigation. *See* Exec. Order 13769, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977 (the "Executive Order" or "EO"). Accordingly, HIRC and its clients have a direct interest in the outcome of this action and respectfully submit this brief in support of Petitioners.

PRELIMINARY STATEMENT

On January 27, 2017, the President signed a wide-ranging Executive Order that prohibited travelers from seven countries from entering the United States for 90 days; suspended the U.S. Refugee Admissions Program for 120 days; indefinitely suspended admission of Syrian refugees; and indicated that "additional countries" may be "recommended for similar treatment." President Trump signed the Executive Order only seven days after taking office, apparently after very limited assessment of the practical challenges posed by the most far-reaching immigration ban ever enacted by executive action.

The Executive Order purported to derive its authority solely from an act of Congress: Section 212(f) of the Immigration and Nationality Act ("INA"), which permits the President to "suspend the entry of all aliens or any class of aliens" upon a finding that "the entry of any aliens or any class of aliens into the United States would be detrimental to the interests of the United

States." 8 U.S.C. § 1182(f).

But Section 212(f) does not grant the President the far-reaching authority the Executive Order endeavors to exercise. For example, the INA expressly forbids discrimination based on national origin in processing immigrant visa applications—hence necessarily foreclosing that same type of discrimination at the border. *See* 8 U.S.C. § 1152(a)(1)(A). The INA and international treaty obligations likewise guarantee immigrants who reach the U.S. border protection against return to a country where they fear persecution or torture—a right the Executive Order denies. *See* 8 U.S.C. § 1158(a)(1). And, perhaps most fundamentally, the Executive Order relies on a reading of Section 212(f) that is so broad as to raise serious constitutional concerns, as multiple courts have now held. *See Washington v. Trump*, No. 17-35105, 2017 WL 526497, at *10 (9th Cir. Feb. 9, 2017) (per curiam); *Aziz v. Trump*, No. 117-CV-116LMBTCB, 2017 WL 580855, at *8 (E.D. Va. Feb. 13, 2017). Under the constitutional avoidance doctrine, Section 212(f) should not be interpreted in a way that would raise the prospects of constitutional violations. In short, Section 212(f) is not a blank check, and the Executive Order far exceeds its bounds.

This Court can enjoin the Executive Order as a matter of statutory construction for at least the following reasons:

First, the Executive Order's interpretation of Section 212(f) risks bringing that statutory provision in conflict with the First Amendment's Establishment Clause and the Fifth Amendment's Equal Protection and Due Process Clauses. The text of the Executive Order evidences an unlawful intent to discriminate against Muslims and to disfavor the religion of Islam. The Administration's contemporaneous public statements and other contextual indicia further reinforce that the Executive Order was signed with unconstitutional discriminatory

purpose. The text of the Executive Order also raises constitutional questions by depriving lawful permanent residents and other visa holders of the right to travel abroad and re-enter the country without any notice or opportunity to respond. Consistent with the canon that statutes should be construed to avoid constitutional questions, this Court should not interpret Section 212(f) to authorize the Executive Order.

Second, the Executive Order would exercise the general power authorized by Section 212(f) in a way that conflicts with other provisions of the INA that specifically circumscribe the President's power, including Sections 202(a), 208, and 241.

Section 202(a) expressly prohibits discrimination on the basis of nationality and place of birth in the issuance of immigrant visas. 8 U.S.C. § 1152(a)(1)(A). The Executive Order violates this prohibition because it bars entry of individuals with valid immigrant visas and nonimmigrant visas from seven countries and provides that the President may indefinitely bar entry of individuals from other countries. EO § 3(c), (e)-(f).

Section 208 addresses the authority, conditions, and procedures of asylum applications, specifically allowing that any alien who is "physically present in the United States or who arrives in the United States . . . irrespective of such alien's status, may apply for asylum." 8 U.S.C. § 1158(a). It also enumerates specific circumstances when an applicant is barred from asylum, such as when an individual is determined to be a foreign terrorist. *Id.* The Executive Order conflicts with the plain language of Section 208 because it suspends the entry of nonimmigrants and immigrants into the United States from certain countries despite their physical presence within the United States—and thus attempts to foreclose access to the asylum application process for those individuals.

Section 241, in turn, prohibits the Secretary of Homeland Security from removing a

foreign national to a country if the Secretary "decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."[1] 8 U.S.C. § 1231(b)(3)(A). Applying the Executive Order in a manner that conflicts with Section 241 would violate the United States' mandatory *nonrefoulement* obligations under domestic and international law, putting individuals at risk of being returned to countries where their lives or freedom are at risk.

Lastly, the Executive Order's exercise of the general authority under Section 212(f) conflicts with Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), which also circumscribes the President's power. Section 2242 provides that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-822 (1998) (reprinted in 8 U.S.C. § 1231, note (2012)). Application of the Executive Order to require that an individual return to a country where he or she faces the risk of torture would violate Section 2242 of FARRA. Well-established canons of statutory construction require that the specific terms of Section 2242 of FARRA be read as constraining the more general authority under Section 212(f).

[1] Although Section 241 refers to the Attorney General, on March 1, 2003, the Department of Homeland Security assumed responsibility for removal programs. Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441(2), 442(a), 116 Stat. 2192–2194; *see also* 6 U.S.C. §§ 251(2), 252(a) (2012). The Supreme Court has interpreted this as transferring the Attorney General's discretion in Section 241 to the Secretary of Homeland Security. *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 338 n.1 (2005) ("Accordingly, the discretion formerly vested in the Attorney General [in Section 241(b)(2)] is now vested in the Secretary of Homeland Security."). As such, while the Attorney General is referenced in Section 241, it is now the Secretary of Homeland Security who is the relevant actor for the purposes of Section 241.

ARGUMENT

I. SECTION 212(f) OF THE INA DOES NOT AUTHORIZE THE PRESIDENT TO SUSPEND ENTRY ON THE BASIS OF RELIGION AND NATIONAL ORIGIN, OR DEPRIVE INDIVIDUALS OF PROTECTED INTERESTS WITHOUT DUE PROCESS

The Executive Order exceeds the authority of Section 212(f) of the INA by applying it in a manner that discriminates on the basis of religion and national origin and deprives individuals of protected interests without due process. Section 212(f) permits the President to "suspend the entry of all aliens or any class of aliens," but only upon a finding 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." 8 U.S.C. § 1182(f). The Executive Order has invoked Section 212(f)—for the first time since its enactment—to discriminate broadly on the basis of religion and national origin, and restrict travel and re-entry rights of lawful permanent residents, immigrant visa holders, and non-immigrant visa holders from seven different countries without any notice or opportunity to respond. Whether the statute permits a "class of aliens" to be defined and treated in this manner raises significant questions under the Establishment Clause of the First Amendment, and the Equal Protection Clause and Due Process Clause of the Fifth Amendment. It is well established that courts must construe statutes to avoid conflicts with the Constitution—and therefore should not interpret Section 212(f) to authorize the President to define a "class of aliens" by reference to religion or national origin.

A. The Constitutional Avoidance Canon of Statutory Construction

Courts must construe statutes to avoid interpretations that "would raise serious constitutional problems." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). When confronted with statutory ambiguity, a court must choose the interpretation that avoids this type of problem. *NLRB v. Catholic Bishop of Chi.*, 440

U.S. 490, 509 & n.1 (1979). Firmly rooted in the separation of powers and institutional comity jurisprudence of the Supreme Court, this "avoidance canon" has achieved "cardinal principle" status and "is beyond debate." *Edward J. DeBartolo Corp*., 485 U.S. at 575.

The Supreme Court has long applied constitutional avoidance principles to immigration statutes. For example, in the context of immigrant detention, the Court has imposed a "reasonable time" limitation on the Attorney General's discretion to detain removable foreign nationals based on a conclusion that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Similarly, in the context of *habeas corpus* review for "deportable aliens," the Court has avoided constructions of INA amendments that would withdraw judicial review of *habeas corpus* on the grounds that such interpretations would raise serious constitutional questions under the Suspension Clause. *INS v. St. Cyr*, 533 U.S. 289, 304-05 (2001).

The same principles counsel against statutory constructions that may conflict with constitutional protections against discrimination, as the Supreme Court held in *Jean v. Nelson*, 472 U.S. 846 (1985). *Jean* concerned a challenge to the Attorney General's use of his authority under Section 212(d)(5)(A) of the INA to grant parole to undocumented immigrants "in his discretion." *Id.* at 848. The plaintiffs, a class of Haitian refugees, claimed that denials of parole on the basis of their race and national origin violated their equal protection rights. *Id.* at 849. Reversing the Eleventh Circuit, the Supreme Court held that the statute and accompanying regulations should have been interpreted to provide "nondiscriminatory parole consideration," thus obviating constitutional questions. *Id.* at 855-56.

Consistent with the constitutional avoidance canon of statutory construction—and its consistent application in the field of the immigration law—this Court should avoid an

interpretation of "class of aliens" that purports to authorize the President to discriminate on the basis of religion or national origin.

B. The Executive Order's Interpretation of Section 212(f) Raises Significant Constitutional Questions

The text and context of the Executive Order raise, at a minimum, significant questions under the Establishment, Equal Protection, and Due Process Clauses. *See Washington v. Trump*, 2017 WL 526497, at *10 ("The States' claims [challenging the Executive Order on these grounds] raise serious allegations and present significant constitutional questions.").

First, the text of the Executive Order indicates that the likely purpose and effect of its definition of "any class of aliens" is to discriminate on the basis of religion. Section 3(c) of the Executive Order suspends entry of individuals from seven majority-Muslim countries on the premise that their entry would be detrimental to the interests of the United States. EO § 3(c). At the same time, Section 5(b) of the Executive Order (issued pursuant to Section 207 of the INA) prioritizes refugee claims for individuals claiming "religious-based persecution," but only if "the religion of the individual is a minority religion in the individual's country of nationality."[2] EO § 5(b). Read together, these two provisions have the effect of discriminating against Muslims and disfavoring the religion of Islam.

It is an understatement to say that the Executive Order's likely purpose and effect of discriminating against Muslims raises significant constitutional questions under the Establishment and Equal Protection Clauses. *See*, *e.g.*, *Zadvydas*, 533 U.S. at 693 ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); *Larson v. Valente*, 456 U.S. 228,

[2] No such requirement concerning preference given to minority religions is reflected in either domestic refugee law or international refugee law.

244 (1982) (under the Establishment Clause, "one religious denomination cannot be officially preferred over another"); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (under the Equal Protection Clause, classifications based on religion are inherently suspect and subject to strict scrutiny).

Moreover, public statements from the Trump Administration further demonstrate that the Executive Order was intended to serve as a "Muslim ban." As early as December 2015, candidate Trump called for a "total and complete shutdown of Muslims entering the United States,"[3] a promise he reiterated in June, July, and August of 2016.[4] Since then, the President's advisors have suggested that they were instructed to draft an order that would "legally" accomplish that purpose: Rudy Giuliani, former Mayor of New York City and advisor to the President, told reporters that "when [President Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"[5]

Such statements by candidate, and then President, Trump are direct and compelling evidence of discriminatory intent and may be properly considered in evaluating the constitutional basis of the Executive Order.[6] *Washington v. Trump*, 2017 WL 526497, at *10 ("It is well

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[3] Donald J. Trump, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration.

[4] Uri Friedman, *Six Answers to the Question Behind Donald Trump's Immigration Ban*, THE ATLANTIC (June 16, 2016), http://www.theatlantic.com/international/archive/2016/06/trump-muslims-ban-orlando/486950/; *see also* Jenna Johnson, *Donald Trump is Expanding his Muslim ban, not rolling it back*, WASH. POST (Jul. 24, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/07/24/donald-trump-is-expanding-his-muslim-ban-not-rolling-it-back/?utm_term=.699b07b32917; Daniel White, *Read Donald Trump's Ohio Speech on Immigration and Terrorism*, TIME (Aug. 15, 2016), http://time.com/4453110/donald-trump-national-security-immigration-terrorism-speech/.

[5] Amy B. Wang, *Trump asked for 'Muslim ban,' Giuliani says – and ordered a commission to do it 'legally'*, WASH. POST (Jan. 29, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-.

[6] *See also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) ("The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. . . . Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."); *Larson v. Valente*, 456 U.S. 228, 254-55 (1982) (holding that a facially neutral statute

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established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims."). As Judge Brinkema of the United States District Court for the Eastern District of Virginia recently explained after evaluating this backdrop:

> The "specific sequence of events" leading to the adoption of the EO bolsters the . . . argument that the EO was not motivated by rational national security concerns. . . . The evidence in this record focuses on the president's statements about a 'Muslim ban' and the link Giuliani established between those statements and the EO.

Aziz, 2017 WL 580855, at *9.

Second, the Executive Order defines "class of aliens" in a manner that discriminates on the basis of nationality. It bars the entry of all individuals, including valid visa and green card holders, from seven named countries—without reference to any other criteria for their exclusion.[7] Defining a class in this manner raises significant constitutional questions about impermissible classifications under the Equal Protection Clause. *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (classifications based on national origin are inherently suspect and subject to strict scrutiny).

Third, the Executive Order defines a "class of aliens" so as to include lawful permanent residents as well as immigrant and non-immigrant visa holders from the specified countries. But, as the Ninth Circuit recently explained, these individuals have a constitutionally protected liberty

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violated the Establishment Clause in light of legislative history demonstrating an intent to apply regulations only to minority religions); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) (explaining that circumstantial evidence of intent, including the historical background of the decision and statements by decisionmakers, may be considered in evaluating whether a governmental action was motivated by a discriminatory purpose).

[7] Although White House counsel's "authoritative guidance" on the Executive Order states that it does not apply to lawful permanent residents, courts have questioned its authority and recognized that this interpretation does not merit judicial notice in this context: "[I]n light of the Government's shifting interpretations of the Executive Order, we cannot say that the current interpretation by White House counsel, even if authoritative and binding, will persist past the immediate stage of these proceedings." *Washington v. Trump*, 2017 WL 526497, at *8.

interest in travel abroad that the government cannot restrict without due process. *See Washington v. Trump*, 2017 WL 526497, at *9 (explaining that constitutionally protected liberty interest in travel extends to "lawful permanent residents . . . [;] persons who are in the United States, even if unlawfully; non-immigrant visaholders who have been in the United States but temporarily departed or wish to temporarily depart; refugees; and applicants who have a relationship with a U.S. resident or an institution that might have rights of its own to assert. . . . [and] citizens who have an interest in specific non-citizens' ability to travel to the United States.") (citations omitted); *see also Zadvydas*, 533 U.S. at 693 (non-citizens have due process rights); *Landon v. Plasencia*, 459 U.S. 21, 33-34 (1982) (certain individuals seeking to re-enter the United States have due process rights); *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958) (right to travel abroad is a constitutionally protected liberty interest). The Executive Order effectively strips these individuals of the right to travel abroad (by preventing them from re-entering the country) without an opportunity to be heard, and thus relies on an interpretation of the grant of authority under Section 212(f) that is so broad as to raise serious Due Process concerns. *See* EO § 3(c); *see also Washington v. Trump*, No. 2017 WL 526497, at *8-9.

C. To Avoid Constitutional Questions, This Court Should Interpret Section 212(f) Consistent With Its Historic Application

Although the authorities conferred by Section 212(f) are hardly new, the Executive Order's interpretation of that provision not only raises constitutional questions but departs from historic practice. Past executive orders issued under Section 212(f) have barred entry only to narrow classes of individuals—and only for tailored purposes. Notably, none has interpreted the statutory phrase "any class of aliens" to authorize a sweeping ban against individuals from a particular religion, individuals from a particular country, or legal permanent residents. *Id.* at 1; *see also* Kate M. Manuel, Cong. Research Serv., R44743, *Executive Authority to Exclude Aliens:*

In Brief 1, 6-10 (Jan. 23, 2017) (hereinafter "Manuel") (not counting EO 13757, 82 Fed. Reg. 1, 6-10 (Jan. 3, 2017), which amended EO 13694, 80 Fed. Reg. 18077 (Apr. 2, 2015)). This history suggests that prior presidents have understood Section 212(f) to provide a far more limited grant of authority than the Executive Order invokes.

Presidents have issued proclamations pursuant to Section 212(f) more than 43 times since 1981. *Id.* Although each of these proclamations has "differed in terms of which and how many aliens are subject to exclusion," each one defined the proscribed "class of aliens" by reference to a set of particularized criteria that reflect a factual determination that their entry would be detrimental to the United States. *Id.* at 6.

The State Department advises that the President can suspend entry under Section 212(f) on the basis of a troublesome "affiliation" or "objectionable conduct." U.S. Dep't of State, *Foreign Affairs Manual*, 9 FAM 302.14-3(B)(1); *see also* Manuel at 2-3. Historically, Presidents have acted within the bounds of this guidance. Presidents have thus occasionally invoked Section 212(f) to suspend entry to individuals closely affiliated with a specific government hostile to the United States. *See* Manuel at 6-10. For example, President Clinton barred the entry of members of the military junta in Sierra Leone (or their family members)[8] and of the Sudanese armed forces.[9] Similarly, as tensions with Cuba re-escalated in the 1980s, President Reagan invoked Section 212(f) authority to bar the entry of members of the Cuban government.[10]

Presidents have also excluded from entry individuals engaged in particular objectionable conduct, such as crimes against humanity or activities that impede democracy.[11] Presidents

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[8] Proclamation 7062, 63 Fed. Reg. 2871 (Jan. 16, 1998).

[9] Proclamation 6958, 61 Fed. Reg. 60007 (Nov. 26, 1996).

[10] Proclamation 5377, 50 Fed. Reg. 41329 (Oct. 10, 1985).

[11] *See, e.g.*, EO 13606, 77 Fed. Reg. 24571 (Apr. 24, 2012) (barring entry of aliens engaged in certain practices *(cont'd)*

George W. Bush, Clinton, and Obama invoked Section 212(f) to bar the entry of individuals who had formulated or benefited from policies impeding the former Zaire's transition to democracy,[12] who were involved in undermining or impeding the transition to democracy in Belarus,[13] and who had participated in serious human rights and humanitarian law violations.[14] Often, Presidents issued these executive orders and proclamations in conjunction with sanctions.[15]

Never before, however, has an executive order—issued pursuant to Section 212(f) or any other section of the INA—been used to bar a class of individuals based on a religious affiliation.[16] Nor has any executive order issued pursuant to Section 212(f) suspended the entry of all foreign nationals from certain nations without reference to other limiting criteria. Nor has any executive order issued pursuant to Section 212(f) swept so broad as to include within its ambit legal permanent residents and other valid visa holders. Manuel, at 6-10 (listing all prior executive orders under Section 212(f)). When it comes to constitutional questions, the Executive Order stands alone. Consistent with the avoidance canon, this Court should reject its constitutionally fraught interpretation of "any class of aliens" under Section 212(f).

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related to the "Grave Human Rights Abuses by the Governments of Iran and Syria via Information Technology"); Proclamation 8693 (barring entry of "aliens subject to United Nation Security Council travel bans and international emergency economic powers act sanctions"); *see also* Manuel at 6-10.

12 Proclamation 6574, 58 Fed. Reg. 34209 (June 21, 1993).

13 Proclamation 8015, 71 Fed. Reg. 28541 (May 12, 2006).

14 Proclamation 8697, 76 Fed. Reg. 49277 (Aug. 5, 2011).

15 *See*, *e.g.*, EO 13608, 77 Fed. Reg. 26409 (May 1, 2012) (barring entry of "Foreign Sanctions Evaders with Respect to Iran and Syria"); EO 13687, 80 Fed. Reg. 819 (Jan. 2, 2015) (barring entry of North Korean government officials as part of a larger sanctions program); *see also* Manuel at 1.

16 Manuel at 6 ("In no case to date . . . has the Executive purported to take certain types of action, such as barring all aliens from entering the United States for an extended period of time or explicitly distinguishing between categories of aliens based on their religion.").

II. THE PRESIDENT'S AUTHORITY UNDER SECTION 212(f) IS CIRCUMSCRIBED BY OTHER PROVISIONS OF THE INA

A. The Non-Discrimination Provision of the INA Forecloses the Executive Order

The Executive Order violates Section 202(a)(1)(A) of the INA, which expressly prohibits discrimination based on nationality and place of birth in the issuance of immigrant visas. *See* 8 U.S.C. § 1152(a)(1)(A). Congress amended the INA to include this non-discrimination provision in 1965, thirteen years after enacting Section 212(f). *See* 89 Pub. L. No. 89-236, 79 Stat. 911 (1965); *see also Olsen v. Albright*, 990 F. Supp. 31, 37 (D.D.C. 1997) (discussing enactment of the 1965 Amendments and noting their superseding effect on prior INA provisions).[17] Section 202(a)(1)(A) provides:

> Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

8 U.S.C. § 1152(a)(1)(A) (emphasis added). There is no ambiguity in the language of Section 202(a)(1)(A); it must therefore be given its plain meaning. *Puello v. Bureau of Citizenship & Immigration Servs.*, 511 F.3d 324, 327 (2d Cir. 2007).

The Executive Order discriminates on the basis of nationality in the issuance of visas and has had an enormous effect: Some estimate that the Department of Homeland Security revoked

[17] INA Section 202, introduced as part of the Immigration Act of 1965, was designed to be a direct repudiation of the discriminatory national quota system of 1952 and previous years. As Senator Edward M. Kennedy explained, "[t]he principal purpose of the bill . . . is to repeal the national origin quota provisions of the Immigration and Nationality Act, and to substitute a new system for the selection of immigrants to the United States." Sen. Edward M. Kennedy of the S. Comm. on the Judiciary, *Report: Amending the Immigration and Nationality Act, and for Other Purposes*, accompanying H.R. 2580 at 10 (1965). President Lyndon B. Johnson, signing the bill at the foot of the Statute of Liberty in 1965, stated: "for over four decades the immigration policy of the United States has been twisted and has been distorted by the harsh injustice of the national origins quota system . . . . This system violated the basic principle of American democracy—the principle that values and rewards each man on the basis of his merit as a man. . . . Today, with my signature, this system is abolished." Remarks at the Signing of the Immigration Bill, Liberty Island, New York, 546 Pub. Papers 1037, 1038 (Oct. 3, 1965) (emphasis added); *see also Olsen v. Albright*, 990 F. Supp. 31, 37 (D.D.C. 1997) (discussing enactment of the 1965 Amendments and noting their superseding effect on prior INA provisions); Manuel at 1.

between 60,000 and 100,000 visas (including immigrant visas) held by individuals from the seven countries identified in the Executive Order within days of the President's action.[18] Moreover, even had the government processed visa applications in a manner that did not discriminate based on nationality or place of birth (thus adhering to the letter of Section 202(a)(1)(A)), but individuals with valid visas were nonetheless denied entry due to their nationality, their visas will be rendered worthless.

Fundamental principles of statutory construction compel the conclusion that Section 202(a)(1)(A) circumscribes the President's power under Section 212(f):

First, "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Hillman v. Maretta*, 133 S.Ct. 1943, 1953 (2013) (alteration in original) (citing *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)). Here, Section 202(a)(1)(A) expressly excludes several provisions of the INA from its nondiscrimination requirements, but notably not the President's authority under Section 212(f).

Second, when interpreting statutory provisions, "[s]pecific terms prevail over the general" in the event of a conflict. *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) ("'However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" (citation omitted)). In this case, Section 202(a)(1)(A) provides the "specific term" (namely, a prohibition on discrimination in the immigrant visa application process), whereas Section 212(f) provides a "general" grant of authority to the Executive to bar entry of classes of foreign nationals where

[18] *Justice Dept. lawyer says 100,000 visas revoked under travel ban; State Dept. says about 60,000*, WASH. POST (Feb. 3, 2017), https://www.washingtonpost.com/local/public-safety/government-reveals-over-100000-visas-revoked-due-to-travel-ban/2017/02/03/7d529eec-ea2c-11e6-b82f-687d6e6a3e7c_story.html?utm_term=.9483c84f3c60.

their immigration "would be detrimental to the interests of the United States." Thus, to the extent there is a conflict between the two provisions, Section 202(a)(1)(A) must supersede Section 212(f).

Lastly, the Court, "in fulfilling [its] responsibility in interpreting legislation, must not be guided by a single sentence or member of a sentence, but (should) look to the provisions of the whole law, and to its object and policy." *Richards v. United States*, 369 U.S. 1, 11 (1962) (citation omitted). As explained above, interpreting Section 212(f) to permit the President to bar entry to immigrant visa holders categorically based on nationality, place of birth, or place of residence would render their visas void—and the nondiscriminatory application process meaningless. To avoid this result, which is at odds with the "object and policy" of the INA as a whole, the grant of authority in Section 212(f) must be limited by the nondiscrimination principles of Section 202(a)(1)(A).

B. The Executive Order's Exercise of Authority Under Section 212(f) Impermissibly Conflicts with Sections 208 and 241 of the INA, As Well As Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA)

The Executive Order has interpreted the grant of authority under Section 212(f) in a manner that conflicts with Sections 208 and 241 of INA and Section 2242 of FARRA.

1. The Executive Order Conflicts With Section 208

Section 208 provides that "[a]ny alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status, may apply for asylum." 8 U.S.C. § 1158(a)(1).[19] This statutory right to apply for asylum codifies the United States

[19] Congress set forth provisions regarding individuals' rights to apply for asylum as part of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 107. Congress endeavored to make the asylum process available for individuals within the United States or at its borders. Deborah Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 Va. J. Int'l L. 1, 3, 34 (1987).

international treaty obligations and extends both to foreign nationals who are already in the country and those who have reached the border but are not yet admitted.[20] *I.N.S. v. Stevic*, 467 U.S. 407, 423 n.18 (1984) ("A new § 208(a) [of the INA] directed the Attorney General to establish procedures permitting aliens either in the United States or at our borders to apply for 'asylum.'").[21] Whenever a foreign national in the custody of the Department of Homeland Security "requests asylum or withholding of removal, or expresses a fear of persecution or harm upon return to his or her country of origin or to agents thereof, [the Department of Homeland Security] shall make available the appropriate . . . forms" for asylum or withholding of removal. 8 C.F.R. §§ 208.5(a), 1208.5(a) (2016). Moreover, even if a foreign national is determined to be subject to expedited removal under Sections 212(a)(6)(C) or 212(a)(7) of INA, that individual is entitled to a "credible fear determination" if he or she "indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country." *See* 8 C.F.R. §§ 235.3(b)(4), 1235.3(b)(4)(i) (2016); 8 C.F.R. §§ 235.3(b)(1), 1235.3(b)(1) (2016) (expedited removal applicability); 8 C.F.R. § 208.30 (2016) (credible fear determinations); *see also* 8 U.S.C. §§ 1182(a)(6)(C), (a)(7).

The Executive Order would abrogate these rights by detaining and deporting certain

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[20] In 1968, by ratifying the 1967 Protocol Relating to the Status of Refugees (Protocol), the United States agreed to comply with the substantive provisions of Articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees (Convention). *See* 19 U.S.T. 6223, 6259-6276, T.I.A.S. No. 6577 (1968); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987). Through the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, Congress incorporated this country's obligations under the Protocol and Convention into federal law. "If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol]." *Cardoza Fonseca*, 480 U.S. at 436.

[21] Asylum may be granted by the Secretary of Homeland Security or the Attorney General under Section 208 if either determine that the applicant is a "refugee." 8 U.S.C. § 1158(b)(1)(A). "Refugee," as defined by Section 101 of INA, refers to "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42).

foreign nationals who reached the U.S. border without affording them the opportunity to express their fears of return or to undergo a credible fear determination.[22] *See* EO § 3(c). Accordingly, the Executive Order, by its plain terms, relies on an interpretation of Section 212(f) that would put it in conflict with Section 208(a).

2. The Executive Order Conflicts With Section 241

The Executive Order also would result in an exercise of the President's authority under Section 212(f) that conflicts with Section 241, which prohibits the Secretary of Homeland Security from removing an individual to a country if the Secretary "decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."[23] 8 U.S.C. § 1231(b)(3)(A).[24] This section provides a mandatory prohibition against return to persecution, known as *refoulement*.[25]

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[22] In addition, the operation of the Executive Order demonstrates that upon arrival, immigrants and nonimmigrants have been sent back to the countries from which they arrived, providing them no opportunity to claim asylum despite having reached the borders of the United States. *See*, *e.g.*, Joanna Walters, *Trump's Travel Ban: Stories of Those Who Were Detained This Weekend*, The Guardian (Jan. 31, 2017), https://www.theguardian.com/us-news/2017/jan/31/people-detained-airports-trump-travel-ban ("Tareq, 21, and Ammar, 19, citizens of Yemen, were handcuffed at the US airport after their long flight and two hours later were put on another plane heading back the way they had come.").

[23] *See supra* note 1.

[24] Section 241 had been codified in the original INA in 1952 as Section 243, but it provided the Attorney General with the discretion to decide whether the risk of persecution was worth withholding deportation. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 243(h), 66 Stat. 163, 214. The Refugee Act of 1980 removed that discretion, so the Attorney General could no longer return an alien to a country if a determination was made that the "alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107.

[25] *See supra* note 20. Section 241, then Section 243, codified the "Prohibition of Expulsion or Return (*Refoulement*)." *See* Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 189 U.N.T.S. at 176, *reprinted in* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 6276 (establishing a mandatory non-refoulement provision that later inspired the change made to Section 243(h) removing the Attorney General's discretion); *see also INS v. Stevic*, 467 U.S. 407, 421 (1984) ("Section 203(e) of the Refugee Act of 1980 amended the language of § 243(h), basically conforming it to the language of Article 33 of the United Nations Protocol."). The mandatory prohibition against *refoulement* has been recognized as the "most essential component of refugee status and of asylum." U.N. High Comm'r for Refugees, *Note on Non-Refoulement* (Submitted by the High Commissioner) para. 1, U.N. Doc. EC/SCP/2 (Aug. 23, 1977), http://www.unhcr.org/en-us/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html.

The Executive Order attempts to exercise the President's authority under Section 212(f) in conflict with Section 241 because it appears to vitiate certain foreign nationals' opportunity to demonstrate that they are at risk of being returned to countries where their lives or freedom are at risk. The implementation of the Executive Order already has resulted in foreign nationals arriving in the United States and being turned back to their country of origin, without any opportunity to demonstrate that their return could threaten their lives or freedom.[26] This lack of process stands in sharp contrast to the "credible fear determinations" that are required for foreign nationals subject to expedited removal proceedings where the foreign national indicates a "fear of persecution or torture, or a fear of return to his or her country."[27] *See* 8 C.F.R. §§ 235.3(b)(1), (b)(4), 1235.3(b)(1), (b)(4)(i) (2016) (expedited removal applicability); 8 C.F.R. § 208.30 (2016) (credible fear determinations); *see also* 8 U.S.C. § 1182(a)(6)(C), (a)(7).

3. The Executive Order Conflicts With Section 2242 of FARRA

For similar reasons, the Executive Order would exercise the President's authority under Section 212(f) in a manner that conflicts with FARRA, which requires the United States to comply with the obligations imposed by the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment. *See* Pub. L. No. 105-277, § 2242(b), 112 Stat. 2681-822 (1998) (requiring regulations to be prescribed to implement the obligations of the United States under Article 3 of the Convention Against Torture). Section 2242 of FARRA provides that "[i]t shall be the policy of the United States not to expel, extradite,

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[26] *See*, *e.g.*, *supra* note 24.

[27] *Osorio v. INS*, 18 F.3d 1017 (2d Cir. 1994), demonstrates the strength of the mandatory prohibition against *refoulement*. In that case, an asylum applicant who had fled political persecution in Guatemala was arrested in Texas for entering without inspection. *Id.* at 1025. Following a deportation and asylum hearing, the Immigration Judge denied asylum and withholding of deportation. *Id.* at 1026. Reversing, the Second Circuit "determined that Osorio feared persecution on account of his political beliefs," and in finding that "[t]he overall picture reveals a pattern of persecution that is horrific, and rivalled in this hemisphere perhaps only by the pattern of persecution in El Salvador," granted the petitioner political asylum and withholding of removal. i at 1031-32.

or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-822 (1998) (reprinted in 8 U.S.C. § 1231, note (2012) (United States Policy with Respect to Involuntary Return of Persons in Danger of Subjection to Torture)). Just as the Executive Order ignores whether a foreign national being turned away is being returned to a country in contravention of Section 241 of the INA, it also does not consider whether returning foreign nationals to the country from which they came may subject them to the risk of being tortured in contravention of FARRA.[28]

4. Section 212(f) of the INA Should Not be Read as Overriding Sections 208 and 241 of INA, or Section 2242 of FARRA

Sections 208 and 241 of the INA, and Section 2242 of FARRA, necessarily constrain the President's exercise of authority under Section 212(f). First, as set forth above, where Congress explicitly enumerates certain exceptions to a general prohibition, courts cannot imply additional exceptions in the absence of evidence of a contrary legislative intent. *See supra* Part II-A. Sections 208 and 241 of the INA enumerate specific exceptions and bars. *See* 8 U.S.C. § 1158(a)(2) (enumerated exceptions limited to a safe third country agreement, a one year time limit, and a previously denied asylum application); 8 U.S.C. § 1231(b)(3)(B) (enumerated exceptions and bars limited to instances such as (for example) the foreign national being removed having previously "ordered, incited, assisted or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in

[28] *See* 8 C.F.R. §§ 235.3(b)(1), (b)(4), 1235.3(b)(1), (b)(4)(i) (2016) (providing an alien subject to expedited removal with an interview by an asylum officer where such alien "expresses a fear of torture"); 8 C.F.R. § 208.30 (2016) (credible fear determinations); *see also* 8 U.S.C. § 1182(a)(6)(C), (a)(7).

a particular social group, or political opinion").[29] Where these exceptions and bars apply, foreign nationals are no longer able to apply for asylum under Section 208 or, in some instances, are no longer subject to the mandatory prohibition against *refoulement* under Section 241. Section 212(f) is not, however, an enumerated exception to either Section 208 or 241.

Second, when reconciling conflicting statutory provisions, "[s]pecific terms prevail over the general" ones. *Fourco Glass*, 353 U.S. at 228-29 (citation omitted). Here, Sections 208 and 241 of the INA, and Section 2242 of FARRA, are specific in their grant of certain protections to asylum applicants and their dual, mandatory prohibitions against *refoulement*. Section 212(f), on the other hand, grants a general authority that the President. Specific provisions of Sections 208 and 241 of the INA and Section 2242 of FARRA should therefore prevail over any conflicting interpretation of Section 212(f).

Lastly, as set forth above, the Court, "in fulfilling [its] responsibility in interpreting legislation, must not be guided by a single sentence or member of a sentence, but (should) look to the provisions of the whole law, and to its object and policy." *Richards*, 369 U.S. at 11 (citation omitted). As explained above, interpreting Section 212(f) to permit the President to prevent immigrants at the U.S. border from applying for asylum or from at least receiving credible fear determinations would render the protections of Sections 208 and 241 of INA and Section 2242 of FARRA worthless. To avoid this result, which is at odds with the "object and policy" of the INA as a whole, the grant of authority in Section 212(f) must be limited by the

[29] Independent of the enumerated exceptions to the authority to apply for asylum, there are statutory grounds that can render an applicant ineligible for asylum. *See* 8 U.S.C. § 1158(b)(2). For instance, if the Attorney General or the Secretary of Homeland Security determine that the asylum applicant has "participated in the persecution of any person on account of race" or "there are reasonable grounds for regarding the alien as a danger to the security of the United States," the Attorney General or the Secretary may not grant asylum to the applicant. 8 U.S.C. § 1158(b)(2)(A). However, it is worth emphasizing that these statutory grounds for ineligibility require determinations by the Executive. *See id.* ("Paragraph (1) [permitting application for asylum] shall not apply to an alien if the Attorney General determines that . . . .").

principles of those sections.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that the enforcement and implementation of the Executive Order be permanently enjoined.

Dated: New York, New York
February 16, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2016, I electronically filed the foregoing BRIEF FOR *AMICUS CURIAE* HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM IN SUPPORT OF THE PETITIONERS, which constitutes service under the Court's rules.

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