

No. 17-16426

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**United States Court of Appeals**  
*for the*  
**Ninth Circuit**

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STATE OF HAWAII and ISMAIL ELSHIKH,

*Plaintiffs-Appellees,*

v.

DONALD J. TRUMP, in his official capacity as President of the United States;  
U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity  
as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in  
his official capacity as Secretary of State; and the UNITED STATES OF AMERICA,

*Defendants-Appellants.*

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APPEAL FROM THE FINAL DECISION OF THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII IN NO. 1:17-CV-00050-DKW-KSC  
(HONORABLE DERRICK KAHALA WATSON, JUDGE)

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**BRIEF OF *AMICUS CURIAE* HUMAN RIGHTS FIRST  
IN SUPPORT OF APPELLEES AND SUPPORTING AFFIRMANCE**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* Human Rights First states that it is a not-for-profit organization with no parent corporation and no publicly traded stock.

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**INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>**

This case tests the legal and constitutional validity of President Donald Trump’s Executive Order No. 13,780 (“Executive Order” or “Order”). Among other things, the Order temporarily suspends the United States Refugee Admissions Program (the “USRAP”). As a consequence, the Order also suspends the resettlement of U.S.-affiliated Iraqis eligible for admission through Priority 2 processing (“P2 processing”) under the USRAP Direct Access Program for U.S.-affiliated Iraqis (the “DAP for U.S.-affiliated Iraqis” or “DAP”), as provided for under the Refugee Crisis in Iraq Act of 2007 (the “RCIA”).

*Amicus Curiae* Human Rights First (formerly known as the Lawyers Committee for Human Rights) is a nonprofit, nonpartisan international human rights organization that has worked since 1978 to promote fundamental human rights and protect refugees’ rights. Human Rights First grounds its refugee protection work in the standards set forth in the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, the Convention Against Torture

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<sup>1</sup> No counsel for any party authored this brief in whole or in part and no party, counsel for any party, or any person other than the *Amicus Curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. See Fed. R. App. P. 29(a)(4)(E). Appellee the State of Hawaii has consented. The other parties have not consented or have not responded to requests for consent. Human Rights First’s motion for leave to file this *amicus* brief accompanies this brief.

and Other Cruel, Inhuman and Degrading Treatment or Punishment, and other international human rights instruments.

In November 2015, Human Rights First launched a project, Veterans for American Ideals (“VFAI”), to engage veterans to continue advocating for policies that uphold the ideals that first motivated them to serve in the armed forces. VFAI seeks to leverage veterans’ experiences, leadership abilities, and credibility to assist those wartime allies who served with them in Iraq and Afghanistan to find safe passage to the United States, to advocate the continued importance of refugee resettlement, to challenge the rise of anti-Muslim rhetoric and policies in the American polity, and to act as an ally to the Muslim community and other vulnerable populations.

Along with Iraq war veterans, Americans who worked with Iraqis, and Iraqi refugees, Human Rights First played a key role in drawing attention to the dangers faced by U.S.-affiliated Iraqis and the lack of effective protection routes for these individuals. To address this pressing issue, Congress passed the RCIA and, in doing so, specifically designated certain classes of Iraqis as “refugees of special humanitarian concern . . . under the refugee resettlement priority system.” Refugee Crisis in Iraq Act of 2007, Pub. Law No. 110-181, § 1243, 122 Stat. 395 (2007). Consequently, certain U.S.-affiliated Iraqis may now apply directly for resettlement in the United States through P2 processing under the DAP.

The Executive Order abandons those Iraqis Congress worked to protect—even though U.S.-affiliated Iraqis eligible for P2 processing meet the Supreme Court’s definition of a bona fide relationship. The Order not only leaves these Iraqis at risk of serious harm, but also undermines U.S. military and diplomatic efforts overseas. While Human Rights First believes that other refugees also have the requisite U.S. relationships, the organization urges that the Court conclude that these Iraqis who are eligible for P2 processing under the RCIA qualify as persons with a bona fide relationship under the Supreme Court’s decision.

The purpose of this *amicus* brief is to bring to the Court’s attention and emphasize the plight of approximately 60,000 Iraqis eligible for participation in the DAP for U.S.-affiliated Iraqis who have bona fide relationships with the United States but will have their resettlement derailed or delayed by months or years because of the administration’s implementation of the Executive Order. This brief further illustrates how, by turning its back on these individuals, the United States is actually imperiling the Nation’s security, not enhancing it, and likewise endangering our military personnel.

## STATEMENT

### **I. P2 Processing and the DAP for U.S.-Affiliated Iraqis**

The United States’ invasion of Iraq in March 2003 created one of the largest humanitarian crises in recent history. *See* Human Rights First, *Living in Limbo:*

*Iraqi Refugees and U.S. Resettlement* 29 (Dec. 2010). The situation became especially perilous for Iraqis who chose to work for the U.S. government, the U.S. military, or U.S. contractors, or U.S.-based media groups or nongovernmental organizations (“NGOs”). *Id.* These individuals and their families were targeted with threats, harassment, kidnapping, violence, and murder by militia groups within Iraq. *Id.* The United States provided insufficient attention to the unfolding humanitarian crisis in Iraq—despite its central role in the Iraq war itself and its deep debt to the Iraqis who risked their lives working with and for Americans. *Id.*

In response, the late Democratic Senator Edward Kennedy and former Republican Senator Gordon Smith introduced the Refugee Crisis in Iraq Act in 2007. *See* Refugee Crisis in Iraq Act, S. 1651, 110th Cong. (2007). Recognizing the importance of protecting our Iraqi allies, Senator Kennedy stated that “[r]egardless of where we stand on the war with Iraq, we are united in our belief that America has a fundamental obligation to assist the Iraqis who have courageously supported our forces and our effort in Iraq and whose lives are in peril as a result.” *See Living in Limbo*, at 30. Senator Smith likewise spoke of “a national moral commitment to resolving the Iraqi refugee issues as quickly as possible.” *Id.* The RCIA received strong bipartisan support, and President George Bush signed the RCIA into law on January 28, 2008, as part of the Department of Defense Authorization Act for Fiscal

Year 2008. *See* Refugee Crisis in Iraq Act of 2007, Pub. Law No. 110-181, 122 Stat. 395 (2007).

Congress's clear intent in passing the RCIA was to protect Iraqis who were in danger due to their assistance to and relationship with the United States. To accomplish its purpose, Congress structured the law in two ways. First, the RCIA created a new class of Special Immigrant Visas ("SIV") for Iraqis who had worked for the United States.<sup>2</sup> *Id.* at § 1244. Second, the RCIA designated certain Iraqis as "[r]efugees of special humanitarian concern eligible for Priority 2 processing under the refugee resettlement priority system who may apply directly to the [USRAP]." *Id.* at § 1243, 122 Stat. 395 (2008). Under the RCIA, Iraqis eligible for P2 processing include those who work or worked in Iraq for the U.S. government, U.S. contractors, or U.S.-based media or non-governmental organizations, as well as their close relatives. *Id.* The RCIA called on the U.S. Secretary of State, in consultation with the Secretary of Homeland Security, to "establish or use existing refugee processing mechanisms in Iraq and in countries, where appropriate, in the region in which . . . [the] aliens described in section 1243 may apply and interview for admission to the

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<sup>2</sup> The Iraqi SIV program stopped accepting applications as of September 2014. *See* Human Rights First, *Fact Sheet: President Trump's Executive Order on Refugees Harms Our Iraqi Allies* (July 2017); *see also* U.S. Dep't of State, Bureau of Consular Affairs, Special Immigrant Visas for Iraqis – Who Were Employed by/on Behalf of the U.S. Government, <https://travel.state.gov/content/visas/en/immigrate/iraqis-work-for-us.html> (last visited Aug. 2, 2017).

United States as refugees.” *Id.* at § 1242. This entire process became known as the USRAP “Direct Access Program for U.S.-affiliated Iraqis.” *See* U.S. Dep’t of State, Fact Sheet: U.S. Refugee Admissions Program (USRAP) Direct Access Program for U.S.-affiliated Iraqis (Mar. 11, 2016), <https://www.state.gov/j/prm/releases/fact-sheets/2016/254650.htm>.

As general background, the United States admits refugees for resettlement through the USRAP. The qualifications for refugee status are set forth in the Immigration and Nationality Act. *See* 8 U.S.C. § 1101(a)(42). The United States Citizenship and Immigration Services (“USCIS”) is responsible for interviewing refugee applicants and adjudicating applications for refugee status. USCIS defines three “processing priorities,” which enable a refugee applicant the opportunity to interview with a USCIS officer. *See* U.S. Citizenship and Immigration Servs., The United States Refugee Admissions Program (URSAP) Consultation & Worldwide Processing Priorities (May 5, 2016), <https://www.uscis.gov/humanitarian/refugees-asylum/refugees/united-states-refugee-admissions-program-usrap-consultation-worldwide-processing-priorities>.

Typically, refugees seeking entry into the United States must first receive a referral from the United Nations High Commissioner on Human Rights (“UNHCR”), a U.S. Embassy, or a designated NGO. *Id.* Refugees identified for Priority

2 processing based on special humanitarian concerns may interview with USCIS without first receiving a referral, however. *Id.*

By designating certain U.S.-affiliated Iraqis as eligible for P2 processing through the DAP, the RCIA allows eligible individuals to file for resettlement in the United States *directly with* the United States—eliminating the U.N. referral requirement given their U.S. relationships. *See* Refugee Crisis in Iraq Act of 2007, at § 1242. Further, while refugees usually must be outside their homelands to be eligible for the USRAP, the RCIA allows eligible Iraqis to apply for P2 processing from *inside* Iraq. *Id.*

The DAP for U.S.-affiliated Iraqis does not reduce the legal requirements or security checks needed for resettlement to the United States. All applicants are interviewed by USCIS officers to determine eligibility for resettlement, including whether they meet the refugee definition, present no known security risk, and are otherwise admissible to the United States under federal immigration law. The process is lengthy and exhaustive. Despite the program's goal to bring at-risk U.S.-affiliated Iraqis quickly to safety, Human Rights First estimated in 2010 (based on attorney accounts) that the entire processing time for resettlement under the DAP for U.S.-affiliated Iraqis was 12 to 21 months—despite the program's goal to bring at-risk U.S.-affiliated Iraqis quickly to safety. *See Living in Limbo*, at 31.

## II. The First Executive Order

On January 27, 2017, President Trump signed the first of two Executive Orders, entitled “Protecting the Nation from Foreign Terrorist Entry into the United States.” Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (“First Executive Order” or “First Order”). The First Executive Order temporarily prohibited entry of all nationals from seven majority-Muslim countries, and directed the Secretary of State to “suspend the U.S. Refugee Admissions Program (USRAP) for 120 days.” *Id.* at 8979. During the temporary suspension of the USRAP, the order provided that “the Secretaries of State and Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis . . . only so long as they determine that the admission of such individuals as refugees is in the national interest—including when the person is a religious minority in his country of nationality facing religious persecution[.]” *Id.* Once the USRAP is resumed, the First Executive Order directed similar religious minority prioritization and instructed the Secretary of State, in consultation with the Secretary of Homeland Security, to “prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual’s country of nationality.” *Id.*<sup>3</sup>

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<sup>3</sup> President Trump indicated that the prioritization of religious minorities was intended to favor Christian refugees. ER 150 ¶ 58.

The First Executive Order sparked lawsuits across the country, including this one. *See* ER 27. The District Court never ruled on the Appellees’ motion to enjoin the enforcement of the First Order because the District Court for the Western District of Washington entered a nationwide preliminary injunction enjoining enforcement of that order. *Id.* This Court denied the Government’s request for an emergency stay of the injunction and ultimately granted the Government’s unopposed motion to dismiss its appeal. ER 28.

### **III. The Executive Order**

The Executive Order now at issue in this case was executed on March 6, 2017, and bears the same title as the First Order. Exec. Order 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017). In section 2(c), the Executive Order temporarily prohibits for 90 days entry of all nationals from six of the seven majority-Muslim countries named in the First Order, excepting only nationals of Iraq. *Id.* at 13213. Like the First Order, the Executive Order in section 6 “suspend[s] travel of refugees into the United States under the USRAP” and suspends decisions on applications for refugee status for 120 days. *Id.* at 13215-6. In spite of the suspension of the USRAP, “the Secretary of State and Secretary of Homeland Security may jointly determine to admit . . . refugees on a case-by-case basis, in their discretion, but only so long as they determine that the entry of such individuals as refugees is in the national interest and does not pose a threat to the security or welfare of the United States.” *Id.* at 13216. The

Executive Order gives as an example of a circumstance where entry would be allowed a situation where “the individual’s entry would enable the United States to conform its conduct to a preexisting international agreement or arrangement, or the denial of entry would cause undue hardship.” *Id.* Section 6(b), however, caps the number of refugees who may enter in 2017 to 50,000. *Id.* Unlike the First Order, the Executive Order does not expressly include a preference for religious minorities. The District Court below granted the Appellees’ motion for a temporary restraining order prohibiting the enforcement of the Executive Order on March 15, 2017, and granted Appellees’ subsequent motion to convert the temporary restraining order to a preliminary injunction on March 29, 2017. ER 1-2, 26.

On appeal, a unanimous panel of this Court affirmed. Thereafter, the Supreme Court consolidated the case with another matter from the Fourth Circuit and granted certiorari review. The Court also modified the District Court’s preliminary injunction, upholding it as to Appellees, but limiting its scope in other respects. In doing so, the Court explained that the interests of the Appellees “outweigh the Government’s interest in enforcing §2(c).” *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). The Court determined, however, that the “Government’s interests in enforcing § 2(c) . . . are undoubtedly at their peak when there is no tie between the foreign national and the United States.” *Id.* at 2088. Accordingly, the

Court stayed the District Court’s preliminary injunction “to the extent the injunction[] prevent[s] enforcement of §2(c) with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States.” *Id.* at 2087. The Supreme Court’s stay also included section 6 of the Executive Order for those “refugees who lack any such connection to the United States.” *Id.* at 2089.

In explaining its ruling, the Court elaborated that that District Court’s preliminary injunction would stand with respect to individuals and entities, including refugees, “who can credibly claim a bona fide relationship with a person or entity in the United States,” and that this applies “even if the 50,000-person cap has been reached or exceeded” under section 6(b). *Id.* The Court defined the relationship with a U.S. person to be a “close familial relationship” and a bona fide relationship with U.S. entity to be “formal, documented, and formed in the ordinary course.” *Id.* at 2088.

Following the Supreme Court’s ruling, the State Department issued guidance regarding implementation of the non-enjoined portions of the Executive Order, stating that “[t]he fact that a resettlement agency in the United States has provided a formal assurance for a refugee seeking admission . . . is not sufficient in and of itself to establish a qualifying relationship for that refugee with an entity in the United States.” *See* U.S. Dep’t of State, Fact Sheet: Information Regarding the U.S. Refu-

gee Admissions Program (June 30, 2017), <https://www.state.gov/j/prm/releases/factsheets/2017/272316.htm>. The administration's implementation of the Supreme Court's direction otherwise severely narrowed the scope of permissible entries. In response, the State of Hawaii filed an emergency petition in the court below. On July 13, the District Court interpreted the condition of a bona fide relationship to include refugees with a formal assurance and enjoined this aspect of the Executive Order, holding that:

An assurance from a United States refugee resettlement agency, in fact, meets each of the Supreme Court's touchstones: it is formal, it is a documented contract, it is binding, it triggers responsibilities and obligations, including compensation, it is issued specific to an individual refugee only when that refugee has been approved for entry by the Department of Homeland Security, and it is issued in the ordinary course, and historically has been for decades. Bona fide does not get any more bona fide than that.

*Hawaii v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 2989048, at \*7 (D. Haw. July 13, 2017) (citations omitted). Although the court below declined to give *categorical* relief to U.S.-affiliated Iraqis, the decision below left open the ability of U.S.-affiliated Iraqis to resettle if they otherwise fall within the scope of the court's ruling. The Government appealed directly to the Supreme Court, which stayed the District Court's order "pending resolution of the Government's appeal to the Court of Appeals for the Ninth Circuit." Order, *Trump v. Hawaii*, No. 16-1540, 2017 WL

3045234, at \*1 (U.S. July 19, 2017), *available at* [https://www.supremecourt.gov/orders/courtorders/071917zr\\_o7jp.pdf](https://www.supremecourt.gov/orders/courtorders/071917zr_o7jp.pdf).

As a result of these developments, Iraqis eligible for P2 processing under the DAP for U.S.-affiliated Iraqis, including (1) those who have already received formal assurances and (2) those who have yet to complete all steps in the refugee admissions process, are not exempt from the Executive Order. Only Iraqis with family ties in the United States that qualify under the administration's guidelines may currently enter the country. As a result, as many as 60,000 Iraqis in the refugee admissions pipeline have been left in a "legal limbo," effectively halting the DAP for U.S.-affiliated Iraqis. *See* Human Rights First, *Fact Sheet: President Trump's Executive Order on Refugees Harms Our Iraqi Allies* (July 18, 2017), <http://www.humanrightsfirst.org/resource/president-trumps-executive-order-refugees-harms-our-iraqi-allies>.

### **SUMMARY OF ARGUMENT**

By definition, Iraqis eligible for P2 processing through the DAP for U.S.-affiliated Iraqis, as provided under the RCIA, qualify as individuals with a bona fide relationship within the meaning of the Supreme Court's direction. Implementation of the Executive Order to ban, derail, or further delay their entry thus violates the Supreme Court's order. In addition, it violates the Nation's commitment to Iraqis who have put their lives at risk to assist the United States and various U.S. entities.

Moreover, blocking the resettlement of these Iraqis not only harms our national security, it also imperils our troops. Because Iraqis eligible for P2 processing through the DAP for U.S.-affiliated Iraqis fall within the scope of the Supreme Court's direction, the decision of the District Court should be affirmed to the extent it protects the interests of Iraqis eligible for entry in accordance with the requirements of the RCIA.

### ARGUMENT

**I. By Definition, Those Eligible for P2 Processing Through the DAP for U.S.-Affiliated Iraqis Have a Bona Fide Relationship and Their Exclusion Violates Not Only the Supreme Court's Direction, But Also the Nation's Commitment to These Individuals.**

Invoking national security interests, the administration has proffered that the prohibition on refugees and immigrants, including those eligible for P2 processing through the DAP for U.S.-affiliated Iraqis, is a necessary means to protect against terrorist entry and activities. This justification is divorced from logic and reality. As discussed in Part II, *infra*, suspending the DAP for U.S.-affiliated Iraqis actually harms our national security. In addition, as discussed in this Part, those eligible for P2 processing through the DAP for U.S.-affiliated Iraqis already have a direct tie to the United States and excluding them conflicts directly with both the Supreme Court's direction and the Nation's profound commitment to the safety of these individuals.

**A. Iraqis Eligible for P2 Processing Through the DAP for U.S.-Affiliated Iraqis Have a Bona Fide Relationship.**

The Supreme Court has determined that the Executive Order's suspension of refugee admissions may not be enforced against individuals seeking entry as refugees who can credibly claim a bona fide relationship with a person or entity in the United States. *Trump*, 137 S. Ct. at 2089. The Court explained that, for those with a tie to U.S. entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for purpose of evading the Executive Order. *Id.* at 2088. The Court provided examples of individuals who could claim such a bona fide relationship with a U.S. entity, including a worker who accepted an offer of employment from an American company, a lecturer invited to address an American audience, or a student admitted to an American university. *Id.*

Iraqis that qualify for P2 processing through the DAP for U.S.-affiliated Iraqis have, by definition, such bona fide relationships with U.S. entities and thus should be exempt from the travel ban under the Supreme Court's order. The DAP for U.S.-affiliated Iraqis applies to Iraqis with verifiable proof of U.S.-affiliated employment, and allows them to apply directly for consideration under the USRAP. *See* U.S. Dep't of State, Fact Sheet: U.S. Refugee Admissions Program (USRAP) Direct Ac-

cess Program (Mar. 11, 2016), <https://www.state.gov/j/prm/releases/factsheets/2016/254650.htm>.<sup>4</sup> These Iraqis include persons who worked as translators and in other support roles for the U.S. military, with contractors on U.S.-funded reconstruction projects, and in U.S.-based media and nongovernmental organizations. *Id.* Importantly, verifiable proof of employment with a U.S. entity is a *requirement* for an Iraqi to qualify for the program; they are not eligible otherwise. *See id.* Also

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<sup>4</sup> The following individuals and their derivatives, with verifiable proof of U.S.-affiliated employment, can seek access through the program:

1. Iraqis who work/worked on a full-time basis as interpreters/translators for the U.S. Government (USG) or Multi-National Forces (MNF-I) in Iraq;
2. Iraqis who are/were employed by the USG in Iraq;
3. Iraqis who are/were employees of an organization or entity closely associated with the U.S. mission in Iraq that has received USG funding through an official and documented contract, award, grant or cooperative agreement;
4. Iraqis who are/were employed in Iraq by a U.S.-based media organization or nongovernmental organization;
5. Spouses, sons, daughters, parents and siblings of individuals described in the four categories above, or of an individual eligible for a Special Immigrant Visa as a result of his/her employment by or on behalf of the USG in Iraq, including if the individual is no longer alive, provided that the relationship is verified;
6. Iraqis who are beneficiaries of an approved I-130 Petition for Alien Relative. Please note that applicants who qualify for direct access under this 6<sup>th</sup> category will be automatically contacted by the Department of State about initiating an application, and should not contact an RSC directly.

*See* U.S. Dep't of State, Fact Sheet: U.S. Refugee Admissions Program (USRAP) Direct Access Program for U.S.-Affiliated Iraqis (Mar. 11, 2016), <https://www.state.gov/j/prm/releases/factsheets/2016/254650.htm>.

included are eligible family members. Individuals who qualify because of a family member's U.S.-affiliated employment must prove both the relative's employment and their relationship to the relative in order to be considered. These individuals are included in the program because of the extreme threats that close relatives also face from their relative's service to U.S.-based entities.

Provision of such proof plainly satisfies the requirements of the Supreme Court's ruling that the relationship be "formal" and "documented." *Trump*, 137 S. Ct. at 2088. Additionally, all relationships between eligible Iraqis and United States entities are formed in the ordinary course, and not to evade the Executive Order, since all relationships were formed in connection with employment and work with U.S. entities in Iraq prior to the issuance of the Executive Order. Thus, those eligible for P2 processing through the DAP for U.S.-affiliated Iraqis have the necessary bona fide relationship and excluding them plainly conflicts with the Supreme Court's instruction.

**B. Excluding Those Eligible for P2 Processing Through the DAP for U.S.-Affiliated Iraqis Violates Not Only the Supreme Court's Direction, But Also the Nation's Commitment to These Individuals.**

The ban's exclusion of U.S.-affiliated Iraqis eligible for P2 processing through the DAP for U.S.-affiliated Iraqis further violates the Nation's commitment to those who aided our efforts in Iraq. In engaging Iraqis to assist in its military and

associated operations in Iraq, the United States government and United States entities put the lives of U.S.-affiliated Iraqis at risk. The United States has an important, continuing obligation to assist all U.S.-affiliated Iraqis, and including them within the purview of the travel ban violates this obligation. The mere fact that the United States had previously withdrawn its troops from Iraq, or that a U.S.-affiliated Iraqi's particular assignment has ended, does not sever the relationship or end our commitment. Many U.S.-affiliated Iraqis are still persecuted, tracked, and threatened in Iraq. *See Living in Limbo*, at 29-30 (U.S.-affiliated Iraqis “remain at significant risk in Iraq,” including as targets of threats, harassment, kidnapping, violence, and murder); *Emails from a Dead Man*, *This American Life* (June 29, 2013), <https://www.thisamericanlife.org/takingnames/> (“There are still tens of thousands of Iraqis whose lives are in danger because they worked with the United States during the war.”); Human Rights First, *Fact Sheet: How President Trump’s Executive Order on Refugees and Immigration Impacts At Risk Iraqis with U.S. Affiliations* (Feb. 2017) (“[M]any [U.S.-affiliated] Iraqis have faced persecution and direct threats from insurgent groups, militias, and terrorist organizations. Their U.S. ties have made them targets, and some have been killed.”).

Members of the United States military and other United States entities who worked with U.S.-affiliated Iraqis likewise view the relationship as ongoing. Even after returning to the United States from Iraq, many advocate tirelessly to secure the

U.S.-affiliated Iraqis' admission to the United States. *See* Press Release, Human Rights First, *New Analysis Details Six-Month Impact of Trump Refugee Bans* (July 24, 2017), <http://www.humanrightsfirst.org/press-release/new-analysis-details-six-month-impact-trump-refugee-bans>; Jacob Wirtschafter, *Iraqi Translators Who Served the US Military Are Desperate for an Exemption to Trump's Travel Ban*, PRI (Jan. 31, 2017), <https://www.pri.org/stories/2017-01-31/iraqi-translators-who-served-us-military-are-desperate-exemption-trumps-travel>. As a number of United States senators have recognized, “[t]he United States has a moral obligation to help those Iraqis who have assisted . . . our military and civilian forces,” and “America has a fundamental obligation to assist the Iraqis who have courageously supported our forces and our effort in Iraq and whose lives are in peril as a result. The target of the assassin’s bullet is now on their back, and our government has a responsibility to try to save their lives.” *See Living in Limbo*, at 29-30.

**II. By Excluding Those Eligible for P2 Processing Through the DAP for U.S.-Affiliated Iraqis, the Executive Order Harms Our National Security and Imperils Our Troops.**

Those who pass through the USRAP are already the most intensely vetted entrants to the United States. In addition, refugees are among the most vulnerable populations in the world. That is true for Iraqis eligible for P2 processing through the DAP for U.S.-affiliated Iraqis. These are individuals who have risked their lives to assist the United States, and who face persecution, violence, and threats of death

for their efforts. Suspending P2 processing through the DAP affirmatively damages our national security and places our armed forces at greater risk of harm.

**A. Vulnerable Persons Resettled Through the USRAP, Including Iraqis Eligible for P2 Processing, Are Highly Vetted Through a Rigorous, Multi-tiered Process.**

Refugees in general are recognized by national and international principles as among the “world’s most vulnerable people.” U.S. Dep’t of State, Fact Sheet: U.S. Refugee Admissions Program FAQs (Jan. 20, 2017), <https://www.state.gov/j/prm/releases/factsheets/2017/266447.htm>. Their status as a class requiring heightened protections and international cooperation is enshrined in the United Nations Convention on the Status of Refugees (the “Convention”) and the 1967 Protocol to the Convention (the “Protocol”). United Nations Convention on the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 and United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, *available at* <http://www.unhcr.org/en-us/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>.<sup>5</sup> According to the Convention and Protocol, the term refugee “shall apply,” *inter alia*, to any person who:

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<sup>5</sup> The United States is party to the Protocol and has “undertake[n] to apply articles 2 to 34 inclusive of the Convention” to refugees by virtue of its accession. Protocol, art. 1(1); *see also* UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/Rev. 1, UNHCR 1979, reedited Jan. 1992, at ¶ 9, *available at* <http://www.unhcr.org/4d93528a9.pdf> (“By accession to the 1967

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

Convention, art. 1(A)(2); Protocol, art. 1 (extending the Convention definition of refugee to encompass those who became refugees due to events that proceeded January 1951).<sup>6</sup>

To qualify as a refugee and resettle in the United States, a refugee must generally navigate a labyrinth of processes and investigations designed precisely to protect national security interests while assessing the refugee's entitlement to status and resettlement. According to the U.S. State Department, refugees undergo the "most intensive security screening of any traveler to the United States." U.S. Dep't of State, Fact Sheet: U.S. Refugee Admissions Program FAQs (Jan. 20, 2017), <https://www.state.gov/j/prm/releases/factsheets/2017/266447.htm>.

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Protocol, States undertake to apply the substantive provisions of the 1951 Convention to refugees as defined in the Convention, but without the 1951 deadline."). The United States has codified certain principles of these conventions as part of national law. *See* 8 U.S.C. § 1522.

<sup>6</sup> Under U.S. law, a refugee is similarly defined as "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).

In light of the administration's assertion that the vetting process needs to be even more extreme than it currently is, a brief review of the exceptionally rigorous nature of the current process is helpful in putting the administration's claim in proper context. As noted, U.S.-affiliated Iraqis eligible for P2 processing are typically those who are or were employed by the United States Government or Multi-National Forces (*e.g.*, as an interpreter or translator), an entity closely associated with the United States' mission in Iraq that received U.S. funding, or a U.S.-based media organization or NGO, together with their spouses, sons, daughters, parents, and siblings. Under the DAP for U.S.-affiliated Iraqis, these individuals may begin the process by applying directly to the United States for resettlement consideration. *See* U.S. Dep't of State, Fact Sheet: U.S. Refugee Admissions Program (USRAP) Direct Access Program for U.S.-affiliated Iraqis, <https://www.state.gov/j/prm/releases/fact-sheets/2016/254650.htm>. This requires each applicant to submit extensive documentation, including proof of qualifying employment and proof of identity.

After the applicant's employment is verified, the U.S. Department of State Resettlement Support Center ("RSC") interviews the applicant and enters the relevant application document into the Department of State's Worldwide Refugee Admission Processing System ("WRAPS"), cross references and verifies the data, and sends information required for a background check to other United States agencies. *See* U.S. Dep't of State, The Refugee Processing and Screening System (Jan. 20,

2017), <https://www.state.gov/j/prm/ra/266458.htm>. Multiple national security agencies, including the National Counterterrorism Center, Department of Homeland Security (“DHS”), Federal Bureau of Investigation (“FBI”),<sup>7</sup> Department of State, and intelligence agencies will screen the applicant and assess any security threats, including any connections to known bad actors, and past immigration and criminal violations. *Id.*<sup>8</sup>

Once results are screened, the USCIS will interview the applicant in a host nation or in the applicant’s country of origin. During this interview, a USCIS officer collects additional biometric data.<sup>9</sup> *Id.* This biometric data is used to conduct an additional series of checks. Additionally, anytime the applicant’s information

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<sup>7</sup> The FBI and intelligence community partners will conduct and prepare a Security Advisory Opinion, which is a biographic check “for an applicant who is a member of a group or nationality that the United States government has designated as requiring this higher level check.” *See* U.S. Citizen and Immigration Services, *Refugee Processing and Security Screening*, available at <https://www.uscis.gov/refugeescreening>.

<sup>8</sup> United States refugee law includes several exclusions from refugee status rendering certain categories of individuals ineligible for asylum protections. The exclusions include, for example, a person who participated in persecution or who has been convicted by a final judgment of a “particularly serious crime” and therefore “constitutes a danger to the community of the United States.” *See* 8 U.S.C. § 1158(b)(2)(A)(i)-(vi).

<sup>9</sup> Fingerprints are stored in a DHS database and screened against: the FBI biometric database, the DHS biometric database, and the U.S. Department of Defense database. U.S. Dep’t of State, U.S. Refugee Admissions Program, <http://www.state.gov/j/prm/ra/admissions/index.htm>.

changes at any point in the process, the information is entered into WRAPS and new security checks are initiated. *Id.* Inconsistencies will place the case on hold until resolved. *Id.*<sup>10</sup> Should the application proceed, applicants must complete a cultural orientation course and a medical screening, the results of which are also entered into WRAPS. *Id.* If the case is cleared, the applicant will be subject to further screening from United States Customs and Border Protection, and the Transportation Administration's Secure Flight Program. *Id.* Although the vetting process includes additional details omitted here, the foregoing illustrates its highly intensive nature and how proof of a bona fide relationship is integral to it.

**B. Excluding Those Eligible for P2 Processing Through the DAP for U.S.-Affiliated Iraqis Harms Our National Security and Imperils Our Troops.**

The suspension of P2 processing through the DAP for U.S.-affiliated Iraqis is highly detrimental to the United States' interests and a slap in the face to Iraqis who

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<sup>10</sup> The Department of State, through the Consular Lookout and Support System ("CLASS"), will also initiate name checks on the applicant's primary names and any variations used by the applicant. Responses are received before the USCIS conducts its interview, and possible matches are reviewed and adjudicated by USCIS headquarters. If another name or variation is identified during the USCIS interview, another name will be screened through CLASS. *See* U.S. Citizen and Immigration Services, Refugee Processing and Security Screening, <https://www.uscis.gov/refugeescreening>. CLASS also includes information from: National Counterterrorism Center/Terrorist Screening Center; Treasury Enforcement Communications System, Interpol. Drug Enforcement Administration, Health and Human Services, and FBI. *Id.* Additionally, if, during the process, any national security concerns are raised, USCIS conducts an additional review through the Controlled Application Review and Resolution Process. *Id.*

have risked their lives to help America. Exclusion will likely make it more difficult going forward for troops to obtain cooperation from foreign nationals who are crucial to U.S. missions.

By suspending P2 processing through the DAP, the Executive Order reneges on the promises that a bipartisan Congress—including a unanimous Senate—made under the RCIA to protect brave Iraqis who have helped U.S. troops operate in Iraq. The United States has thoroughly depended upon tens of thousands of Iraqi translators, security guards, journalists, engineers, cultural advisors, and others to achieve its military and political objectives in Iraq. *See Human Rights First, Fact Sheet: How President Trump's Executive Order on Refugees and Immigration Impacts At Risk Iraqis with U.S. Affiliations* (Feb. 2017), <http://www.humanrightsfirst.org/sites/default/files/Fact-Sheet-P2-and-SIV-Iraqis.pdf>. To this day, these Iraqis and their families are targeted by militants as a direct result of their past association with the United States. *See, e.g., Allen Vaught, Refugee Ban Trapped My Iraqi Translator: Veteran*, USA TODAY (Jan. 31, 2017), <https://www.usatoday.com/story/opinion/2017/01/31/trump-ban-iraq-muslim-translators-column/97250702/>. Often unable to protect themselves in Iraq, they rely on the United States to help keep them out of harm's way and, if necessary, to help them and their families resettle in America to survive. As a group of more than 2,000 veterans explained in a recent letter to President Trump:

many veterans can point to a moment when one of our foreign allies saved our lives – often by taking up arms against our common enemies. They acted because they believed in America, in our mission, and in the promise that was given.

Open Letter from Scott Cooper, Founder, Veterans for American Ideals, to President Trump (Jan. 29, 2017), <http://www.vfai.org/blog/vfais-open-letter-president-trump>.

If America reneges its promise to protect these Iraqis, it is obvious that it will be far more difficult for our troops to ensure future cooperation in Iraq and other nations where local assistance is critical to the mission. As one former United States Army captain explained, suspension of the DAP for U.S.-affiliated Iraqis would “endanger American troops by making it harder to recruit local support in war zones.” See Jonathan Allen and Ned Parker, *Trump Refugee Order Dashes Hopes of Iraqis Who Helped the U.S.*, Reuters (Jan. 27, 2017), <http://www.reuters.com/article/us-usa-trump-immigration-iraq-idUSKBN15C036>.

Despite their having helped Americans fight terrorism in Iraq and their having served as allies in the battle against ISIS, suspension of the DAP for U.S.-affiliated Iraqis turns America’s back on these Iraqis, treating them as pariahs rather than friends who have fought side-by-side for a common cause. This illogical and immoral behavior is contrary not only to our commitment to these individuals, but will serve only as a disincentive for future assistance by foreign nationals, which ultimately will make America less, not more, safe. It is therefore imperative that P2

processing be available for those eligible for the DAP for U.S.-affiliated Iraqis as provided under the RCIA.

### **CONCLUSION**

For the foregoing reasons, as well as those set forth in Appellees' Brief, the *Amicus* respectfully requests that the Court affirm the decision of the District Court to the extent it protects Iraqis eligible for P2 processing through the DAP for U.S.-affiliated Iraqis.

Dated: August 3, 2017

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Rule 32(a)(7)(C)(i) of the Federal Rules of Appellate Procedure. The foregoing brief contains 6,278 words of Times New Roman (14 pt) proportional type. Microsoft Word is the word-processing software that was used to prepare the brief.

/s/ G. Eric Brunstad, Jr.  
G. Eric Brunstad, Jr.

### **CERTIFICATE OF SERVICE**

I hereby certify that on August 3, 2017, a copy of the foregoing was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF Filing System. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ G. Eric Brunstad, Jr.

G. Eric Brunstad, Jr.