

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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HAMEED KHALID DARWEESH and
HAIDER SAMEER ABDULKHALEQ
ALSHAWI,

Petitioners,

THE STATE OF NEW YORK,

No. 1:17-cv-00480-CBA

Intervenor-Petitioner,

v.

DONALD TRUMP, President of the United
States; et al.,

Respondents.

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**BRIEF OF LEADING COMPANIES AS *AMICI CURIAE* IN SUPPORT OF THE
RELIEF SOUGHT BY PETITIONERS**

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INTRODUCTION AND STATEMENT OF INTEREST

*Amici curiae*¹ are a collection of prominent companies and employers in the United States, representing a range of different industries critical to the national and global economies. *Amici* are united by their common belief that a workplace should be diverse and must under all circumstances provide equal opportunities to its employees, contractors, and partners, regardless of nationality or religion. They regard this value as essential to recruit and retain the most talented possible workforces, achieve success in business, and deliver the best possible goods and services to the marketplace. The immigration-related Executive Order dated January 27, 2017 (the “Executive Order”) impedes *amici*’s ability to realize this essential value and these objectives.

Several *amici* employ, partner, or contract with individuals directly targeted by the Executive Order. Some of these individuals are from one of the seven countries covered by the Executive Order’s travel ban and now reasonably fear that they would be unable to return to the United States if they were to depart the country to visit family or to conduct business on *amici*’s behalf. Others have been separated from family members, relatives, and close friends.

This intolerable situation has imposed a concrete harm on *amici*, their employees, partners, and contractors, and—as a result—the states in which *amici* operate, including New York. *Amici* compete with businesses around the world—including in countries without immigration bans—to recruit and retain top talent. But these efforts were disrupted by an Executive Order that cut *amici* off from more than 212 million potential employees, contractors, partners, and consumers; caused the revocation of as many as 100,000 validly issued visas; wrongly signaled to Muslims in the United States and across the world that they are unwelcome in this country; and raised inescapable fears about the treatment of foreign-born persons in the United States.

¹ A complete listing of *amici curiae* is provided in Appendix A to this brief.

In determining whether to grant a preliminary injunction, the Court must consider, among other factors, the public interest. *See Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34 (2d Cir. 2010). As *amici*'s circumstances demonstrate, the public interest considerations in this case are weighty, and strongly favor injunctive relief against the Executive Order to prevent long-lasting harm to the nation's economic vitality. The Executive Order directly and immediately harms *amici*, their employees, and many other businesses in the global economic community that hold the same inclusive values as *amici*. Furthermore, serious questions exist regarding the constitutionality of the Executive Order—an order which will harm *amici* and their workforces long after the travel ban itself expires.

In light of the far-reaching and adverse impact of the Executive Order, and the absence of evidence or constitutional justification to support such arbitrary and overbroad measures, *amici* respectfully submit that this Court should grant the injunctive relief sought by Petitioners Hameed Khalid Darweesh and Haider Sameer Abdulkhaleq Alshawi and Intervenor, the State of New York (collectively, "Petitioners").

FACTUAL BACKGROUND²

On January 27, 2017, President Donald J. Trump signed the Executive Order at issue in this case. Among other provisions, the Executive Order (1) "suspend[s] entry into the United States, as immigrants and nonimmigrants" for 90 days of "aliens" from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen, Sec. 3(c); (2) directs the Department of Homeland Security or State Department to "submit to the President the names of any additional countries recommended for similar treatment" as the seven countries currently covered by the 90-day ban, Sec. 3(f); (3) cancels

² *Amici* adopt, and respectfully incorporate, the more detailed recitation of the facts contained in New York's Complaint to Intervene in Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief at 4-12, ECF No. 42-1.

the Visa Interview Waiver Program, Sec. 8(a), a program commonly used by low-risk travelers, including many employment-based visa applicants, to expedite the time in which visas are obtained for travel to the United States; and (4) requires the Secretary of State to review “all nonimmigrant visa reciprocity agreements,” Sec. 9, raising the possibility that certain visas will be scaled back in the future.

The Executive Order also suspends all refugee admissions for at least 120 days. Sec. 5(a). Equally if not more troubling, it grants the Secretaries of State and Homeland Security discretionary power to make “case-by-case” exceptions to that ban, “but 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.” Sec. 5(e). Additionally, if (or when) refugee admissions resume, the Department of Homeland Security will “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.” Sec. 5(b).

The Executive Order was immediately challenged in federal court and, within 36 hours of issuance, three district courts, including this one, temporarily or preliminarily enjoined enforcement of various aspects of the order against groups of individuals. A fourth joined on January 31, and a fifth on February 2.³ In quick succession, additional courts granted similar relief for specific individuals.⁴ On February 3, a federal court in Washington ordered a nationwide stay

³ See ECF No. 8; see also *Aziz v. Trump*, No. 1:17-cv-116, 2017 WL 386549 (E.D. Va. Jan. 28, 2017); *Louhghalam v. Trump*, No. 1:17-cv-10154, 2017 WL 386550 (D. Mass. Jan. 29, 2017); *Mohammed v. Trump*, No. 2:17-cv-786, 2017 WL 438750 (C.D. Cal. Jan. 31, 2017); Order, *Arab Am. Civil Rights League v. Trump*, No. 2:17-cv-10310 (E.D. Mich. Feb. 2, 2017), ECF No. 8.

⁴ See, e.g., Order, *Doe I v. Trump*, No. 2:17-cv-126 (W.D. Wash. Jan. 28, 2017), ECF No. 5; Order, *Vayeghan v. Kelly*, No. 2:17-cv-702 (C.D. Cal. Jan. 29, 2017), ECF No. 6.

of many components of the ban.⁵ On February 9, the Ninth Circuit Court of Appeals—in a unanimous per curiam opinion—denied the Government’s emergency motion for a stay of the Washington federal court’s order, finding that “the Government [had] failed to establish that it w[ould] likely succeed on its ... argument[s] in [its] appeal.” *See Washington v. Trump*, ___ F.3d ___, 2017 WL 526497, at *10 (9th Cir. Feb. 9 2017) (per curiam). And most recently, the Eastern District of Virginia entered a preliminary injunction against many aspects of the Executive Order, similarly finding that the “unrefuted evidence presented by” Virginia “establishes that there is a likelihood the Commonwealth will prevail on the merits of its Establishment Clause claim.” *Aziz v. Trump*, No. 1:17-cv-116, 2017 WL 580855, at *11 (E.D. Va. Feb. 13, 2017).

ARGUMENT

I. The Executive Order Harms *Amici*.

A. The Executive Order Curtails Diversity and Harms Innovation.

Diversity of community and culture is central to our national history and identity. Acceptance of diversity and, in particular, of foreign-born persons has been part of the American fabric ever since the Founding. George Washington, for instance, wrote that “[t]he bosom of America is open to receive not only the opulent and respectable Stranger, but the oppressed and persecuted of all Nations And Religions; whom we shall wellcome to a participation of all our rights and privileges, if by decency and propriety of conduct they appear to merit the enjoyment.”⁶ The inscription on the Statue of Liberty, which stands as a beacon of freedom near Ellis Island, reads, in part: “Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my

⁵ *Washington v. Trump*, No. 17-cv-141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017).

⁶ Letter from George Washington to Joshua Holmes (Dec. 2, 1783), <http://founders.archives.gov/documents/Washington/99-01-02-12127>.

lamp beside the golden door!”⁷ *Amici* wholeheartedly share these same values and, on a daily basis, strive to foster them in their workplaces.

Yahoo! Inc. (“Yahoo”), for example, was itself co-founded by a Taiwanese immigrant, Jerry Yang.⁸ As a global business with over one *billion* monthly active users around the world, Yahoo “has a distinct opportunity to leverage the power of [its] platforms to advance inclusion and diversity at the company, and across the tech industry.”⁹ For this reason, Yahoo recognizes that “building an inclusive and diverse workplace is more than a theoretical goal.”¹⁰ Instead, it is a “mission-critical business imperative.”¹¹

Tumblr, Inc. (“Tumblr”), which lets users share text, photos, links, music, and videos with each other, is made up of over 335 million blogs, with millions of posts every day across 17 languages.¹² With over half its audience coming from outside the U.S., Tumblr recognizes the importance of diverse voices online as well as in its workforce. In light of this global audience, Tumblr recognizes that it is “building something for everybody,” and that a diverse workforce is vitally important because its user base includes people of all races and religions.¹³

⁷ This passage is from Emma Lazarus’s poem “The New Colossus,” which is inscribed at the foot of the Statue of Liberty, located just miles from this Court. *See also Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009) (“A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure.”).

⁸ Kerry Flynn, *What The Tech Industry Would Look Like Without Immigrants*, Yahoo! News, (Jan. 31, 2017), <https://www.yahoo.com/news/tech-industry-look-without-immigrants-150406925.html>.

⁹ Yahoo, *Diversity*, <https://about.yahoo.com/diversity>.

¹⁰ *Id.*

¹¹ *Id.*

¹² Tumblr, *Press Information*, <https://www.tumblr.com/press>.

¹³ Edward C. Baig, *Tumblr’s David Karp on Social Media, YouTube, Diversity*, USA Today (Nov. 4, 2014), <http://usat.ly/2kXm3J>.

Diversity and inclusiveness are crucial to *amici* because of the basic human dignity and respect these values afford those who are part of our workforces and our communities. They also strengthen *amici*'s productivity, their ability to serve diverse audiences, and, ultimately, their bottom lines. *See Grutter v. Bolinger*, 539 U.S. 306, 330 (2003) (“[T]he skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”). In this modern technological era, as has been true throughout our history, immigrants play an important role in teaming with American citizens in the fields of science, technology, engineering, and mathematics, among many others, all of which are crucial to *amici*'s innovation and to the products *amici* create and the services *amici* provide. Indeed, immigrants make up approximately 25% of the members of the college-educated U.S. workforce working in occupations that are linked to innovation and technology,¹⁴ and account “for more than half of the net increase in the [U.S. science and engineering] labor force since 1995.”¹⁵

Substantial research also demonstrates that an inclusive and diverse workforce “result[s] in reduced costs and more positive employee outcomes, along with measurable performance outcomes and bottom-line results.”¹⁶ It invigorates companies with new ideas and opportunities, increases the potential for competitiveness, creates awareness of new potential markets, and

¹⁴ William R. Kerr, *U.S. High-Skilled Immigration, Innovation, and Entrepreneurship: Empirical Approaches & Evidence* 4-5, Harvard Bus. Sch. Working Paper No. 14-017 (Aug. 27, 2013), <https://dash.harvard.edu/bitstream/handle/1/11508211/14-017.pdf>.

¹⁵ William R. Kerr & William F. Lincoln, *The Supply Side of Innovation: H-1B Visa Reforms and US Ethnic Invention* 1, NBER Working Paper No. 15768 (Feb. 2010), <http://www.nber.org/papers/w15768.pdf>.

¹⁶ Kristyn A. Scott et al., *The Diverse Organization: Finding Gold at the End of the Rainbow*, 50 Human Res. Mgmt. 735, 748 (2011), <http://www.hireimmigrants.ca/wp-content/uploads/The-Diverse-Organization-Finding-Gold-at-the-End-of-the-Rainbow.pdf>.

reduces the likelihood of overconfidence.¹⁷ As a result, diversity is “associated with increased sales revenue, more customers, greater market share, and greater relative profits.”¹⁸

The Executive Order, however, undermines *amici*’s commitment to diversity and threatens to erode the competitive advantage *amici* hold as companies headquartered in a country that historically and proudly welcomes immigrants. Unless the Executive Order is enjoined, *amici* and other U.S.-based companies—for at least 90 days, and possibly beyond—cannot recruit in the seven affected countries and bring highly skilled, highly educated individuals from those countries into the United States. The Executive Order even impairs *amici*’s ability to recruit and retain such individuals for positions headquartered in *amici*’s international offices, given that *amici*’s international employees are often required to travel to the United States for work.

Furthermore, the Executive Order and its harmful symbolic effects will likely hinder the recruitment efforts of *amici* and other U.S.-based companies long after the 90-day period expires and well beyond the borders of the seven countries covered by the Executive Order. It signals to new hires and potential workers that they are unwelcome in the United States or at U.S.-based companies. This misguided, unacceptable message directly undermines the business policies and strategies that have made *amici*—as well as New York and America—so successful. All these harms, ameliorated in part by this Court’s order granting Petitioners’ request for a temporary restraining order, *see* ECF No. 8, weigh significantly in favor of an order granting Petitioners’ request for injunctive relief.

¹⁷ Feng Li & Venky Nagar, *Diversity & Performance*, 59 *Mgmt. Sci.* 529, 531 (2013).

¹⁸ Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 *Am. Soc. Rev.* 208, 219 (2009), <http://www.asanet.org/sites/default/files/savvy/images/journals/docs/pdf/asr/Apr09ASRFeature.pdf>.

B. The Executive Order Impairs *Amici*'s Ongoing Business Operations.

In addition to the many ways in which the Executive Order contravenes *amici*'s policies of diversity and inclusivity, the sudden, sweeping changes that the Executive Order wrought upon U.S. immigration policy also have caused immediate and concrete harm to many of *amici*'s global business operations. The Executive Order's travel ban has particularly harmed employees to the extent they travel to conduct business on *amici*'s behalf, employees who are in some cases now unable to perform jobs for which they were hired and trained.

Even for those employees who do not travel abroad in furtherance of *amici*'s businesses, the Executive Order has generated unease and serves as an unwelcome and time-consuming distraction that reduces productivity. *Amici* have been compelled to expend significant resources trying to decipher the rapidly changing scope and impact of the Executive Order, to ensure that *amici* comply with the Executive Order, and to properly advise any affected employees.

For *amici*, the Executive Order inflicts concrete harm. It imposes travel restrictions on many of *amici*'s hard-working employees and contractors whose jobs and livelihoods depend on their ability to travel abroad. It reduces *amici*'s ability to recruit, retain, and utilize diverse talent. And it generates uncertainty and concern in the workforce—all reasons this Court should grant Petitioners' request for injunctive relief.

II. Petitioners Are Likely to Succeed on the Merits of Their Claims Because the Executive Order Is Unconstitutional.

This Court should also grant the requests for injunctive relief because significant doubts exist as to whether the Executive Order satisfies the constitutional guarantees of equal protection, due process, and separation of powers.

A. Serious questions exist regarding whether the Executive Order violates the Equal Protection Clause by singling out individuals from seven Muslim-majority countries in Africa and

the Middle East. Classifications based on nationality, alienage, and religion—such as those created by the Executive Order—are “inherently suspect,” *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Friedman v. Rogers*, 440 U.S. 1, 17 (1979), and subject to strict scrutiny, *United States v. Virginia*, 518 U.S. 515, 532 n.6 (1996); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Furthermore, lawful permanent residents, *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953), and aliens with “significant voluntary connection” to the United States, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), are accorded constitutional protections.

Even if the Executive Order could be considered “facially neutral,” rather than expressly discriminatory, “an inquiry into intent is [still] necessary to determine whether [it] in some sense was designed to accord disparate treatment on the basis of [impermissible] considerations.” *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 484-85 (1982); *see also United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (“In determining whether a law is motivated by an improper animus or purpose, ‘[d]iscriminations of an unusual character’ especially require careful consideration.” (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996))). If so, strict scrutiny is warranted. *Seattle Sch. Dist. No. 1*, 458 U.S. at 484-85. For example, in *Seattle School District No. 1*, after examining campaign statements by proponents of a challenged initiative, the Supreme Court held that “despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes” and invalidated a statewide school desegregation initiative. *Id.* at 471; *see also Romer*, 517 U.S. at 634 (“[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”).

Accordingly, when deciding the proper level of scrutiny to apply to the Executive Order, this Court can and should consider the well-reported statements made by the President¹⁹ and the President's top advisors²⁰ to discern whether the Executive Order was predicated, in whole or part, on an intent to discriminate on an impermissible basis, such as religion. *See Washington*, 2017 WL 526497, at *10 (“[T]he States have offered evidence of numerous statements by the President about his intent to implement a ‘Muslim ban’ as well as evidence they claim suggests that the Executive Order was intended to be that ban.”); *see also Aziz*, 2017 WL 580855, at *7-8 (finding it proper to “determin[e] what purpose motivates governmental action” and crediting the fact that “[t]he ‘Muslim ban’ was a centerpiece of the president’s campaign for months, and the press release calling for it was still available on his website as of the day this Memorandum Opinion is being entered.”).

Moreover, that the Executive Order affects only a portion of the world’s Muslim population does not make the Executive Order any less suspect. The notion that discrimination is permissible so long as it does not target every single member of a protected class has no basis in the Supreme Court’s equal protection jurisprudence. *See Aziz*, 2017 WL 580855, at *9 (rejecting argument that “the Court cannot infer an anti-Muslim animus because the EO does not affect all, or even most, Muslims” because “[i]t is a discriminatory purpose that matters, no matter how

¹⁹ *See, e.g.*, First Amended Complaint at ¶¶ 42–61, *State of Washington*, No. 2:17-cv-141 (W.D. Wash. Feb. 1, 2017), ECF No. 18, <https://www.clearinghouse.net/chDocs/public/IM-WA-0029-0006.pdf>.

²⁰ Amy B. Wang, *Trump Asked for a ‘Muslim Ban,’ Giuliani Says—and Ordered a Commission to Do It ‘Legally’*, Wash. Post (Jan. 29, 2015), <http://wapo.st/2jLbEO5> (discussing statements made by cybersecurity advisor Rudolph Giuliani); Pamela Engel, *Trump National Security Adviser Once Said Fear of Muslims is ‘Rational,’* Business Insider (Nov. 16, 2016), <http://read.bi/2gvcgdh> (discussing statements made by recently resigned National Security Advisor, retired Lieutenant General Michal Flynn); Andrew Kaczynski, *Michael Flynn in August: Islamism a ‘Vicious Cancer’ in Body of All Muslims That ‘Has to be Excised’*, CNN (Nov. 22, 2016), <http://cnn.it/2jbHVAf> (same).

inefficient the execution”). The Supreme Court struck down a provision of the Defense of Marriage Act in *Windsor* as violating “basic due process and equal protection principles” for “seek[ing] to injure” gays and lesbians, even though the provision only directly affected gays and lesbians who were in valid marriages (a minority of that group at the time of the decision). 133 S. Ct. at 2683, 2693. And it struck down racial segregation in the nation’s public schools, even though the challenged policies only directly affected African-Americans who were minors enrolled in public schools. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954). Here, too, the Executive Order cannot survive equal protection scrutiny.

Under heightened scrutiny analysis, the Government cannot prove that the Executive Order is “narrowly tailored” to “further compelling state interests.” *Johnson v. California*, 543 U.S. 499, 505 (2005) (citation omitted). Although national security is unquestionably of critical importance, general invocations of national security and threats of terrorism alone cannot justify this overbroad and discriminatory Executive Order because no compelling justification exists for a wholesale travel ban that applies to *all* non-U.S. citizens from the seven covered countries, including the skilled employees who work for *amici* as well as their families and young children. *See United States v. Robel*, 389 U.S. 258, 264 (1967) (“It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties ... which makes the defense of the Nation worthwhile.”).²¹

²¹ Even if the Executive Order were examined under a lesser standard of scrutiny, its classification of the affected individuals would not stand. “When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest.” *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976). “By requiring that the classification bear a rational relationship to an independent and legitimate legislative end,” the Supreme Court explained in *Romer*, “we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.” 517 U.S. at 633. Here, in light of its blanket exclusions and preferences and improper

For all these reasons, Petitioners are likely to succeed on the merits of their Equal Protection claim.

B. Serious questions also exist regarding whether the Government violated due process by revoking valid visas of individuals from the seven affected countries, without any process, individualized review, or recourse. As the Ninth Circuit recently concluded, “[t]he procedural protections provided by the Fifth Amendment’s Due Process Clause are not limited to citizens.” *Washington*, 2017 WL 526497, at *8. Rather, the Due Process Clause “applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (legal permanent residents who leave the United States are protected under the Due Process Clause when they return). Furthermore, once a visa is validly issued, its holder has “a legitimate claim of entitlement to it,” and the attached privileges and permissions. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Thus, the Government cannot arbitrarily and capriciously rescind a visa or destroy its value by suspending one’s ability to use the document for its essential purpose—entry into, and presence in, the United States. *See, e.g., Mantena v. Johnson*, 809 F.3d 721, 736 (2d Cir. 2015) (raising the possibility that “despite the doubts cast by many courts on the liberty and property interests implicated in an immigrant visa, a lack of notice of visa revocation would violate the constitutional procedural due process requirements”); *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 125 (2d Cir. 2009) (allowing U.S. employer to raise First Amendment claims relating to visa applicants); *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008) (same). Nor can the

purpose, the Executive Order is so overbroad and under inclusive that it is not rationally related to its stated goals.

federal government, through implementation and enforcement of the Executive Order, deprive due process protections to “[1] other persons who are in the United States, even if unlawfully, [2] non-immigrant visaholders who have been in the United States but temporarily departed or wish to temporarily depart, [3] refugees, and [4] applicants who have a relationship with a U.S. resident or an institution that might have rights of its own to assert.” *Washington*, 2017 WL 526497, at *9 (citations omitted). As the Supreme Court has cautioned, “the Constitution commands restraint before discarding liberty in the name of expediency.” *J. McIntyre Machinery v. Nicastro*, 564 U.S. 873, 887 (2011) (plurality opinion of Kennedy, J.).

C. Serious questions exist as to whether the Executive Order’s travel restrictions violate the due process liberty interests of those affected. “Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage,” and “is basic in our scheme of values.” *Kent v. Dulles*, 357 U.S. 116, 126 (1958). “Travel abroad, like travel within the country, may be necessary for a livelihood.” *Id.* By banning travel to the United States for persons from the seven affected countries—including many of *amici*’s employees who previously held valid visas allowing them to work in the United States and re-enter the country after traveling abroad—the Executive Order raises serious constitutional questions pertaining to the right to travel.

D. Petitioners have raised serious concerns that the Executive Order exceeds the scope of the President’s Article II powers. “The Constitution limits [the President’s] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *see also Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (“The Framers of the Federal Constitution ... viewed the principle of separation of powers as the absolutely central guarantee of a just

government. ... Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.”). However, serious questions exist regarding whether the President’s order “does not direct that a congressional policy be executed in a manner prescribed by Congress,” but rather “directs that a presidential policy be executed in a manner prescribed by the President.” *Youngstown*, 343 U.S. at 588. In such circumstances, courts have a constitutional duty to ensure that the Executive complies with the relevant immigration statutes, within the boundaries set by Congress, as well as the Bill of Rights. *See, e.g., Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935) (finding Executive Order unconstitutional); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1324 (D.C. Cir. 1996) (same).

While the Government has elsewhere argued that judicial scrutiny of the Executive Order and presidential decision-making raises a separation of powers problem, Emergency Mot. at 21, *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 4, 2017), ECF No. 14 (“[j]udicial second-guessing of the President’s national security determination in itself imposes substantial harm on the federal government and the nation at large”), such judicial review is the essence of our constitutional system of checks and balances. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (“The identification and protection of [constitutional] rights is an enduring part of the judicial duty to interpret the Constitution.”). Indeed, “the Supreme Court has repeatedly and explicitly rejected the notion that the political branches have unreviewable authority over immigration or are not subject to the Constitution when policymaking in that context.” *Washington*, 2017 WL 526497, at *5; *see also Aziz*, 2017 WL 580855, at *6 (“Defendants have cited no authority for the proposition that Congress can delegate to the president the power to violate the Constitution and its amendments.”). As Alexander Hamilton explained in *Federalist*

78, constitutional “[I]mitations ... can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.” *The Federalist No. 78* (Alexander Hamilton). This Court should follow these precedents and teachings, and conclude—as the Ninth Circuit did—that the Government is unlikely to prevail on the merits of its claims.

CONCLUSION

For all the foregoing reasons, this Court should grant Petitioners’ request for injunctive relief.

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Respectfully submitted,

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Attorneys for Leading Companies as *Amici Curiae*

APPENDIX A

LIST OF *AMICI CURIAE*

1. Affirm, Inc.
2. Airbnb, Inc.
3. Ampush LLC
4. Appboy, Inc.
5. AppDynamics, Inc.
6. AppNexus Inc.
7. Chobani LLC
8. DoorDash, Inc.
9. Dropbox, Inc.
10. EquityZen Inc.
11. General Assembly Space, Inc. (d/b/a General Assembly)
12. Greenhouse Software, Inc.
13. Habla Inc. (d/b/a Olark Live Chat)
14. Hewlett Packard Enterprise Co.
15. Imgur, LLC
16. InVisionApp, Inc.
17. JAND, Inc. (d/b/a Warby Parker)
18. Kickstarter, PBC
19. Knotel, Inc.
20. Managed By Q Inc.
21. Mapbox, Inc.
22. Marin Software Inc.

23. MeetUp, Inc.
24. MongoDB, Inc.
25. Nextdoor.com, Inc.
26. nTopology Inc.
27. Postmates Inc.
28. Purch Group, Inc.
29. Quantcast Corp.
30. RealNetworks, Inc.
31. RetailMeNot, Inc.
32. Ryzac, Inc. (d/b/a Codecademy)
33. Shutterstock, Inc.
34. Tech:NYC
35. Trello, Inc.
36. Tumblr, Inc.
37. Uber Technologies, Inc.
38. Udacity, Inc.
39. Upwork, Inc.
40. WorkAndCo International, Inc. (d/b/a Work & Co)
41. Yahoo! Inc.