No. 17-1351

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself; HIAS, INC., on behalf of itself and its clients; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; JOHN DOES #1 & 3; JANE DOE #2,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; DANIEL R. COATS, in his official capacity as Director of National Intelligence,

Defendants-Appellants.

On Appeal from an Order of the United States District Court for the District of Maryland, Southern Division, Case No. 8:17-cv-00361-TDC
United States District Judge Theodore D. Chuang

BRIEF OF AMICI CURIAE NATIONAL IMMIGRANT JUSTICE CENTER, ASISTA, AMERICANS FOR IMMIGRANT JUSTICE, FUTURES WITHOUT VIOLENCE, NORTH CAROLINA COALITION AGAINST DOMESTIC VIOLENCE, AND SANCTUARY FOR FAMILIES, IN SUPPORT OF AFFIRMANCE AND PLAINTIFFS-APPELLEES

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INTRODUCTION

This case involves a challenge from the International Refugee Assistance Project and others to Executive Order #13,780 (the "EO"), the second order issued by President Trump purporting to cut off immigrant and nonimmigrant entries from six countries. This is the federal government's appeal from a preliminary injunction entered by the District Court.

Amici write separately for two reasons.[1] First, Amici write to explain additional ways in which the breadth of the EO likely violates the Immigration and Nationality Act, apart from those respects noted by Plaintiffs-Appellees and the District Court. The parties below focused on the EO's impact on immigrant visas generally, and on applicants within the refugee system. However, the EO also appears to affect visas for victims of human trafficking and their families; victims of specified criminal offenses and their families; visas pertaining to spouses of U.S. citizens; and the spouses and children of refugees and asylees. Amici would not wish to suggest that the EO is permissible as to other visa categories; Amici are experts in these areas, and can speak to its incompatibility with the statute in these areas of the law. The EO runs contrary to the statutes and regulations that govern

[1] This brief was authored by counsel for Amici, without the involvement of counsel for any party in this matter. No party or counsel for such party contributed money that was intended to fund preparing or submitting this brief. No person other than the Amici or their counsel contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

these specific visa categories, and to international law governing treatment of refugees and asylees.

Second, the EO's language is not severable as to aspects which clearly violate statute and aspects which would be unlawful only if done for an improper or irrational reason. Thus, the Court could choose to uphold the preliminary injunction under challenge without reaching several of the other important issues presented by this case.

STATEMENT OF INTEREST OF AMICI

Amici are public interest organizations with longstanding commitments to serving the family members of noncitizen victims of human trafficking and other crimes; mixed-status households including marriages where only one spouse is a U.S. citizen, and the families of refugees and asylees. Amici have decades of experience and an interest in ensuring that the laws for adjudicating an immigrant's eligibility for asylum are properly applied.

The National Immigrant Justice Center (NIJC) is a Chicago-based national non-profit organization that provides free legal representation to low-income refugees and asylum seekers. In collaboration with *pro bono* attorneys, NIJC represents hundreds of applicants for U visas, T visas, K-3 visas, asylees, and refugees at any given time, before the Asylum Office, the Immigration Courts, the Board of Immigration Appeals, and the Federal Courts. In addition to the cases

that NIJC accepts for representation, it also screens and provides legal orientation to hundreds of potential asylum applicants every year.

ASISTA Immigration Assistance (ASISTA) worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes, which were incorporated in the 1994 Violence Against Women Act (VAWA) and its progeny. ASISTA serves as liaison for the field with Department of Homeland Security (DHS) personnel charged with implementing these laws, most notably Citizenship and Immigration Services (CIS), Immigration and Customs Enforcement (ICE), and DHS's Office for Civil Rights and Civil Liberties. ASISTA also trains and provides technical support to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates, and legal services, non-profit, pro bono, and private attorneys working with immigrant crime survivors.

Americans for Immigrant Justice ("AI Justice"), formerly Florida Immigrant Advocacy Center, is a non-profit law firm dedicated to promoting and protecting the basic rights of immigrants. Since our founding in 1996, AI Justice has served over 90,000 immigrants from all over the world. Our clients include unaccompanied immigrant children; immigrants who are detained and facing removal proceedings; as well as immigrants seeking assistance with work permits, legal permanent residence, asylum and citizenship. Over the past two decades, AI

Justice has served thousands of individual non-citizens who face removal. The deleterious effects of the Executive Order at issue in this case would directly affect the populations we serve and we believe that our organization's extensive experience representing such persons can assist the Court in its deliberative process. Our clients also include survivors of domestic violence, sexual assault, and human trafficking, and their children, who have been irreparably traumatized and victimized by abuse and violence and are seeking refuge. Part of our mission is to ensure that immigrants are treated justly, and to help bring about a society in which the contributions of immigrants are valued and encouraged. In Florida and on a national level, we champion the rights of immigrants; serve as a watchdog on immigration detention practices and policies; and speak for immigrant groups who have particular and compelling claims to justice. AI Justice is dedicated to advancing and defending the rights of immigrants.

Futures Without Violence (FUTURES), formerly the Family Violence Prevention Fund, is a national nonprofit organization that has worked for over thirty years to prevent and end violence against women and children around the world. FUTURES mobilizes concerned individuals; children's, women's, and civil rights groups; allied professionals; and other social justice organizations to end violence through public education and prevention campaigns, public policy reform,

training and technical assistance, and programming designed to support better outcomes for women and children experiencing or exposed to violence.

FUTURES joins with amici because it has a long-standing commitment to supporting the rights and interests of women and children who are victims of crime regardless of their immigration, citizenship, or residency status. FUTURES co-founded and co-chaired the National Network to End Violence Against Immigrant Women working to help service providers, survivors, law enforcement and judges understand how best to work collaboratively to bring justice and safety to immigrant victims of violence. Using this knowledge FUTURES helped draft legislative recommendations that were ultimately included in the Violence Against Women Act and Trafficking Victims Protection Act to assist immigrant victims of violence. FUTURES currently participates in the Alliance to End Slavery and Trafficking and co-chairs the Coalition to End Violence Against Women and Girls Globally.

The North Carolina Coalition Against Domestic Violence (NCCADV) is a not-for-profit organization incorporated in North Carolina in 1982 (www.nccadv.org) to end domestic violence. NCCADV represents and assists 85 domestic violence service programs which serve victims of domestic violence. In addition, NCCADV has hundreds of individual and organizational members. Working with federal, state and local policymakers and domestic violence

advocates throughout the nation, NCCADV helps identify and promote policies and best practices to assist immigrant survivors of intimate partner violence. NCCADV is deeply concerned that the Executive Order at issue is contrary to the immigration statute and regulations, undermines U Visas for immigrant victims of crime, including domestic violence, and places already vulnerable victims at more risk of harm.

Sanctuary for Families is New York State's largest dedicated service provider and advocate for survivors of domestic violence, human trafficking, and related forms of gender violence. Each year Sanctuary provides legal, clinical, shelter, and economic empowerment services to approximately 15,000 survivors and their children. Sanctuary's legal arm, The Center for Battered Women's Legal Services ("The Center"), specializes in providing legal assistance and direct representation to indigent victims, mostly in family law and immigration matters. Legal services at the Center are carried out by Center staff through direct representation, in collaboration with volunteers from the private bar, law schools, and New York City's public interest community. In addition, the Center provides training on domestic violence and trafficking to community advocates, pro bono attorneys, law students, service providers, and the judiciary, and, in collaboration with a diverse range of local, national, international, private, and community organizations, plays a leading role in advocating for legislative and public policy

changes that further the rights and protections afforded battered women and their children.

ARGUMENT

The EO is contrary to the immigration statute and regulations in various respects, in ways neither discussed nor (to all appearances) contemplated by the drafter of the EO. The EO's sweeping language appears to result from the misconception that authority under § 1182(f) supersedes the rest of the immigration statute. The Court should correct this misimpression and uphold the preliminary injunction.

I. The EO Is Contrary to the Immigration Statute and Regulations.

Plaintiffs appropriately focused their arguments on those aspects of the EO which are without legal support and would result in substantial harm to them. Amici write to explain additional ways in which the breadth of the EO likely violates the Immigration and Nationality Act (INA) and, if allowed to take effect, would harm others. Other submissions to this Court correctly argue that the EO violates the anti-discrimination provision at 8 U.S.C. § 1152(a)(1)(A) as to immigrant visas. Amici agree. In addition, the EO would on its face prevent noncitizens from obtaining visas as spouses or children of victims of human trafficking (T visas) or victims of specified criminal offenses (U visas), as spouses and children of U.S. citizens (K-3 and K-4 visas), and as spouses and children of

admitted refugees and asylees. By suspending the issuance of visas and travel documents, the EO undermines these programs, runs afoul of the statutory and regulatory regimes governing them, and conflicts with international law. The general grant of authority at 8 U.S.C. § 1182(f) can and should be read harmoniously with the rest of the INA. This Court should not read § 1182(f) to authorize the effective unilateral Presidential repeal of much of the INA, even temporarily. Since the EO is irreconcilable with multiple parts of the INA, it is unlawful.

A. The Authority Granted at 8 U.S.C. § 1182(f) Must Be Read Consistently with the Rest of the INA.

Courts must interpret a statute, where possible, so as to give meaning to all of the statutory text. *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). A court construing a statute must attempt to "fit . . . all parts into a harmonious whole." *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1145 (9th Cir. 2013) (citations omitted).

The federal government contends that the broad authority at 8 U.S.C. § 1182(f) should be understood to override all other provisions of the INA. (*E.g.*, Dkt. 36, Br. for Appellants, at 27-28.) That contention is inconsistent with the requirement that the immigration statute be read as a harmonious whole. The INA is a complex, multi-faceted statute that accommodates a variety of rights and interests in the context of a global economy and globalized personal relationships.

While § 1182(f) authority may be broad, it need not and should not be read to conflict with other provisions of the INA. Section 1182(f) authority must be implicitly limited by other portions of the INA, both the anti-discrimination provision of 8 U.S.C. § 1152(a)(1)(A) and statutory provisions protecting the issuance of visas to particularly vulnerable aliens. Section 1182(f) authority should be understood to be in service of the various other aims and policies of Congress, such as exclusion of terrorists, 8 U.S.C. § 1182(a)(3)(B), exclusion of persecutors and participants in genocide, 8 U.S.C. § 1182(a)(3)(E), and the various other statutory rules set forth by Congress. *See generally* 8 U.S.C. § 1182(a). Reading § 1182(f) authority to override the statutory rules would render various parts of the statute unnecessary or duplicative. *See* 8 U.S.C. § 1182(a)(3)(C)(i).

By contrast, § 1182(f) retains its viability even when read consistently with other provisions of the INA. Such an approach to the statute preserves the efficacy of the INA in its entirety. The President must exercise § 1182(f) authority in ways tethered to Congressional objectives, as codified into statute.

B. The EO Conflicts with Statute and Regulation in Multiple Respects.

The EO implicates a host of visas in a wide variety of circumstances. The EO is inconsistent with the text, structure, intent, and purpose of the statute in various respects.

1. The EO is Contrary to Statute Governing Visas for Victims of Specified Criminal Offenses.

Congress created a category of visas for noncitizens who are victims of specified crimes – including *inter alia* domestic violence, sexual assault, and stalking – who assist U.S. law enforcement in the prosecution of criminal cases. *See* 8 U.S.C. § 1101(a)(15)(U). Congress created the U visa program to protect immigrant "women and children who are victims of [qualifying] crimes." *United States v. Cisneros-Rodriguez*, 813 F.3d 748, 762 (9th Cir. 2015) (citation omitted). *See also* Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1533, § 1513(a)(1)(B) (codified at 8 U.S.C. § 1101 et. seq.) ("All women and children who are victims of these crimes committed against them in the United States must be able to report these crimes to law enforcement and fully participate in the investigation of the crimes committed against them and the prosecution of the perpetrators of such crimes."). The legislative history demonstrates Congressional intent to "make it easier for abused women and their children to become lawful permanent residents" and to ensure that "battered immigrant women should not have to choose to stay with their abusers in order to stay in the United States." *See* 146 Cong. Rec. S10185 (Oct. 11, 2000) (statement of Sen. Patrick Leahy). Congress intended to support this effort by affording such victims a broad and generous opportunity to find safety for themselves and their children.

The INA specifies a process for the grant of U visas, the length of U visa status, and extensions thereof. 8 U.S.C. §§ 1184(p)(1), (6). U visas are multiple-entry visas, permitting noncitizen visa holders to travel abroad. 9 Foreign Affairs Manual 402.6-6(G)(b) ("U visas must be issued for multiple entries").

The EO, however, bars all noncitizens from six countries from obtaining a U visa abroad. It also bars issuance of derivative U visas to specified family members of noncitizens granted U visa status.

The U visa statute itself permits family members to reunite with the principal applicant. Where the U visa victim is under 21, the statute permits derivative status to the "spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien." 8 U.S.C. § 1101(a)(15)(U)(ii)(I). Where the U visa victim was over 21, the statute permits derivative status to the spouse or child of the principal applicant. 8 U.S.C. § 1101(a)(15)(U)(ii)(II).

Indeed, the regulations mandate parole for many U nonimmigrant applicants. Due to a Congressional limit on the annual number of U visa grants, some U applicants are provisionally granted that status, but must wait on a waiting list. When such a backlog is in effect, the U visa regulations provide in mandatory terms that "USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list." 8

C.F.R. § 214.14(d)(2). However, the EO bars parole, just as it bars U visa adjudication, absent some kind of waiver.

Many U visa derivatives abroad are in situations of great vulnerability. *See* USCIS Ombudsman, "Parole for Eligible U Visa Principal and Derivative Petitioners Residing Abroad" (June 16, 2016). Children and family abroad may be vulnerable to retaliation due to testimony that helped put someone into jail. Children may face additional vulnerability from difficult conditions in that country, compounded by the problem of a parent living in the United States.

The intent of the U visa statute is to protect vulnerable noncitizens in this situation; the statute is structured accordingly. The regulations mandate parole issuance for U visa applicants abroad, and their family members. A full freeze of U visa applications is inconsistent with the intent and structure of the statute.

2. The EO is Contrary to Regulations and Statutes Governing Visas for Victims of Human Trafficking and Their Family Members.

In order to target the problem of human trafficking, Congress created a visa for victims of severe forms of human trafficking, and their family members. 8 U.S.C. § 1101(a)(15)(T) ("T visa"). As with the U visa, Congress specified by statute the length of T visa, as well as termination of T visa status as to derivative beneficiaries. *See* 8 U.S.C. §§ 1184(o)(7)(A) (length of status); (o)(7)(C) (automatic extension); (o)(4) (continued classification of children).

Noncitizens seeking T status abroad are generally family members of the victim of severe human trafficking. 9 Foreign Affairs Manual 402.6-5(E)(1). Derivative beneficiaries may be in situations of great danger, due to networks of human traffickers put at peril by the cooperation of a human trafficking victim with U.S. authorities. *See id.* at 402.6-5(E)(1)(c).

The EO de facto terminates T visa derivative status for any T visa child or parent seeking to join the individual found to have been a victim of severe forms of human trafficking.

3. The EO is Contrary to Law Relating to Spouses of U.S. Citizens Under the K-3 Visa.

Worried by lengthy visa delays, Congress created a nonimmigrant visa category for spouses of U.S. citizens seeking to enter the United States to seek permanent resident status here. 8 U.S.C. § 1101(a)(15)(K)(ii). Spouses of U.S. citizens seeking K status may obtain K-3 nonimmigrant status. *In re Sesay*, 25 I. & N. Dec. 431, 433 n.3 (BIA 2011) (citing 8 C.F.R. § 214.1(a)(1)(v), (a)(2)).

A K-3 visa is a multiple entry visa, meaning that it permits the visa holder to travel in and out of the United States multiple times. 9 Foreign Affairs Manual 502.7-5(C)(7)(a); see also USCIS, "K-3/K-4 Nonimmigrant Visas," available at https://www.uscis.gov/family/family-us-citizens/k3-k4-visa/k-3k-4-nonimmigrant-visas ("Applicants presently in the United States in a K-3 or K-4 nonimmigrant

classification may travel outside the United States and return using their K-3 or K-4 nonimmigrant visa.").

The purpose of the K-3 visa was explained in a Joint Memorandum entered into the Congressional Record:

> The purpose of the … "K" visa[] is to provide a speedy mechanism by which family members may be reunited…. Like the existing Fiancée visa, the new "K" visa is not intended to be a prerequisite for the admission of citizen spouses, but a speedy mechanism for the spouses and minor children of U.S. citizens to obtain their immigrant visas in the U.S., rather than wait for long periods of time outside the U.S.

146 Cong. Rec. S11851 (Dec. 15, 2000). The entire point of the K-3 visa (and the K-4 visa for children of K-3 applicants) is to permit a "speedy mechanism" to reunite U.S. citizens with family members abroad. A months-long suspension of K-3 issuance—which could be extended—is plainly inconsistent with the purpose and structure of the K-3 visa.

Due process liberty interests are implicated by visa decisions affecting U.S. citizen spouses. *See Bustamonte v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008) ("Freedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause.").[2] It is highly unlikely that the EO could survive Due Process scrutiny. The EO applies a one-size-fits-all

[2] In *Kerry v. Din*, 135 S. Ct. 2128 (2015), five justices did not reach the question of "whether a citizen has a protected liberty interest in the visa application of her alien spouse." *Id.* at 2139 (Kennedy, J., concurring).

approach to thousands of families from six countries, despite vast differences in individual cases. The EO does not specify "discrete factual predicates" or a fact providing "at least a facial connection" to a statutory ground of inadmissibility. The EO identifies no facts at all that pertain to visa holders who are the spouses of U.S. citizens. *Cf. Bustamonte*, 826 F.3d at 1062-63 (upholding denial of visa where consular official relied on specific information that applicant was involved in drug trafficking, giving a basis for inadmissibility under § 1182(a)(2)(C)).

Moreover, even if the EO made any showing of facts common to all spouses from the six specified countries (it does not), the EO itself and the various statements of President Trump and others demonstrate bad faith. These include then-candidate Donald Trump's December 2015 call for "a total and complete shutdown of Muslims entering the United States," President Trump's January 27, 2017 interview with Christian Broadcasting Network stating that immigration and refugee policy had been "very, very unfair" to Christians and that he was "going to help them," and former mayor of New York City Rudy Giuliani's January 28, 2017 statement that he had been asked by then-candidate Donald Trump to "put a commission together" on the proposed "Muslim ban" to show Mr. Trump "the right way to do it legally."

Amici submit that the Court need not reach the constitutional arguments because the statute is amenable to an interpretation which would avoid grave

doubts as to these constitutional issues. *United States v. Bradley*, 418 F.2d 688, 691 (4th Cir. 1969) ("Fortifying our interpretation is the venerable principle that a provision should be construed, if possible, to avoid doubts about its constitutionality."). Requiring § 1182(f) to be read harmoniously with other parts of the INA would confine Presidential authority within statutory limits, and would thereby avoid the grave constitutional issues otherwise presented by the case.

4. The EO Precludes Travel by Children of Admitted Refugees and Asylees, Contrary to Regulation and International Treaty Obligations.

An individual who has been granted asylum status in the United States, or has been admitted in refugee status, will not have their status directly questioned by the current EO. However, the EO clearly does preclude derivative refugees and asylees (i.e., spouses and children) from entering the United States, in violation of statute.

By statute, a spouse or child (defined as children who are unmarried and under age 21, 8 U.S.C. § 1101(b)) of an admitted refugee is entitled to derivative refugee status. Specifically, the statute provides that a spouse or child of the refugee "shall… be entitled to the same admission status" as the principal refugee. 8 U.S.C. § 1157(c)(2). However, the EO purports to preclude all noncitizens from all countries in the world from obtaining refugee status to enter the United States, except where the refugee grant had already occurred. EO §§ 2(c), 3(b)(vi). Thus,

any child or spouse of a refugee is blocked by the EO but entitled under statute—in mandatory terms—to "the same admission status," i.e., refugee status, as the admitted refugee.

Likewise, an asylee is entitled to request derivative asylee status for a child or spouse. 8 U.S.C. § 1159(b)(3). The only basis under regulation for denial of such an application is that "the spouse or child is found to be ineligible for the status." 8 C.F.R. § 208.21(e).[3]

Under the EO, a child or spouse of an admitted refugee or asylee would no longer be able to enter the U.S. to be with their spouse or parent. This not only runs afoul of the regulations and statutes discussed above, but also violates international law. Treaty obligations undertaken by the United States require the federal government to issue travel authorization to refugees and asylees. *See* Convention Relating to the Status of Refugees, art. 28(1), 19 U.S.T. 6259, 189 U.N.T.S. 150 (July 28, 1951; see also annex at para. 2.[4]

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[3] It is unclear whether entry as a refugee or asylee would be considered travel as an immigrant or nonimmigrant. *Cf.* 8 U.S.C. § 1101(a)(15) (providing that "immigrant" includes "every alien except an alien who is within one of the following classes," refugees and asylees not listed). If the former, the EO also violates the anti-discrimination language of § 1152(a)(1)(A).

[4] Federal statutes "ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). This principle is particularly appropriate as to admitted refugees and asylees because, by enacting the Refugee Act of 1980, "one of Congress' primary purposes was to bring United States refugee law into

II. Assuming Severability Applies, a Court Should Hesitate to Rewrite the EO to Cure an Overarching Incorrect Legal Analysis.

It is unclear whether severability analysis should apply to executive orders; only the Ninth Circuit has addressed the question, holding that the test for severability with respect to executive orders is the same as that for statutes. *See Matter of Reyes*, 910 F.2d 611, 613 (9th Cir. 1990) (affirming judgment striking executive order in its entirety). *See also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) (assuming without deciding "that the severability standard for statutes also applies to Executive Orders"). In this Circuit, a statutory provision will be found severable unless (1) other remaining provisions "are not themselves constitutionally valid," (2) remaining provisions are "incapable of functioning independently," or (3) if a remaining provision's "separate existence would be inconsistent with Congress' basic objectives in enacting the statute." *Ameur v. Gates*, 759 F.3d 317, 325 (4th Cir. 2014) (citations and quotation marks omitted).

The EO contains a severability clause. EO § 15(a). However, severability analysis does not permit courts to rewrite statutes. *See United States v. Rutherford*, 442 U.S. 544, 555 (1979) ("Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation."); *R.R. Ret. Bd. v.*

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conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987).

Alton R. Co., 295 U.S. 330, 362 (1935) ("[W]e cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole.").

As demonstrated above, the application of Section 3(c) to multiple classes of family members of visa holders is unlawful or improper, as are the restrictions on family members of refugees and asylees in Section 6. Any revision of the EO to resolve these problems would require rewriting the EO, which was drafted to apply across broad categories of such entrants to the United States. Moreover, as Amici argue above, Section 1182(f) must be read harmoniously with the rest of the immigration statute. Excising or limiting the EO's applicability to some visa categories would not cure the larger failure of the President to exercise the authority of § 1182(f) with conscious awareness of his legal obligations under the rest of the immigration statutes. Even if applied, this Circuit's statutory severability test would attempt to slice the EO down to comply with the law. The "separate existence" of a narrower, rewritten travel ban would also be inconsistent with the intended—but unlawful—objective of a "total and complete shutdown of Muslims entering the United States." *See Ameur*, 759 F.3d at 325.

In any event, it is doubtful that severability analysis permits courts to engage in revision and modification of discretionary assertions of executive authority, as was invoked in the Executive Order at issue. 8 U.S.C. § 1182(f). Once the Court

determines that the Executive's analysis was flawed, the Court should enjoin the EO, rather than rewriting it in the first instance. *See INS v. Ventura*, 537 U.S. 12, 16-18 (2002). As with review of other agency decisions, "judicial judgment cannot be made to do service" for the decision of the Executive. *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). Nor can an "appellate court . . . intrude upon the domain which Congress has exclusively entrusted" to the President. *Id.* *See also Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); 8 U.S.C. § 1252(a)(2)(B)(ii).

Thus, even if additional exclusions or limitations on the EO would eliminate some of the legal problems identified above, it would be inappropriate for the Court to enact those in the first instance. The EO should remain enjoined pending further proceedings in the case.

CONCLUSION

For these reasons, and for the reasons stated in the various other briefs presented to the Court, Amici request that this Court affirm the decision of the court below.

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Respectfully submitted,

s/ Robert N. Hochman

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with FED. R. APP. P. 29(a)(5) and the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 4,648 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii);

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Date: April 19, 2017

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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