No. 19-2375

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARAB AMERICAN CIVIL RIGHTS LEAGUE, on behalf of itself, its members, and its clients; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, on behalf of itself and its members; AMERICAN ARAB CHAMBER OF COMMERCE, on behalf of itself and its members; ARAB AMERICAN AND CHALDEAN COUNCIL, on behalf of itself and its members; ARAB AMERICAN STUDIES ASSOCIATION, on behalf of itself and its members; HEND ALSHAWISH; SALIM ALSHAWISH; FAHMI JAHAF; and KALTUM SALEH, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees

v.

DONALD J. TRUMP, President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; U.S. CUSTOMS AND BORDER PROTECTION; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; U.S. DEPARTMENT OF STATE; U.S. DEPARTMENT OF JUSTICE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; KEVIN MCALEENAN, Acting Secretary of Homeland Security; MARK A. MORGAN, Senior Official Performing the Functions and Duties of the Commissioner of U.S. Customs and Border Protection; KENNETH T. CUCCINELLI, Acting Director of U.S. Citizenship and Immigration Services; MICHAEL R. POMPEO, Secretary of State; WILLIAM P. BARR, U.S. Attorney General; JOSEPH MAGUIRE, Acting Director of National Intelligence; UNITED STATES OF AMERICA,

Defendants-Appellants.

On Appeal from the
United States District Court for the Eastern District of Michigan
Case No. 2:17-cv-10310-VAR-SDD

BRIEF OF FORMER NATIONAL-SECURITY OFFICIALS AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT OF INTEREST[1]

Amici curiae are former national-security, foreign-policy, intelligence, and other public officials who have worked on security matters at the seniormost levels of the United States government.[2] Amici have held the highest security clearances in the U.S. government. They have devoted their careers to combatting the various terrorist threats that the United States faces in an increasingly dangerous and dynamic world. A number of them have served in leadership roles in the administrations of presidents from both major political parties.

Many were current on active intelligence regarding credible terrorist threat streams directed against the United States as recently as one week before the issuance of the original January 27, 2017, Executive Order on "Protecting the Nation from Foreign Terrorist Entry into the United States" ("Travel Ban 1.0"). Some were current around the time of the identically titled March 6, 2017, Executive Order ("Travel Ban 2.0"), mere months before the September 24, 2017,

[1] No counsel for a party to this case authored this brief in whole or in part, and no such counsel or party contributed monetarily to the preparation or submission of any portion of this brief. Yale Law School's Peter Gruber Rule of Law Clinic is organized separately from the school's Jerome N. Frank Legal Services Organization ("LSO"), one of the counsel for certain of Plaintiffs-Appellees in a challenge to the initial executive order. Plaintiffs-Appellees consented to the filing of an amicus brief. Defendants-Appellants consented to the filing of an amicus brief as long as the brief is timely filed and otherwise complies with the rules for an amicus brief.

[2] A complete list of signatories can be found in the Appendix.

Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats ("Proclamation," "Travel Ban 3.0," or "Ban") (collectively, the "Orders").

Amici write to offer the Court their perspective on the substantial national-security and foreign-policy issues raised by this case.

ARGUMENT

Amici agree that, to keep our country safe from terrorist threats, the U.S. government must gather all credible evidence to thwart those threats before they ripen. Through the years, amici have worked individually and collectively to develop national-security policies that have:

(1) responded to specific, credible threats based on individualized information,

(2) rested on the best available intelligence, and

(3) been subject to thorough interagency review.

By contrast, the Orders that the President issued over several months, culminating in the Proclamation now before this Court, did not rest on such carefully tailored grounds. Instead, they

(1) were overbroad, blanket entry bans based on national origin, that

(2) were not supported by any intelligence that Defendants have cited or of which amici are aware, and

(3) originated from an order that received no careful interagency policy and legal review—and took even the President's own seniormost national-security officials by surprise.

These Orders radically departed from the Executive's consistent approach to border security across multiple administrations. For compelling national-security reasons, prior administrations have adopted rigorous individualized vetting based on cognizable intelligence, rather than blanket, national-origin-based bans. Overwhelming evidence demonstrates that the Proclamation's overbroad suspension of travel has not only failed to advance our national-security or foreign-policy interests, but seriously damages those interests.

The various fig leaves of "process" that Defendants have since applied have not cured the Proclamation's original defects. Remarkably, years after the ban was hastily imposed, Defendants still have not come forward with evidence of any credible—let alone compelling—national-security or foreign-policy need for the Orders. Defendants' rationale for a sweeping national-origin-based ban on travel has shifted with each new Order. Defendants have not submitted a sworn declaration from a single Executive official who is willing to defend the supposed national-security-based need for the Orders, or the process that led to their

adoption. Nor have Defendants pointed to any other evidence of a security imperative that could remotely justify these unprecedented actions. Particularly when considered in light of the President and his advisors' well-publicized statements calling for a "Muslim Ban," these facts negate any claim that this has been a credible exercise of the Executive's foreign-policy and national-security judgment.

For these reasons, national-security or foreign-policy interests would be gravely disserved by this case's summary dismissal, before the claims are considered through the adversarial process. Discovery would provide critical facts that go directly to the legality of Defendants' conduct, including whether the Order was motivated by or administered with animus, and whether the waiver process upon which Defendants have relied in the proceedings is a sham. These legal and factual arguments—plausibly pleaded by Plaintiffs—deserve to be tested through the adversarial process. It is the province and duty of this Court to say what the law is, not to act as a national-security rubber stamp. This Court should not allow Defendants to shield the Proclamation from meaningful judicial review by cloaking discrimination in a thin veil of "national security"—without that excuse being tested for pretext through fact-finding.

I. The proclamation does not advance the national-security or foreign-policy interests of the United States, and in fact does serious harm to those interests.

Amici know of no national-security or foreign-policy interest that would justify Travel Ban 3.0 or its predecessors. Amici include officials who were current on active intelligence concerning credible terrorist-threat streams directed against the United States as recently as June 2017, five months *after* Travel Ban 1.0 was adopted. Yet, amici collectively know of no specific threat or deficiencies in the current visa-vetting system that would justify the complete, country-wide suspensions of travel to the United States imposed here. Travel Ban 3.0 not only fails to advance the national-security or foreign-policy interests of the United States; it does lasting harm to those interests.

A. The Proclamation advances neither the national-security nor the foreign-policy interests of the United States.

Since the September 11, 2001, attacks, the United States has developed a rigorous system of security vetting, leveraging the full capabilities of the law-enforcement and intelligence communities. This vetting is applied to individual travelers not once, but multiple times. As government officials, amici sought continually to improve that vetting, as was done in response to previous threats identified by U.S. intelligence. Indeed, successive administrations have constantly worked to improve this vetting through robust information-sharing and data integration. Yet, every one of these administrations did so without resorting to

"leverage" in the form of multiple, sweeping bans on travel for all citizens of any particular country.

Amici know of no evidence of a national-security threat that would necessitate Defendants' sudden shift to a blanket, national-origin-based ban, away from the tested system of individualized vetting that national-security professionals across the government had developed and implemented.[3] Defendants claim that Travel Ban 3.0 is needed "to encourage foreign governments to improve their information-sharing and identity-management protocols and practices."[4] But banning all or most of the travelers from a group of countries to induce their governments to improve their information-sharing practices is an arbitrary and massively imprecise response to any concerns about information-sharing arrangements.

A sweeping national-origin-based ban on travel is both over- and under-inclusive. First, it is a remarkably overbroad and blunt mechanism for improving information sharing. In amici's experience, other countries are willing to cooperate with the United States to improve the exchange of necessary information. Occasionally, these countries may be unable to provide this information due to

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[3] *The Security of U.S. Visa Programs: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 114th Cong. (2016) (written statements of David T. Donahue & Sarah R. Saldaña).

[4] Proclamation No. 9,645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) [Travel Ban 3.0].

technological or resource limitations, but banning their citizens outright from coming to the United States will not solve those problems. In fact, such a ban will likely only make information-sharing issues with the targeted country worse, by impairing economic and political interchange and spurring anti-American sentiment. That is why until now, no administration in history has resorted to this tool to achieve such a goal.

The individualized-vetting system has been the settled approach of the U.S. government across multiple administrations. That individualized system already requires that each specific visa applicant bear the burden of proving his or her identity and eligibility for entry into the United States before a visa is issued.[5] Those visa applicants who cannot provide information or cannot be vetted are routinely denied. A country-based ban was thus hardly necessary, as Travel Ban 3.0 stated, to "protect the United States until such time as improvements occur."[6] The pre-existing system of individualized vetting already provided that protection.

If the Ban aims in fact to improve information-sharing protocols, it is also remarkably under-inclusive. The Ban claims to reduce possible public-safety threats posed by foreign nationals by excluding travelers who cannot be adequately vetted. Yet, the Ban does not remotely target all of the countries where there are

[5] 8 U.S.C. § 1361 (1996).
[6] Travel Ban 3.0, note 4, above.

known deficiencies in identity-management.[7] For example, all three Orders omitted Belgium, even though that nation has faced widely documented problems with information sharing—to the frustration of U.S. officials—and its nationals have carried out recent deadly terrorist attacks in Europe.[8] And all three Orders omitted Pakistan, even though the United States acknowledges that country's unreliable intelligence-sharing record as well as its "persistent acquiescence to safe havens" and provision of aid for terrorist groups.[9]

Further, there is no evidence that nationals of the banned countries who are allowed to enter the United States pose any credible threat to the safety of Americans. The Proclamation targets eight countries whose nationals have committed no deadly terrorist attacks on U.S. soil in the last 40 years.[10] Although Defendants initially invoked the September 11 attacks as a purported rationale for

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[7] David Bier, *Travel Ban Is Based on Executive Whim, Not Objective Criteria*, Cato Institute: Cato at Liberty (Oct. 9, 2017).

[8] *See, e.g.*, Mark Hosenball, *U.S. Frustration Simmers Over Belgium's Struggle with Militant Threat*, Reuters (Mar. 24, 2016); Andrew Higgins, *Terrorism Response Puts Belgium in a Harsh Light*, N.Y. Times (Nov. 24, 2015).

[9] Vanda Felbab-Brown, *Why Pakistan Supports Terrorist Groups, and Why the US Finds It So Hard to Induce Change*, Brookings: Order from Chaos (Jan. 5, 2018); *see also, e.g.*, Mohammed Ayoob, Can US-Pakistan Relations Be Reset?, Austl. Strategic Pol'y Inst.: The Strategist (Jul. 29, 2019).

[10] Alex Nowrasteh, *President Trump's New Travel Executive Order Has Little National Security Justification*, Cato Institute: Cato at Liberty (Sept. 25, 2017).

Travel Ban 1.0,[11] none of the September 11 hijackers were citizens of the countries listed in any of the Orders.[12] And multiple analyses show that the overwhelming majority of individuals who have been charged with—or who died in the course of committing—terrorism-related crimes inside the United States since September 11 have not been citizens of foreign countries at all, but rather U.S. citizens or legal permanent residents. [13]

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[11] Exec. Order No. 13,769, 82 Fed. Reg. 8977, § 1 (Feb. 1, 2017) [hereinafter Travel Ban 1.0].

[12] Peter Bergen, *et al.*, *Terrorism in America After 9/11*, New America Foundation (accessed Mar. 25, 2018).

[13] *See id.*; Lorenzo Vidino & Seamus Hughes, *ISIS in America: From Retweets to Raqqa*, Geo. Wash. Program on Extremism 7 (Dec. 2015); Nora Ellingsen, *It's Not Foreigners Who Are Plotting Here: What the Data Really Show*, Lawfare (Feb. 7, 2017); Lisa Daniels, Nora Ellingsen & Benjamin Wittes, *Trump Repeats His Lies About Terrorism, Immigration and Justice Department Data*, Lawfare (Jan. 16, 2018); Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, Cato Institute (Sept. 13, 2016). A March 2017 letter from then-Secretary of Homeland Security Kelly and Attorney General Sessions falsely claimed that since September 11, 2001, "a substantial majority of those convicted in U.S. courts for international terrorism-related activities were foreign-born." Letter from Jefferson B. Sessions III, Att'y Gen., & John Francis Kelly, Sec'y of Homeland Sec., to Donald J. Trump, President (Mar. 6, 2017) ["March 6 Letter"]. This claim referenced no underlying data, and has been widely criticized as inaccurate, and based on numerous apparent methodological flaws. *See* Nora Ellingsen & Lisa Daniels, What the Data Really Show about Terrorists Who "Came Here," Lawfare (Apr. 11, 2017); Alex Nowrasteh, *42 Percent of "Terrorism-Related" Convictions Aren't for Terrorism*, Cato Institute: Cato at Liberty (Mar. 6, 2017); Molly Redden, *Trump Powers "Will Not be Questioned" on Immigration, Senior Official Says*, The Guardian (Feb. 12, 2007); Shirin Sinnar, *More Misleading Claims on Immigrants and Terrorism*, Just Security (Mar. 4, 2017). Defendants' own agencies have since acknowledged an absence of support for multiple claims the administration has made in defense of the Orders. Benjamin Wittes, *The Justice*

Against this evidence, Defendants offer no proof that the threat from the listed countries has suddenly increased so as to warrant the country-based ban in Travel Ban 3.0. They cite no data, in either the Proclamation or their pleadings to this Court, that show that nationals from these countries present a growing threat, or any particularized threat at all.

Collectively, amici know of no change in threat level that would have justified the Proclamation's sweeping ban on travel for these countries. In fact, when Travel Ban 2.0 called on the Department of Justice and the Department of Homeland Security to make available information on foreign nationals who have been charged with terrorism-related offenses in the United States, the agencies responded with a report—which Defendants choose not to cite—indicating that the federal government does *not* collect, maintain, or even have access to the data that would be necessary to determine whether nationals from particular countries in fact pose a greater terrorism threat to the United States.[14] Thus, even when tasked, the responsible national-security agencies themselves could produce no data to support

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Department Finds 'No Responsive Records' to Support a Trump Speech, Lawfare (July 31, 2018); Kate Smith, *Justice Department says its report defending travel ban "could be criticized*,*"* CBS News, Jan. 4, 2019.

[14] For example, the agencies advised that they were unable to provide compiled information about the "manner of entry into the United States, countries of origin, [or] general immigration histories" of the individuals convicted of international terrorism-related offenses since September 11, 2001. *See Protecting the Nation From Foreign Terrorist Entry Into the United States: Initial Section 11 Report* (January 2018).

their sweeping claim that a country-based ban on travel was needed to protect against terrorist attacks.

The outcome-driven process that produced Travel Ban 1.0 casts yet more doubt on the national-security basis for the orders. Collectively, amici are aware of no intragovernmental process that was underway before January 20, 2017, to change current immigration vetting procedures. According to extensive reporting, subsequent government reviews, and information available to amici, Defendants followed no such interagency review in producing Travel Ban 1.0. The Order received little, if any, advance scrutiny by the Departments of State, Justice, Homeland Security, or the intelligence community.[15] Nor, apparently, did the White House consult officials from any of the seven agencies tasked with enforcing immigration laws.[16] Travel Ban 1.0 took even the President's own seniormost national-security officials by surprise. The then-Secretary of Homeland Security reportedly received his first full briefing on the final Order just as the

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[15] Jonathan Allen & Brendan O'Brien, *How Trump's Abrupt Immigration Ban Sowed Confusion at Airports, Agencies*, Reuters (Jan. 29, 2017); Evan Perez, *et al.*, *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017); Michael D. Shear & Ron Nixon, *How Trump's Rush to Enact an Immigration Ban Unleashed Global Chaos*, N.Y. Times (Jan. 29, 2017).

[16] Office of the Inspector Gen., U.S. Dep't of Homeland Sec., OIG-18-37, *DHS Implementation of Executive Order #13769 "Protecting the Nation from Foreign Terrorist Entry Into the United States"* 5 (Jan. 18, 2018) [OIG Report] (explaining that "DHS and its components had no opportunity to provide expert input in drafting the EO," and were "largely caught by surprise" as the Order was issued).

President was signing it.[17] Even the Secretary of Defense was neither consulted during the drafting of the Order nor given an opportunity to provide input.[18] This sequence departed drastically from the traditional national-security policymaking process, particularly for measures of this scope.

And although the White House involved more agencies for Travel Ban 3.0, its design defects have not been cured: the Proclamation's generalized, country-based approach remains virtually identical to its predecessors. Travel Ban 3.0 includes a few new exceptions and names a slightly different list of countries, but still relies on sweeping and unprecedented nationality-based bans, directed at almost exclusively Muslim-majority countries, nearly all of which were on the prior lists. And unlike the earlier Orders, Travel Ban 3.0 is now indefinite. Any additional governmental process plainly was not meant to alter or question the structure, purpose, or broad generalization that drove the original Travel Ban 1.0.

B. The Proclamation does serious damage to the national-security and foreign-policy interests of the United States.

Travel Ban 3.0 not only fails to advance the national-security or foreign-policy interests of the United States; it causes multiple, serious harms to those interests.

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[17] Shear & Nixon, note 15, above.

[18] *Id.*

First, the Ban has had a devastating humanitarian impact on men, women, and children throughout the world, by tearing families apart and preventing vulnerable individuals from seeking life-saving refuge in the United States. The Travel Ban has disrupted the travel of countless people who have themselves been victimized by terrorists.[19] Others face deep uncertainty about whether they will be able to travel to or from the United States for reasons including medical treatment, study or scholarly exchange, funerals, or other pressing family reasons. While the Ban allows the Secretaries of State and Homeland Security to admit travelers from targeted countries on a case-by-case basis, amici consider it unrealistic for these overburdened agencies to apply such procedures to every affected individual with urgent and compelling needs to travel. And indeed, there is ample reason in the public record to give rise to at least an inference that the waiver process was not meant to be applied in a true or rational manner, and may in fact be a sham. For instance, a declaration from a former consular official, tasked with applying the waiver standard, described the process as "window dressing" and a "fraud."[20]

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[19] *See, e.g.*, Mallory Moench, *Banned From the U.S. Due to Terrorist Threats, Yemenis Are Themselves the Victims of Attacks*, The Intercept (Feb. 18, 2018).

[20] *Trump v. Hawaii*, 138 S. Ct. 2392, 2431–33 (2018) (Breyer, J., dissenting) (reviewing evidence suggesting that the waiver process is not being applied as written); Decl. of Christopher Richardson, Alharbi v. Miller, No. 1:18-cv-2435 (E.D.N.Y. 2018); Ctr. for Constitutional Rights & Yale Law School Rule of Law Clinic, *Window Dressing the Muslim Ban: Reports of Waivers and Mass Denials from Yemeni-American Families Stuck in Limbo* (2018).

Second, Travel Ban 3.0 disrupts key counterterrorism, foreign-policy, and national-security partnerships. These partnerships are critical in maintaining the necessary collaboration channels in intelligence, law enforcement, military, and diplomacy to address the threat posed by terrorist groups such as the "Islamic State" (ISIS). The over-inclusive Ban has strained our relationships with partner countries in Europe, Africa, and the Middle East, on which we rely for vital counterterrorism cooperation, undermining years of effort to bring them closer.[21]

By alienating these partners, Travel Ban 3.0 has frustrated access to the intelligence and resources necessary to fight the root causes of terror or to disrupt potential terror plots abroad before attacks occur within U.S. borders. For instance, Chad, a Muslim-majority country, had long been one of the United States' most effective counterterrorism partners in Africa. Chad was used as a staging ground by the U.S. Air Force in its surveillance of the terrorist group Boko Haram, hosted about 2,000 U.S. troops for an annual military exercise in March 2017, and served as the base of the Multinational Joint Task Force, the coordinated regional effort to

[21] *See, e.g.*, Helene Cooper, *et al.*, *Chad's Inclusion in Travel Ban Could Jeopardize American Interests, Officials Say*, N.Y. Times (Sept. 26, 2017); *The International Implications of Trump's Refugee Ban*, NPR (Jan. 29, 2017).

fight Boko Haram.[22] Yet, shortly after being added to the list of banned countries in Travel Ban 3.0, Chad pulled out of supporting anti-terrorism efforts in Niger.[23]

Third, the Ban endangers intelligence sources in the field. For up-to-date information, our intelligence officers often rely on human sources in many of the countries targeted by the Ban. The Ban breaches trust with those very sources, who have put themselves at great risk to keep Americans safe—and who our officers have promised to protect.[24] Additionally, by suspending visas, this Ban halts the collection of vital intelligence that occurs during visa-screening processes—information that can be used to recruit agents and identify regional trends of instability.

Fourth, the Ban feeds the recruitment narrative of ISIS and other extremists who portray the United States as engaging in an indiscriminate war against Islam. Because of its disparate impact on Muslim travelers and immigrants, the Ban fuels ISIS's narrative and sends the wrong message to the Muslim community here at home and all over the world: that the U.S. government is hostile to them and their

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[22] Kevin Sieff, *Why Did the U.S. Travel Ban Add Counterterrorism Partner Chad? No One Seems Quite Sure*, Wash. Post (Sept. 25, 2017); Krishnadev Calamur, *Why Was Chad Included in the New Travel Ban?*, The Atlantic (Sept. 26, 2017).

[23] Conor Gaffey, *After Trump's Travel Ban, Chad Pulls Troops from Boko Haram Fight in Niger*, Newsweek (Oct. 13, 2017).

[24] Michael V. Hayden, Opinion, *Former CIA Chief: Trump's Travel Ban Hurts American Spies–and America*, Wash. Post (Feb. 5, 2017).

religion.[25] The Ban also endangers Christian and other non-Muslim communities by handing ISIS a recruiting tool and propaganda victory that spreads their message that the United States is waging a religious war.[26]

Fifth, the Ban disrupts diplomatic relations. The Ban has visibly compromised the ability of U.S. embassies throughout the world to carry out their day-to-day functions. These embassies rely heavily on local employees, whose abilities to travel, or even to work at all, have been thrown into confusion by this Ban.[27] More broadly, the Ban has compromised our nation's diplomatic efforts on a range of issues with countries around the world.[28]

Finally, the Ban affects many foreign travelers who annually inject hundreds of billions of dollars into the U.S. economy, supporting well over a million U.S. jobs.[29] This will have a negative impact on strategic economic sectors,

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[25] *See, e.g.*, Joby Warrick, *Jihadist Groups Hail Trump's Travel Ban as a Victory*, Wash. Post (Jan. 29, 2017); Lisa Gibson, *Can the U.S. Embassy in Libya Bridge the Divide with Facebook?*, U. Southern Cal.: Ctr. on Pub. Dipl. Blog (Jan. 3, 2019).

[26] *See, e.g.*, Bruce Riedel, *Al-Qaida Today, 18 Years After 9/11*, Brookings: Order from Chaos (Sept. 10, 2019).

[27] *See, e.g.*, Memorandum, U.S. Embassy in Addis Ababa, Ethiopia (Feb. 6, 2017), https://www.documentcloud.org/documents/3995035-State-Dept-Response-for-Doc-Cloud.html.

[28] *See, e.g.*, *Trump Ban Leads Dutch to Halt Talks with the US on Clearance at Schiphol*, Dutch News (Jan. 31, 2017); *Taoiseach Orders Review of US Preclearance in Ireland*, RTE (Jan. 30, 2017); Gibson, note 25, above.

[29] U.S. Dep't of Commerce, *Department of Commerce Releases October Travel and Tourism Expenditures* (Dec. 15, 2016).

including defense, technology, and medicine. About one-third of U.S. innovators were born outside the United States, and their scientific and technological innovations have contributed to making our nation and the world safer.[30] If allowed to continue, the unwarranted harm caused by the Ban to the economic dynamism of our country would carry long-term negative consequences for our national security.

Defendants have offered a constantly shifting series of national-security justifications for each of their generalized bans. From the beginning, this has always been a ban in search of a threat, not vice versa.

Travel Ban 1.0 included no public rationale for the ban at all, apart from suggesting that certain foreign individuals from these foreign countries were uniquely dangerous. The text of the Order made vague allusions to "numerous foreign-born individuals" who have been convicted or implicated in terrorism-related crimes, without tying these assertions to any of the seven listed countries.[31]

Travel Ban 2.0 shifted focus to the conditions in the listed countries and their claimed inability to screen for terrorist groups who might exploit their porous borders to slip through to the United States. The Order characterized each of the

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[30] Adams Nager, *et al.*, *The Demographics of Innovation in the United States*, Information Technology & Innovation Foundation 29 (Feb. 2016); *see also* Patrick O'Neill, *How Academics Are Helping Cybersecurity Students Overcome Trump's Immigration Order*, CyberScoop (Jan. 30, 2017).

[31] Travel Ban 1.0, note 11, above.

countries as a haven for terrorism or a place of active conflict, arguing that these circumstances increased the chance that "conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States."[32] But as discussed above, Defendants offered no actual evidence that travelers from any of these countries present a particular risk to the United States of conducting terrorist attacks.

Perhaps because no such evidence was available, Travel Ban 3.0 changed course yet again. Defendants shifted from the earlier emphasis on foreign nationals as terrorist threats, or the listed countries as compromised by terrorism. Instead, claiming the vague purpose of addressing "security or public safety" threats, Travel Ban 3.0 posits that country-based bans on travel are necessary to induce those countries to "improve their information-sharing and identity-management protocols," as well as to advance other unspecified "foreign policy, national security and counterterrorism objectives."[33]

Defendants have offered no credible information whatsoever in support of these shifting explanations. The text of Travel Ban 1.0 included no evidence at all to support such a sweeping ban on travel, and Defendants offered none in court. The text of Travel Ban 2.0 added boilerplate language—now deleted from Travel

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[32] Exec. Order No. 13,780, 82 Fed. Reg. 13,209, § 1(h) (Mar. 9, 2017).
[33] Travel Ban 3.0, note 4, above.

Ban 3.0—from the 2015 Department of State Country Reports on Terrorism and other public reports generally discussing security conditions in the six listed countries, a thin reed on which to ban tens of millions of travelers. At that time, Defendants also submitted a vaguely worded two-page letter from the Secretary of Defense and the Secretary of Homeland Security that discussed the risks of terrorism in general terms, yet included no meaningful specific evidence justifying the need for a travel ban.[34]

And more than two years later, Defendants have come forward with no credible information in defense of Travel Ban 3.0. The Proclamation mechanically asserts that the listed countries do not share information, while providing no evidence of any specific threat or harm that can be tied to any particular country's deficiencies, or that if allowed to enter the United States, any particular nationals from the banned countries would pose a credible threat to the safety of

[34] *See* March 6 Letter, note 13, above. Without providing any evidence or citations for its assertions, the letter claimed that "based on DHS data and the experience of its operators, nationals from these countries are more likely to overstay their visas and are harder to remove to their home countries," and "there is a greater risk that the United States will not have access to necessary records." *Id*. It remains unclear whether the above statement was alluding to the six listed countries in Travel Ban 2.0, or instead to the broader group of all countries that, in the words of the letter, are deemed "state sponsors of terrorism, or . . . have active conflict zones in which the central government has lost control of territory to terrorists." *Id.*; *see* U.S. Dep't of State, *Country Reports on Terrorism 2015*, Chapter 5: Terrorist Safe Havens (Update to 7120 Report) (listing more than a dozen countries or regions as "terrorist safe havens").

Americans.[35] The Supreme Court in *Trump v. Hawaii* observed that the text of the Proclamation was "expressly premised" on "preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices," but that textual premise has never been tested.[36] The Government has offered no evidence on this score. Although the Proclamation references a report that it says drove its conclusions, Defendants have not provided it, drawn from it, or even cited it in their brief to this Court.[37]

Defendants also have failed to produce a single official willing to swear on the record to a national-security-based need for Travel Ban 3.0, or the process that led to its creation. In countless prior cases in which the Executive Branch has faced a legal challenge to a significant national-security initiative, it has submitted into the record at least one sworn declaration from a federal official that seeks to explain the motivation and origins of the challenged policy.[38] Indeed, this

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[35] Travel Ban 3.0, note 4, above.

[36] *Trump v. Hawaii*, 138 S. Ct. at 2421.

[37] While the report supposedly examined the security and information systems of every country in the world, an index produced in FOIA litigation suggested that the report's findings are contained in just a few pages. *See* Eric Rothschild, *The Government Has Yet to Produce Evidence Showing the Travel Ban Is About National Security*, Just Security (June 21, 2018).

[38] *See, e.g.*, Unclassified Decl. in Supp. of Formal Claim of State Secrets Privilege by James R. Clapper, Director of Nat'l Intelligence, Al-Aulaqi v. Obama, 727 F.Supp.2d 1 (D.D.C. 2010) (No. 1:10-cv-01469) (explaining the Government's rationale for targeting Anwar al-Aulaqi); Decl. by Brig. General Jay

Administration has followed that same standard practice when its other immigration policies have faced substantial constitutional and statutory challenges.[39] Yet here, after years of litigation, Defendants have not proffered to any court a single national-security official who will so attest for the claimed security rationale of the most sweeping ban on travel in American history.[40]

Given the above, summary dismissal would be entirely premature. At least two questions—whether the Ban is motivated by unconstitutional animus rather than national-security imperatives, and whether the waiver process is a sham—constitute issues of fact that deserve closer examination at the discovery and trial phase of this case. At a minimum, Plaintiffs in this case have more than plausibly pleaded their case in their operative complaint. And the information amici provide

Hood, Hamdan v. Rumsfeld, 341 F.Supp.2d 152 (D.D.C. 2004) (No. 1:04-cv-01519) (defending the detention and interrogation practices at Guantánamo Bay).

[39] For example, when the Secretary of State, Acting Secretary of Homeland Security, and Director of National Intelligence issued a Joint Memorandum in October 2017 imposing an indefinite pause on "follow-to-join" refugee applications, this administration submitted a sworn declaration from a senior DHS official describing the claimed rationale for the change. *See* Decl. of Jennifer B. Higgins in Supp. of Defendant's Opposition to Plaintiff Joseph Doe's Motion for Prelim. Inj., Doe v. Trump, No. 17-cv-00178 JLR (W.D. Wash. 2017).

[40] The Government did offer a declaration by a Department of State official in defense of the separate refugee ban in Travel Ban 2.0 not at issue here. But even that declaration studiously avoided defending the national-security process or rationale for the Refugee Ban, instead confining itself to giving background information on the U.S. refugee process. Decl. of Lawrence E. Bartlett, State v. Trump, No. 17-00050 DKW-KSC, 263 F. Supp. 3d 1049 (D. Haw.).

here should persuade this Court that evidence supporting those claims—and showing the pretextual nature of the Ban as a cover for unconstitutional animus—will follow.

II. The summary dismissal of the Complaint would not serve the national-security or foreign-policy interests of the United States.

Nonetheless, Defendants now ask this Court to dismiss the complaint as a matter of law. Their core claim is that the Proclamation was motivated by a legitimate rationale of "national security" need. But this claim has never been tested through anything resembling an adversarial process. Even years later, discovery has not yet begun. The Government rests their claim on nothing more than the face of the Proclamation, and a pair of public reports. They have not put forward a single witness, nor offered a single piece of evidence, to defend their claim of national-security necessity for such a blanket ban on travel seemingly focused on national origin and religion.

Congress and the courts through the years have developed a carefully calibrated set of rules of privilege and evidence that address the availability of fact-gathering in cases that touch on national-security or foreign-policy concerns.[41]

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[41] *See, e.g.*, *In re Sealed Case*, 121 F.3d 729, 736–37 (D.C. Cir. 1997) (discussing judicially created privileges that bear on "the unique role and responsibilities of the executive branch of our government"); 18 U.S.C. App. III (2012) (Classified Information Procedures Act); *see also* 5 U.S.C. § 552(b)(1) (2018) (exceptions to Freedom of Information Act for information properly classified in the interest of national defense or foreign policy).

These rules seek to strike the proper balance between the public's interest in vindicating constitutional and statutory rights, the need to scrutinize potential government misconduct, and the importance of justice for individual plaintiffs (on the one hand), and the Government's need to encourage candid internal discussions and protect sensitive information (on the other).[42] Defendants do not—and could not conceivably—invoke these established rules to argue for dismissal at this preliminary stage. Rather, they appear to ask this Court to recognize a sweeping immunity from discovery from substantial claims of bad faith or unconstitutional motive that touch on migration and national-security issues.

Amici operated in senior national-security and foreign-policy roles under these rules. They understood that, in appropriate cases, their documents could be disclosed in litigation, to ensure that the executive branch is always complying with the law, and promote the effective functioning of the checks and balances at the heart of the very system of government they work to protect. Indeed, courts have routinely permitted challenges to government conduct that touch on national-security or foreign-affairs concerns to move past a motion to dismiss, taking steps later if necessary to tailor the scope of discovery to accommodate particular

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[42] *See, e.g.*, *In re Sealed Case*, 121 F.3d at 736–56; *Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995).

legitimate national-security concerns that may arise.[43] As these precedents show, courts have ample tools to protect the interests of the Executive as the case proceeds through court-managed discovery under the existing legal framework.

Dismissal would be especially improper here for four additional reasons:

- *First*, although this case began nearly three years ago, there has been no discovery to date. The Supreme Court based its *Trump v. Hawaii* opinion entirely on information then available in the public record, and remanded for further proceedings on whether the travel ban was being discriminatorily applied.
- *Second*, Defendants remain unable even to articulate—let alone show convincingly—any national-security or foreign-policy harm that would follow from further proceedings.

[43] *See, e.g.*, *Stone v. Trump*, No. 1:17-cv-02459-MJG, Dkt #85, 204 (D. Md. 2018) (denying in part motion to dismiss complaint challenging policy banning transgender individuals from serving in the military, and denying in part and granting in part defendants' motion for a protective order on grounds of privilege); *Ramos v. Nielsen*, No. 3:18-cv-01554-EMC, Dkts #55, 79, 84 (N.D. Cal. 2018) (denying motion to dismiss complaint challenging legality of Secretary of Homeland Security's termination of Temporary Protected Status for several countries, and granting in part and denying in part defendants' request to narrow discovery on grounds of privilege); *Wagafe v. Trump*, No. 2:17-cv-0094-RAJ, Dkt # 69, 189 (W.D. Wash. 2018) (denying in part a motion to dismiss challenging delays on national-security grounds of immigration applications, and later reserving judgment on open discovery issues).

- *Third*, the specific allegations of animus and what Justice Sotomayor described as a "sham" waiver process in this case[44] cannot by their nature fairly be resolved on the basis of self-serving statements and records.
- *Finally*, the information that is available to Plaintiffs in the public record gives rise to plausible claims of discriminatory intent and bad faith.

At least in such circumstances, summary dismissal is inappropriate. The case law is emphatic that "shielding internal government deliberations . . . does not serve the public's interest in honest, effective government" where there is reason to believe that discovery "may shed light on government misconduct."[45] This is no less true in matters of security and migration. The summary dismissal of cases such as this would leave the national-security or foreign-policy apparatus vulnerable to illicit or improper designs, and over time, degrade the capacity of that apparatus to discharge its long-term missions. And systematic denial of judicially supervised fact-finding would send a damaging message to present and future officials that misconduct is immune from even a modicum of judicial oversight or process. Allowing the Government to cloak itself in immunity from any fact-finding would

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[44] *Trump v. Hawaii*, 138 S. Ct. at 2445 (Sotomayor, J., dissenting); *see also id*. at 2431 (Breyer, J., dissenting) ("Unfortunately, there is evidence that supports the second possibility, i.e., that the Government is not applying the Proclamation as written. . . . [T]he Court's decision today leaves the District Court free to explore these issues on remand.").

[45] *In re Sealed Case*, 121 F.3d at 738.

disserve, not aid, America's security and foreign-policy interests and the principles of equity and the rule of law that national-security officials are sworn to protect and serve.

* * *

Ours is a nation of immigrants, committed to the faith that we are all equal under the law, and rejecting discrimination, whether based on race, religion, sex, or national origin. As government officials, amici sought diligently to protect our country, while maintaining an immigration system that is as free as possible from prejudice, that applies no religious tests, and that measures individuals by their merits, not stereotypes of their countries or groups. Blanket bans of certain countries or classes of people are beneath the dignity of the Nation and Constitution that we each took oaths to protect. Rebranding a proposal first advertised as a "Muslim Ban" as "Protecting the Nation from Foreign Terrorist Entry into the United States" should not allow Defendants to disguise the Proclamation's discriminatory intent without meaningful review, nor make it necessary, effective, or faithful to America's Constitution, laws, or values.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the District Court denying in relevant part the Government's motion to dismiss and remand the matter for discovery to proceed.

Respectfully submitted,

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Counsel for Amici Curiae Former National-Security Officials

APPENDIX

List of Amici

1. **Madeleine K. Albright** served as Secretary of State from 1997 to 2001. She previously served as U.S. Permanent Representative to the United Nations from 1993 to 1997.

2. **Rand Beers** served as Deputy Homeland Security Advisor to the President of the United States from 2014 to 2015.

3. **John B. Bellinger, III** served as the Legal Adviser for the U.S. Department of State from 2005 to 2009. He previously served as Senior Associate Counsel to the President and Legal Adviser to the National Security Council from 2001 to 2005.

4. **Daniel Benjamin** served as Ambassador-at-Large for Counterterrorism at the U.S. Department of State from 2009 to 2012.

5. **Antony Blinken** served as Deputy Secretary of State from 2015 to January 20, 2017. He previously served as Deputy National Security Advisor to the President of the United States from 2013 to 2015.

6. **John O. Brennan** served as Director of the Central Intelligence Agency from 2013 to 2017. He previously served as Deputy National Security Advisor for Homeland Security and Counterterrorism and Assistant to the President from 2009 to 2013.

7. **R. Nicholas Burns** served as Under Secretary of State for Political Affairs from 2005 to 2008. He previously served as U.S. Ambassador to NATO and as U.S. Ambassador to Greece.

8. **William J. Burns** served as Deputy Secretary of State from 2011 to 2014. He previously served as Under Secretary of State for Political Affairs from 2008 to 2011, as U.S. Ambassador to Russia from 2005 to 2008, as Assistant Secretary of State for Near Eastern Affairs from 2001 to 2005, and as U.S. Ambassador to Jordan from 1998 to 2001.

9. **James Clapper** served as U.S. Director of National Intelligence from 2010 to January 20, 2017. He previously served as Undersecretary of Defense for

Intelligence from 2007 to 2010, and before that, Director of the National Geospatial-Intelligence Agency from 2001 to 2006, and Director of the Defense Intelligence Agency from 1991 to 1995.

10. **David S. Cohen** served as Under Secretary of the Treasury for Terrorism and Financial Intelligence from 2011 to 2015 and as Deputy Director of the Central Intelligence Agency from 2015 to January 20, 2017.

11. **Bathsheba N. Crocker** served as Assistant Secretary of State for International Organization Affairs from 2014 to 2017.

12. **Ryan Crocker** served as U.S. Ambassador to Afghanistan from 2011 to 2012, as U.S. Ambassador to Iraq from 2007 to 2009, as U.S. Ambassador to Pakistan from 2004 to 2007, as U.S. Ambassador to Syria from 1998 to 2001, as U.S. Ambassador to Kuwait from 1994 to 1997, and U.S. Ambassador to Lebanon from 1990 to 1993.

13. **Jen Easterly** served as Special Assistant to the President and Senior Director for Counterterrorism from October 2013 to December 2016.

14. **Daniel Feldman** served as U.S. Special Representative for Afghanistan and Pakistan from 2014 to 2015, Deputy U.S. Special Representative for Afghanistan and Pakistan from 2009 to 2014, and previously Director for Multilateral and Humanitarian Affairs at the National Security Council.

15. **Jonathan Finer** served as Chief of Staff to the Secretary of State from 2015 until January 20, 2017, and Director of the Policy Planning Staff at the U.S. Department of State from 2016 to January 20, 2017.

16. **Michèle Flournoy** served as Under Secretary of Defense for Policy from 2009 to 2013.

17. **Robert S. Ford** served as U.S. Ambassador to Syria from 2011 to 2014, as Deputy Ambassador to Iraq from 2009 to 2010, and as U.S. Ambassador to Algeria from 2006 to 2008.

18. **Josh Geltzer** served as Senior Director for Counterterrorism at the National Security Council from 2015 to 2017. Previously, he served as Deputy Legal Advisor to the National Security Council and as Counsel to the Assistant Attorney General for National Security at the Department of Justice.

19. **Suzy George** served as Deputy Assistant to the President and Chief of Staff and Executive Secretary to the National Security Council from 2014 to 2017.

20. **Phil Gordon** served as Special Assistant to the President and White House Coordinator for the Middle East, North Africa and the Gulf from 2013 to 2015, and Assistant Secretary of State for European and Eurasian Affairs from 2009 to 2013.

21. **Chuck Hagel** served as Secretary of Defense from 2013 to 2015, and previously served as Co-Chair of the President's Intelligence Advisory Board. From 1997 to 2009, he served as U.S. Senator for Nebraska, and as a senior member of the Senate Foreign Relations and Intelligence Committees.

22. **Avril D. Haines** served as Deputy National Security Advisor to the President of the United States from 2015 to January 20, 2017. From 2013 to 2015, she served as Deputy Director of the Central Intelligence Agency.

23. **Luke Hartig** served as Senior Director for Counterterrorism at the National Security Council from 2014 to 2016.

24. **General (ret.) Michael V. Hayden**, USAF, served as Director of the Central Intelligence Agency from 2006 to 2009. From 1995 to 2005, he served as Director of the National Security Agency.

25. **Heather A. Higginbottom** served as Deputy Secretary of State for Management and Re-sources from 2013 to 2017.

26. **Christopher R. Hill** served as Assistant Secretary of State for East Asian and Pacific Affairs from 2005 to 2009. He also served as U.S. Ambassador to Macedonia, Poland, the Republic of Korea, and Iraq.

27. **John F. Kerry** served as Secretary of State from 2013 to January 20, 2017.

28. **Prem Kumar** served as Senior Director for the Middle East and North Africa on the National Security Council staff of the White House from 2013 to 2015.

29. **Richard Lugar** served as U.S. Senator for Indiana from 1977 to 2013, and as Chairman of the Senate Committee on Foreign Relations from 1985 to 1987 and 2003 to 2007, and as ranking member of the Senate Committee on Foreign Relations from 2007 to 2013.

30. **John E. McLaughlin** served as Deputy Director of the Central Intelligence Agency from 2000 to 2004 and as Acting Director in 2004. His duties included briefing President-elect Bill Clinton and President George W. Bush.

31. **Lisa O. Monaco** served as Assistant to the President for Homeland Security and Counterterrorism and Deputy National Security Advisor from 2013 to January 20, 2017.

32. **Cameron P. Munter** served as U.S. Ambassador to Pakistan from 2009 to 2012 and to Serbia from 2007 to 2009.

33. **James C. O'Brien** served as Special Presidential Envoy for Hostage Affairs from 2015 to January 20, 2017. He served in the U.S. Department of State from 1989 to 2001, including as Principal Deputy Director of Policy Planning and as Special Presidential Envoy for the Balkans.

34. **Matthew G. Olsen** served as Director of the National Counterterrorism Center from 2011 to 2014.

35. **Leon E. Panetta** served as Secretary of Defense from 2011 to 2013. From 2009 to 2011, he served as Director of the Central Intelligence Agency.

36. **Anne W. Patterson** served as Assistant Secretary of State for Near Eastern Affairs from 2013 to 2017. Previously, she served as the U.S. Ambassador to Egypt from 2011 to 2013, to Pakistan from 2007 to 2010, to Colombia from 2000 to 2003, and to El Salvador from 1997 to 2000.

37. **Jeffrey Prescott** served as Special Assistant to the President and Senior Director for Iran, Iraq, Syria and the Gulf States from 2015 to 2017.

38. **Samantha J. Power** served as U.S. Permanent Representative to the United Nations from 2013 to January 20, 2017. From 2009 to 2013, she served as Senior Director for Multilateral and Hu-man Rights on the National Security Council.

39. **Susan E. Rice** served as National Security Advisor from 2013 to January 20, 2017. From 2009 to 2013, she served as U.S. Permanent Representative to the United Nations from 2009 to 2013.

40. **Anne C. Richard** served as Assistant Secretary of State for Population, Refugees and Migration from 2012 to January 20, 2017.

41. **Kori Schake** served as the Deputy Director for Policy Planning at the U.S. Department of State from December 2007 to May 2008. Previously, she was the director for Defense Strategy and Requirements on the National Security Council in President George W. Bush's first term.

42. **Eric P. Schwartz** served as Assistant Secretary of State for Population, Refugees and Migration from 2009 to 2011. From 1993 to 2001, he was responsible for refugee and humanitarian issues on the National Security Council, ultimately serving as Special Assistant to the President for National Security Affairs and Senior Director for Multilateral and Humanitarian Affairs.

43. **Wendy R. Sherman** served as Under Secretary of State for Political Affairs from 2011 to 2015.

44. **Vikram Singh** served as Deputy Special Representative for Afghanistan and Pakistan from 2010 to 2011 and as Deputy Assistant Secretary of Defense for Southeast Asia from 2012 to 2014.

45. **Dana Shell Smith** served as U.S. Ambassador to Qatar from 2014 to 2017. Previously, she served as Principal Deputy Assistant Secretary of Public Affairs.

46. **Jeffrey H. Smith** served as General Counsel of the Central Intelligence Agency from 1995 to 1996. Previously, he served as General Counsel of the Senate Armed Services Committee.

47. **James B. Steinberg** served as Deputy National Security Adviser from 1996 to 2000 and as Deputy Secretary of State from 2009 to 2011.

48. **Linda Thomas-Greenfield** served as Assistant Secretary for the Bureau of African Affairs from 2013 to 2017. Previously she served as U.S.

Ambassador to Liberia and Deputy Assistant Secretary for the Bureau of Population, Refugee and Migration from 2004 to 2006.

49. **William Wechsler** served as Deputy Assistant Secretary for Special Operations and Combating Terrorism at the U.S. Department of Defense from 2012 to 2015.

50. **Samuel M. Witten** served as Principal Deputy Assistant Secretary of State for Population, Refugees, and Migration from 2007 to 2010. From 2001 to 2007, he served as Deputy Legal Adviser at the State Department.

CERTIFICATE OF SERVICE

I certify that on July 31, 2020, the foregoing document was filed and served through the CM/ECF system.

/s/ Subodh Chandra

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,378 words excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(ii). This brief complies with the typeface and the type-style requirements of Fed. R. App. P. 27 because it has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ Subodh Chandra

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