No. 17-965

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *ET AL.*,
Petitioners,

v.

STATE OF HAWAII, *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* PEN AMERICA AND OTHERS IN SUPPORT OF RESPONDENTS

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I. INTEREST OF *AMICI CURIAE*

Amici, described in Appendix A, include a broad array of organizations working to advance cultural and artistic exchange in this country.[1] Lead *amicus* PEN America is a non-profit association of writers that includes novelists, journalists, editors, poets, essayists, playwrights, publishers, translators, agents, and other professionals. PEN America stands at the intersection of literature and human rights to protect open expression in the United States and worldwide. It champions the freedom to write, recognizing the power of the word to transform the world. Its mission is to unite writers and their allies to celebrate creative expression and defend the liberties that make it possible, working to ensure that people everywhere have the freedom to create literature, to convey information and ideas, to express their views, and to make it possible for everyone to access the views, ideas, and literatures of others. PEN America has approximately 7,000 members and is affiliated with PEN International, the global writers' organization with over 100 Centers in Europe, Asia, Africa, Australia, and the Americas.

In the decision here on review, the Court of Appeals for the Ninth Circuit affirmed the district court's order enjoining the enforcement of Sections

[1] All parties have consented to this *amici curiae* brief. Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

2(a), (b), (c), (e), (g), and (h) of Presidential Proclamation 9645, entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or other Public-Safety Threats" (the "Proclamation"), 82 Fed. Reg. 45161 (Sept. 27, 2017), which the Administration promulgated as a replacement for Executive Order No. 13780 ("EO-2" or the "Second Order"). The Ninth Circuit found that the Proclamation exceeds the authority delegated to the President under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq*., that the President had not made a legally sufficient finding that entry of the banned individuals would be detrimental to U.S. national interests as required to block entry pursuant to his suspension authority under 8 U.S.C. § 1182(f), and that the President lacked a separate source of statutory or constitutional authority to issue the Proclamation. *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017). These findings by the Ninth Circuit should be affirmed. But *amici* further contend that the Proclamation, like EO-2, also violates the First Amendment right of Americans to receive information. By preventing our citizens from receiving in-person transmission of ideas, expression, and speech, the Proclamation impermissibly burdens the free interchange of information necessary to the proper functioning of our democracy. Amicus PEN America – joined by dozens of other artistic and cultural groups – made exactly this argument to the Court in the now-mooted challenge to the second temporary travel ban in EO-2. *See* Brief of Amicus Curiae PEN American

Center and Other Organizations In Support of Respondents, *Int'l Refugee Assistance Project v. Trump*, (2017) (No. 16-1436 and No. 16-1540).

Amici have a vital mission to foster rich intellectual and artistic discourse in this country, and that mission is directly impaired by the Proclamation. *Amici* therefore urge this Court to find that the Proclamation violates the First Amendment's Free Speech clause, in addition to constituting an impermissible overreach of the President's statutory powers.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

For the reasons outlined in Respondents' brief, this Court should find that the Proclamation suffers from the same constitutional infirmities as EO-2, as held by the Fourth Circuit Court of Appeals, and is, in fact, a much more acute violation given its permanence and sweep. While the principal Constitutional argument Plaintiffs advance is that the Proclamation violates the Establishment Clause of the First Amendment (and *Amici* concur that it does), *amici* contend that the Proclamation also impermissibly burdens the Free Speech rights of *amici* and other U.S. citizens, and should be found unconstitutional for that independent reason.

The United States is singularly unafraid to hear voices that have been silenced elsewhere. From this nation's founding, visitors from abroad have regarded our uncharacteristically open society as a model for the world and for democracy. As Alexis de

Tocqueville wrote of our experiment in self-governance:

> When the right of every citizen to cooperate in the government of society is acknowledged, every citizen must be presumed to possess the power of discriminating between the different opinions of his contemporaries, and of appreciating the different facts from which inferences may be drawn.[2]

Moreover, the United States has always defined itself as nation of immigrants, built by those seeking freedom of thought and action. Throughout our history, we have benefited immeasurably from the contributions immigrants have made to all spheres of knowledge and culture in this country. It is no coincidence – but rather an animating principle – that refugees have created many of the works that define what it means to be an American. From the films of Billy Wilder, the novels of Chinua Achebe, the political philosophy of Hannah Arendt and the poetry of Reinaldo Arenas, the contributions of visitors, immigrants, and refugees to American arts and letters is knit into the very cultural fabric of our nation.

The Proclamation threatens this legacy and upends our deeply American commitment to the free and fearless exchange of ideas. The First

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[2] Alexis de Tocqueville, DEMOCRACY IN AMERICA 11 (Henry Reeve trans. 2006), *available at* http://www.gutenberg.org/files/815/815-h/815-h.htm.

Amendment presumes that a free people can and must choose the ideas they deem worthy of adherence, rather than receiving a state-mandated diet of acceptable views. American citizens must be allowed to engage in in-person dialogue with nationals from the countries affected by the Proclamation, experience their work, test their ideas, and learn first-hand from their perspectives. As the Supreme Court has repeatedly recognized, the First Amendment right to free speech is meaningless without a concomitant right to receive information, and the latter right must be as zealously protected as the first. *See, e.g.*, *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). In the words of James Madison:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

James Madison to W.T. Barry, Aug. 4, 1822, 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910), *available at* https://www.loc.gov/resource/mjm.20_0155_0159/?st=text. This Court has also recognized that there is no First Amendment substitute for live, in-person interaction. Yet the Proclamation impermissibly restricts the right of Americans to receive information by preventing our citizens from hearing and interacting with the ideas and

viewpoints of nationals of the targeted countries. By prohibiting the admission of these nationals without a bona fide reason and because of religious animus, the Proclamation hinders the free marketplace of ideas.

Our civil society depends on the ability of American arts and literary organizations, museums, universities, and cultural institutions to receive and share ideas, and to amplify voices that are being silenced by repression, civil war, and censorship abroad. The message that the Proclamation sends the world is one of retreat from our history as an open society. The sweeping restriction that the Proclamation imposes on our citizens' First Amendment right to receive information is contrary to precedent and this country's ideals. Accordingly, we urge this Court to find that the Proclamation not only exceeds the President's statutory authority, but also and independently violates the First Amendment Free Speech rights of U.S. citizens.

III. ARGUMENT

A. The Proclamation Impermissibly Burdens The First Amendment Rights of *Amici* and Other U.S. Citizens to Receive Information

Amici are cultural institutions in the United States whose mission depends on the freedom to engage in intellectual and cultural exchange. Amicus PEN America has provided an unparalleled forum for open expression and exchange of ideas, inviting writers, artists and dissidents from around

the world to speak and debate their views in this country.[3] PEN America gives U.S. citizens the opportunity to hear voices (often voices of dissent) that may never have been heard otherwise.[4] The Proclamation jeopardizes this vital mission by banning Americans from experiencing first-hand the work of nationals from the affected countries, to hear their perspectives in face-to-face communications, and to ask what is happening in their countries of origin, and why.

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[3] Among other conferences, PEN America hosts the PEN World Voices Festival, founded by Salman Rushdie, Esther Allen, and Michael Roberts after the events of September 11, 2001, "with the aim of broadening channels of dialogue between the United States and the world." PEN America, *PEN World Voices Festival*, https://pen.org/world-voices-festival/ (last visited Sept. 12, 2017). Since its founding, the annual World Voices Festival has hosted more than 1,500 writers from 118 countries who participate in a weeklong series of events and discussions with a focus on human rights issues.

[4] Reflecting on the 48th International PEN Congress of 1986, a weeklong gathering of writers from around the world, Salman Rushdie wrote:

> In those last years of the cold war, it was important for us all to hear Eastern European writers like Danilo Kiš and Czesław Miłosz, György Konrád and Ryszard Kapuściński, setting their visions against the visionless Soviet regime. Omar Cabezas, Nicaragua's deputy interior minister at the time, who had just published a memoir of his life as a Sandinista guerrilla, and Mahmoud Darwish, the Palestinian poet, were there to articulate views not often heard on American platforms[.]

Salman Rushdie, *The PEN and the Sword*, THE NEW YORK TIMES (Apr. 17, 2005), *available at* https://www.nytimes.com/2005/04/17/books/review/the-pen-and-the-sword.html.

Unlike its predecessor, the Proclamation is a permanent restriction on travel by some or all nationals from Iran, Libya, Somalia, Syria, Yemen, Chad, North Korea, and Venezuela. Specifically, the ban prohibits entry to the United States of *all* immigrants from each affected country, save Venezuela (where the prohibitions on immigration extend to a limited number of government officials and their immediate family members). The Proclamation also broadly prohibits non-immigrant travel to varying degrees, ranging from a complete bar to all entry (for Syrian or North Korean nationals) to a suspension of issuance of any business or tourist visas (for Chadian and Libyan nationals). In the limited cases where travel may be permitted, prospective entrants under various types of visas would be subjected to enhanced scrutiny beyond existing vetting procedures. In imposing these sweeping limitations, the Proclamation sends a clear message to U.S. organizations and citizens: Efforts to bring over artists and thinkers from the affected countries to engage in cultural exchange – even on a temporary basis – will be frustrated.[5]

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[5] Iranian filmmaker Asghar Farhadi's film *The Salesman* won the Oscar for Best Foreign Language Film at the 2017 Academy Awards. However, Farhadi did not attend the Academy Awards that year because of the EO-1 travel ban then in force (entry would also have been blocked under the Proclamation's ban on most non-immigrant entry by Iranian nationals). Farhadi's Oscar acceptance speech, which was given by Iranian-American CEO Anousheh Ansari, read in part:

> I'm sorry I'm not with you tonight. My absence is out of respect for the people in my country and those of [the] other six [affected] nations . . . Filmmakers can turn their cameras to capture

Indeed, respondent Hawaii in this very action presented evidence that the Proclamation would negatively impact efforts by the University of Hawaii to fulfill its "recruitment, educational programming, and educational mission" – and indeed prior travel bans have already impeded that mission by forcing the cancellation of a speaking engagement by a Syrian journalist and a lecture series involving a Syrian national. *See State v. Trump*, 265 F. Supp. 3d 1140, 1149 (D. Haw. 2017), *aff'd in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 923 (2018); Joint Appendix at 314 (Decl. of Nandita Sharma ¶¶ 4–9).

The effects of the Proclamation and its predecessor travel bans upon Americans' access to vital cross-cultural exchange are already being felt. To take but a few examples: Due to predecessor travel bans, Tehran's Ag Galierie announced last year that it had been forced to withdraw from the 2018 Association of International Photography Art Dealers (AIPAD) show in New York, where it had planned to exhibit the work of Iranian photographer Bahman Jalali documenting the Iran-Iraq war from 1980 through 1988.[6] And because of the

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> shared human qualities and break stereotypes of various nationalities and religions. They create empathy between "us" and "others," an empathy which we need today more than ever.

Steve Dove, *Asghar Farhadi Oscar 2017 Winner Speech Delivered By Anousheh Ansari*, THE OSCARS (Feb. 27, 2017, 6:30am) http://oscar.go.com/news/winners/asghar-farhadi-oscar-2017-winner-speech-delivered-by-anousheh-ansari.

[6] *See* Benjamin Sutton, *Iranian Gallery Drops Out of AIPAD Photo Fair Over Trump's Travel Ban*, HYPERALLERGIC (Mar. 28,

Proclamation's sweeping ban on nearly all travel to the United States by Iranian nationals, Ag Galierie would be barred from sending its Iranian representatives and artists to future art fairs to interact with this country's artists, curators, dealers, and collectors. Likewise, legendary Syrian musician Omar Souleyman, who fled Syria for Turkey in 2011 after the onset of the civil war and has since performed at the 2013 Nobel Peace Prize Concert, expressed concern last year that he would be unable to perform at future engagements in the United States[7] – and indeed, under the Proclamation, U.S. citizens would be indefinitely deprived of any further opportunity to experience Mr. Souleyman's live performances in this country.

There are many other artists, writers, and dissidents whose work explores the conditions of life in the banned countries, but whose invaluable perspectives would, under the Proclamation, never be fully understood, appreciated, or tested by U.S. citizens in the unique conditions of an in-person interaction. These include, as a small sampling: Syrian designer Fares Cachoux, whose minimalist posters tell the story of the Syrian revolution[8]; Abdalla Al Omari, a Syrian refugee living in Belgium whose images of world leaders (including

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2017), https://hyperallergic.com/368526/iranian-gallery-drops-out-of-aipad-photo-fair-over-trumps-travel-ban.

[7] *See* Marc Hogan, *Here's What Musicians Hurt by the Muslim Ban Have to Say to Trump*, PITCHFORK (Jan. 31, 2017), http://pitchfork.com/thepitch/1428-heres-what-musicians-hurt-by-the-muslim-ban-have-to-say-to-trump.

[8] *See Fares Cachoux*, BEHANCE, https://www.behance.net/farescachoux (last visited Mar. 28, 2018).

Bashar al-Assad) as refugees are a stark reminder of the gap between policymakers and the people whose lives are in their hands[9]; and Yemeni photographer Boushra Almutawakel, whose portraits explore the experience of Muslim women.[10] The Proclamation indefinitely bars these individuals and countless others from traveling to the United States without regard for the valuable contributions they could make to political, intellectual, and artistic discourse in this country. Because of the Proclamation, U.S. citizens are deprived of the opportunity to fully inform themselves of current conditions in the banned countries, and the manner in which those conditions are reflected in art and discourse.

In the short time they have existed, the Proclamation and its predecessor bans have directly and adversely burdened the First Amendment rights of *Amici* and other U.S. citizens to receive information through face-to-face interactions. But beyond this, these policies more generally and perniciously deplete the richness of our country's cultural wellspring. Historically, refugees, immigrants and foreign visitors have contributed to every facet of American life, creating celebrated works of arts and letters and helping to define our country's identity.[11] America has traditionally

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[9] *See* Abdalla Al Omari, *The Vulnerability Series*, *available at* http://www.abdallaomari.com/thevulnerabilityseries.

[10] *See* Boushra Almutawakel, *The Hijab/Veil Series*, *available at* http://muslima.globalfundforwomen.org/content/hijab-veil-series.

[11] Refugees and immigrants who have shaped American cultural and political life are too numerous to name, and include such luminaries as Albert Einstein, Hannah Arendt,

welcomed writers, thinkers, and others whose works bear witness to state repression, so that we can better understand and value our own freedoms. With the Proclamation, its predecessor executive orders, and the clear message of exclusion and religious animus they all send, we risk abandoning our identity as a nation of immigrants, and our role as a global defender of the right to free expression.

B. Americans Have a First Amendment Right to Receive Information and Ideas Via In-Person Interactions

For three-quarters of a century, the Supreme Court has recognized that the First Amendment protects not only the freedom to speak, but also the corollary freedom to receive ideas and information, ensuring that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *see also*

Leo Strauss, Bertolt Brecht, Thomas Mann, Marlene Dietrich, Jacob Riis, Elie Wiesel, Vladimir Nabokov, Isabel Allende, Czesław Miłosz, Reinaldo Arenas, Nuruddin Farah, Milos Forman, Yaa Gyasi, Masha Gessen, Gary Shteyngart, Viet Thanh Nguyen, Khaled Mattawa, Henry Kissinger, Zbigniew Brzezinski, Madeline Albright, Ilhan Omar (the first Somali-American woman to be elected to a state legislature), Ted Cruz, and Elaine Chao. No less than fourteen individuals on the foregoing list came to this country as refugees. Under a blanket, nationality-based travel ban comparable to the Proclamation, those individuals – who include refugees from extremism in forms such as German national socialism (Albert Einstein, Hannah Arendt, Henry Kissinger) and totalitarian communism (Vladimir Nabokov, Madeline Albright, Reinaldo Arenas) – would not have been allowed entry.

Martin, 319 U.S. at 143. The principle animating our constitutional guarantee of free speech – that "the power of reason as applied through public discussion" can "free men from the bondage of irrational fears," *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) – is rendered meaningless without a robust pool of knowledge to inform speakers and drive intellectual, artistic, and political discourse. Thus, while the First Amendment operates by limiting government restrictions on speech, its mandate is far broader: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969).

Recognizing that, in order to be "free," speech must be not only uninhibited but also fully informed, this Court has enshrined a constitutional "right to receive [information]," and has reiterated that right wherever it has been challenged. *See Martin*, 319 U.S. at 143. *See also Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[i]t is now well established that the [First Amendment] protects the right to receive information and ideas"); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to

its recipients both"). Indeed, in the decision referenced repeatedly in challenges to the previous iterations of this travel ban, *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972), which concerned the visa application of Belgian journalist and intellectual Ernest Mandel, this Court explicitly recognized that in denying Mandel's visa application, the government had burdened the First Amendment rights of those who sought to hear him lecture in the United States. The majority opinion only found this burden on the right to receive information permissible because Mandel's visa application had been denied for a "facially legitimate and bona fide" reason (that Mandel had violated the terms of an earlier visa). *Id.* at 770. In his dissent, Justice Marshall elaborated on the vital free speech rights to which the majority had alluded:

> The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the "means indispensable to the discovery and spread of political truth."

Id. at 775-76 (Marshall, J. dissenting) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)). In short, this Court has long recognized that, even in the sphere of immigration policy, any law that restricts the pool of knowledge available to United

States citizens directly implicates their freedom of speech.

The right to receive information is not media-agnostic; each medium – written, spoken, interactive – provides unique and valuable contributions to the quality of a communication. *See, e.g., Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it"). In-person interactions – which permit free, improvised exchange of thoughts and reactions, observation of facial expressions, body language, and gestures, and the tailoring of one's message to the mood or energy of the recipients – carry a value that cannot be replicated by any other form of speech or expression.[12] This Court recognized the distinctive First Amendment value of face-to-face interactions in *Martin v. City of Struthers* (concerning the door-to-door distribution of literature by a Jehovah's Witness), holding that the "widespread use of this method of communication by many groups espousing various causes at[t]ests its major importance." 319 U.S. at 145. Indeed, the truism that there is no substitute for live, face-to-face exchange of information and ideas finds voice in the explicit constitutional right of assembly, which is set out

[12] *See* Laura Vanderkam, *The Science of When You Need In-Person Communication*, FAST COMPANY (Sept. 30, 2015), *available at* https://www.fastcompany.com/3051518/the-science-of-when-you-need-in-person-communication (citing extensive research supporting the unique and positive social value of face-to-face interaction).

separately and distinctly from the rights to speak and publish. U.S. CONST. amend. I.

Technological advancements in remote communications do not provide a constitutionally sufficient alternative to live, in-person exchanges. In *Mandel*, the majority rejected the government's argument that "technological developments" could provide a substitute for physical presence, citing the "particular qualities inherent in sustained, face-to-face debate, discussion and questioning." 408 U.S. at 765. Justice Marshall elaborated on this principle:

> The availability to appellees of Mandel's books and taped lectures is no substitute for live, face-to-face discussion and debate, just as the availability to us of briefs and exhibits does not supplant the essential place of oral argument in this Court's work.

Id. at 776 n. 2 (Marshall, J., dissenting). While *Mandel* was decided some time ago, recent advances in technology do not undercut this Court's prescient recognition that remote communication (whether via email, video chat, or tweet) is no substitute for live academic conferences or lectures – much less for live concerts, plays, and other performances. This recognition is exemplified by our courts' continuing emphasis on in-person hearings, trials, and appellate arguments. If anything, advances in technology have only thrown into sharp relief the inimitable

qualities of live, face-to-face interaction.[13] Indeed, since *Mandel*, this Court has consistently continued to acknowledge that government bans on in-person interactions violate the First Amendment. *See e.g., McCullen v. Coakley*, 134 S. Ct. 2518, 2536 (2014). ("When the government makes it more difficult to engage in ['one-on-one communication'], it imposes an especially significant First Amendment burden."); *Edenfield v. Fane*, 507 U.S. 761, 766 (1993) (law prohibiting "direct, in-person, uninvited solicitation" by certified public accountants was unconstitutionally overbroad).

There is simply no substitute for in-person conversation, debate, gathering, or live performance. American citizens have a constitutional right – and duty – to engage in robust intellectual and artistic discourse. The Proclamation, by effectively preventing citizens of the affected countries from presenting their knowledge and viewpoints in the United States (subject only to very limited exceptions), places an unjustifiable burden on the

[13] A Forbes article from 2011 cited the "growing pile of data from psychologists, biologists and computer scientists" showing that even the most advanced form of teleconferencing cannot replicate the unique benefits of an in-person interaction. Susan Adams, *Being There*, FORBES (Feb. 9, 2011), *available at* https://www.forbes.com/forbes/2011/0228/travel-teleconferencing-polycom-john-medina-being-there.html. *See also* Cisco, *Power of In-Person: The Business Value of In-Person Collaboration* (White Paper conducted by the Economist Intelligence Unit) (2012), *available at* https://www.cisco.com/c/dam/global/en_in/assets/pdfs/45808_Economist_wp1c_HR.pdf.

First Amendment right of U.S. citizens to receive information and exchange ideas.[14]

C. By Any Standard of Review, the Proclamation's Burdens on Free Speech Must be Found Unconstitutional

The Ninth Circuit's decision here on review declined to consider whether the Proclamation violates the U.S. Constitution, finding it unnecessary to consider this alternate ground. *Hawaii v. Trump*, 878 F.3d at 702. Should the Court reach this question, however, it should follow the reasoning of the Fourth Circuit Court of Appeals when it considered EO-2 and find that the Proclamation does indeed violate the Establishment Clause. *See Int'l Refugee Assistance Project ("IRAP") v. Trump*, 857 F.3d 554, 591 (4th Cir. 2017), *as amended* (May 31, 2017), *as amended* (June 15, 2017), *cert. granted*, 137 S. Ct. 2080 (2017), *and vacated and remanded sub nom*. *Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017). Moreover, *amici* contend that the Court should find further that the Proclamation violates the First Amendment's Free Speech clause.

In enjoining EO-2, the predecessor ban to the Proclamation, the Fourth Circuit Court of Appeals found that EO-2 was enacted with an "anti-Muslim

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[14] This burden on the First Amendment right of all Americans to engage in in-person interchanges with nationals from the banned countries is impermissibly onerous regardless of whether a foreign national meets the "bona fide relationship" test applied by the court below to define the scope of its injunction. *See Hawaii v. Trump*, 878 F.3d 662, 673 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 923 (2018).

religious purpose" – as evidenced by unmistakable anti-Muslim rhetoric and statements of intent to ban Muslims from entering the United States by then-candidate Trump[15] – and was therefore not "facially legitimate and bona fide." *IRAP v. Trump*, 857 F.3d at 591. Notwithstanding the administration's attempt to validate, *post hoc*, its disproportionate and intentional focus on Muslim-majority countries by now adding North Korea and a narrow category of Venezuelan nationals, the Proclamation was transparently enacted for the same illegitimate and bad-faith purpose as the prior travel bans. As such, the Court is not limited to the deferential standard of review set forth by *Mandel* (*see* 408 U.S. at 770),

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[15] In finding that EO-2 was enacted for an improper purpose, the Fourth Circuit court cited

> ample evidence that national security is not the true reason for EO-2, including, among other things, then-candidate Trump's numerous campaign statements expressing animus towards the Islamic faith; his proposal to ban Muslims from entering the United States; his subsequent explanation that he would effectuate this ban by targeting "territories" instead of Muslims directly; the issuance of EO-1, which targeted certain majority-Muslim nations and included a preference for religious minorities; an advisor's statement that the President had asked him to find a way to ban Muslims in a legal way; and the issuance of EO-2, which resembles EO-1 and which President Trump and his advisors described as having the same policy goals as EO-1.

IRAP v. Trump, 857 F.3d at 591. These circumstances apply equally to the Proclamation, which was enacted against the same backdrop, betraying its improper and discriminatory purpose.

and may engage in a searching constitutional inquiry into whether the Proclamation violates the U.S. Constitution's Bill of Rights.

Amici agree with Respondents that the Proclamation violates the First Amendment's Establishment Clause. *See* Resp. Br. at 61-76. Moreover, for the reasons stated above, *amici* contend that the Proclamation also burdens the Free Speech rights guaranteed under that Amendment. Regardless of the standard of review applied, this burden is constitutionally impermissible. In a separate challenge to the Proclamation, the Federal District Court for the District of Maryland, in a decision affirmed by the Fourth Circuit Court of Appeals, characterized the Proclamation as "the inextricable re-animation of the twice-enjoined Muslim ban," whose "primary purpose" was to target and exclude Muslims on the basis of their religion. *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 628 (D. Md. 2017), *aff'd*, 883 F.3d 233 (4th Cir. 2018), *as amended* (Feb. 28, 2018). Under these circumstances, the government can make no claim to even a rational basis underlying the Proclamation.

But even if the Proclamation had some legitimate justification, and assuming that it could even be defined as a content-neutral law (a categorization of which *amici* are deeply skeptical), the Proclamation would still not pass constitutional muster because it suppresses too much speech. The Proclamation operates to foreclose Americans' access to an entire channel of communication – in-person interaction – with nationals of the targeted

countries, and thus impermissibly burdens First Amendment free speech rights. *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) ("Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression . . . . Although [such] prohibitions . . . may be completely free of content or viewpoint discrimination, . . . by eliminating a common means of speaking, such measures can suppress too much speech.").

In its overbreadth, the Proclamation cuts off access to whole swaths of information that we, as citizens, are entitled to hear and consider in exercising self-government. Only an informed citizenry can properly judge its government's policies and actions, and our citizenry cannot be fully informed without an opportunity to engage in face-to-face interactions with nationals from the countries targeted by the Proclamation. In the words of Albert Einstein, "[i]n these unfinished things, people understand one another with difficulty unless talking face to face."[16]

IV. CONCLUSION

For the foregoing reasons, the Court should find that Presidential Proclamation 9645 – the permanent implementation of the Trump Administration's twice-enjoined Muslim travel ban – violates the First Amendment's Free Speech guarantee.

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[16] As quoted by Justice Marshall in his *Mandel* dissent, 408 U.S. at 776 n. 2 (quoting from *Developments in the Law—The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1154 (1972)).

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