

**PETITION TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS SEEKING A  
DETERMINATION ON THE DISCRIMINATORY POLICY OF SUSPENDING IMMIGRATION OF  
CERTAIN MUSLIMS BY THE UNITED STATES OF AMERICA**

3 December 2018

Submitted by the Aaron Fellmeth and Nourin Abourahma on behalf of Dr. Ismail Elshikh and the Muslim Association of Hawai'i.

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**I. SUMMARY OF THE PETITION**

By this petition, the petitioners, Prof. Aaron Fellmeth and Ms. Nourin Abourahma, submit that it is the policy of the United States of America to suspend immigration indefinitely from various Muslim countries based solely on discrimination based on religion and national origin. This policy has caused victims Dr. Ismail Elshikh and his family, as well as members of the Muslim Association of Hawai'i, to experience discrimination and a restriction of their right to family life, as established in the American Declaration on the Rights and Duties of Man, which binds the United States by virtue of U.S. ratification of the Charter of the Organization of American States. The U.S. policy also violates the human rights of refugees and the right to due process of law proclaimed by the Declaration. The petitioners have exhausted domestic remedies available to them, and the U.S. courts declined to remedy the discriminatory U.S. policy. Instead, they have afforded great deference to the U.S. President to take measures purportedly serving national security purposes, regardless of their discriminatory intent or effects.

The petitioners hereby request a determination that the facts presented in this petition constitute a violation of the American Declaration of the Rights and Duties of Man, as well as other human rights law binding on the United States.

**II. PETITIONERS WHOSE RIGHTS HAVE BEEN VIOLATED**

This petition is submitted on behalf of Dr. Ismail Elshikh and the Muslim Association of Hawai'i.

**Dr. Ismail Elshikh**, 1935 Aleo Place, Honolulu, Hawai'i, +1808-230-1514. Dr. Elshikh is U.S. citizen of Egyptian descent who has been resident in Hawai'i since 2003. He became a U.S. citizen in April 2016. Dr. Elshikh is the Imam of the Muslim Association of Hawai'i. His wife, also U.S. citizen, is of Syrian descent. His brothers-in-law and sisters-in-law are Syrian nationals resident in Syria and have been barred from entering the United States due to the U.S. government measures complained of in this petition.

**The Muslim Association of Hawai'i**, 1935 Aleo Place, Honolulu, Hawai'i 96822, +1-808-947-6263. The Association is located in Manoa, Honolulu, on the island of O'ahu, and consists of approximately 4000 members, all of whom are Muslim citizens or permanent residents of the United States. Members of the Association have family members in Syria, Iran, Libya, Somalia, and Yemen, all of which are subject to a suspension of immigration in the United States. Mr. Hakim Ouansafi is the current Chairman of the Association.

### III. FACTS: THE MUSLIM IMMIGRATION BANS

#### A. Background

The relevant facts from which this petition arise can be traced back to the presidential candidacy of Donald J. Trump, beginning in the fall of 2015. In the course of his campaign, until and after the election, Trump repeatedly made remarks disparaging Muslims as a class; openly expressed hostility toward Islam; told falsehoods about the behavior of Muslims and Arabs in the United States to exacerbate fear of them among the American public; and stated or implied that Muslim refugees and immigrants in the United States are hostile toward the United States and do not share its values at best, and at worst are part of a terrorist conspiracy against the safety of U.S. citizens. Trump made anti-Islamic remarks so frequently that religious bigotry could reasonably be viewed as one of the main themes of his presidential campaign. The following are representative examples of statements he made at official events and interviews during his campaign:

On 30 September 2015, at a rally in New Hampshire, Trump opined that the Syrian refugees seeking asylum in the United States and Europe “could be ISIS,” and indeed part of “a 200,000 man army” sent to subvert the United States. He then stated that, if elected, he would force all Syrian refugees to leave the United States without any evaluation of the risk of persecution: “They’re going back. And if I lose, I guess they’re staying. But if I win, they’re going back.”<sup>1</sup>

On 21 October 2015, during an interview on the Fox Business cable channel, he expressed admiration for the idea of closing mosques attended by persons who subsequently joined ISIS. “I would do that, absolutely, I think it’s great,” Trump said.<sup>2</sup> On 16 November of that year, following terrorist attacks in Paris, Trump stated during an MSNBC interview, that “the problem” is “radical Islamic terrorism.” He then criticized Democratic politicians for not putting the blame on Islam, saying: “I mean you’d almost think they have the terrorists coming out from Sweden.”<sup>3</sup> When asked what he would do in the United States to combat terrorism, Trump stated: “Well you’re going to have to watch and study the mosques, because a lot of talk is going on at the mosques.” He then claimed that the United States formerly had “great surveillance” and “tremendous surveillance going on in and around Mosques in New York City.” When asked if Trump would close mosques, he said “I would hate to do it, but it’s something you’re going to have to strongly consider, because some of the ideas and some of the hatred, the absolute hatred, is coming from these areas.” When asked if closing mosques would itself breed hatred of the United States by Muslims, Trump replied: “There’s already hatred. The hatred is incredible. It’s embedded. It’s

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<sup>1</sup> Jenna Johnson, *Donald Trump: Syrian refugees might be a terrorist army in disguise*, WASHINGTON POST, 30 Sept. 2015, at [https://www.washingtonpost.com/news/post-politics/wp/2015/09/30/donald-trump-syrian-refugees-might-be-a-terrorist-army-in-disguise/?utm\\_term=.b73710db3fec](https://www.washingtonpost.com/news/post-politics/wp/2015/09/30/donald-trump-syrian-refugees-might-be-a-terrorist-army-in-disguise/?utm_term=.b73710db3fec).

<sup>2</sup> Sarah Pulliam Bailey, *Donald Trump says he would consider closing down some mosques in the U.S.*, WASHINGTON POST, 21 Oct. 2015, at [https://www.washingtonpost.com/news/acts-of-faith/wp/2015/10/21/donald-trump-says-he-would-consider-closing-down-some-mosques-in-the-u-s/?utm\\_term=.d9dd91a3aa70](https://www.washingtonpost.com/news/acts-of-faith/wp/2015/10/21/donald-trump-says-he-would-consider-closing-down-some-mosques-in-the-u-s/?utm_term=.d9dd91a3aa70).

<sup>3</sup> Phone Interview with Donald Trump, Morning Joe, MSNBC.com, 16 Nov. 2015, at <https://www.msnbc.com/morning-joe/watch/trump-we-must-watch-and-study-mosques-567563331864?v=raila>.

embedded. The hatred is beyond belief. The hatred is greater than anybody understands. And it's already there.”<sup>4</sup>

On 20 November 2015, an MSNBC reporter asked Trump: “Should there be a database or system that tracks Muslims in this country?” Trump replied: “There should be a lot of systems. Beyond databases. I mean, we should have a lot of systems. . . . I would certainly implement that. Absolutely.”<sup>5</sup> When asked whether Muslims should be legally required to register in the database, he answered: “They have to be, they have to be.”<sup>6</sup> The following day, at a rally in Birmingham, Alabama, he reaffirmed: “So the database – I said yeah, that's alright, fine. . . . [A] database is okay, and a watch list is okay, and surveillance is okay. . . . But I do want databases for those people coming in.”<sup>7</sup> On 22 November, when asked on ABC News whether he was referring to Syrian refugees only and would “unequivocally” rule out a “database on all Muslims,” Trumps replied “No, not at all. . . . I definitely want a database and other checks and balances [*sic*]. We want to go with watchlists. We want to go with databases. And we have no choice.”<sup>8</sup> Later in the interview, he said “I don't want to close mosques; I want to surveil mosques. I want mosques surveilled.”<sup>9</sup> However, Trump then stated:

Hey, I watched when the World Trade Center came tumbling down. And I watched in Jersey City, New Jersey, where thousands and thousands of people were cheering as that building was coming down. Thousands of people were cheering. . . . There were people that were cheering on the other side of New Jersey, where you have large Arab populations. They were cheering as the World Trade Center came down. . . . There were people over in New Jersey that were watching it, a heavy Arab population, that were cheering as the buildings came down. Not good.”<sup>10</sup>

Trump produced no evidence to back up this claim at the time, or at any time subsequently.

On 7 December 2015, Trump's campaign issued an official announcement: “Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until

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<sup>4</sup> *Id.*

<sup>5</sup> Vaughn Hillyard, *Donald Trump's Plan for a Muslim Database Draws Comparison to Nazi Germany*, NBC NEWS, 20 Nov. 2015, at <https://www.nbcnews.com/politics/2016-election/trump-says-he-would-certainly-implement-muslim-database-n466716>.

<sup>6</sup> *Id.*

<sup>7</sup> *Donald Trump MASSIVE Rally in Birmingham*, Right Side Broadcasting Network, 21 Nov. 2015, at <https://www.youtube.com/watch?v=kmPqV41bfC0>.

<sup>8</sup> *'This Week' Transcript: Donald Trump and Ben Carson*, ABC NEWS, 22 Nov. 2015, at <https://abcnews.go.com/Politics/week-transcript-donald-trump-ben-carson/story?id=35336008>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* When the interviewer pointed out that the police had pointed out this claim was a myth and never happened, Trump insisted: “It did happen. I saw it.” *Id.* For an extensive review of the evidence relating to Trump's claim, see Glenn Kessler, *Trump's outrageous claim that 'thousands' of New Jersey Muslims celebrated the 9/11 attacks*, WASHINGTON POST, 22 Nov. 2015, at [https://www.washingtonpost.com/news/fact-checker/wp/2015/11/22/donald-trumps-outrageous-claim-that-thousands-of-new-jersey-muslims-celebrated-the-911-attacks/?utm\\_term=.c575a24a26c9](https://www.washingtonpost.com/news/fact-checker/wp/2015/11/22/donald-trumps-outrageous-claim-that-thousands-of-new-jersey-muslims-celebrated-the-911-attacks/?utm_term=.c575a24a26c9).

our country's representatives can figure out what is going on." He read the statement at a rally in South Carolina the same day.<sup>11</sup>

The following day during an interview with CNN, Trump quoted a unconfirmed poll by an anti-Islamic organization asserting that "a quarter of Muslims living in the U.S. believe violence against Americans is justified as part of a global jihadist campaign."<sup>12</sup> He followed that by stating during an interview with Fox News: "[T]here's a tremendous section and cross-section of Muslims living in our country who have tremendous animosity."<sup>13</sup>

On 9 March 2016, Trump stated during a CNN interview: "I think Islam hates us. There's something there that—there's a tremendous hatred there. There's a tremendous hatred. We have to get to the bottom of it. There's an unbelievable hatred of us."<sup>14</sup>

On 22 March 2016, Trump said in an interview with Fox Business: "Frankly, we're having problems with the Muslims, and we're having problems with Muslims coming into the country. . . . You have to deal with the mosques, whether we like it or not, I mean, you know . . . These attacks are not done by Swedish people. That I can tell you. We have to be smart. We have to look at the mosques and study what's going on. There is a sick problem going on."<sup>15</sup> The following day, during an interview with Bloomberg TV, Trump asserted with regard to "the Muslim world": "First of all they have to respect us. They do not respect us at all. . . . They have no respect for our President, and they have no respect for our country."<sup>16</sup>

On 14 June 2016, at a North Carolina rally, Trump stated: "The children of Muslim American parents, they're responsible for a growing number for whatever reason a growing number of terrorist attacks. . . . Every year we bring in more than 100,000 lifetime immigrants from the Middle East and many more from Muslim countries outside of the Middle East. A number of these immigrants have hostile attitudes."<sup>17</sup> Trump presented no evidence at the time or subsequently that children of Muslim American parents commit a growing number of terrorist acts, or that they commit terrorist attacks at a higher rate than non-Muslims. Nor has he ever presented evidence that even a single Muslim immigrant into the United States has a "hostile attitude" toward the United States.

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<sup>11</sup> Jenna Johnson, *Trump calls for 'total and complete shutdown of Muslims entering the United States,'* Washington Post, 7 Dec. 2015, at [https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm\\_term=.b34b50a57bbd](https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.b34b50a57bbd).

<sup>12</sup> Jeremy Diamond, *Donald Trump: Ban all Muslim travel to U.S.,* CNN NEWS, 8 Dec. 2015, at <https://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/index.html>.

<sup>13</sup> *Id.*

<sup>14</sup> Theodore Schleifer, *Donald Trump: 'I think Islam hates us,'* CNN NEWS, 10 Mar. 2016, at <https://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/>.

<sup>15</sup> Mark Hensch & Jesse Byrnes, *Trump: 'Frankly, we're having problems with the Muslims,'* THE HILL, 22 Mar. 2016, at <http://thehill.com/blogs/ballot-box/presidential-races/273857-trump-frankly-were-having-problems-with-the-muslims>.

<sup>16</sup> *With All Due Respect,* BLOOMBERG TV, 23 Mar. 2016, at 28:46, at <https://www.bloomberg.com/news/videos/2016-03-23/with-all-due-respect-03-23-16>.

<sup>17</sup> Candace Smith & John Santucci, *Donald Trump: Number of Muslim Immigrants Have 'Hostile Attitudes,'* ABC NEWS, 14 June 2016, at <https://abcnews.go.com/Politics/donald-trump-number-muslim-immigrants-hostile-attitudes/story?id=39844183>.

On 24 July 2016, after accepting the presidential nomination of the Republican Party, Trump defended his proposal to ban in the immigration of Muslims during an interview with NBC News. In response to objections that the Constitution forbids discrimination based on religion, Trump replied:

I'm looking now at territories. People were so upset when I used the word Muslim: 'Oh, you can't use the word Muslim. Remember this.' And I'm okay with that, because I'm talking territory instead of Muslim. . . . Our Constitution is great, but it doesn't necessarily give us the right to commit suicide, okay? . . . I view it differently.<sup>18</sup>

On 11 August 2016, Trump criticized U.S. immigration policy before a meeting of Christian evangelicals: "If you were a Christian in Syria, it was virtually impossible to come into the United States. If you were a Muslim from Syria, it was one of the easier countries to be able to find your way into the United States. Think of that. Just think of what that means."<sup>19</sup> This statement was later discredited by the Pew Research Center. Although more Muslim refugees were admitted into the United States in 2016 compared with prior years, about as many Christian refugees were admitted into the United States as Muslim refugees that same year.<sup>20</sup> Nonetheless, when asked directly whether Trump would prioritize immigration of Christians from the Middle East, Trump replied: "Yes."<sup>21</sup>

Much of Trump's rhetoric was based on his claim that the U.S. immigration process inadequately vetted visa applicants for national security threats. However, the process for vetting visa applicants and refugees after 2001 had become very thorough in the estimation of national security experts. Temporary visa applicants were screened against terrorism, criminal conviction, and immigration violator databases. The discovery of any derogatory information would trigger interviews and evidence gathering by Department of State consular officials. Applicants were also screened using a preclearance procedure and security agents in airports outside the United States, and their diligence stopped thousands of applicants prior to traveling to the United States before 2016. Applicants were moreover photographed and fingerprinted, and upon arrival in a U.S. customs screening area, they were interviewed anew, their data were analyzed, and their fingerprints were compared prior to entry into the United States.<sup>22</sup>

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<sup>18</sup> Meet the Press with Chuck Todd, NBC NEWS, 24 July 2016, at <https://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706>.

<sup>19</sup> *Donald Trump Remarks in Orlando, Florida*, C-SPAN, 11 Aug. 2016, at <https://www.c-span.org/video/?413877-1/donald-trump-addresses-evangelical-leaders-orlando-florida>.

<sup>20</sup> Phillip Connor, *U.S. admits record number of Muslim refugees in 2016*, Pew Research Center, 5 Oct. 2016, at <http://www.pewresearch.org/fact-tank/2016/10/05/u-s-admits-record-number-of-muslim-refugees-in-2016/>.

<sup>21</sup> Carol Morello, *Trump signs order temporarily halting admission of refugees, promises priority for Christians*, 27 Jan. 2017, at [https://www.washingtonpost.com/world/national-security/trump-approves-extreme-vetting-of-refugees-promises-priority-for-christians/2017/01/27/007021a2-e4c7-11e6-a547-5fb9411d332c\\_story.html?utm\\_term=.5a030fb3a7c4](https://www.washingtonpost.com/world/national-security/trump-approves-extreme-vetting-of-refugees-promises-priority-for-christians/2017/01/27/007021a2-e4c7-11e6-a547-5fb9411d332c_story.html?utm_term=.5a030fb3a7c4).

<sup>22</sup> Rebecca Shabad, *Inside the U.S. vetting system Trump wants to replace*, CBS NEWS, 27 Feb. 2017, at <https://www.cbsnews.com/news/inside-u-s-vetting-for-visas-refugees-and-improvements-that-could-be-made/>.

The refugee vetting process was more stringent still. The U.N. High Commissioner for Refugees initially collected documentation and biographical information on refugees that were transmitted to U.S. Department of State. The State Department conducted a detailed interview with the applicant, cross-referenced and verified the data, and then forwarded the information to five agencies: the National Counterterrorism Center, Federal Bureau of Investigation, Department of Homeland Security, Department of Defense, and Department of State. These agencies screened the applicants against databases for connections to terrorist or criminal organizations, or for a history of immigration violations. Officers trained by the Departments of Homeland Security and State then interviewed the refugee in person, collected biometric data, researched their social media posts, and performed a medical screening. Applicants were required to complete a class about American culture. If approved, the refugees undergo screening again from U.S. Customs and Border Protection and the Transportation Security Administration upon arrival in the United States, including comparing biometric information and further interviews.<sup>23</sup> Trump never specified exactly what part of these vetting processes he considered inadequate, or what additional measures should be proposed. There is indeed no evidence that he was ever aware of what vetting procedures were used on visa applicants and refugees prior to his election.

## **B. Executive Order of 27 January 2017**

Donald Trump was inaugurated President of the United States of America on 20 January 2017. Within a week, he signed an executive order entitled Protecting the Nation from Foreign Terrorist Entry into the United States (hereinafter “EO-1”),<sup>24</sup> attached hereto as Annex 1. EO-1 directs changes to the manner non-citizens of the United States, including permanent residents and asylum seekers, may seek and obtain entry into the United States. At the signing ceremony, Trump stated that the purpose of the EO was to establish “new vetting measures to keep radical *Islamic* terrorists out of the United States of America.”<sup>25</sup> He expressed no concern about terrorists of any other religion.

EO-1 claims authority under the Immigration and Nationality Act of 1965,<sup>26</sup> which establishes the conditions under which nationals of foreign states may enter the United States as immigrants and nonimmigrants. According to Section 1182 of the Act, the President is authorized to deem individual aliens or classes of aliens inadmissible. Section 1182(f) provides:

Whenever the President finds that the entry of any aliens or any class of aliens into the United States would be detrimental to the interests of the United States, he may by Proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

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<sup>23</sup> *Id.*

<sup>24</sup> Executive Order 13769, Jan. 27, 2017.

<sup>25</sup> Dan Merica, *Trump signs executive order to keep out ‘radical Islamic terrorists,’* CNN.com, 30 Jan. 2017 (emphasis added), at <https://www.cnn.com/2017/01/27/politics/trump-plans-to-sign-executive-action-on-refugees-extreme-vetting/index.html>.

<sup>26</sup> Pub. L. 89-236, 79 Stat. 911, *codified as amended* at 8 U.S.C. ch. 12.



In general, courts have deferred to the actions of U.S. presidents under this provision, recognizing the broad discretion that it grants to the Executive Branch.<sup>27</sup> However, the Act also establishes that “no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.”<sup>28</sup>

Section 3(c) of EO-1 proclaims that the entry of immigrants and nonimmigrants from the following countries “would be detrimental to the interests of the United States”: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. The ostensible basis of this choice of countries was that the Secretary of Homeland Security had chosen these countries pursuant to a congressional grant of authority to restrict the use of certain visa waivers for nationals from the countries.<sup>29</sup> EO-1 accordingly suspends entry into the United States of anyone of those nationalities for 90 days from the date of the EO. The purpose of the 90-day suspension, according to sections 1 and 3 of the EO, was to design and implement new security measures with respect to immigrants and nonimmigrants from those countries. The populations of all countries listed in EO-1 are predominantly Muslim. EO-1 did not impose suspensions on entry from citizens of any country not populated predominantly by Muslims.

Section 5 of EO-1 ordered the Secretary of State to immediately and categorically suspend refugee admissions for a period of 120 days, with only refugee applicants already in the admission process eligible for consideration. Refugees and asylum seekers currently in the United States were to be ejected from the United States without examination of the risks of torture, persecution, or extrajudicial killing faced by the refugees. Moreover, Section 5(b) instructed the Secretary of State to “prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual’s country of nationality.”<sup>30</sup> Because all of the targeted states were majority Muslims, EO-1 directed the Secretary to discriminate against Muslims in refugee admissions.

Section 10 of EO-1 directs the Secretary of Homeland Security, in consultation with the U.S. Attorney General, to collect and publish information regarding the number of foreign nationals in the United States who:

- (1) have been charged, convicted by, or deported from the United States for terrorism-related offenses;
- (2) have been “radicalized after entry into the United States and engaged in terrorism-related acts” or materially supported terrorism; and

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<sup>27</sup> See, e.g., *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187 (1993).

<sup>28</sup> 8 U.S.C. § 1152(a)(1)(A).

<sup>29</sup> 8 U.S.C. § 1187(a)(12).

<sup>30</sup> Section 5(e) of EO-1 allows the Secretaries of State and Homeland Security to jointly consider exceptions on a case-by-case basis, but again directs them specifically to prioritize members of religious minorities. Section 5(f) directs the Secretary of State to report to the President specifically on the prioritization of religious minorities, presumably so that Trump could use the information to gratify the Christian evangelical leaders to whom Trump promised to prioritize Christian refugees.

- (3) have committed acts of gender-based violence against women, “including honor killings.”

EO-1 did not require such data collection and publication with regard to U.S. nationals. This biased data collection and publication would allow the Trump Administration to present to the American public statistics about the participation of foreign nationals in terrorism and gender-based violence in the United States, and thereby to foment fear in the public of immigrants, even if the rates of terrorism and gender-based violence by U.S. nationals were in fact much higher. For example, if (hypothetically) 22 foreign nationals were charged with or convicted of terrorism in 2018, but 44 U.S. nationals were charged with or convicted of terrorism in the same year, the EO required that only the data about foreign nationals be presented to the American public. The public would thereby be deceived into believing that foreign nationals pose the sole or primary threat of terrorism, even though in fact U.S. nationals were twice as likely to commit such acts.

Finally, because EO-1 did not require specifying the specific country of nationality of the foreign nationals, the public could be deceived into believing that any acts of terrorism were committed by citizens of the countries targeted in EO-1, and not by citizens of other countries, such as, by way of random example, Sweden.

EO-1 did not exempt lawful permanent residents, holders of valid student or work visas, foreign investors supervising their investments, or legitimate refugees or asylum seekers. Its effect was immediate and disastrous. At the time, there were 52,275 lawful permanent residents from the countries listed in in EO-1 living in the United States. Any that had been outside of the United States on vacation, visiting family, for work or school, or for any other reason, were prevented from returning home and detained at the airport or sent to (or kept in) a foreign country without preparation or resources. Those within the United States were effectively trapped there, because leaving meant they could not return home. They were also put in immediate fear of having their visas revoked and being ejected from their homes; being separated from families and friends; and losing their jobs or access to their educations.<sup>31</sup>

Refugees and asylum seekers were refused entry as well and either detained or returned to their country of origin. According to news sources, 109 travelers were detained or returned on the first day of the ban.<sup>32</sup> Many others were denied the right to come to the United States, such as spouses and children of refugees who had been granted asylum.<sup>33</sup>

At the time the order was issued, Trump had privately called it a “Muslim ban,” but had asked his adviser, Rudolph Giuliani (subsequently appointed his attorney), to “Put a commission

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<sup>31</sup> Two weeks later, Donald Francis McGahn II, White House Counsel, circulated a memorandum stating that the travel ban did not apply to lawful permanent residents despite its clear terms. However, the White House Counsel is merely an adviser to the President and has no lawful authority to alter or interpret an executive order.

<sup>32</sup> Ariane de Vogue, Eli Watkins & Alanne Orjoux, *Judges temporarily block part of Trump’s immigration order, WH stands by it*, CNN.com, 29 Jan. 2017, at <https://www.cnn.com/2017/01/28/politics/2-iraqis-file-lawsuit-after-being-detained-in-ny-due-to-travel-ban/index.html>,

<sup>33</sup> *Id.*

together. Show [Trump] the right way to do it legally.”<sup>34</sup> In other words, Giuliani’s statement indicates that framing EO-1 as a territorial ban on immigration was intended to put a veneer of legality on a ban factually based on religion.

EO-1 was immediately challenged by several private litigants and multiple U.S. states as contrary to U.S. immigration legislation and a violation of the First and Fifth Amendments to the U.S. Constitution. Mr. Elshikh and the Muslim Association of Hawaii were among the plaintiffs who filed lawsuits challenging the suspension. On 28 January, a federal judge in the Eastern District of New York ordered a partial stay on EO-1, resulting in a stop to the deportations of refugees and visa-holders, but the detentions were allowed to continue.<sup>35</sup> The following day, a federal judge in Massachusetts issued a similar restraining order, adding an injunction against detaining lawful visa holders.<sup>36</sup> On 30 January 2018, the acting U.S. Attorney General instructed the Department of Justice to refuse to defend EO-1 in court, and Trump immediately fired her.<sup>37</sup> Meanwhile, a Democrat in the Senate attempted to introduce a bill to reverse EO-1, but Senate Republicans blocked it.<sup>38</sup>

The Massachusetts injunction was set to expire on 5 February, but on 3 February the state of Washington challenged the ban and obtained a nationwide preliminary injunction blocking its implementation.<sup>39</sup>

In the meantime, the Inter-American Commission on Human Rights issued a press release expressing its concern *inter alia* about EO-1. In the release, it stated:

The measures envisaged in these executive orders reflect a high degree of discrimination of migrant communities and minority groups, particularly Latinos and Muslims or those perceived as such. The implementation of these executive orders puts migrants and refugees at grave risk of violation of their rights to non-discrimination, personal liberty, due process, judicial protection, special protection for families and children, the right to seek and receive asylum, the principle of non-refoulement, the prohibition of cruel, inhuman and degrading treatment, and the right to freedom of movement, among others. In particular, the IACHR is concerned over the serious risk that these orders pose to unaccompanied children, families and women who may be returned to the countries from which they fled, where their life and integrity were under threat.<sup>40</sup>

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<sup>34</sup> Amy B. Wang, *Trump asked for a ‘Muslim ban,’ Giuliani says—and ordered a commission to do it ‘legally,’* WASH. POST, 29 Jan. 2017, at [https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm\\_term=.e9187b0a64a2](https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.e9187b0a64a2).

<sup>35</sup> *Darweesh v. Trump*, Decision & Order, Case 17 Civ. 480 (AMD) (E.D.N.Y., 28 Jan. 2017).

<sup>36</sup> *Tootkaboni v. Trump*, Temporary Restraining Order, Case 17-cv-10154 (D. Mass., 29 Jan. 2017).

<sup>37</sup> Eli Watkins & Eugene Scott, *Who Is Sally Yates*, CNN.com, 14 Feb. 2017, at <https://www.cnn.com/2017/01/30/politics/who-is-sally-yates/index.html>.

<sup>38</sup> Ted Barrett & Zachary Cohen, *GOP blocks Schumer moves to rescind Trump travel ban*, CNN.com, 30 Jan. 2017, at <https://www.cnn.com/2017/01/30/politics/tillerson-vote-delay-immigration-order/index.html>.

<sup>39</sup> *State of Washington v. Trump*, Temporary Restraining Order, Case C17-0141JLR (W.D. Wash., 3 Feb. 2017).

<sup>40</sup> Inter-American Commission on Human Rights, Press Release: IACHR Expresses Concern over Executive Orders on Immigration and Refugees in the United States, 1 Feb. 2017, at [http://www.oas.org/en/iachr/media\\_center/preleases/2017/008.asp](http://www.oas.org/en/iachr/media_center/preleases/2017/008.asp).

The U.S. government immediately appealed the Washington district court's injunction. Cases from district courts in Washington are appealed to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit decided *per curiam* on 9 February to decline to remove the preliminary injunction.<sup>41</sup> In its decision, the Ninth Circuit held that the government had failed to show a likelihood of success on the merits. The court found that the plaintiffs had made a strong showing that valid visa holders were denied due process of law when the government refused to honor their visas.<sup>42</sup> The court reserved consideration of the claim of religious discrimination, finding that a decision at the time would be unnecessary in light of its decision upholding the injunction.<sup>43</sup>

In the meantime, two versions of a report from the U.S. Department of Homeland Security ("DHS") were released. First, a draft DHS report, prepared about one month after EO-1 was issued, concluded that a person's nationality "is unlikely to be a reliable indicator of potential terrorist activity" and that citizens of the countries specifically listed in EO-1 are rarely implicated in U.S.-based terrorism. In particular, the report determined that, since the spring of 2011, *more than half* of the eighty-two persons who tried to commit terrorist attacks on the United States were U.S. citizens born in the United States, and the remaining persons were from twenty-six different countries, with the most individuals originating from Pakistan, followed by Somalia, Bangladesh, Cuba, Ethiopia, Iraq, and Uzbekistan. Of the countries included in EO-1, only Somalia was identified as being among the top countries-of-origin for the terrorists analyzed in the report. During the time period covered in the report, three offenders were from Somalia; one was from Iran, Sudan, and Yemen each; and none was from Syria or Libya. A copy of the draft report is attached hereto as Annex 1A.

On 1 March 2017, DHS published a final version of the report as an unclassified internal memorandum. The final report made no change to the conclusions of the earlier draft, but it added "that most foreign-born, [U.S.]-based violent extremists likely radicalized several years after their entry to the United States, [thus] limiting the ability of screening and vetting officials to prevent their entry because of national security concerns." A copy of the final report, characterized as an "official DHS assessment," is attached hereto as Annex 1B.

### **C. Executive Order of 6 March 2017**

Regardless of these reports, Trump issued a second, very similar executive order on 6 March 2017, under the same title (hereinafter "EO-2"), revoking EO-1.<sup>44</sup> EO-2 took effect on 16 March 2017.<sup>45</sup> It is attached hereto as Annex 2. Stephen Miller, Senior Policy Advisor to the President, announced that EO-2 would reflect "mostly minor technical differences" from EO-1, and that it would produce the "same basic policy out-come for the country."<sup>46</sup> White House Press

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<sup>41</sup> *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (*per curiam*).

<sup>42</sup> *Id.* at 1165.

<sup>43</sup> *Id.* at 1167-68.

<sup>44</sup> Executive Order 13780, Mar. 6, 2017, § 13 [hereinafter EO-2].

<sup>45</sup> *Id.* § 14.

<sup>46</sup> Matt Zapotosky, *A new travel ban with 'mostly minor technical differences'? That probably won't cut it, analysts say*, WASH. POST, 22 Feb. 2017, at <https://www.washingtonpost.com/world/national-security/a-new-travel->

Secretary Sean Spicer stated: “The principles of the executive order remain the same.”<sup>47</sup> Trump himself, at a rally in Nashville, Tennessee, described EO-2 as “a watered down version of the first order.”<sup>48</sup>

EO-2 maintained the suspension of immigration from all of the countries listed in EO-1 except Iraq. Another significant innovation was the removal of the preference for religious minorities (i.e., non-Muslims). In addition, EO-2 exempted several classes of persons from its suspension, primarily lawful permanent residents, non-visa admittees, dual nationals, foreign nationals granted asylum prior to the entry in force of EO-2, and anyone issued a visa after entry into force of EO-2.

EO-2 also attempted to add a *post hoc* justification for the choice of countries by claiming: “conditions in these countries present heightened threats. Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones.” The exemption of Iraq was justified based solely on:

the close cooperative relationship between the United States and the democratically elected Iraqi government, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq’s commitment to combat ISIS justify different treatment for Iraq. In particular, those Iraqi government forces that have fought to regain more than half of the territory previously dominated by ISIS have shown steadfast determination and earned enduring respect as they battle an armed group that is the common enemy of Iraq and the United States. In addition, since Executive Order 13769 was issued, the Iraqi government has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal. Decisions about issuance of visas or granting admission to Iraqi nationals should be subjected to additional scrutiny to determine if applicants have connections with ISIS or other terrorist organizations, or otherwise pose a risk to either national security or public safety.<sup>49</sup>

EO-2 further attempts to justify the list by the general statement: “Since 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States.”<sup>50</sup> It then mentions “two Iraqi nationals admitted to the United States as refugees” who had years later been sentenced to prison “for multiple terrorism-related offenses,” and one former Somalian refugee who, decades after he had been naturalized, was convicted for an attempted terrorist act.<sup>51</sup> Putting aside the fact that EO-2 *exempts* Iraq from the suspension, nothing in the order even

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ban-with-mostly-minor-technical-differences-that-probably-wont-cut-it-analysts-say/2017/02/22/8ae9d7e6-f918-11e6-bf01-d47f8cf9b643\_story.html?utm\_term=.fcaa6c77de48.

<sup>47</sup> White House Press Briefings: Press Gaggle by Sean Spicer, 6 Mar. 2017, at <https://www.whitehouse.gov/briefings-statements/press-gaggle-press-secretary-sean-spicer-4/>.

<sup>48</sup> Katie Reilly, *Read President Trump’s Response to the Travel Ban Ruling: It ‘Makes Us Look Weak’*, TIME, 16 Mar. 2017, at <http://time.com/4703622/president-trump-speech-transcript-travel-ban-ruling/>.

<sup>49</sup> *Id.* § 1(g).

<sup>50</sup> *Id.* § 1(h).

<sup>51</sup> *Id.*

remotely demonstrates that the risk of terrorism from the listed countries is actually higher than from unlisted countries. In addition, EO-2 conveniently fails to mention instances of terrorist activity by immigrants from non-listed countries. The order also pointedly gives no statistics on the relative prevalence of terrorism by immigrants versus native-born U.S. citizens. Finally, the purported justification for EO-2 was contradicted by Donald Trump's own website, which continued as late as 28 April 2017 to announce his intention to prevent "Muslim" immigration (a screenshot of that website is attached hereto as Annex 2A).

On 7 March, the state of Hawaii challenged the EO-2 and obtained another preliminary injunction.<sup>52</sup> Nine days later, a federal district court in Maryland issued its own injunction restraining enforcement of EO-2.<sup>53</sup> Meanwhile, the state of Washington, now joined by five other states, amended its complaint to account for the new order.<sup>54</sup> In each case, the plaintiffs prevailed before the district courts in obtaining injunctions to prevent the operation of the suspension. Appeals followed to the U.S. Court of Appeals for the Ninth Circuit (*Washington v. Trump* and *Hawaii v. Trump*) and the U.S. Court of Appeals for the Fourth Circuit (*IRAP v. Trump*).

The Fourth Circuit decided the appeal in *IRAP v. Trump* on 25 May 2017, sitting *en banc*.<sup>55</sup> In its decision, the court affirmed in substantial part the district court's injunction. In the decision, the Chief Judge of the Fourth Circuit, writing for the court, described EO-2 as follows: "[A]n Executive Order that in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination." After reciting many of Trump's remarks intended to suggest that Islam and Muslims are dangerous and hostile to the United States, and noting the absence of any evidence of a national security purpose, the court held that the plaintiffs had "more than plausibly alleged that EO-2's stated national security interest was provided in bad faith, as a pretext for its religious purpose. And having concluded that the 'facially legitimate' reason proffered by the government is not 'bona fide,' we no longer defer to that reason . . . ."<sup>56</sup> In other words, the Fourth Circuit's opinion rested primarily on the conclusion that the EO-2 had no legitimate national security purpose, but that it instead embodied a policy of religious discrimination in violation of the First Amendment to the U.S. Constitution. "The evidence in the record, viewed from the standpoint of the reasonable observer, creates a compelling case that EO-2's primary purpose is religious."<sup>57</sup> Specifically, it enacts "President Trump's desire to exclude Muslims from the United States."<sup>58</sup>

The Ninth Circuit decided the appeal in *Hawaii v. Trump* on 12 June 2017.<sup>59</sup> In a *per curiam* opinion, it affirmed the preliminary injunction primarily based on its assessment that EO-2's suspension of immigration was not authorized by statute. The President's invocation of

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<sup>52</sup> *Hawaii v. Trump*, Temporary Restraining Order, Case 17-cv-00050 (D. Haw., 7 Mar. 2017).

<sup>53</sup> *International Refugee Assistance Project v. Trump*, Memorandum Opinion, Civ. Case TDC-17-0361 (D. Md., 16 Mar. 2017).

<sup>54</sup> Second Amended Complaint for Declaratory and Injunctive Relief, *Washington v. Trump*, Civ. Case No. 2:17-cv-00141-JLR, 13 Mar. 2017.

<sup>55</sup> *International Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (*en banc*).

<sup>56</sup> *Id.* at 592.

<sup>57</sup> *Id.* at 594.

<sup>58</sup> *Id.* at 595.

<sup>59</sup> *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017).

national security, the court held, could not support EO-2, because that order “makes no finding that nationality alone renders entry of this broad class of individuals a heightened security risk to the United States.” In so holding, the court noted that the national security rationale is inconsistent with the measures adopted:

Indeed, its use of nationality as the sole basis for suspending entry means that nationals without significant ties to the six designated countries, such as those who left as children or those whose nationality is based on parentage alone, should be suspended from entry. Yet, nationals of other countries who do have meaningful ties to the six designated countries—and may be contributing to the very country conditions discussed—fall outside the scope of Section 2(c).<sup>60</sup>

However, unlike the Fourth Circuit, the Ninth Circuit reserved the question of whether the order constitutes discrimination based on religion.

The U.S. government filed petitions for review of both decisions with the U.S. Supreme Court. In the meantime, the case would have become moot, because the suspension was only to last until 27 April 2017, while the government supposedly formulated and adopted measures to increase the reliability of immigrant screening and vetting. Instead, Trump extended the suspension indefinitely, until a final judicial decision on the case had issued. Trump thus confirmed that the reason for the suspension had nothing to do with reevaluating the immigration vetting procedures for national security purposes, but was instead designed to block the entry of Muslims into the United States.

The Supreme Court granted *certiorari* and consolidated the petitions. In June 2017, it issued an opinion *per curiam*.<sup>61</sup> granting the government’s applications to temporarily stay the injunctions (and thereby allow the EO-2 to take effect), but only with respect to “foreign nationals who lack any bona fide relationship with a person or entity in the United States.”<sup>62</sup> It otherwise left the injunctions in place pending final consideration of the EO-2.

The Court did not definitively decide the legality or constitutionality of the EO-2, however, because the U.S. government soon requested that the Court defer consideration until a new policy, which was then being drafted, could replace the EO.

#### **D. Proclamation No. 9645 of 24 September 2017**

On 24 September 2017, President Trump issued Presidential Proclamation No. 9645, attached hereto as Annex 3. The choice of Proclamation rather than executive order is primarily a matter of form. The Proclamation differed in some respects from the EO-2, but in substance it differed very little. It made no significant changes to the immigration ban and the list of countries targeted, or the basis on which the countries were targeted. The Proclamation indefinitely suspends entry into the United States of all nationals of Iran (with some exceptions), North Korea, and Syria. It restricts entry of nationals of Chad, Libya, and Yemen that seek immigrant visas and

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<sup>60</sup> *Id.* at 773.

<sup>61</sup> *Trump v. International Refugee Assistance Project & Trump v. Hawaii*, 582 U.S. \_\_\_ (26 June 2017).

<sup>62</sup> *Id.* pt. II.B.

nonimmigrant business or tourist visas. The Proclamation suspends entry of nationals of Somalia seeking immigrant visas and mandates additional scrutiny of Somali nationals seeking nonimmigrant visas. Finally, it restricts the entry of certain officials of the Venezuelan government and their families.

Sudanese nationals were no longer categorically denied visas at all. The U.S. government never explained why Sudan had been removed from the Proclamation, despite being designated under U.S. law as a state sponsor of terrorism at the time.<sup>63</sup> When asked by reporters what policies Sudan had altered to merit removal from the suspension list, Trump could not identify any change.<sup>64</sup> Some have hypothesized that the real explanation for Sudan's removal was that the United Arab Emirates, which benefits from Sudanese soldiers fighting in Yemen, persuaded the U.S. government to remove Sudan from the ban.<sup>65</sup> If so, that reason has nothing to do with any risk of terrorism posed by Sudanese citizens.

The Proclamation did differ from the preceding executive orders by trying to justify the choice of targeted countries at greater length, without, however, changing that choice or justification meaningfully. As with EO-2, the Proclamation rested its choice primarily on the alleged inability of the United States to obtain satisfactory evidence that nationals of the targeted countries have legitimate travel documents. The Proclamation assumes that foreign states have an obligation to the United States to screen nationals leaving its territory for risk of terrorist activity. According to the Proclamation: "The United States expects foreign governments to provide the information needed to determine whether individuals seeking benefits under the immigration laws are who they claim to be" and "to provide information about whether persons who seek entry to this country pose national security or public-safety risks."<sup>66</sup>

The Proclamation then states that, after a review of various risk factors, the Secretary of Homeland Security "identified 16 countries as being 'inadequate' based on an analysis of their identity-management protocols, information-sharing practices, and risk factors. Thirty-one additional countries were classified 'at risk' of becoming 'inadequate' based on those criteria."<sup>67</sup> Instead, it targets the exact same countries that, *mirabile dictu*, the President targeted in EO-2 before the DHS undertook the alleged comprehensive risk factor analysis. The Proclamation did not identify any of the other ten "inadequate" countries except Chad, North Korea, and Venezuela.<sup>68</sup>

The Proclamation then states that DHS issued a report recommending visa suspension against nationals of those very countries.<sup>69</sup> The Proclamation makes no mention of the DHS

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<sup>63</sup> 31 C.F.R. pts. 538, 596 (2017).

<sup>64</sup> Press Gaggle by President Trump, 27 Sept. 2017, at <https://www.whitehouse.gov/briefings-statements/press-gaggle-president-trump/>.

<sup>65</sup> Ryan Grim & Alex Emmons, *How Sudan Got Off Donald Trump's Latest Travel Ban List*, THE INTERCEPT, 25 Sept. 2017, at <https://theintercept.com/2017/09/25/sudan-trump-travel-ban-uae-yemen/>.

<sup>66</sup> Proclamation No. 9645 (24 Sept. 2017), § 1(c).

<sup>67</sup> *Id.* § 1(e). In other words, the Proclamation declares that over quarter of the world's states are either dangerously irresponsible with regard to their identity management systems, or are "at risk" of becoming so. Nonetheless, the Proclamation does not target the sixteen "inadequate" states.

<sup>68</sup> *Id.* § 1(g).

<sup>69</sup> *Id.* § 1(h).



official report stating that such suspension would be unlikely to have any effect whatsoever on national security.

Dr. Ismail Elshikh is an American citizen of Egyptian descent whose wife, also an American citizen, is of Syrian descent. Together, they have five children. Dr. Elshikh is the Imam at the Muslim Association of Hawaii and a leader in the Muslim community. Dr. Elshikh's mother-in-law lived in Syria at the time of the events described here, and she had last visited his family in the United States in 2005. She had not met two of her grandchildren. In September 2015, Dr. Elshikh's family filed an I-130 petition for an immigrant visa in order to reunite their family with his mother-in-law. The petition was approved in February of 2016, but upon issuance of EO-1 in January of 2017, the family was informed that their application for an immigrant visa was on hold. In March 2017, after EO-1 was enjoined by the courts, Dr. Elshikh's family received notice that his mother-in-law's visa had progressed to the next stage and that she would be interviewed at an overseas embassy. She was eventually allowed to enter the United States with a grant of lawful permanent residence while enforcement of the suspension was enjoined by courts.

However, Dr. Elshikh and his family remain unable to receive visits from other family members in Syria, including four brothers and one sister of Dr. Elshikh's wife. Because Presidential Proclamation No. 9645 suspends the entry of Syrian nationals indefinitely, Dr. Elshikh and his family are uncertain of when they will see these family members again. He and his family are also deeply affected by the message sent by the series of executive orders and the Proclamation issued by President Trump, signaling that members of the Muslim faith and of Syrian descent are not welcome in the United States and are regarded as inferior to Christians.

The same measures have had similar effects on the family lives of members of the Muslim Association of Hawai'i, whose families include nationals of Iran, Libya, Somalia, Syria, and Yemen.

The Proclamation was again challenged in the district courts by Dr. Elshikh, various U.S. states, and others, and it was found unconstitutional or *ultra vires* under the Immigration and Nationality Act. Within a few months, Dr. Elshikh's case, *Hawaii v. Trump*, came to the Ninth Circuit on appeal for the third time. On 22 December, that court held *per curiam* once again that the Proclamation exceeds the President's delegated statutory authority, limited however to "foreign nationals who have a bona fide relationship with a person or entity in the United States."<sup>70</sup> It again declined to rule on the compatibility of the Proclamation with the constitutional prohibition on religious discrimination.

On 8 December 2017, the Fourth Circuit heard arguments about the Proclamation and issued a final *en banc* decision on 15 February 2018.<sup>71</sup> That court found that the Proclamation violated the constitutional prohibition on religious discrimination, just as its predecessor executive orders had, and on the same grounds.

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<sup>70</sup> *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017).

<sup>71</sup> *International Refugee Assistance Project v. Trump*, 883 F.3d 233 (4th Cir. 2018).

## E. U.S. Supreme Court Decision in *Trump v. Hawaii*

The Supreme Court granted certiorari to the U.S. government on 19 January 2018.<sup>72</sup> During the Court’s consideration of the case, the government removed Chad from the list of targeted countries (10 April 2018), allegedly based on “marked improvements” in “identity-management and information-sharing practices.”<sup>73</sup> In fact, Chad appears to have made no significant changes to its security practices, other than “sharing updated passport exemplars” with the United States and notifying it of lost and stolen passports. Indeed, in the Proclamation lifting the entry restrictions, Trump merely “confirmed that Chad” already shared information about known or suspected terrorists before the restrictions had been adopted.<sup>74</sup>

The Court announced its opinion on 26 June 2018.<sup>75</sup> A copy of that opinion is attached hereto as Annex 4. The Court majority held that the Proclamation was consistent with the “comprehensive delegation” of authority to the President under INA Section 1182(f), and it determined that it was unnecessary to examine the justifications for the Proclamation.<sup>76</sup>

More importantly, the Court rejected the argument that the Proclamation violated the constitutional prohibition on discrimination based on religion. According to the Court, because the Proclamation is “facially neutral toward religion” and invokes “national security,”<sup>77</sup> any actual discriminatory motive or effect is irrelevant.<sup>78</sup> The Court majority conceded that, if the policy is motivated *only* by a discriminatory motive, it is unconstitutional. But it held that it would “uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.”<sup>79</sup> Based on this position, the Court further disregarded all evidence of discriminatory motive by candidate and later President Trump. It focused instead solely on whether, in theory, a U.S. President could have chosen the states targeted in the Proclamation based on a national security rationale.

In undertaking the analysis, the Court focused exclusively on the Proclamation’s recitation of steps allegedly undertaken to ascertain the risk of terrorism from the listed countries, without examining the credibility of these claims. It ignored the abundant evidence, including evidence issuing from the government itself, showing that the Proclamation had no rational relationship to national security whatsoever. Instead, relying almost entirely on the President’s assurance that he had “a legitimate national security interest” in mind, the Court concluded that the Proclamation could possibly be related to legitimate state interests, and that was enough to overcome the interests

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<sup>72</sup> *Trump v. Hawaii*, 585 U.S. \_\_\_, 138 S. Ct. 923 (2018).

<sup>73</sup> Presidential Proclamation Maintaining Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, 10 Apr. 2018, at <https://www.whitehouse.gov/presidential-actions/presidential-Proclamation-maintaining-enhanced-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/>.

<sup>74</sup> *Id.*

<sup>75</sup> *Trump v. Hawaii*, 585 U.S. \_\_\_, 138 S. Ct. 2392 (2018).

<sup>76</sup> *Id.*, slip op. at 13.

<sup>77</sup> *Id.*, slip op. at 20.

<sup>78</sup> *Id.*, slip op. at 32.

<sup>79</sup> *Id.*

of U.S. citizens and residents in their civil rights.<sup>80</sup> The Court chose not to address the issue of national origin discrimination, which is also generally illegal or unconstitutional in the United States.<sup>81</sup>

The Court also determined that the Proclamation was not inconsistent with section 1152(a)(1)(A) of the INA, because this provision narrowly addresses the issuance of immigrant visas. Finally, the Court ruled that the Proclamation did not discriminate against Muslims in violation of the First Amendment of the Constitution. Because the Proclamation dealt with matters of national security, the Court afforded great deference to the executive branch and reviewed the Proclamation on the basis of whether it was “plausibly related to the Government’s stated objective to protect the country” and its national security.<sup>82</sup> Observing that the Court “hardly ever strikes down a policy as illegitimate under rational basis scrutiny,” it upheld the constitutionality and legality of the Proclamation.<sup>83</sup>

As with all previous judicial decisions in the course of this recitation, no court at any stage, including the U.S. Supreme Court, considered the compatibility of the EOs or Proclamation with international human rights law or international refugee law. These obligations were detailed in several *amicus* briefs, but in each case the courts ignored the rights.

## IV. HUMAN RIGHTS VIOLATIONS

### A. The Human Right to Freedom from Discrimination

The Inter-American Commission has repeatedly recognized that the American Declaration on the Rights and Duties of Man “constitutes a source of legal obligation for OAS member states, including those States that are not parties to the American Convention on Human Rights. These obligations are considered to flow from the human rights obligations of Member States under the OAS Charter.”<sup>84</sup> The United States ratified the OAS Charter in 1951, and it is therefore bound to respect the rights contained in the American Declaration.<sup>85</sup>

Article II of the American Declaration provides that:

All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

According to Article III:

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<sup>80</sup> *Id.*, slip op. at 36.

<sup>81</sup> *See* *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (holding that aliens are entitled to equal protection of the laws under the Constitution’s Fifth Amendment regardless of national origin); 42 U.S.C. § 2000d (prohibiting discrimination “on ground of race, color, or national origin” in “any program or activity receiving Federal financial assistance.”).

<sup>82</sup> *Id.* at 32.

<sup>83</sup> *Id.* at 33-39.

<sup>84</sup> *See, e.g., Jessica Lenahan (Gonzales) v. United States*, Inter-American Comm’n on Hum. Rts., Rep. No. 80/11 (Merits), Case 12.626, para. 115 (21 July 2011).

<sup>85</sup> *See, e.g., Djamel Ameziane v. United States*, Report No. 17/12 (Admissibility), Petition 900-08, para. 27.

Every person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private.

The right to equality before the law and to nondiscrimination contained in Article II has been recognized as “a fundamental principle of the inter-American system of human rights” and the “backbone of the universal and regional systems for the protection of human rights.”<sup>86</sup> This means that the state has

the obligation to adopt the measures necessary to recognize and guarantee the effective equality of all persons before the law; to abstain from introducing in their legal framework regulations that are discriminatory towards certain groups either in their face or in practice; and to combat discriminatory practices. The Commission has underscored that laws and policies should be examined to ensure that they comply with the principles of equality and non-discrimination; an analysis that should assess their potential discriminatory impact, even when their formulation or wording appears neutral, or they apply without textual distinctions.<sup>87</sup>

The right to nondiscrimination applies in the context of state criteria for aliens seeking to enter their territories. The Commission has recognized the right of states to control the entry, residence, and expulsion of removable aliens; however, state actions in this regard must be consistent with certain protections inherent in democratic societies.<sup>88</sup> This includes the principle of nondiscrimination. In the *Haitian Interdiction Case*, the Commission found a violation of Article II of the Declaration when the United States intercepted boats carrying Haitian asylum-seekers and returned them to Haiti. The evidence indicated that boats carrying asylum-seekers from Cuba were admitted to the United States, and that asylum was granted to nationals of other countries at a significantly higher rate than it was granted to Haitians.<sup>89</sup>

The Commission has also determined that

the jurisprudence of other international supervisory bodies can provide constructive insights into the interpretation and application of rights that are common to regional and international human rights systems. Therefore, it is wholly appropriate and established practice for the IACHR to consider authorities originating from the European Court, the U.N. Human Rights Committee, or similar other international instances, to the extent the decisions are relevant to the obligations owed by the State to the alleged victims.<sup>90</sup>

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<sup>86</sup> See, e.g., *Lenahan (Gonzales) v. United States*, *supra* note 84, para. 107.

<sup>87</sup> *Id.* para. 109; see also *Undocumented Migrant Workers (United States)*, Inter-American Comm’n on Hum. Rts., Rep. No. 50/16 (Merits and Pub.), Case 12.834, para.73 (30 Nov. 2016).

<sup>88</sup> See, e.g., *Hugo Armendariz v. United States*, Report No. 81/10, para. 41.

<sup>89</sup> *Haitian Interdiction Case (United States)*, Report No. 51/96 (Merits), Case 10.675, paras. 175-78 (13 Mar. 1997).

<sup>90</sup> See, e.g., *Wayne Smith & Hugo Armendariz v. United States*, Inter-American Comm’n on Hum. Rts., Rep. No. 81/10 (Publication of Merits), Case 12.562, para. 4 (12 July 2010); *Mary and Carrie Dann v. United States*, Inter-American Comm’n on Hum. Rts., Rep. No. 75/02 (Merits), Case 11.140 paras. 96-97 (27 Dec. 2002).

The Commission may wish to consider other sources of international human rights law binding upon the respondent state in its recommendations. The United States supported the Universal Declaration of Human Rights (“UHDR”) and has been bound by the International Covenant on Civil and Political Rights (“ICCPR”) since its ratification of the treaty in 1992.<sup>91</sup> Articles 2 and 7 of the UDHR include prohibitions on discrimination and a requirement of equal protection of the law on similar terms to the ADHR.<sup>92</sup> Article 2 of the ICCPR states in relevant part:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, *religion*, political or other opinion, *national or social origin*, property, birth or other status.

...

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.<sup>93</sup>

The United Nations Human Rights Committee (“HRC”) is charged by the ICCPR to monitor implementation by state parties and to issue guidance on the ICCPR’s proper interpretation. The HRC interprets Article 2 to prohibit “any distinction, exclusion, restriction or preference which is based on” a prohibited ground, and which has “the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing.”<sup>94</sup> To justify a derogation from the nondiscrimination (or any other human rights) duty, a measure must pursue a legitimate aim and be proportionate to that aim.<sup>95</sup> A “proportionate” measure is one effective at achieving the aim and narrowly tailored (or “necessary”) to it.<sup>96</sup>

More generally, Article 26 of the ICCPR prohibits discrimination in any government measure, regardless of whether the measure violates a Covenant right:

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<sup>91</sup> 138 Cong. Rec. S4781-01 (daily ed., 2 Apr. 1992).

<sup>92</sup> Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948) [hereafter UDHR].

<sup>93</sup> ICCPR, art. 2 (emphasis added).

<sup>94</sup> Human Rights Committee, General Comment No. 18, para. 6, U.N. Doc. HRI/GEN/1Rev.1 at 26 (1994).

<sup>95</sup> Committee on the Elimination of Racial Discrimination, General Recommendation No. 30, para. 4, 64th Sess., U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004).

<sup>96</sup> See AARON XAVIER FELLMETH, PARADIGMS OF INTERNATIONAL HUMAN RIGHTS LAW 119-21 (2016).

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

As interpreted by the HRC and consistent with its wording, this provision “prohibits discrimination in law or fact in any field regulated” by the government. Notably, unlike ICCPR Article 2, the equal protection provisions of ICCPR Article 26 lack Article 2’s limitation to “all individuals within [the state party’s] territory and subject to its jurisdiction.” According to its plain terms, it thus prohibits the state to discriminate with respect to alien refugees and visa applicants not within the state’s territory or subject to its jurisdiction.

The International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”)<sup>97</sup> also bars discrimination based on national origin. The United States has been a party to the CERD since 1994. Under Article 2, paragraph (1)(a) of the CERD, each state party commits to refraining from and prohibiting all forms of racial discrimination, and each further undertakes “to engage in no act or practice of racial discrimination . . . and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.” CERD defines “racial discrimination” to include distinctions and restrictions based on national origin in article 1(1). With regard to immigration practices, CERD makes clear in Article 1(3) that states are free to adopt only such “nationality, citizenship or naturalization” policies that “do not discriminate against any particular nationality.” Like the nondiscrimination provisions of ICCPR Article 26, CERD Article 2 does not specifically limit its application to citizens or resident noncitizens. While CERD does not speak specifically to restrictions on entry of nonresident aliens, the general language of CERD Article 5 expresses a clear intention that discrimination based on race or national origin should be eliminated from all areas of government activity: “States Parties undertake to prohibit and to eliminate racial discrimination *in all its forms* . . . without distinction as to race, colour, or national or ethnic origin ....” (emphasis added). National origin discrimination in immigration policy is one such prohibited form.

In the present case, the policy of the United States as announced in Proclamation No. 9645, which excludes individuals from the United States on the basis of their religion and national origin, violates the rights of Dr. Elshikh and his family, as well as members of the Muslim Association of Hawaii, to be free from discrimination as established in Article II of the Declaration, as well as the ICCPR and CERD. The evidence demonstrates that the Proclamation was the latest of several attempts of President Trump to institute a “Muslim ban,” prohibiting entry to the United States to a group of people based on their religion and national origin.

The fact that the Proclamation does not bar entry to all foreign nationals from Muslim countries or to all Muslims generally does not negate its discriminatory animus. Instead, the statements and actions of President Trump prior and subsequent to his assumption of office signal

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<sup>97</sup> International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res 2106(XX), 21 Dec. 1965, 660 U.N.T.S. 195.

that the Proclamation was crafted to fit the broad discretion afforded to the President by INA Section 1182(f) and to prompt deference by the courts. In light of these developments, the Commission itself has expressed concern that EO-1 and EO-2 “represent a policy designed to stigmatize and criminalize migrants or anyone perceived as a migrant,” as well as those perceived to be Muslims.<sup>98</sup>

Section 3(c) of EO-1 categorically suspended the issuance of visas to applicants and nullified valid visas from seven specified Muslim countries. Section 1(f) of EO-2 similarly applied to six of the seven Muslim countries designated in EO-1, but removed Iraq from the general suspension because, although Iraq remained an active combat zone and country in which terrorist groups were highly active, EO-2 claimed that the concerns were alleviated because the United States had a “close cooperative relationship” with the Iraqi government. The 2017 Proclamation suspends most or all types of visas in Section 2 to seven listed Muslim countries. As such, both orders and the Proclamation make an explicit distinction based on national origin that, unless necessary and proportionate to a legitimate government aim, violates U.S. obligations under international law.

In addition, every one of the designated countries in both EO-1 and EO-2 has a population that is overwhelmingly Muslim, and neither order suspends entry from any state with a non-Muslim majority. EO-1 specifically instructed government officials to discriminate based on “minority” religious status. Because only non-Muslims could benefit from this preference, it discriminated explicitly based on religion. EO-2 and the Proclamation both omitted this preference. Not by coincidence, the Proclamation merely retains the ban on the Muslim countries in the EO-2, but adds *dicis causa* a suspension of entry from North Korea, and of certain officials of the Venezuelan government. In addition, the Proclamation adds Chad, another predominantly Muslim country, to the list of countries subject to the suspension of entry.

The addition of one non-Muslim country was intended to hide the discriminatory purpose of the ban. Although North Korea is not a predominantly Muslim country, the United States has never granted more than an insignificant number of visa applications from North Koreans since the Korean War. From 2010 to 2016, for example, the United States issued an average of only six immigrant and 79 nonimmigrant visas to North Koreans per year.<sup>99</sup> As one expert on North Korea wrote: the Trump Administration “should have checked if there is North Korean immigration before they banned it. . . . Why are you banning something that doesn't exist?”<sup>100</sup> Of those few North Korean immigrants or nonimmigrant visa holders in the United States, the government was unable to identify a single North Korean citizen who has ever been arrested for or convicted of terrorist acts. There is, in short, no reason to believe that a suspension on immigration from North Korea served any national security purpose whatsoever. Moreover, no Venezuelan government

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<sup>98</sup> *IACHR Expresses Concern in Executive Orders on Immigration and Refugees in the United States*, 1 Feb. 2017.

<sup>99</sup> Data compiled from U.S. Department of State, Annual Report of the Visa Office, for the years 2010 to 2018, Tables III and XVII, *available at* <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/annual-reports.html>.

<sup>100</sup> See Emily Rauhala, *Almost no North Koreans travel to the U.S., so why ban them?*, WASH. POST, Sept. 25, 2017, *at* [https://www.washingtonpost.com/world/almost-no-north-koreans-travel-to-the-us-so-why-ban-them/2017/09/25/822ac340-a19c-11e7-8c37-e1d99ad6aa22\\_story.html?utm\\_term=.8c36760cea77](https://www.washingtonpost.com/world/almost-no-north-koreans-travel-to-the-us-so-why-ban-them/2017/09/25/822ac340-a19c-11e7-8c37-e1d99ad6aa22_story.html?utm_term=.8c36760cea77).

official has ever committed an act of terrorism in the United States, and nothing in the Proclamation suggests or offers the slightest evidence that this group poses a risk of committing acts of terrorism in the United States. The addition of these two non-Muslim countries to a Proclamation allegedly concerned with terrorism was intended solely to disguise the religious discrimination that U.S. courts found evident in EO-1 and EO-2, which were confined to Muslim countries.

The Proclamation thereby makes a distinction based on religion. This distinction is not incidental, but intentional. As the history recounted in Section III indicates, Donald Trump campaigned on a platform of overt discrimination against Muslims. He made plain after the election, and indeed upon the signing of EO-1 and thereafter, that such discrimination was his intention. Distinctions based on religion violate international human rights law, unless necessary and proportionate for achieving a legitimate government purpose. The facts demonstrate clearly that the purpose of the executive orders and 2017 Proclamation is to effectuate a policy of discrimination against Muslims. No international human rights authority has ever upheld discrimination based on hostility to or fear of a religion as a legitimate aim of government.<sup>101</sup> Therefore, the Proclamation violates the human rights of all persons subject to the suspension, including Dr. Elshikh and the Muslim Association of Hawai'i.

As the titles of the executive orders and Proclamation announce, the U.S. government alleges that the purpose of the policy is to enhance national security by targeting countries whose citizens pose a high risk of terrorism. The 2017 Proclamation in particular purports to be based on a review of state practices in passport control and intelligence sharing relevant to U.S. national security. The promotion of national security would plainly be a legitimate goal under international human rights law. However, the purpose of the Proclamation is not the promotion of national security. The national security review allegedly conducted by the U.S. government prior to issuance of the Proclamation supported suspensions of entry from *nearly all the same Muslim countries* targeted in EO-1 and EO-2. Yet, the executive orders were adopted before any national security analysis had been conducted. It is therefore extremely unlikely that the choice of countries is based on the alleged national security review, unless purely by coincidence the same Muslim countries identified in EO-1 are the countries whose citizens pose the greatest risk of terrorism (which, as will be discussed, is not the case).

Even assuming *arguendo* that the protection of national security was the aim of the 2017 Proclamation, the Proclamation nonetheless violates the right against discrimination because the measures adopted in the Proclamation have no reasonable relationship to U.S. national security. The measure is therefore disproportionate to its stated aim.

The reason for the original immigration suspension in January 2017, described in Section 1 of EO-1, is that the suspended countries are known to sponsor terrorism or are areas in which conflicts or heightened terrorist activity is occurring. The 2017 Proclamation switched rationales and attempted to justify its choice of suspended countries based on ostensibly neutral criteria: first,

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<sup>101</sup> Indeed, ICCPR Article 20 forbids even advocating racial or religious hatred, and CERD Article 4(a) prohibits the dissemination of ideas based on racial (including national origin) hatred or intended to incite discrimination based on race or national origin. *A fortiori*, a state may not adopt discriminatory government policies motivated by such hatred.



the presence of a civil conflict or active terrorist groups in the country, and second, the failure of the government of each country to adequately monitor the identity of its citizens and share information about potential identity fraud with the U.S. government. President Trump claimed that the Proclamation was based on “a worldwide review,” conducted by the Secretary of Homeland Security, “of whether, and if so what, additional information would be needed from each foreign country to assess adequately whether their nationals seeking to enter the United States poses a security or safety threat.” The Secretary allegedly developed “a comprehensive set of criteria” for information sharing and “determined that a small number of countries,” by coincidence the very same ones listed in the EO-2 but not EO-1, “remain deficient . . . with respect to their identity-management and information-sharing capabilities, protocols, and practices.”

According to EO-2, being designated a state sponsor of terrorism, having the presence of terrorist organizations, or containing active conflict zones “diminishes the foreign government’s willingness or ability to share or validate important information about individuals seeking to travel to the United States.”<sup>102</sup> EO-2 further stated: “Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States.”<sup>103</sup> The Proclamation adopts the same reasoning. According to the Proclamation, the intelligence-sharing criterion is important because “[i]nformation-sharing and identity-management protocols and practices of foreign governments are important for the effectiveness of the screening and vetting protocols and procedures of the United States.”<sup>104</sup> The choice of states is allegedly based on, “in particular, on identity management, security and public-safety threats, and national security risks.”<sup>105</sup>

In fact, neither the executive orders nor the Proclamation designate countries based on any actual risk to national security or public safety. The alleged criteria used to designate countries are so unrelated to the alleged goals that they qualify as merely arbitrary.

First, with respect to refugees, the rationale is inherently nonsensical. Countries in which conflict and terrorism proliferate are precisely those from which refugees tend to flee. Therefore, allowing states to suspend refugee admissions *ad liberum* from countries suffering from civil conflict or terrorist activity would effectively annul the greater part of international refugee law. For obvious reasons, the Refugee Convention does not authorize states to discriminate based on national origin in admitting refugees merely because refugees are fleeing volatile political or military situations in their home countries.

With respect to visa applicants more generally, the proffered explanation cannot be accurate, because the U.S. government policy did not seek the suspension of immigrant and nonimmigrant visas or applications from many countries with such conflicts, such as Afghanistan, the Democratic Republic of Congo, Israel, or Turkey; or in which terrorist organizations are active, such as Afghanistan, Egypt, Israel, Pakistan, or the Philippines. Moreover, the Proclamation excludes Iraq, despite the fact that Iraq was both an active conflict zone at the time and seriously

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<sup>102</sup> EO-2, § 1(d).

<sup>103</sup> *Id.*

<sup>104</sup> Proclamation, § 1(b).

<sup>105</sup> *Id.* § 1(d).

compromised by the terrorist organizations, including ISIS, Hizballah and Hamas, at the time the Proclamation was issued.<sup>106</sup> The alleged rationale for the exclusion was that Iraq is committed to fighting terrorism. However, the same applies to Syria, which is committed to fighting ISIS. Indeed, Iran, which is included in the Proclamation, is not even alleged to have active terrorist cells or an internal conflict. Ironically, the sole justification for including Iran appears to be alleged Iranian support for terrorism *in Iraq*, and yet Iraq is excluded from the Proclamation.<sup>107</sup> It is therefore unclear why visas issued to nationals of Iran should be treated as presenting a greater risk of terrorism in the United States than visas issued to persons presenting themselves as Iraqis. In summary, it is entirely implausible that the criteria stated in the Proclamation are the ones used by the U.S. government to select the countries to be targeted for suspensions of entry.

Regarding information-sharing about terrorist threats, on which the Proclamation bases the remainder of its justification, that rationale is no more rational or credible. It is not rational, because information-sharing by foreign countries is not an important basis for national security decisions by any country in the world, including the United States, for determining which individuals are actual or potential terrorists. The importance of information sharing, according to the Proclamation, rests primarily on notifications to the United States of passports lost, stolen, or forged in the country. However, the petitioners are aware of no evidence, and the U.S. government has offered none, of any positive correlation between such notifications and terrorist activity. Potential terrorists can and do enter the United States on a perfectly valid passport.

It is not credible, because there are countries not included in the list that almost certainly do not have “information-sharing capabilities, protocols, and practices” that give the United States any non-trivial assurance that their nationals who apply for U.S. visas are not a threat to national security or public safety. There are many other areas of the world in which terrorism is common (indeed, more prevalent than the designated countries) and ongoing conflicts are occurring, such as Afghanistan, Pakistan, Nigeria, India, and Egypt, yet the measures do not apply to these countries. As such, the suspension would be entirely ineffective in protecting the United States against terrorism in any case. There is also no reason to believe, and the Trump Administration

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<sup>106</sup> EO-2, § 1(g). EO-2’s explanation for Iraq’s different treatment, based on the Iraqi government’s commitment to fighting ISIS and “steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal,” is disingenuous at best. If government commitment to fighting terrorism were so important, the U.S. government would never have suspended visa issuance to citizens of Chad, which experts in national security found a reliable partner to the United States in counterterrorism programs. See John Campbell, *Counterterrorism Partner Chad Included in New Travel Ban*, Council on Foreign Relations Blog, 26 Sept. 2017, at <https://www.cfr.org/blog/counterterrorism-partner-chad-included-new-travel-ban>; Ruby Mellon, *Why Is Chad in Trump’s New Travel Ban?*, FOREIGN POLICY, 25 Sept. 2017, at <https://foreignpolicy.com/2017/09/25/why-is-chad-in-trumps-new-travel-ban/>; Kevin Sieff, *Why did the U.S. travel ban add counterterrorism partner Chad? No one seems quite sure*, WASH. POST, 25 Sept. 2017, at [https://www.washingtonpost.com/news/worldviews/wp/2017/09/25/why-did-the-u-s-travel-ban-add-counterterrorism-partner-chad-no-one-seems-quite-sure/?utm\\_term=.303c02f0273e](https://www.washingtonpost.com/news/worldviews/wp/2017/09/25/why-did-the-u-s-travel-ban-add-counterterrorism-partner-chad-no-one-seems-quite-sure/?utm_term=.303c02f0273e). See also U.S. Department of State, *Country Reports on Terrorism 2016: Chad*, at <https://www.state.gov/j/ct/rls/crt/2016/272229.htm> (“The Government of Chad continued to prioritize counterterrorism efforts at the highest levels,” despite financial constraints). As if to confirm that the addition of Chad was merely intended to make the Proclamation’s criteria appear based on evidence, Chad was removed from the ban on 10 April 2018, only six months after its inclusion.<sup>106</sup>

<sup>107</sup> EO-2, § 1(e)(i).

has offered no evidence, that many other countries, such as Egypt, Lebanon, Pakistan, Saudi Arabia, or the United Arab Emirates, have information-sharing capabilities and share security information with the United States more readily than do Chad or Yemen, for example. On the contrary, the fact that acts of terrorism have been committed by nationals of all of these former countries in the United States in the last two decades.<sup>108</sup> strongly suggests otherwise. Indeed, the Pakistani government knew for five years that Osama bin Laden, who was responsible for consequential acts of terror in and against the United States leading to the deaths of many U.S. citizens, was being sheltered by Pakistan without the U.S. government being informed.<sup>109</sup> Yet, immigration from Pakistan was not suspended by the Proclamation.

More generally, the means adopted are disproportionate, because none of the government measures present any credible evidence that refugees, visa holders, and visa applicants from the listed countries carry a significantly higher risk of engaging in terrorist acts than those from any other country. In fact, all available evidence is contrary. As noted, in Part III hereinabove, and Annex 1A and Annex 1B hereto, DHS itself reported soon after Trump issued EO-1 that nationality-based discrimination in immigration policies were unlikely to increase U.S. national security, and that in any case, nationals of the states targeted by EO-1 (which, except for Iraq, were also targeted by the 2017 Proclamation) were not those most likely to become terrorists.

Conclusive independent evidence supports DHS's earlier conclusions. Nationals of the countries targeted in the Proclamation have killed zero persons in terrorist attacks in the United States since 1975. Indeed, according to a thorough study by the conservative Cato Institute, attached hereto as Annex 5, the annual chance of being murdered in the United States by a foreign-born terrorist is about 253 times lower than the chance of being murdered by anyone else.<sup>110</sup> The Institute also specifically found in another report, attached hereto as Annex 6, that the nationality of foreign-born terrorists who have committed or were convicted of attempting to commit terrorist acts in the United States has no correlation whatsoever to the list of states in the EOs or Proclamation in the period from 1975 to 2016.<sup>111</sup> The following comparison shows the incidents

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<sup>108</sup> For example, the airplane hijackers on September 11, 2001, were of Saudi, Egyptian, UAE, and Lebanese nationality. See *September 11 Hijackers Fast Facts*, CNN NEWS, Aug. 2, 2018, at <https://www.cnn.com/2013/07/27/us/september-11th-hijackers-fast-facts/index.html>. See also *Los Angeles airport shooting kills 3*, CNN NEWS, July 5, 2002, at <http://www.cnn.com/2002/US/07/04/la.airport.shooting/> (Egyptian terrorist); Michael S. Schmidt & Richard Pérez-Peña, *F.B.I. Treating San Bernardino Attack as Terrorism Case*, N.Y. TIMES, 4 Dec. 2015, at <https://www.nytimes.com/2015/12/05/us/tashfeen-malik-islamic-state.html> (Pakistani terrorist).

<sup>109</sup> See, e.g., Ishaan Tharoor, *Pakistani leaders knew Osama bin Laden was in Pakistan, says former defense minister*, WASH. POST, Oct. 14, 2015, available at [https://www.washingtonpost.com/news/worldviews/wp/2015/10/14/pakistani-leaders-knew-osama-bin-laden-was-in-pakistan-says-former-defense-minister/?utm\\_term=.1d7f91c93ec9](https://www.washingtonpost.com/news/worldviews/wp/2015/10/14/pakistani-leaders-knew-osama-bin-laden-was-in-pakistan-says-former-defense-minister/?utm_term=.1d7f91c93ec9); Carlotta Gall, *What Pakistan Knew About Bin Laden*, N.Y. TIMES, Mar. 19, 2014, available at <https://www.nytimes.com/2014/03/23/magazine/what-pakistan-knew-about-bin-laden.html>.

<sup>110</sup> Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, CATO Institute Policy Analysis No. 798, 13 Sept. 2016, at 2.

<sup>111</sup> Alex Nowrasteh, *Guide to Trump's Executive Order to Limit Migration for "National Security" Reasons*, CATO Institute, 26 Jan. 2017, Figure 1.

during this period by nationality of terrorist, with countries in the Proclamation on the left side and a few countries not in the Proclamation on the right:

| Nationality<br>(in Proclamation) | Number of<br>Terrorists | Murders of<br>U.S. citizens |
|----------------------------------|-------------------------|-----------------------------|
| Chad                             | 0                       | 0                           |
| Iran                             | 6                       | 0                           |
| Libya                            | 0                       | 0                           |
| North Korea                      | 0                       | 0                           |
| Somalia                          | 2                       | 0                           |
| Sudan                            | 6                       | 0                           |
| Venezuela                        | 0                       | 0                           |
| Yemen                            | 1                       | 0                           |

| Nationality<br>(not in Proclamation) | Number of<br>Terrorists | Murders of<br>U.S. citizens |
|--------------------------------------|-------------------------|-----------------------------|
| Armenia                              | 6                       | 1                           |
| Croatia                              | 9                       | 1                           |
| Cuba                                 | 11                      | 3                           |
| Egypt                                | 11                      | 162                         |
| Pakistan                             | 14                      | 17                          |
| Saudi Arabia                         | 19                      | 2,355                       |
| United Arab Emirates                 | 2                       | 314                         |
| United Kingdom                       | 3                       | 0                           |

In short, the Proclamation suspends immigration of nationals from countries that have had relatively little history of terrorism in the United States and *in not one case* has resulted in the death of a single person in the United States. At the same time, the Proclamation ignores countries whose nationals have a much higher rate (though still not especially high, given the lengthy time period) of committing terrorist acts in the United States resulting in deaths, sometimes numbering in the hundreds or thousands. Differentiating visa holders, visa applicants, and refugees from the states targeted in the Proclamation is therefore not a “reasonable and objective” means of achieving national security. As these data demonstrate, there is no possible rational basis for distinguishing visa applicants or refugees based on country of origin in general, and of the countries chosen in the Proclamation in particular.

Even if (counterfactually) the rate of terrorism by refugees and visa holders were statistically higher in the designated countries, the government has presented no evidence that the risk of terrorist acts from visa applicants from those countries presents such a threat that immediate and drastically discriminatory action is necessary or proportionate. In effect, the measures presume that every visa applicant or refugee from the countries is an actual or potential terrorist, based entirely on their country of origin or religion. By the same logic, if adult men have a much higher chance than adult women of engaging in terrorist acts (and they do), it would be rational to presume men to be terrorists and issue a blanket suspension of entry visas to males. Increased scrutiny of visa applicants and immigrants from regions with high terrorism would undoubtedly qualify as a proportionate measure, if significant evidence indicated a heightened risk of threat to national security from those regions. A blanket suspension based on national origin or religion cannot be justified under the proportionality test.

Moreover, the assumption upon which the executive orders and Proclamation are based—that a suspension of immigration is necessary to remedy inadequate vetting procedures of visa applicants and asylum-seekers—has been shown to be unsupported. As established in the DHS reports in [Annexes 1A](#) and [1B](#), most foreign-born terrorists become radicalized long after entry into the United States. Therefore, vetting procedures upon application for entry are unlikely to increase the rate of detection of terrorist risks. A report by the CATO Institute, attached hereto as [Annex 7](#), found that prior to EO-1, vetting failures were already extremely rare. Specifically, it

found that only 13 of the 531 individuals convicted of terrorism offenses or killed while committing terrorism since the terrorist attack of September 11, 2001, entered due to vetting failures. This is equivalent to a vetting failure rate of less than 3%.<sup>112</sup> Even much more stringent vetting measures are unlikely to reduce the rate of failure below the current rate of 13 individuals in a span of 17 years among hundreds of thousands of U.S. visa applicants.

Finally, it should be recalled that Trump extended EO-2 during the appeals process, despite the lapse of the months allegedly needed for its official purpose of formulating and implementing new screening and vetting procedures. It is therefore not credible that the real purpose of the suspension was ever to increase national security. If it had been, Trump would have allowed EO-2 (and, therefore, the Proclamation) to lapse with the expiration of the time needed for review of vetting procedures. Instead, the interagency review never took place, and Trump continued the suspension indefinitely, strongly suggesting that the real purpose of the executive order and the subsequent Proclamation was to impose barriers to the entry of Muslims, or at a minimum on persons of the listed nationalities, into the United States.

The U.S. policy of restricting the entry of a large number of members of the Muslim faith to the United States, coupled with the statements made by President Trump in 2015 and 2016 described in Part III of this Petition, also constitute a violation of Article III of the American Declaration, read in conjunction with Article II. The statements of President Trump, the highest-ranking public official in the United States, have created a hostile environment for Muslims to profess their faith publicly. Dr. Elshikh and his family, as well as members of the Muslim Association of Hawai'i—particularly the children—have been deeply affected by remarks that purport to associate them with terrorists and hostile attitudes toward the United States on the sole basis of their religion. In the wake of these statements, the incidence of hate crimes against those perceived to be Muslims has increased in the United States by at least 26% from before Trump began his campaign.<sup>113</sup> The Pew Research Center found that assaults against Muslims rose during Trump's campaign to the highest in history (127 in 2016, as compared to an average of 48 per year since the attack on the World Trade Center in 2001).<sup>114</sup> As a leader in the Islamic community, Dr. Elshikh strives to resist intimidation from manifesting his faith, but the message to him and to other members of the Muslim Association of Hawai'i is clear: the official policy of the United States is to disfavor and exclude Muslims, and this message has encouraged a climate among the U.S. public that is intolerant of and hostile to Muslim Americans.

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<sup>112</sup> David J. Bier, *Extreme Vetting of Immigrants: Estimating Terrorism Vetting Failures*, CATO Institute Policy Analysis No. 838, 17 Apr. 2018, at 18.

<sup>113</sup> According to the Federal Bureau of Investigation's Hate Crime Statistics, there were 388 victims of anti-Muslim hate crimes in 2016, *see* Federal Bureau of Investigation, Uniform Crime Reports: 2016 Hate Crime Statistics: Victims, at <https://ucr.fbi.gov/hate-crime/2016/topic-pages/victims>, up from the previous year's 307 victims. *See* Federal Bureau of Investigation, Uniform Crime Reports: 2015 Hate Crime Statistics: Victims, at [https://ucr.fbi.gov/hate-crime/2015/topic-pages/victims\\_final](https://ucr.fbi.gov/hate-crime/2015/topic-pages/victims_final).

<sup>114</sup> Katayoun Kishi, *Assaults against Muslims in U.S. surpass 2001 levels*, Pew Research Ctr., 15 Nov. 2017, at <http://www.pewresearch.org/fact-tank/2017/11/15/assaults-against-muslims-in-u-s-surpass-2001-level/>.

## B. The Human Right to Family Life

Article VI of the American Declaration provides that “[e]very person has the right to establish a family, the basic element of society, and to receive protection therefore.” The Universal Declaration of Human Rights has a comparable provision.<sup>115</sup> Similarly, Article 23 of the ICCPR provides in relevant part: “The family is the natural and fundamental unit of society and is entitled to protection by society and the State.”<sup>116</sup> The HRC has interpreted this right to include living together, which in turn obligates the state “to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.”<sup>117</sup>

This Commission has determined that states have the prerogative to control the entry and removal of aliens, but that when this leads to the separation of families, a balancing test must be performed between the interests of the State and those of the alleged victims. This is particularly important where children are impacted. In these circumstances, the state must demonstrate that separation of a family is necessary to meet a pressing need to protect public order and that the means of doing so are proportionate to that need.<sup>118</sup> This requires a consideration of the individual circumstances of the foreign nationals implicated, prior to a decision that will separate a family.<sup>119</sup>

The HRC has similarly explained that, although aliens do not have a right to be present in a State party’s territory,

in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.<sup>120</sup>

Thus, the right of entry into the United States is not beyond the scope of its commitments under the ICCPR. On the contrary, the ICCPR’s nondiscrimination principles and protections for family life apply in full in immigration policies.

In the present case, the U.S. policy of excluding nationals from Muslim countries such as Syria has led to the separation of Dr. Elshikh’s wife and her mother, of his children and their grandmother and now of other family members. Members of the Muslim Association of Hawai’i with family members in Iran, Libya, Somalia, and Syria face similar obstacles to the enjoyment of their right to family life. While the 2017 Proclamation allows for case-by-case reviews of petitions from impacted individuals on its face, this does not appear to occur in practice, and the Proclamation suspends entry of nationals of several countries (including Iran and Syria) in broad

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<sup>115</sup> UDHR, art.16(3).

<sup>116</sup> ICCPR, art. 22(1).

<sup>117</sup> Human Rights Committee, General Comment No. 19, para. 5 (1990), U.N. Doc. HRI/GEN/1/Rev.1 at 28 (1994).

<sup>118</sup> *Wayne Smith & Hugo Armendariz v. United States*, Inter-Am. Comm’n on Hum. Rts., Rep. No. 81/10, Case 12.562, paras. 49-51 (12 July 2010).

<sup>119</sup> *Id.* para. 51; *Andrea Mortlock v. United States*, Inter-Am. Comm’n on Hum. Rts., Rep. No. 63/08 (Merits), Case 12.534, para. 78 (25 July 2008).

<sup>120</sup> HRC, General Common No. 15, para. 5 (1986), U.N. Doc. HRI/GEN/1/Rev.1 at 18 (1994).

terms. Consequently, the U.S. policy that has led to the indefinite separation of the Elshikh family and family members of the Muslim Association of Hawai'i on the basis of the religion and national origin of the family members violates Article VI of the American Declaration, as well as international treaties binding the United States and customary international law.

### C. Human Rights of Refugees

Article XXVII of the American Declaration provides, "Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements." The Inter-American Commission has looked to the 1951 Convention Relating to the Status of Refugees and its 1967 Additional Protocol (ratified by the United States)<sup>121</sup> when interpreting Article XXVII.<sup>122</sup> The 1951 Convention prohibits discrimination against refugees on the basis of race, religion or nationality in the application of its provisions, and it establishes the obligation of *nonrefoulement*, which prohibits Contracting States from returning refugees to territories where their life or freedom would be threatened on account of their identity.<sup>123</sup>

According to this Commission, Article XXVII "encompasses certain substantive and procedural guarantees," including ensuring "an asylum seeker at a minimum a hearing to determine his refugee status."<sup>124</sup> An individualized assessment of circumstances is particularly needed where possible *refoulement* is at issue, meaning that the individual may be placed in physical danger upon his return to the country of origin or a third country.<sup>125</sup> Where states have expelled asylum seekers without providing them an opportunity for review of their individual circumstances, the Commission has found a violation of Article XXVII of the Declaration.<sup>126</sup>

Following implementation of EO-1 and subsequently, asylum seekers from the listed countries who were present in the United States were expelled without an asylum hearing. For example, on January 28, 2018, a Syrian woman traveling to the United States from a third country was denied entry and forced to return to her port of origin. She was denied humanitarian parole (temporary entry in emergency situations) and her request for asylum based on her fear of persecution in Syria was denied without examination. She was then forced to sign a paper stating that she understood she had violated U.S. immigration law (she had in fact not violated any U.S. law) and was compelled to return to the third country where she had no residency or right of

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<sup>121</sup> Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, 31 Jan. 1967, 606 U.N.T.S. 267, 19 U.S.T. 6223.

<sup>122</sup> John Doe v. Canada, Report No. 78/11, Case No. 12.586 (Merits), para. 71 (July 21, 2011); Haitian Interdiction Case (United States), Report No. 51/96 (Merits), Case 10.675, paras. 154-57 (March 13, 1997).

<sup>123</sup> Convention Relating to the Status of Refugees, arts. 3, 33; Protocol to the Convention Relating to the Status of Refugees, arts. 1-2; *see also* UDHR art. 14(1) ("Everyone has the right to seek and to enjoy in other countries asylum from persecution.").

<sup>124</sup> John Doe v. Canada, Inter-Am. Comm'n on Hum. Rts., Rep. No. 78/11, Case No. 12.586 (Merits), para. 71 (2011).

<sup>125</sup> *Id.*, para. 107.

<sup>126</sup> *Id.*, paras. 96-98 (2011); *Haitian Interdiction Case* (United States), Inter-Am. Comm'n on Hum. Rts., Rep. No. 51/96 (Merits), Case 10.675, para. 163 (13 mar. 1997).

entry.<sup>127</sup> It is likely that the human rights of other refugees were similarly violated by the executive orders.

#### **D. The Human Right to Due Process of Law**

Article XVIII of the American Declaration provides:

Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

This Commission, as well as the Inter-American Court of Human Rights, have recognized that the guiding principle of the right to due process, established in the Declaration and the Pact of San José, is to provide “all the guarantees which make it possible to arrive at fair decisions” in a state proceeding of any nature that could impact them. This includes proceedings for the removal of foreign nationals.<sup>128</sup> In the latter context, the Commission recognized that a State’s

immigration policy must guarantee to all an individual decision with the guarantees of due process; it must respect the right to life, physical and mental integrity, family, and the right of children to obtain special means of protection. Finally, the execution of this immigration policy cannot give rise to cruel, degrading and inhumane treatment nor discrimination based on race, color, religion or sex.<sup>129</sup>

The Commission has determined that the failure to provide a judicial mechanism that would allow foreign nationals to present their arguments regarding why they should not be removed from a state’s territory constituted a violation of their right to due process under the Declaration.<sup>130</sup>

When the United States government issued EO-1 in 2016, U.S. Customs and Border Protection (CBP) interpreted the order to prevent the entry into the United States of aliens holding valid U.S. visas. A visa confers a right to enter the United States subject to its terms. However, EO-1 ordered and resulted in the U.S. government refusing to honor valid visas without a hearing or other due process of law, including the visa of Dr. Elshikh’s mother-in-law. As a result, lawful permanent residents of the United States, non-U.S. students studying at U.S. universities, foreign tourists with planned vacations in the United States, and foreign entrepreneurs with legitimate

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<sup>127</sup> Ryan Devereaux, Murtaza Hussain & Alice Speri, *Trump’s Muslim Ban Triggers Chaos, Heartbreak, and Resistance*, THE INTERCEPT, Jan. 29, 2017, at <https://theintercept.com/2017/01/29/trumps-muslim-ban-triggers-chaos-heartbreak-and-resistance/>.

<sup>128</sup> John Doe v. Canada, Report No. 78/11, Case No. 12.586 (Merits), para. 116.

<sup>129</sup> Andrea Mortlock v. United States, Report No. 63/08, Case 12.534 (Admissibility and Publication), para. 78 (July 25, 2008).

<sup>130</sup> Wayne Smith, Hugo Armendariz, et al. v. United States, Report No. 81/10, Case 12.562 (Publication), paras. 61-65 (July 12, 2010); Haitian Interdiction Case (United States), Report No. 51/96 (Merits), Case 10.675, para. 180 (March 13, 1997).



business to conduct in the United States, all holding valid U.S. visas obtained after a thorough security screening process, were denied the right to enter the United States.

According to the most reliable sources, EO-1 denied the established legal rights of some 90,000 foreign nationals<sup>131</sup> to enter the United States to return home, continue their university studies or employment, visit family, supervise business ventures, or enjoy their vacation plans when Trump issued EO-1. Over one hundred individuals, migrants, permanent residents, and asylum seekers were detained at U.S. ports in the days immediately after EO-1 was implemented purely on the basis of religion and national origin,<sup>132</sup> and more than two hundred individuals were denied entry to the U.S. despite having valid immigration documents.<sup>133</sup> Individuals have been reportedly expelled from the United States with valid immigration documents.<sup>134</sup> Many were immediately sent back to their most recent country of departure, without any individual assessment of their situation.<sup>135</sup> EO-1 thus resulted in the U.S. government detaining, delaying, or preventing the entry of numerous foreign nationals in violation of their rights under the Immigration and Nationality Act.

The alleged rationale for the ban on immigration from certain Muslim countries was that visas had previously been granted to visitors from the listed countries without adequate vetting for national security risks.<sup>136</sup> However, the Trump Administration produced no evidence that immigrants and visitors from the listed presented a security risk greater than visitors from any other countries. It equally produced no evidence that any visa had been issued by any previous U.S. government administration using inadequate security screening. It was unable to produce such evidence because no such evidence exists. As noted in Part IV.A. above, the vetting process for nonimmigrant and immigrant visas and asylum seekers petitioning to enter the United States prior to 2017 was already both rigorous and thorough in the estimation of security experts, including the U.S. government itself.

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<sup>131</sup> Glenn Kessler, *The number of people affected by Trump's travel ban: About 90,000*, WASH. POST, Jan. 30, 2017, at [https://www.washingtonpost.com/news/fact-checker/wp/2017/01/30/the-number-of-people-affected-by-trumps-travel-ban-about-90000/?utm\\_term=.2de8d9304066](https://www.washingtonpost.com/news/fact-checker/wp/2017/01/30/the-number-of-people-affected-by-trumps-travel-ban-about-90000/?utm_term=.2de8d9304066).

<sup>132</sup> Maquita Peters & Colin Dwyer, *Federal Judge Stays Deportations, Blocking Part of Trump's Immigration Order*, NPR, 28 Jan. 2017, at <http://www.npr.org/sections/thetwo-way/2017/01/28/512158238/arrivals-to-u-s-blocked-and-detained-as-trumps-immigration-freeze-sets-in>.

<sup>133</sup> Betsy Woodruff, *White House Lowballs Impact of Trump Ban*, THE DAILY BEAST, 30 Jan. 2017, at <http://www.thedailybeast.com/articles/2017/01/30/white-house-lowballs-impact-of-trump-ban.html>.

<sup>134</sup> Evan Perez, Pamela Brown & Kevin Liptak, *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN, 28 Jan. 2017, at <http://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/>.

<sup>135</sup> Evan Perez, Pamela Brown & Kevin Liptak, *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN, 30 Jan. 2017, at <http://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/>.

<sup>136</sup> See David Jackson, *Trump calls for tougher immigration restrictions after New York City attack*, USA TODAY, 11 Dec. 2017, at <https://www.usatoday.com/story/news/politics/2017/12/11/trump-team-immigration-restrictions-needed-after-new-york-city-incident/941692001/> (“America must fix its lax immigration system, which allows far too many dangerous, inadequately vetted people to access our country.”); see also EO-1, § 1 (“[W]hile the visa-issuance process was reviewed and amended after the September 11 attacks to better detect would-be terrorists from receiving visas, these measures did not stop attacks by foreign nationals who were admitted to the United States.”).

Article XVIII of the American Declaration of the Rights and Duties of Man states that “Every person may resort to courts to ensure respect for his legal rights.” Article XXV prohibits states from depriving any person of liberty “except in the cases and according to the procedures established by *pre-existing law*.” (Emphasis supplied.) Moreover,

Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.<sup>137</sup>

Due process rights relevant here are also found in the UDHR and ICCPR. The UDHR states in Article 10, in relevant part: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations.” ICCPR Article 9 prohibits arbitrary arrests or detention. Article 12 further provides that everyone “lawfully within the territory of a State shall, within that territory, have the right to liberty of movement . . .” subject to restrictions “provided by law” and “necessary to protect national security, public order (*ordre public*),” etc. Moreover, Article 13 provides:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

By definition, an alien within U.S. territory (including at a U.S. port of entry) and holding a valid entry visa is “lawfully in the territory” of the United States. Therefore, the U.S. government’s arbitrary refusal to honor valid entry visas held by nationals of the countries listed in the suspension of EO-1 constitutes a deprivation of a vested legal right without due process of law, in violation of the American Declaration, the UDHR, and the ICCPR. Moreover, the expulsion from U.S. territory of a valid visa holder without any reason specific to the expelled individual violates Article 13 of the ICCPR. Finally, the detention of valid visa holders and lawful permanent residents violates the rights guaranteed in the American Declaration and ICCPR of freedom of movement and against detention without due process of law.

The Inter-American Court of Human Rights has already drawn attention to the fact that deportations and expulsions without an impartial hearing of the individual facts relating to the deported person violates due process of law. In its advisory opinion on *The Juridical Condition and Rights of Undocumented Migrants*, the Court quoted approvingly the African Commission on Human and Peoples’ Rights’ view that “it is unacceptable to deport individuals without giving

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<sup>137</sup> ADHR, art. XXV.

them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the [Banjul] Charter and international law.”<sup>138</sup>

Furthermore, in its advisory opinion on *The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law*, the Court further noted that “for ‘the due process of law’ a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants. It is important to recall that the judicial process is a means to ensure, insofar as possible, an equitable resolution of a difference.”<sup>139</sup>

Aliens holding valid U.S. visas who were denied entry into the United States were denied a hearing before an impartial tribunal, representation, and any opportunity to appeal the denial. They were thus deprived of their rights without due process of law, regardless of whether they were present in the United States at the time of the nullification of their rights.

To the knowledge of petitioners, no alien arbitrarily detained, expelled, or denied entry without due process of law pursuant to EO-1 has received any compensation or other reparations for the harm suffered. Petitioners have requested confirmation on this point from the U.S. Department of Homeland Security and U.S. Department of State under the Freedom of Information Act on 1 October 2018. The government has not yet responded. Unless such reparations were made, the United States is in further violation of Article 2(3) of the ICCPR, which requires state parties to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy” and to ensure that such remedies are enforced.

## V. JURISDICTION OF THE COMMISSION

The Inter-American Commission on Human Rights has competence to receive and to act on this petition in accordance with articles 1.2.b, 18, 20.b, and 24 of the Commission’s Statute.

## VI. PROCEDURAL COMPLIANCE

### A. Exhaustion of Domestic Remedies and Timeliness of the Petition

As described in Part III.E hereof, in *Trump v. Hawaii*, the State of Hawaii, Dr. Elshikh, and the Muslim Association of Hawaii challenged Presidential Proclamation No. 9645 and its application to his case before the U.S. courts, culminating in the U.S. Supreme Court’s adverse decision on 26 June 2018. The case was remanded to the district court for further proceedings, but because the Court’s interpretation of U.S. law foreclosed any possibility of prevailing in the case,

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<sup>138</sup> Advisory Opinion OC-18/03: *Juridical Condition and Rights of Undocumented Migrants*, Inter-Am. Ct. Hum. Rts., 17 Sept. 2003, para. 119, *quoting* African Commission of Human and Peoples’ Rights, Communication No: 159/96 - Union Inter-Africaine des Droits de l’Homme, Federation Internationale des Ligues des Droits de l’Homme, Rencontre Africaine des Droits de l’Homme, Organisation Nationale des Droits de l’Homme au Sénégal and Association Malienne des Droits de l’Homme au Angola, Decision of 11 Nov. 1997, para. 20.

<sup>139</sup> Advisory Opinion No. OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, Inter-Am. Ct. Hum. Rts., 1 Oct. 1999, Ser. A No. 16, para. 117.

the plaintiffs voluntarily dismissed the complaint on 13 August 2018.<sup>140</sup> The Supreme Court's decision exhausts domestic remedies for Dr. Elshikh, Dr. Elshikh's family, and the Muslim Association of Hawaii. Under Article 32 of the Commission's Rules of Procedure, a petition to the Commission should be submitted within six months of notification of the final ruling that comprises the exhaustion of domestic remedies. Petitioners have submitted their petition prior to 26 December 2018 in compliance with Article 32.

### **B. Absence of Parallel International Proceedings**

The subject of this petition is not pending in any other international proceeding for settlement, nor does it duplicate any petition pending before or already examined by the Commission or any other international governmental organization.

## **VII. REQUEST FOR RELIEF**

For the reasons stated above, Petitioners respectfully request that the Commission:

1. Hold a hearing to investigate the claims raised in this Petition;
2. Prepare a report setting forth all the facts and applicable law, declaring that the United States of America is internationally responsible for violations of rights affirmed in the American Declaration of the Rights and Duties of Man and in other instruments of international law, and recommending that the United States:
  - a. Withdraw or otherwise annul the Proclamation No. 9645 suspending immigration from certain Muslim countries;
  - b. Adopt legislation prohibiting the President or any agent of the Executive Branch to make distinctions on the basis of race, religion, national origin, or other status in immigration policy, except to the extent that (i) such distinctions can be shown effectively to serve a legitimate aim, (ii) such measures are proportional to the legitimate aim, and (iii) such distinctions are not based on a discriminatory motive;
  - c. Adopt legislation prohibiting the President or any agent of the Executive Branch to refuse to accept a valid entry visa except upon a showing that the specific individual denied entry does not fulfill an existing visa condition or presents a threat to U.S. national security based on facts specific to that individual; and
  - d. Immediately cease the practice of returning or repulsing asylum-seekers unless, after a fair hearing including a right of appeal, the government has sound reason to believe the asylum-

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<sup>140</sup> Hawaii v. Trump, Civ. No. 1:17-cv-00050-DKW-KSC, Notice of Voluntary Dismissal, Doc. No. 415 (D. Haw., 13 Aug. 2018).

seeker lacks a well-founded fear of persecution and is not likely to be subjected to torture, extrajudicial killing, or other persecution in the country to which he or she is returned.

- e. Grant appropriate reparations to all visa holders and applicants harmed by the discriminatory measures in EO-1, EO-2, and the Proclamation.

### VIII. VERIFICATION, SIGNATURE AND DESIGNATION OF ATTORNEYS

Aaron Fellmeth and Nourin Abourahma present this petition on behalf of the named petitioners whose rights have been violated, and on behalf of other affected U.S. citizens, U.S. alien residents and visa applicants, and refugees seeking asylum in the United States of America. By their signatures below, Prof. Fellmeth and Ms. Abourahma attest to the truthfulness of the facts set forth in this petition.

Prof. Fellmeth agrees that his name may be used by the Commission in its communications with the government of the United States of America and with the public. Prof. Fellmeth is authorized to represent the petitioners as their attorney in this case. All notices and communications to the petitioners in relation to this case should be sent to Prof. Fellmeth, counsel of record, at the address.



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**ANNEX 1 – EXECUTIVE ORDER 13,769**

**ANNEX 1A – DHS DRAFT REPORT, FEBRUARY 2016**

**ANNEX 1B – FINAL DHS REPORT, 1 MARCH 2017**



**ANNEX 2 – EXECUTIVE ORDER 13,780**

**ANNEX 2A – SCREENSHOT: [www.donaldtrump.com](http://www.donaldtrump.com), 28 Apr. 2017**

**ANNEX 3 – PROCLAMATION OF 24 SEPTEMBER 2017**

**ANNEX 4 – U.S. SUPREME COURT OPINION IN *TRUMP v. HAWAII***

**ANNEX 5 – CATO INSTITUTE, TERRORISM AND IMMIGRATION**

**ANNEX 6 – CATO INSTITUTE, GUIDE TO TRUMP’S EXECUTIVE ORDER**

**ANNEX 7 – CATO INSTITUTE, EXTREME VETTING OF IMMIGRATIONS**