No. 17-15589

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAI'I and ISMAIL ELSHIKH,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from an Order of the United States
District Court of Hawai'i

United States District Judge Derrick K. Watson
Case No. 1:17-cv-00050-DKW-KSC

BRIEF OF INTERNATIONAL LAW SCHOLARS AND NONGOVERNMENTAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *amici curiae* certify that they have no parent corporations or any publicly held corporations owning 10% or more of their stock.

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I. INTEREST OF *AMICI CURIAE*[1]

The individual *amici* whose views are presented here are international law scholars specializing in public international law and international human rights law. They include members of the International Human Rights Committee of the International Law Association, American Branch[2] as well as university professors and practicing lawyers with expertise in these subjects. *Amici* also include nongovernmental organizations with expertise in civil rights law, immigration law, or international human rights law. *Amici* submit this brief to vindicate the public interest in ensuring a proper understanding and application of the international human rights law relevant to this case. The nongovernmental organizations and individual scholars are listed in the Appendix.

II. INTRODUCTION

The purpose of this brief is to bring to the Court's attention U.S. treaty provisions and customary international law principles that bear on the legality of

[1]No counsel for a party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

[2] This brief represents the opinion of the individual Committee member signatories, but not necessarily that of the International Law Association ("ILA") or the ILA American Branch.

Executive Order 13780 of March 6, 2017 ("EO"), which replaces the now-rescinded EO dated January 27, 2017.

International law, which includes treaties ratified by the United States as well as customary international law, is part of U.S. law and must be faithfully executed by the President and enforced by U.S. courts except when clearly inconsistent with the U.S. Constitution or subsequent acts of Congress. The United States is a party to and bound by several international human rights treaties relevant to the subject matter of the EO. In assessing the legality of the EO, the Court should be cognizant of those treaty obligations, and of customary international law, which should influence constructions of the U.S. Constitution and statutes that prohibit discrimination based on religion or national origin.

In addition, the Immigration and Nationality Act and other statutes must be read in harmony with these international legal obligations pursuant to the Supremacy Clause of the Constitution and long established principles of statutory construction requiring acts of Congress to be interpreted in a manner consistent with international law, whenever such a construction is reasonably possible. In this case, the international law obligations described below reinforce interpretations of those statutes forbidding discrimination of the type threatened by Sections 2 and 11 of the EO.

III. ARGUMENT

A. International Law Is Relevant to Assessing the Legality of the Executive Order

International law is relevant to this case because the U.S. Constitution makes treaties part of U.S. law. Customary international law is also part of U.S. law and is enforceable by U.S. courts. Under the Supremacy Clause of the Constitution, "treaties made . . . under the authority of the United States, shall be the supreme law of the land; and the judges of every state shall be bound thereby."[3] Although the Constitution does not require legislation prior to treaties taking legal effect, the Supreme Court distinguishes between self-executing and non-self-executing treaties.[4] The Senate or the President have declared that the relevant human rights treaties to which the United States is a party are non-self-executing.[5] Nevertheless, by ratifying those treaties, the United States bound itself to provide judicial or other remedies for violations of treaty obligations.[6] Thus, even if the treaty provisions themselves are not directly enforceable in U.S. courts, the rights they grant should be protected by courts through their interpretation of constitutional provisions and statutes addressing the same or similar subject matter.

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[3] U.S. Const. art. VI, cl. 2.
[4] *See* Restatement (Third) of Foreign Relations Law § 111(3)–(4) (Am. Law Inst. 1987).
[5] *See, e.g.*, 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992) (International Covenant on Civil and Political Rights).
[6] *See, e.g.*, International Covenant on Civil and Political Rights art. 2(2), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter "CCPR"].

This is consistent with the positions taken by both the Executive Branch and Congress in those cases in which Congress has not passed implementing legislation.[7] When submitting human rights treaties to the Senate for its advice and consent, both Presidents George H.W. Bush and William Clinton assured the Senate that the United States could and would fulfill its treaty commitments by applying existing federal constitutional and statutory law.[8] Courts generally construe federal constitutional and statutory law to be consistent with human rights treaties in part because the Senate has relied on such assurances as a basis for its consent to ratification.[9] The United States acknowledged this principle in its comments to the

[7] *See, e.g.*, Rep. of the Comm. Against Torture, ¶¶ 58–60, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000) ("Where domestic law already makes adequate provision for the requirements of the treaty and is sufficient to enable the United States to meet its international obligations, the United States does not generally believe it necessary to adopt implementing legislation.").

[8] For example, during Senate hearings on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), June 26, 1987, 1465 U.N.T.S. 113, the State Department Legal Advisor told the Senate: "Any Public official in the United States, at any level of government, who inflicts torture . . . would be subject to an effective system of control and punishment in the U.S. legal system." Hearing Before the S. Comm. on Foreign Relations, 101st Cong. 8 (1990). Similarly, with respect to G.A. Res. 2106 (XX), annex, International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") (Dec. 21, 1965), the Clinton Administration told the Senate: "As was the case with the prior treaties, existing U.S. law provides extensive protections and remedies sufficient to satisfy the requirements of the present Convention." S. Comm. on Foreign Relations, Report on International Convention on the Elimination of All Forms of Racial Discrimination, S. Exec. Rep. No. 103-29, at 25-26 (1994).

[9] *See, e.g., Immigration & Naturalization Serv. v. Stevic*, 467 U.S. 407, 426 (1984).

U.N. Committee Against Torture: "Even where a treaty is 'non-self-executing', courts may nonetheless take notice of the obligations of the United States thereunder in an appropriate case and may refer to the principles and objectives thereof, as well as to the stated policy reasons for ratification."[10] "Taking notice" of treaty obligations comports with a core principle of statutory construction announced by the Supreme Court in *Murray v. The Schooner Charming Betsy*: "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[11] That doctrine has been consistently and recently reaffirmed by the Supreme Court.[12]

Moreover, in *Filartiga v. Pena-Irala*, the U.S. Court of Appeals for the Second Circuit observed that a treaty that is not self-executing may provide evidence of customary international law.[13] Customary international law must be enforced in U.S. courts even in the absence of implementing legislation, regardless of whether customary rules appear in a treaty.[14] In *The Paquete Habana*, the Supreme Court held that customary international law "is part of our law" and directly enforceable

[10] Rep. of the Comm. Against Torture, *supra* note 7, ¶ 57 (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993)).
[11] 6 U.S. (2 Cranch) 64, 118 (1804); *accord Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801).
[12] *See, e.g., F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).
[13] 630 F.2d 876, 882 n.9 (2d Cir. 1980).
[14] Restatement (Third) of the Foreign Relations Law § 111(3) (Am. Law Inst. 1987).

in courts when no conflicting treaty, legislative act, or judicial decision controls.[15] As discussed below, several human rights treaty rules applicable in this case are also customary international law.

The President is also obligated to respect international law pursuant to his constitutional duty faithfully to execute the law.[16] Because Article VI of the Constitution makes treaties the supreme law of the land, the President is constitutionally required to comply with U.S. treaty obligations as well as with customary international law. This was the intent of the Framers.[17] Courts therefore have a duty to restrain federal executive action that conflicts with a duly ratified treaty. As the Supreme Court wrote in ordering the President to restore a French merchant ship to its owner pursuant to a treaty obligation: "The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted."[18]

Even if the President were not directly bound by international law, however, he is still obligated to comply with the Constitution itself and all applicable

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[15] 175 U.S. 677, 700 (1900); *see also Filartiga*, 603 F.2d at 886 ("Appellees . . . advance the proposition that the law of nations forms a part of the laws of the United States only to the extent that Congress has acted to define it. This extravagant claim is amply refuted by the numerous decisions applying rules of international law uncodified by any act of Congress.").

[16] U.S. Const. art. II, § 3.

[17] Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), *reprinted in* 15 *The Papers of Alexander Hamilton* 33, 33–43 (Harold C. Syrett et al. eds. 1969).

[18] *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801).

legislation enacted by Congress within its authority, which (as noted) must be interpreted in a manner consistent with international law whenever possible.

The following sections identify the treaties and customary international law relevant to the legality of the EO.

B. International Law Regarding Discrimination on the Basis of Religion and National Origin

1. The International Covenant on Civil and Political Rights

Discrimination based on religion or national origin is prohibited by the International Covenant on Civil and Political Rights ("CCPR"). The United States ratified the CCPR in 1992.[19]

Article 2 of the CCPR 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, . . . religion, . . . national or social origin, . . . 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

[19] 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992).

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.

The United Nations Human Rights Committee ("HRC") is charged by the CCPR to monitor implementation by state parties and to issue guidance on its proper interpretation. The HRC interprets article 2 to prohibit "any distinction, exclusion, restriction or preference" based on a prohibited ground, and which has "the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms" protected by the treaty.[20] 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.[21] A "proportionate" measure is one effective at achieving the aim and narrowly tailored (or "necessary") to it.[22]

The substantive rights guaranteed by the CCPR, which must be protected without discrimination based on religion or national origin under article 2, include the protection of the family. Article 23 provides in relevant part: "The family is the

[20] Human Rights Comm., General Comment No. 18, ¶ 6, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994).
[21] Comm. on the Elimination of Racial Discrimination, General Recommendation 30: Discrimination against non-citizens, U.N. Doc. CERD/C/64/Misc.11/rev.3, at 2 (2004).
[22] *See* Aaron Xavier Fellmeth, *Paradigms of International Human Rights Law* 119–21 (2016).

natural and fundamental group unit of society and is entitled to protection by society and the State."[23] The HRC has interpreted this right to include living together, which in turn obligates the state to adopt appropriate measures "to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons."[24]

Restrictions on travel and entry caused by the EO that impose disparate and unreasonable burdens on the exercise of this right violate CCPR article 2. The HRC has explained that, although the CCPR does not generally

> recognize the right of aliens to enter or reside in the territory of a State party . . . , 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.[25]

Thus, the right of entry is not beyond the scope of the CCPR. On the contrary, the CCPR's nondiscrimination principles and protections for family life should be considered by courts in interpreting government measures affecting family unification. This treaty-based protection for family life is consistent with Supreme Court jurisprudence respecting the role of due process of law in governmental decisions affecting family unity.[26]

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[23] CCPR, *supra* note 6, art. 23(1).
[24] Human Rights Comm., *supra* note 20, General Comment No. 19, ¶ 5.
[25] *Id*. at 9, General Comment No. 15, ¶ 5.
[26] *See Landon v. Plasencia*, 459 U.S. 21, 34, 37 (1982); *Kerry v. Din*, __ U.S. __, 135 S. Ct. 2128, 2140–41 (2015) (Kennedy, J., concurring).

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

> 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 in fact in *any field* regulated" by the government.[27] Notably, unlike CCPR article 2, the equal protection provisions of CCPR article 26 lack article 2's limitation to "all individuals within [the state party's] territory and subject to its jurisdiction."

The nondiscrimination provisions of the CCPR are also customary international law binding on the United States, forming part of U.S. law unless contrary to the Constitution or a statute. The Universal Declaration of Human Rights, which the United States approved in 1948, mandates nondiscrimination in religion and national origin, equal protection of the law, and protection from arbitrary interference in family life.[28] The American Declaration of the Rights and Duties of Man, which the United States approved when it signed and ratified the

[27] Human Rights Comm., *supra* note 20, General Comment No. 18, ¶ 12 (emphasis added).
[28] G.A. Res. 217 A (III), Universal Declaration of Human Rights arts. 2, 7, 12 (Dec. 10, 1948).

Charter of the Organization of American States the same year, has similar provisions in articles 6 and 17.[29] These nondiscrimination principles and the right to family unity have become sufficiently widespread and accepted by the international community that they have entered into customary international law in the present day.[30]

2. The International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") also bars discrimination based on national origin. The United States has been a party to the CERD since 1994.[31] Under article 2, paragraph (1)(a), 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 or local, shall act in conformity with this obligation." CERD defines "racial discrimination" to include distinctions and restrictions based on national origin.[32] With regard to immigration practices, CERD makes clear that states are free to adopt only such "nationality, citizenship or naturalization" policies that "do not

[29] O.A.S. Res. XXX (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/I.4 rev. 13, at 13 (2010).
[30] *See* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 Ga. J. Int'l & Comp. L. 287, 329 (1995/96).
[31] *See* 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994).
[32] CERD, *supra* note 8, art. 2(1)(a).

discriminate against any particular nationality."[33] Like the nondiscrimination provisions of CCPR article 26, CERD article 2 does not 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 expresses a clear intention to eliminate discrimination based on race or national origin 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 . . . ."[34]

Article 4 of CERD further provides that state parties "[s]hall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination," which (as noted) includes discrimination based on national origin. The Committee on the Elimination of Racial Discrimination, the body of independent experts appointed to monitor CERD's implementation, interprets article 4 to require states to combat speech stigmatizing or stereotyping non-citizens generally, immigrants, refugees, and asylum seekers,[35] with statements by high-ranking officials causing "particular concern."[36] In *TBB-Turkish Union in Berlin/Brandenburg v. Germany*, for example, the Committee specifically

[33] *Id.* art. 2(1)(c).
[34] *Id.* art. 5.
[35] Comm. on the Elimination of Racial Discrimination, General Recommendation No. 35: Combating Racist Hate Speech, ¶ 6, U.N. Doc. CERD/C/GC/35 (2013).
[36] *Id.* ¶ 22.

determined that Germany violated the Convention when it failed to discipline or punish a minor government official who had *inter alia* drawn attention to low employment rates of Turkish and Arab populations in Germany, suggested their unwillingness to integrate into German society, and proposed that their immigration should be discouraged.[37] These statements, the Committee determined, implied "generalized negative characteristics of the Turkish population" and incited racial discrimination.[38]

The legality of the EO in this case, and the proper interpretation of the statutes and constitutional provisions cited by the parties, should be assessed with those proscriptions in mind. Those international law principles require courts to reject any attempt by the President to define classes based on national origin or religion, and then to impose on those classes disparate treatment, except to the extent necessary to achieve a legitimate government purpose.

C. Relevant Provisions of the Executive Order

Section 2 categorically suspends immigration from six specified countries—Iran, Libya, Somalia, Sudan, Syria, and Yemen, and imposes special requirements on immigrants from Iraq. Section 2(a), moreover, authorizes the Secretary of

[37] Comm. on the Elimination of Racial Discrimination, Commc'n No. 48/2010, U.N. Doc. CERD/C/82/D/48/2010 (2013).
[38] *Id.* ¶ 12.6.

Homeland Security to demand "certain information" from "particular countries even if it is not needed from every country."

The EO thus makes an explicit distinction based on national origin that, unless necessary and narrowly tailored to achieve a legitimate government aim, would violate U.S. obligations under international law. In effect, the EO also makes a distinction based on religion, as Appellees have argued. Notably, every one of the designated countries has a population that is overwhelmingly Muslim,[39] and the EO does not suspend immigration from any state with a non-Muslim majority.

International law is also relevant to Section 11 of the EO, which requires the Secretary of Homeland Security to "collect and make publicly available" certain information relating *inter alia* to convictions of terrorism-related offenses, government charges of terrorism, and "gender-based violence against women" by foreign nationals. The EO requires no publication of similar information relating to U.S. nationals. By mandating that the Secretary publish pejorative information about noncitizens without publishing comparable information about U.S. citizens, Section 11 makes a suspect distinction based on national origin. While Section 11 has not been challenged specifically by the Appellees, it may bear on the intent to discriminate, because the decision to publish derogatory information about

[39] *See* Central Intelligence Agency, The World Factbook, https://www.cia.gov/library/publications/resources/the-world-factbook/index.html (last visited Apr. 6, 2017).

noncitizens alone is stigmatizing, and appears to be motivated by a desire to characterize noncitizens as more prone to terrorism or gender-based violence than U.S. citizens. Apart from what it may indicate with respect to intent, a measure designed to stigmatize noncitizens cannot be proportionate and thus violates article 26 of the CCPR and articles 2 and 4 of the CERD.

IV. CONCLUSION

For the foregoing reasons, *amici* request that the Court consider U.S. obligations under international law, which forms part of U.S. law, in evaluating the legality of the EO.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel certifies that this brief:

(i) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word and is set in Times New roman font in a size equivalent to 14 points or larger and,

(ii) complies with the length requirement of Rule 29(a)(5) because it is 3,585 words excluding the parts exempted by Circuit Rule 32-1(c). (The maximum number of words is 7,000 for an *amicus* brief in connection with an answering brief, which has a word limit of 14,000 words per Circuit Rule 32-1(a)).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 21, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct.

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APPENDIX

The *amici* are nongovernmental organizations and legal scholars specializing in public international law and international human rights law. They have substantial expertise in issues directly affecting the outcome of this case. These *amici* are identified below.

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Human Rights & Gender Justice Clinic, City University of New York School of Law

International Association of Democratic Lawyers

International Center for Advocates Against Discrimination

International Justice Project

International Justice Resource Center

Legal Aid Society (New York)

MADRE

National Law Center on Homelessness & Poverty

National Lawyers Guild

Secular Communities of Arizona

T'ruah: The Rabbinic Call for Human Rights

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