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February 16, 2017

VIA ECF

Hon. Carol Bagley Amon
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: ***Darweesh v. Trump,*** **Case No. 1:17-cv-00480-CBA**

Dear Judge Amon:

Following yesterday's submission of a letter motion, filed as Document 91 in Case No. 1:17-cv-00480-CBA, undersigned counsel resubmits this letter motion with the proposed brief enclosed. There is an additional amicus, Muslim Bar Association of New York, joining this motion and brief.

Undersigned counsel writes to seek the Court's permission to file a brief of amici curiae on behalf of the Arab American Association of New York, Brooklyn Defender Services, Immigrant Rights Clinic of Washington Square Legal Services, Inc., Legal Services NYC, National Organization for Women - New York State, the New York Immigration Coalition, Muslim Bar Association of New York, and Tamizdat, community organizations that represent and/or advise people with visas from the seven designated countries at issue in this case, in support of the petitioners and the intervenor-plaintiff in the above-referenced case. In the alternative, we respectfully request a pre-motion conference to authorize leave to file such a brief, as provided by Rule 3(A) of this Court's Individual Rules.

As explained below, the proposed *amici* therefore have an interest in the outcome of the above-referenced case. The purpose of the proposed *amici*'s brief in support of the petitioners and intervenor-plaintiff will be to demonstrate that the government's method of carrying out the Executive Order by implementing a classwide visa revocation is unlawful. Such a classwide visa revocation is not authorized by the Executive Order or by the governing statutes or regulations, and is impermissibly retroactive.

"District courts have broad discretion to permit or deny the appearance of amici curiae in a given case." *United States v. Ahmed*, 788 F. Supp. 196, 198 n.1 (S.D.N.Y. 1992), *aff'd* 980 F.2d 161 (2d Cir. 1992). "An amicus brief should normally be allowed when ... the amicus has

unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Andersen v. Leavitt*, No. 03-cv-6115, 2007 U.S. Dist. LEXIS 59108, *6 (E.D.N.Y. Aug. 13, 2007) (internal quotations omitted). Leave to file an amicus brief is particularly appropriate "in cases involving matters of public interest." *Id.*

The interests of the proposed *amici* are as follows:

The **Arab American Association of New York** ("AAANY") is a social service and advocacy agency based in Bay Ridge, Brooklyn, the largest Arab community in New York City. Our mission is to support and empower the Arab American and Arab immigrant community, providing the tools needed to achieve independence, productivity, and stability. Following the Executive Order, AAANY has provided legal counsel, Know Your Rights trainings, and direct support to hundreds of individuals and families directly impacted by the travel and immigration restrictions imposed by the order.

Brooklyn Defender Services ("BDS") is a public defender organization that represents more than 45,000 people each year who cannot afford an attorney in criminal, family, and immigration proceedings. BDS has a robust Immigration Practice and has provided immigration legal services and removal defense to Brooklyn residents for many years. BDS attorneys have represented and advised individuals affected by the Executive Order, and were present at John F. Kennedy Airport to assist individuals who were detained.

Immigrant Rights Clinic of Washington Square Legal Services, Inc. ("IRC") is a law clinic at New York University ("NYU") School of Law that represents and works with immigrants and immigrant rights organizations. IRC operates the NYU Immigrant Defense Initiative, a project aimed at providing legal advocacy to NYU students and staff at risk of deportation. Through this initiative, IRC has worked closely with visa holders affected by the Executive Order targeting individuals from Libya, Iran, Iraq, Somalia, Sudan, Syria, and Yemen. IRC has represented individuals who were detained under the Executive Order, including at John F. Kennedy Airport. IRC also advises individuals with visas from the seven targeted countries. IRC has a stake in the proper application of the law.

Legal Services NYC ("LSNYC") is a Legal Services Corporation funded legal aid agency that fights poverty and seeks justice for low-income New Yorkers. For more than 40 years, LSNYC has helped clients meet basic needs for housing, access to high-quality education, health care, family stability, and income and economic security. The communities LSNYC serves include many immigrant and mixed-immigration status families and LSNYC assists many asylum seekers, refugees, and survivors of crime and violence attain lawful immigration status. LSNYC is the largest civil legal services provider in the country, with deep roots in all of the communities they serve. LSNYC's neighborhood-based offices and outreach sites across all five boroughs help more than 80,000 New Yorkers annually. LSNYC's advocates were directly involved in supporting families whose relatives were affected by the Executive Order.

The **National Organization for Women - New York State** is a chapter within the National Organization for Women (NOW), the largest organization of intersectional feminist grassroots activists in the United States. NOW's New York State chapter plays a critical role in

holding government accountable to the women of New York. The Executive Order perpetuates the inherently discriminatory immigration system. Deportation repeats a cycle of violence—forcing families back into the dangerous and life-threatening circumstances that first led them to seek refuge. NOW stands in solidarity with their Muslim and immigrant sisters and brothers in opposition to the Administration's abuse of executive authority.

The **New York Immigration Coalition** ("NYIC") is an advocacy and policy umbrella organization for more than 175 multi-ethnic, multi-racial, and multi-sector groups across the state. Through its members and its own advocacy, the NYIC has long worked against unjust immigration policies. Many NYIC member organizations work directly with immigrants affected by the Executive Order. The NYIC and its members played a coordinating role to support individuals and families directly impacted by this order at John F. Kennedy Airport.

Muslim Bar Association of New York ("MuBANY") is one of the nation's largest and most active professional associations for Muslim lawyers. MuBANY provides a range of services for the legal community and for the larger Muslim community. One of MuBANY's missions is to improve the position of the Muslim community at large by addressing issues affecting the local and national Muslim population, through community education, advancing and protecting the rights of Muslims in America, and creating an environment that helps guarantee the full, fair and equal representation of Muslims in American society. MuBANY works actively to combat anti-Muslim and anti-Islamic stereotypes in the media, courts, law enforcement and the greater community. Many MuBANY members work directly with immigrants affected by the recent Executive Order barring entry to visa holders from seven Muslim-majority countries. MuBANY members volunteered their time to support individuals and families directly impacted by this order at John F. Kennedy Airport. They have also worked with local bar associations and community groups to conduct Know Your Rights workshops across New York.

Tamizdat is a nonprofit organization that facilitates international cultural exchange. Tamizdat's mission is motivated by the conviction that the international exchange and mobility of culture is fundamental to the growth of global civil society. Since 2000, Tamizdat has worked to safeguard cultural diversity in the United States by helping the international performing arts community address problems presented by U.S. immigration policy and procedure. Tamizdat has been integral in arranging visas for more than 20,000 performing artists from all over the world. Many of Tamizdat's clients have been directly impacted by the Executive Order and its chilling effect on cultural programming in the U.S. will reverberate for months, if not years.

For the foregoing reasons, we respectfully request the Court's permission to file a brief of amici curiae on or before a date set by the Court or the date on which the plaintiffs' briefs are due. In the alternative, we request a pre-motion conference with the Court for leave to file such a brief.

Respectfully submitted,

/s/Alina Das
Alina Das

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cc: All counsel of record (via ECF).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HAMEED KHALID DARWEESH, et al., Petitioners, and PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK, Intervenor-Plaintiff, v. DONALD TRUMP, President of the United States, et al., Respondents	Civil Action No. 1:17-cv-00480 (Amon, J.)

BRIEF OF ARAB AMERICAN ASSOCIATION OF NEW YORK, BROOKLYN DEFENDER SERVICES, IMMIGRANT RIGHTS CLINIC OF WASHINGTON SQUARE LEGAL SERVICES, LEGAL SERVICES NYC, THE NATIONAL ORGANIZATION OF WOMEN - NEW YORK STATE, THE NEW YORK IMMIGRATION COALITION, MUSLIM BAR ASSOCIATION OF NEW YORK, AND TAMIZDAT AS *AMICI CURIAE* IN SUPPORT OF THE RELIEF SOUGHT BY PETITIONERS AND INTERVENOR-PLAINTIFF

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DISCLOSURE STATEMENT

Pursuant to Fed. R. Civ. P. 7.1, *amici curiae* state that there is no parent corporation or any publicly held corporation that owns 10% or more of the stock of any of the parties listed herein.

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

PRELIMINARY STATEMENT

On January 27, 2017, President Trump signed Executive Order 13769, "Protecting the Nation from Foreign Terrorist Entry into the United States," (hereinafter "Executive Order" and "EO") suspending the entry of all nationals from seven Muslim-majority countries: Somalia, Iran, Sudan, Syria, Iraq, Libya, and Yemen.[1] Shortly after the first court challenges to the Executive Order were filed, the Department of Justice produced a memorandum (hereinafter "Visa Revocation Memo"), also dated January 27, 2017, from the U.S. Department of State.[2] This Visa Revocation Memo provisionally revoked all immigrant and nonimmigrant visas held by nationals of the seven countries named in the Executive Order. In one fell swoop, the federal government upended the lives of tens of thousands of students, doctors, artists, and others—many of whom had waited years for their visas or who had travelled in and out of the United States for years. As a result of the memo, airlines refused to board passengers even though they were permitted to enter the U.S. under then-existing court orders, including the order of this Court.

This case addresses the legality of the President's Executive Order, which intends to suspend the entry of people from the seven designated countries and refugees into the United States. *Amici* support the arguments of the petitioners that this order is illegal, and submit this brief to address the emerging and related question of the legality of the Visa Revocation Memo which revokes visas on a classwide basis for all visa holders from the seven designated countries.

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[1] Executive Order 13769, Protecting the Nation from Terrorist Entry into the United States, 82 Fed. Reg. 8,977, 8,977–78 (Feb. 1, 2017).

[2] Josh Gerstein, *State Department Notice Revoking Visas Under Trump Order Released*, Politico (Jan. 31, 2017), http://www.politico.com/blogs/under-the-radar/2017/01/trump-visas-state-department-234454 (noting that "the [DOS memorandum] was made public in a filing in [sic]federal court of Boston"). The case referred to is *Louhghalam v. Trump*, No. 17-10154-NMG (D. Mass. Feb. 3, 2017).

There is no authority for the Visa Revocation Memo in the Executive Order or in the governing statutes. The text of the Executive Order itself, the statutes and regulations relating to visa revocations, and well-established principles of statutory construction, including the presumption of non-retroactivity and the canon of constitutional avoidance, do not permit such classwide visa revocations. By issuing this blanket visa revocation, the federal government has needlessly upset our visa issuance system and unsettled the lives of thousands of individuals both in and out of the United States.

STATEMENT OF INTEREST

Amici curiae are community organizations that advocate for individuals and communities that have been immediately and directly impacted by the January 27, 2017 Executive Order. The Executive Order and Visa Revocation Memo threaten the interests of *amici* by targeting visa holders who have deep ties to our families and communities. *Amici* have a strong interest in protecting the rights of visa holders, including the right to travel on valid visas and to petition for family members. New York is the port of entry into the United States for many of the current and future community members we serve. *Amici* therefore submit this brief in support of the relief sought by Petitioners and Intervenor-Plaintiff.

Amici curiae are the Arab American Association of New York, Brooklyn Defender Services, Immigrant Rights Clinic of Washington Square Legal Services, Inc., Legal Services NYC, the National Organization for Women - New York State, the New York Immigration Coalition, Muslim Bar Association of New York, and Tamizdat.

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Amici therefore submit this brief in support of the relief sought by Petitioners and Intervenor-Plaintiff.

BACKGROUND ON THE EXECUTIVE ORDER AND U.S. DEPARTMENT OF STATE MEMORANDUM

At approximately 4:42 pm[3] on Friday, January 27, 2017, President Trump signed Executive Order 13769, which intended to, among other things, "suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this Order" for nationals from seven Muslim-majority countries.[4] The President's order caused immediate chaos at our nation's borders as lawful permanent residents, refugees, employment and student visa holders, and others with valid visas found themselves detained at ports of entry and denied entry under threat of removal.[5] At the time, it was unclear what process the government was using to deny individuals entry. Some were sent away from the U.S. with "cancelled" stamped on their visas, but no one was given concrete information about how this was occurring.[6] These practices continued until—and in some cases, after—various federal courts, including this Court, issued orders temporarily restraining the federal government from enforcing the EO.

On January 31, 2017, the Department of Justice filed for the first time in the case *Louhghalam v. Trump*, a copy of the Visa Revocation Memo dated January 27, 2017.[7] Prior to

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[3] *Lives Rewritten with the Stroke of a Pen*, N.Y. Times (Jan. 29, 2017), https://www.nytimes.com/interactive/2017/01/29/nyregion/detainees-trump-travel-ban.html.
[4] Executive Order 13769, Protecting the Nation From Terrorist Entry into the United States, 82 Fed. Reg. 8,977, 8,977–78 (Feb. 1, 2017).
[5] *Lives Rewritten with the Stroke of a Pen*, N.Y. Times (Jan. 29, 2017), https://www.nytimes.com/interactive/2017/01/29/nyregion/detainees-trump-travel-ban.html.
[6] *See* Angela Dewan, *Airlines Allow Passengers After Judge Blocks Travel Ban*, CNN (Feb. 3, 2017) http://www.cnn.com/2017/02/04/politics/airlines-airports-trump-travel-ban/ (describing how some passengers had their visas physically cancelled).
[7] Josh Gerstein, *State Department Notice Revoking Visas Under Trump Order Released*, Politico (Jan. 31, 2017), http://www.politico.com/blogs/under-the-radar/2017/01/trump-visas-state-department-234454 (noting that "the [DOS memorandum] was made public in a filing in [sic]federal court of Boston"). The case referenced is *Louhghalam v. Trump*, No. 17-10154-NMG (D. Mass. Feb. 3, 2017). The same memorandum was filed in the present case on January

the court filing, the memo had not been released to the public.[8] The Visa Revocation Memo was signed by Edward J. Ramotowski, Deputy Assistant Secretary, Bureau of Consular Affairs, Department of State ("State Department" or "DOS").[9] The memo stated that at the request of the Department of Homeland Security, as well as under the direction of the Executive Order and pursuant to its statutory and regulatory authority, the agency had "provisionally revoke[d] all valid nonimmigrant and immigrant visas of nationals of Iraq, Iran, Libya, Somalia, Sudan, Syria and Yemen."[10] The only visas exempted from the revocation were visas for certain diplomats, certain foreign government officials, and certain international organization employees, and their family members.[11] Provisional revocation, per federal regulations, has the same effect as an actual revocation.[12] In four short paragraphs, the Visa Revocation Memo unraveled an immigration system founded on intricate, individualized, and thoroughly vetted procedures.

Confusion about the Visa Revocation Memo ensued as the public grappled to understand its meaning and the government scrambled to clarify its scope. On February 3, 2017, a State Department spokesperson indicated that because of the mass revocations, those visa holders who

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31, 2017 as Exh. Department of State Letter by Steven Platt. *Darweesh et al v. Trump et al*, No. 1:17CV00480 (E.D.N.Y. 2017).

[8] *Id.*

[9] U.S. Dep't of State Memorandum (Jan. 27, 2017), http://www.politico.com/f/?id=00000159-f6bd-d173-a959-ffff671a0001.

[10] *Id.* On February 4, 2017, DOS temporarily reversed the provisional visa revocation in response to court orders. However, if someone's visa had been "physically canceled," the visa holder "must apply for a new visa at a U.S. embassy or consulate, absent a CBP decision to grant parole or waive the visa requirement at the port of entry." *See* U.S. Dep't of State, Bureau of Consular Affairs, *Executive Order on Visas* (Feb. 4, 2017), https://travel.state.gov/content/travel/en/news/important-announcement.html.

[11] U.S. Dep't of State Memorandum (Jan. 27, 2017) ("The revocation does not apply to visas in the following nonimmigrant classifications: A-1, A-2, G-1, G-2, G-3, G-4, NATO, C-2, or certain diplomatic visas.").

[12] 22 C.F.R. § 41.122(b)(1) (noting that "[p]rovisional revocation shall have the same force and effect as any other visa revocation under INA 221(i), unless and until the revocation has been reversed."); 22 C.F.R. § 42. 82(b) (same provision for immigrant visas).

chose to leave the United States would no longer be deemed to have valid visas.[13] With regards to visa holders already present in the United States, an unnamed State Department spokesperson remarked to a news reporter that "the revocation would have no impact on the legal status of those already in the United States,"[14] but as of February 14, 2017, there has been no official statement from the State Department or the Department of Homeland Security confirming or denying this, even as the State Department has temporarily stayed the revocation itself due to current court orders.[15] Furthermore, the plain text of INA § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B), as amended in 2004, states that all persons in the United States with revoked visas are deportable. The full text of the Visa Revocation Memo remains unavailable on the State Department website, although it has already impacted visa holders who were neither notified of its existence nor its scope.[16]

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[13] Justin Jouvenal, Rachel Weiner & Ann E. Marimow, *Justice Dept. Lawyer Says 100,000 Visas Revoked Under Travel ban; State Dept. Says About 60,000*, Washington Post (Feb. 3, 2017), https://www.washingtonpost.com/local/public-safety/government-reveals-over-100000-visas-revoked-due-to-travel-ban/2017/02/03/7d529eec-ea2c-11e6-b82f-687d6e6a3e7c_story.html?utm_term=.10f70cacabf9.

[14] Josh Gerstein, *State Department Notice Revoking Visas Under Trump Order Released*, Politico (Jan. 31, 2017), http://www.politico.com/blogs/under-the-radar/2017/01/trump-visas-state-department-234454 (noting that "the [DOS memorandum] was made public in a filing in [sic]federal court of Boston").

[15] U.S. Dep't of State, Bureau of Consular Affairs, *Executive Order on Visas* (Feb. 4, 2017), https://travel.state.gov/content/travel/en/news/important-announcement.html (noting that its provisional revocation "is now lifted and those visas are now valid" and that the State Department will "provide further updates as soon as information is available.").

[16] *See* Shannon Dooling, *All Visas Revoked For People From 7 Barred Countries, Per State Dept.*, WBUR News (Feb. 7, 2017), http://www.wbur.org/news/2017/02/01/visas-revoked-state-department; *see also* Maria Sacchetti and Milton J. Valencia, *With Visas Revoked, Travelers Barred Entry Despite Court Order,* Boston Globe (Feb. 1, 2017), https://www.bostonglobe.com/metro/2017/02/01/document-filed-boston-court-reveals-visas-were-revoked-for-people-from-banned-countries/D6NBbEBA1HrF4IUrJjuljI/story.html; Amended Petition for Writ of Habeas Corpus and Complaint at n.12, *Louhghalam v. Trump*, No. 17-10154-NMG (D. Mass. Feb. 3, 2017), https://aclum.org/wp-content/uploads/2017/01/28.-Louhghalam-Amended-Complaint.pdf (noting that the State Department memorandum was

SUMMARY OF ARGUMENT

Each year, hundreds of thousands of people apply for visas allowing them to participate in American society, often at the invitation of and benefit to U.S. institutions. Some of these visas allow people to visit relatives, tour the country, or receive life-saving medical treatment. Other visas allow immigrants to embark on a path to American citizenship, pursue higher education, or join the workforce, often in vital contribution to the U.S. economy. After a prolonged and complex vetting process, visas are issued to individuals who rely on their validity to then purchase plane tickets, leave jobs, and sell homes. Visa holders in the United States might make academic, personal, or business trips abroad, depending on their visas to return to America. Some of these individuals cannot return to their country of origin for fear of persecution.

At the request of DHS, citing the January 27, 2017 Executive Order, the State Department revoked visas on a classwide basis with no individualized process mirroring their initial issuances. But the Executive Order neither authorizes visa revocation, nor does the Immigration and Nationality Act provide the Secretary of State with boundless discretion to do so in a categorical, classwide manner. Governing regulations require that revocation occur following a tailored determination that a particular individual is deemed ineligible for a visa. The statute and governing regulations cabin the Secretary of State's power to ensure constitutionally adequate revocations that do not have impermissible retroactive effects. As the stories, statutory analysis, and legislative history below demonstrate, this Court should ensure that the federal government exercises its authority to revoke visas strictly on an individualized basis to protect individuals' significant reliance interests and constitutional rights.

"never before disclosed to the plaintiffs, nor was it disclosed to this Court at the hearing on January 28-29, 2017").

ARGUMENT

I. The U.S. Visa System Reflects a Highly Individualized Process Upon Which Thousands of Individuals, Families, and Institutions in the United States Rely.

Actors both inside and outside of the U.S. rely on the general functioning of a visa system that is premised on individualized determinations about whether noncitizens will be granted visas and allowed to enter the country. Private citizens, corporations, universities, the tourism industry, and other institutions in the U.S. all depend upon the visa system in order to conduct their lives and go about their daily business. These expectations crystalize once noncitizens go through the individualized process of applying for visas, passing security checks, and obtaining visas. These expectations also grow over time once noncitizens have been issued a valid visa; they buy plane tickets, sell property, quit jobs in their countries of origin, schedule surgeries, and take other steps to plan their visit or move to the U.S.

Even before the formal visa process begins, many individuals who seek and will ultimately obtain visas have already invested time and resources into their decisions to pursue a visa. For example, many individuals who apply for "immigrant visas," which generally require an intent to settle permanently in the U.S., by definition have U.S. citizen and lawful permanent resident family members who are sponsoring them for their visas.[17] For instance, **Hamdiyah Al Saeedi** is a 65-year-old Iraqi woman whose son, a U.S. citizen and sergeant in the U.S. Army, spent five years "filling out endless forms" so that his parents could join him in the U.S. as lawful permanent residents.[18] When Mrs. Al Saeedi's husband died in December 2016, leaving

[17] INA § 101(a)(16), 8 U.S.C. § 1101(a)(16); U.S. Customs and Border Protection, *Immigrant Visas vs. Nonimmigrant Visas,* https://help.cbp.gov/app/answers/detail/a_id/72/~/immigrant-visas-vs.-nonimmigrant-visas.

[18] *Lives Rewritten with the Stroke of a Pen*, N.Y. Times (Jan. 29, 2017), https://www.nytimes.com/interactive/2017/01/29/nyregion/detainees-trump-travel-ban.html.

her widowed and alone, the need for her to be reunited with her son only intensified.[19] By the time she finally was able to travel to the U.S. with her approved family visa petition, ready to be admitted to the country as a lawful permanent resident, Mrs. Al Saeedi and her son had already invested significant resources into the visa process.

Similarly, many individuals who apply for "non-immigrant visas" have already made decisions and invested their time and effort to pursue studies, research, or employment in the United States.[20] For example, individuals seeking "F1" student visas must first apply to a school approved by the Student and Visa Exchange Program.[21] If accepted, potential students are enrolled in a program, pay a fee, and then are issued an I-20 "Certificate of Eligibility for Nonimmigrant Student Status."[22] Only then are students able to apply for a visa to enter the U.S. to attend their school. Some students spend years saving money and applying to schools before they ever get to the stage of applying for a visa. **Shadi Heidarifar**, an Iranian philosophy student recently admitted to New York University, spent three years saving money, gathering documents, and applying to universities.[23] The application fees alone were enough for a family in Iran to live on for one month.[24]

Similarly, many employment-related visas require applicants to have a pre-existing relationship with their potential employer. Some employment visa petitions require an approved

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[19] *Id.*
[20] Some nonimmigrant visas can lead to permanent status in the U.S. and recognize that nonimmigrants may have a "dual intent"—that is, both a short-term intent to leave and a long-term intent to stay permanently. *Matter of H-R-*, 7 I&N Dec. 651, 654 (RC 1958); 8 C.F.R. §§ 214.2(h)(16), (l)(16), (o)(13), (p)(15).
[21] 8 C.F.R. § 213.2(f); U.S. Dep't of State, Bureau of Consular Affairs, *Student Visa*, https://travel.state.gov/content/visas/en/study-exchange/student.html.
[22] *Id.*
[23] Michael D. Shear & Nicholas Kulish, *Judge Blocks Part of Trump's Immigration Order*, The Seattle Times (Jan. 29, 2017), http://www.seattletimes.com/nation-world/panic-at-airports-as-trumps-order-blocks-immigrants/.
[24] *Id.*

labor certification issued by the Department of Labor before a visa petition can be filed at all.[25] Other employment visas require extensive applications and interviews prior to any visa application. In the medical field, for example, licensed physicians seeking H-1B visas must take exams and interview with potential employers through the residency process before applying for a visa.[26] **Dr. Kamal Fadlalla**, a Sudanese medical resident, made multiple trips to the U.S. to interview with the Interfaith Medical Center in Brooklyn and take his entrance exam prior to receiving his H-1B visa.[27] Each trip came with financial costs and resource investments by not only Dr. Fadlalla, but also the Interfaith Medical Center, which, like many hospitals, depends on the ability to recruit qualified doctors from across the world.[28]

Individuals' and institutions' investments into the visa process deepen at the stage of the visa application. For visas that require an initial petition to be approved by the U.S. Citizenship and Immigration Services (USCIS), part of the Department of Homeland Security (DHS), approved petitions are then sent to an intermediary processing center where the information about the petition is entered into a system that can be accessed by consular posts.[29] For immigrant visas, once the intermediary processing center is ready to continue with visa processing, the applicant must submit additional fees, forms, and documents, including proof that someone in the U.S. will economically support them, before their application is forwarded to a

[25] INA § 212(a)(5), 8 U.S.C. § 1182(a)(5).
[26] Charles Ornstein, *Trump's Executive Order Strands Brooklyn Doctor in Sudan*, ProPublica (Jan. 29, 2017), https://www.propublica.org/article/trumps-executive-order-strands-brooklyn-doctor-in-sudan.
[27] *Id.*
[28] *Id.* ("Each year, around a quarter of the residents and fellows in advanced training programs around the U.S. attended medical school outside the country. While some of those are U.S. citizens or permanent residents, about 15 to 20 percent of the total are not.").
[29] 8 C.F.R. §§ 204.2(c)(3)(i), (g)(3), (h)(2), (n).

U.S. consulate for processing.[30] Most immigrant visa applicants also must submit police certificates[31] and undergo a medical exam by an authorized physician, which includes a physical and a mental evaluation.[32] Nonimmigrant visa applicants additionally undergo considerable processing before receiving their visas. They must first fill out a form, usually online, that includes personal information, passport information, travel plans, previous U.S. travel, contacts in the U.S., family, work, education and training history, and extensive security-related questions.[33] The form has a fee of $160 or more depending on the visa type.[34] Most males ages 16 to 45 must fill out an additional form.[35]

With limited exceptions, all visa applicants between the ages of 14 and 79 must submit photographs, have their fingerprints taken, and be interviewed at a U.S. consulate abroad.[36] Those who live in countries without U.S. consulates must travel to a third country to have their visas processed.[37] Traveling to a far-away U.S. consulate can be very onerous. **One 12-year-old Yemini girl** seeking to be reunited with her U.S. citizen parents and siblings had to go to an immigrant visa interview in Djibouti after the U.S. consulate in Yemen closed.[38] To get from

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[30] U.S. Dep't of State Cable, 13 State 103210, *DS-260 Worldwide Deployment* (Aug. 13, 2013); INA § 213(a), 8 U.S.C. § 1183a; 8 C.F.R. § 213a(2).
[31] 22 C.F.R. § 42.65(b).
[32] 22 C.F.R. § 42.66; 9 FAM 504.4-7 (2015).
[33] 22 C.F.R. § 41.103(a); U.S. Dep't of State, Consular Electronic Application Center, *Form DS-160*, https://ceac.state.gov/GenNIV/Default.aspx.
[34] U.S. Dep't of State, *Fees for Visa Services,* https://travel.state.gov/content/visas/en/fees/fees-visa-services.html.
[35] U.S. Dep't of State Cable, 02-State-6020 (Jan. 11, 2002), *reprinted in* 79 No. 4 *Interpreter Releases* 118-19 (Jan. 21, 2002).
[36] 69 FR 78515 (Dec. 30, 2004); INA § 222(h), 8 US.C. § 1202(h); 22 C.F.R. § 41.102; 22 C.F.R. § 42.67(c).
[37] 9 FAM 504.4-8(E) (2016).
[38] Josh Levin, *Thanks to Donald Trump, A 12-Year-Old Girl With American Parents Is Stuck in Djibouti*, Slate (Jan. 29, 2017), http://www.slate.com/blogs/the_slatest/2017/01/29/a_12_year_old_girl_is_stuck_in_djibouti_thanks_to_trump_s_executive_order.html.

Yemen to Djibouti, she took a 16-hour bus ride to the airport, flew to Jordan, and then made her way to Djibouti.[39] For decades, Iranians have had to leave Iran to apply for visas to come to the U.S., as there is no U.S. consulate in Iran.[40]

At their interview, applicants must show both that they are eligible for the visa they are seeking and that they are not subject to any of the many bars to admission.[41] Unless the applicant is eligible for a waiver, immigrant and nonimmigrant visas can be denied based on a wide range of grounds of inadmissibility, including criminal history, security-related grounds, health-related grounds, indigence, violations of immigration laws, and prior removals from the U.S.[42] Through the interview process and by reviewing all of the forms and documents provided by the applicant, consular officers then determine on an individualized basis whether each applicant is eligible for a visa.[43]

Most visa applicants must also provide additional, application-specific information. For example, students may have to provide proof of their prior schooling, standardized test scores, and proof that they can pay for all education, living, and travel expenses.[44] Those seeking

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[39] *Id.*
[40] 9 FAM 504.4-8(E) (2016); Thomas Erdbring, *Former American Embassy in Iran Attracts Pride and Dust*, N.Y. Times (Oct. 31, 2013), http://www.nytimes.com/2013/11/01/world/middleeast/former-american-embassy-in-iran-attracts-pride-and-dust.html?_r=0.
[41] *See generally* INA §§ 201-210, 8 U.S.C. §§ 1151-1160; INA § 212, 8 U.S.C. § 1182.
[42] *See generally* INA § 212(a), 8 U.S.C.§ 1182(a). For certain diplomatic and foreign government officials, DOS only has to accept their credentials in order to issue a visa. INA § 101(a)(15)(A), 8 U.S.C. § 1101(a)(15)(A); 8 C.F.R. § 214.2(a)(1) ("A visas" for diplomats and certain recognized foreign government employees); INA § 101(a)(15)(G), 8 U.S.C. § 1101(a)(15)(G) ("G visas" for certain international organization members). Those who are eligible for A visas and G visas are largely exempt from the grounds of inadmissibility except for certain security-related grounds. *See* INA § 102, 8 U.S.C. § 1102.
[43] U.S. Dep't of State, Bureau of Consular Affairs, *Visitor Visa*, https://travel.state.gov/content/visas/en/visit/visitor.html#apply.
[44] 22 C.F.R. § 41.61(b)(1)(ii); U.S. Dep't of State, Bureau of Consular Affairs, *Student Visa*, https://travel.state.gov/content/visas/en/study-exchange/student.html.

medical treatment must present a diagnosis from their local doctor explaining why they need treatment in the U.S., proof that a provider in the U.S. has agreed to provide the needed treatment, and proof that the visa seeker can pay for all of their travel, living, and medical expenses while in the U.S.[45]

All visa applications go through multiple levels of individualized security review. Applicants' biographic data and fingerprints are checked against the Consular Consolidated Database, which contains over 143 million records of past visa applications and comments by consular officers, and links to multiple DHS and FBI databases, including DHS's Automated Biometric Identification System (IDNET), the FBI's Integrated Automated Fingerprint Identification System (IAFIS), and DHS's Traveler Enforcement Compliance System (TECS).[46] DOS uses facial recognition software to compare applicants' photos against photos from the Terrorist Screening Center.[47] Consular officers also check applicants' data against security-related "lookout databases," including the Consular Lookout and Support System (CLASS) database.[48] Pursuant to § 428 of the Homeland Security Act (HAS),[49] DHS is now heavily involved in providing regulatory guidance for visa processing at consulates, and DHS employees are assigned to most consulates and diplomatic posts.[50] If there is a match between an applicant and the CLASS database, consular officials "must assume that the finding was correct" and may

[45] U.S. Dep't of State, Bureau of Consular Affairs, *Travel for Medical Treatment*, https://travel.state.gov/content/visas/en/visit/visitor.html#apply.
[46] Ruth Ellen Wasem, Cong. Research Serv., R43589, *Immigration: Visa Security Policies* 17-18 (2014).
[47] *Id.*
[48] *Id.*
[49] PL 107-296, 116 Stat. 2135 (Nov. 25, 2006).
[50] 6 U.S.C. § 236; Colin L. Powell and Thomas J. Ridge, Memorandum of Understanding between the Secretaries of State and Homeland Security Concerning the Implementation of Section 428 of the Homeland Security Act of 2002, September 29, 2003.

not look behind DHS's finding.[51] In sum, both DOS and DHS are involved in multilevel security-related reviews of visa applicants. Only after this highly individualized process is complete will a visa be granted.

Approved nonimmigrant visas are issued for varying lengths of time and are valid for one or multiple entries.[52] Approved immigrant visas are issued in passports and returned to the applicant with a sealed packet to be presented at the border.[53] Generally the immigrant visa holder must travel to the U.S. within six months or less and must pay an additional fee to USCIS.[54]

Once a visa is issued, and during the period of time that it remains valid, visa holders upend their lives in reliance on the visas. For example, when **Fuad Sharef Suleman** and his wife, **Arazoo Sulemen**, learned that their Kurdish family of five were granted special immigrant visas after waiting for two years, they quit their jobs at a pharmaceutical company and as a kindergarten teacher, sold their house, belongings, and vehicles, and removed their three children from their schools.[55] They spent $5,000 making travel arrangements and arranged for their friends in Nashville, Tennessee to help find them a house and jobs.[56] Similarly, when U.S. citizen **Douman Khoshbakhti's** parents from Iran were granted immigrant visas to join him in

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[51] U.S. Dep't of State Cable, 05-State-066722 (Apr. 12, 2005) at ¶¶ 7-8, *published on* AILA Doc. No. 05052060.
[52] 22 C.F.R. §§ 41.113(e), (f); U.S. Dep't of State, Bureau of Consular Affairs, *What the Visa Expiration Date Means*, https://travel.state.gov/content/visas/en/general/visa-expiration-date.html.
[53] 22 C.F.R. § 42.73.
[54] 22 C.F.R. § 42.72(a); USCIS, *Immigrant Fee Payment to Move USCIS* (May 2, 2013).
[55] Ariana Maia Sawyer, *Kurdish family head to Nashville sent back to Iraq*, The Tennessean (Jan. 29, 2017), http://www.tennessean.com/story/news/local/2017/01/29/kurdish-family-headed-nashville-sent-back-iraq/97220858/.
[56] Arwa Gaballa, Eric Knecht & Michael Georgy, *Trump order dashes dreams of Iraqi family bound for the United States*, Reuters (Jan. 30, 2017), http://www.reuters.com/article/us-usa-trump-immigration-iraqis-idUSKBN15D0FK.

the U.S, his mother immigrated first while his father stayed in Tehran to "tie up the loose ends of a lifetime," selling his car and the family's construction supplies shop.[57] Even those coming to the U.S. temporarily make substantial investments once a visa has been issued. For example, Dr. **Samira Asgari**, an Iranian national who was granted a fellowship at Harvard Medical School, quit her job in Switzerland and rented out her apartment in preparation for the fellowship.[58] Harvard Medical School similarly depended on the availability of visas in order to recruit Dr. Asgari and other "talented young researchers from around the globe."[59]

Once visa holders enter the U.S., they make endless important life decisions premised on the ability to maintain their visa and travel outside of the U.S. Those who enter on student visas, for example, are usually admitted for "duration of status," meaning for as long as their visa is valid and they are "making normal progress toward completing a course of study."[60] State Department guidance thus provides that "[p]osts should facilitate the reissuance of student visas so that these students can travel freely back and forth between the homeland and the United States."[61] Some students spend years or even decades getting their education in the U.S. and are able to get work visas. Before and after completing a course of study, student visa holders may be eligible for limited work authorization and optional practical training.[62]

Similarly, employment visa holders already in the U.S. rely on their visas to maintain their personal and professional contacts abroad. For example, **Murtadha Al Tameemi**, an Iraqi

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[57] *Lives Rewritten with the Stroke of a Pen*, N.Y. Times (Jan. 29, 2017), https://www.nytimes.com/interactive/2017/01/29/nyregion/detainees-trump-travel-ban.html.
[58] Felicia Gans, *I told him I do have a valid visa, but he told me that it doesn't matter*, Boston Globe (Jan. 29, 2017), https://www.bostonglobe.com/metro/2017/01/28/told-him-have-valid-visa-but-told-that-doesn-matter/yttREc10s5cc7yjX3d48hJ/story.html.
[59] *Id.*
[60] 8 C.F.R. § 214.2(f)(5)(i).
[61] U.S. Dep't of State Cable, 05-State-180015 (Sept. 28, 2005) at ¶6, *published on* AILA InfoNet at Doc. No. 05110115.
[62] 8 C.F.R. §§ 214.2(f)(10)(i), (ii).

national, originally came to the U.S. through a cultural exchange program over ten years ago, and then was able to get a work visa.[63] He currently works in Seattle as an engineer at Facebook.[64] His family was recently resettled in Vancouver, Canada, and, until recently, he was able to reestablish a close relationship with them by visiting regularly.[65] **Babak Seradjeh**, an Iranian-Canadian physics professor from Indiana University, relies on his visa to be able to conduct research funded by the National Science Foundation.[66] Prior to the EO, he could travel relatively freely in order to conduct research that his university and other American institutions value deeply.[67] Valid visa holders have the expectation and make concrete plans on the basic premise that if they abide by the terms of their visa, it will remain valid for the specified term. Employers and institutions in the U.S. similarly rely on the availability of visas and the freedom of movement of their employees and students in order to secure attractive candidates and carry out their missions.[68]

In sum, noncitizens seeking to come to the U.S. temporarily or permanently make choices about where to live, study, and work. After choosing to come to the U.S., they go through a complex process whereby the government makes a series of individualized determinations about each visa holder's eligibility for the visa they seek. Once visas are granted, noncitizens rely on their visas to rent apartments, buy homes, and otherwise settle for a period of time in the U.S.,

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[63] Julie Bort, *This Iraqi Facebook engineer was invited to the US under President Bush, and now he's feeling trapped*, Business Insider (Jan. 30, 2017), http://www.businessinsider.com/iraqi-facebook-engineer-caught-in-the-immigration-ban-2017-1.
[64] *Id.*
[65] *Id.*
[66] Lyric Lewin, "These are the faces of Trump's ban," CNN, http://www.cnn.com/interactive/2017/01/politics/immigration-ban-stories/.
[67] *Id.*
[68] *See, e.g.*, *Order*, *State of Washington v. Trump*, No. 17-35105, D.C. No. 2:17-cv-00141 at 9–10, (Feb. 9, 2017) (per curiam) (summarizing the State of Washington's arguments that the EO causes "a concrete and particularized injury to their public universities").

while at the same time being free to travel outside of the country in order to attend weddings, funerals and conferences; conduct research; visit family; and otherwise live their lives. These individualized visa determinations, therefore, have great implications for the noncitizens themselves, as well as for their American schools, employers, family members, and communities.

II. Nothing in the Executive Order or the Immigration and Nationality Act and Implementing Regulations Directs or Authorizes the Federal Government's Categorical, Classwide Revocation of Visas.

The Visa Revocation Memo cites two sets of sources for its authority to engage in classwide visa revocation: First, section 3(c) of the Executive Order and INA § 212(f),[69] upon which the Executive Order relies; and second, INA § 221(i)[70] and the implementing regulations for visa revocations under 22 C.F.R. §§ 41.122 and 42.82.[71] None of these sources direct or authorize the classwide revocation of visas. First, the Executive Order itself does not explicitly or implicitly direct DOS to revoke visas, nor does INA § 212(f) require or permit classwide revocation. Second, INA § 221(i), the only statutory authority for visa revocation, does not contemplate such a categorical and overbroad classwide revocation. Instead, INA §221(i) and its implementing regulations specifically restrict DOS's capacity to revoke visas to individualized adjudicatory revocations, rendering the DOS's Visa Revocation Memo an impermissible, unauthorized exercise of the federal government's authority.

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[69] 8 U.S.C. § 1182(f).
[70] 8 U.S.C. § 1201(i).
[71] U.S. Dep't of State Memorandum (Jan. 27, 2017) ("Upon request of the U.S. Department of Homeland Security. . . and in implementation of section 3(c) of the Executive Order on Protecting the Nation from Terrorist Attacks by Foreign Nationals, I hereby provisionally revoke all valid nonimmigrant and immigrant visas of nationals of Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen").

A. The Executive Order and the Statute It Relies Upon, INA § 212(f), Do Not Authorize Categorical and Classwide Visa Revocation.

The Executive Order on its face does not direct the Secretary of State to begin wide-scale visa revocations.[72] The Executive Order claims only one source of authority, INA § 212(f), and nothing in § 212(f) mention visas or provides the President or the Secretary of State with authority to revoke visas on a classwide basis.[73] INA § 212(f) only permits the President to suspend "entry" into the United States.[74] Although "entry" is no longer formally defined in the INA, it has historically described when an individual makes herself *physically present* in the

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[72] *See* U.S. Dep't of State, Bureau of Consular Affairs, *Executive Order on Visas* (Feb. 4, 2017), https://travel.state.gov/content/travel/en/news/important-announcement.html. In arguing that the Executive Order does not direct the State Department to revoke visas, *amici* do not suggest that the State Department acted independently when it issued the visa revocation memo. Rather, the text of the memorandum itself notes that it was directed by the Department of Homeland Security, and the reference to the Executive Order suggests that the White House itself likely requested this action. However, the text of the Executive Order does not specify that visas should be revoked on a classwide basis.

[73] INA § 212(f) provides in relevant part:

> Whenever the President finds that the entry of any aliens or of 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.

[74] *Id.* Furthermore, as the Department of Justice recognized less than a month after 9/11, "no President had invoked section 212(f) for all nationals of a particular country but has tied the suspension of entry to subsets of nationalities that have engaged in a specific activity." *See* Dan Levin, Counsel to the Attorney General *Memorandum on Presidential Proclamation Under Section 212(f) of the Immigration and Nationality Act*, U.S. Department of Justice Office of the Deputy Attorney General (Oct. 3, 2001) at 2, https://www.scribd.com/document/17819320/T5-B61-Condor-Fdr-10-3-01-Levey-Memo-Re-Presidential-Proclamation-Section-212-f-Immigration-and-Nationality-Act; *see also* David A. Martin, *Trump's "refugee ban" - annotated by a former top Department of Homeland Security lawyer* (Jan. 3, 2017), http://www.vox.com/the-big-idea/2017/1/30/14429866/trump-refugee-ban-executive-order-annotated.

The history of executive orders issued under INA § 212(f) suggests that a classwide suspension of entry based on national origin without exception is unprecedented, but instead has been further cabined by alleged incriminating actions taken by impacted individuals or suspected connections with nefarious groups that those individuals may have. *See* Kate M. Manuel, *Executive Authority to Exclude Aliens: In Brief*, Congressional Research Service (Jan. 23, 2017) at p. 6–10, https://fas.org/sgp/crs/homesec/R44743.pdf.

United States.[75] *Matter of Z*, 20 I&N Dec. 707, 708 (BIA 1993) (describing entry as "crossing into the territorial limits of the United States, inspection and admission by an immigration officer or actual and intentional evasion of inspection at the nearest inspection point; and freedom from official restraint.").

Visa revocations are not required to suspend entry. U.S. Customs and Border Protection (CBP) regularly restricts entry for individuals as a part of its travel screening procedures without revoking or otherwise cancelling visas.[76] Visa revocation has wide-ranging implications beyond barred entry. A person present in the U.S. with a revoked visa is subject to removal under INA § 237(a)(1)(B),[77] and federal law bars aircrafts from boarding people with revoked visas, thus making those people unable to present themselves at the U.S. border for entry.[78] In this case, the Visa Revocation Memo circumvented this Court's order enjoining the federal government from barring entry of valid visa holders by preventing those individuals from boarding their flights to the U.S.[79] Visa holders in other countries attempting to board their U.S. bound flights were told they had invalid visas and were thus unable to benefit from this Court's order.[80]

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[75] *See Rosenberg v. Fleuti*, 374 U.S. 449, 452 (1963) ("The term 'entry' means any coming of an alien into the United States, from a foreign port or place or from an outlying possession"); *Haitian Refugee Center, Inc. v. Gracey*, 600 F. Supp. 1396 (D.D.C. 1985) (finding that interdiction of Haitians lacking visas attempting to arrive to the United States by sea was permissible pursuant to the President's authority to suspend *entry* under INA § 212(f)).

[76] *See* Lisa Seghetti, Cong. Research Serv., R43356, *Border Security: Immigration Inspections at Port of Entry* (2014).

[77] 8 U.S.C. § 1227(a)(1)(B).

[78] INA § 273, 8 U.S.C. § 1323 (barring transportation companies from bringing anyone to the U.S. without a valid visa).

[79] Order granting Motion to Stay, January 28, 2017, *Darweesh et al v. Trump et al*, 1:17CV00480.

[80] *See*, *e.g.*, Felicia Gans, *I told him I do have a valid visa, but he told me that it doesn't matter*, Boston Globe (Jan. 29, 2017), https://www.bostonglobe.com/metro/2017/01/28/told-him-have-valid-visa-but-told-that-doesn-matter/yttREc10s5cc7yjX3d48hJ/story.html.

Previous exercises of INA § 212(f) authority have not required the classwide revocation of visas, and any direction given to the State Department in past executive orders under INA § 212(f) have historically been limited to identifying individuals who have undertaken specific activity rather than revoking visas on a classwide basis. [81] Thus an exercise of authority under INA § 212(f)—assuming such authority is legal—neither authorizes nor requires the revocation of visas.

B. Neither INA § 221(i) Nor Its Implementing Regulations Authorize Classwide Visa Revocation.

Of the sources of authority cited in the Visa Revocation Memo, only INA § 221(i) and its implementing regulations speak at all to the State Department's authority to revoke visas. [82] These sources do not authorize classwide visa revocation; rather, they provide the State Department with authority to make individualized decisions to revoke visas based on new

[81] Previous executive orders invoking INA § 212(f) have explicitly requested the Secretary of State to take action but in such a way that the critical determination is whether an individual fits within the identified class—they have not authorized blanket revocation of visas. For instance, President Clinton suspended entry of members of the Sierra Leonean military junta under INA § 212(f), but dictated that "persons covered" by the suspension of entry would be "identified" by the Secretary of State. *Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Are Members of the Military Junta in Sierra Leone and Members of Their Families,* 63 Fed. Reg. 2871 (Jan. 14, 1998). In that case, the executive order recognized that the Secretary of State's authority was cabined by a requirement to make individualized assessments as to whether a person fits within the scope of the President's suspension.

Other executive orders, dating as far back as 1985, enacted similar provisions. *See*, *e.g.*, *Suspension of Entry as Nonimmigrants by Officers or Employees of the Government of Cuba or the Communist Party of Cuba*, 50 Fed. Reg. 41329 (Oct 4., 1985); *Proclamation to Suspend Entry as Immigrants or Nonimmigrants of Persons Engaged in or Benefitting From Corruption*, 69 Fed. Reg. 2287 (Jan. 12, 2004); *Proclamation 7524 Suspension of Entry as Immigrants and Nonimmigrants of Persons Responsible for Actions That Threaten Zimbabwe's Democratic Institutions and Transition to a Multi-Party Democracy*, 67 Fed. Reg. 8857 (Feb. 26, 2002); *Proclamation 8158 Suspension of Entry as Immigrants and Nonimmigrants of Persons Responsible for Policies and Actions That Threaten Lebanon's Sovereignty and Democracy*, 72 Fed. Reg. 36587 (Jul. 3, 2007). No comparable stipulation exists in the current Executive Order at issue.

[82] U.S. Dep't of State Memorandum (Jan. 27, 2017) ("[Pursuant to sections 212(f) and 221(i) of the Immigration and Nationality Act and 22 CFR 41.122 and 42.82 . . .").

information or after revisiting a prior determination. The plain language of the statute and regulations, the statutory framework and purpose, the legislative history, and other tools of statutory construction support this understanding of INA § 221(i) and its implementing regulations.

The language of INA § 221(i) and its implementing regulations, 22 C.F.R. §§ 41.122 and 42.82, contemplate that DOS has the authority to make *individualized* visa revocation decisions.[83] A plain reading of the statute makes clear that visa revocation is an individualized adjudicatory procedure.[84] INA § 221(i) provides: "After the issuance of *a visa* or other documentation to *any alien*, the consular officer or the Secretary of State may at any time, in his discretion, revoke *such visa* or other documentation." By using the singular ("a visa," "any alien," and "such visa"), the plain language demonstrates that DOS should make case-by-case assessments about the need to invalidate an individual's previously approved visa. Just as the granting of *a* visa requires individualized evaluations, revocation of *a* visa requires DOS to make a case-by-case determination.[85]

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[83] The non-discrimination provision of INA § 202(a)(1), 8 U.S.C. § 1152(a)(1), prohibiting discrimination in the issuance of an immigrant visa because of a person's nationality or place of birth, also underscores the invalidity of the federal government's reading of its authority under INA § 221(i).

[84] *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) ("The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written); *United States v. Providence Journal Co*., 485 U.S. 693, 700-01 (1988).

[85] Diplomatic visas present an exception to this general rule of individualized revocation where the United States severs diplomatic ties with the visa holder's country. Diplomatic visas are statutorily distinct from other non-immigrant visas, in that diplomatic visas must be "accepted by the President or by the Secretary of State" and are based on de jure recognition of the visa holder's country. 8 U.S.C. § 1101(a)(15)(A); *see also see also* INA § 101(a)(15)(G) (international organization visas based on accreditation and de jure recognition by the United States). There are at least two instances where, invoking statutory authority under INA § 221(i), the Secretary of State has revoked diplomatic visas. *See* Public Notice, *Revocation of Certain Nonimmigrant Visas*, 45 Fed. Reg. 24437 (April 9, 1980) (providing notice that the Secretary of

Federal regulations also demonstrate the individualized nature of visa issuance and revocation. Sections 41.122(b)(2) and 42.82(b) of the C.F.R. state that the Secretary "may provisionally revoke a [nonimmigrant or immigrant] visa while considering information related to whether a visa holder is eligible for the visa." While a provisional revocation may be reversed by DOS, "[p]rovisional revocation shall have the same force and effect as any other visa revocation under INA 221(i)."[86] Applicants should be notified of the intent to revoke a visa if it is practicable.[87] Nonimmigrant visa holders may have their visas revoked if they are arrested for a DUI, or if the U.S. government receives information about a "suspected ineligibility."[88] The revocation of a visa, therefore, requires the government to consider a visa holder's individual circumstances in order to determine whether revocation is appropriate.

A holistic[89] reading of the INA further indicates that INA § 221(i) should be read to authorize individualized visa revocation. When Congress authorizes action on a classwide basis,

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State had revoked "all nonimmigrant visas issued to nationals of Iran pursuant to section 101(a)(15)(A) of the Immigrant and Nationality Act [diplomatic provision]"); Public Notice, *Revocation of Certain Nonimmigrant Visas*, 46 Fed. Reg. 26976 (May 15, 1981) (noting that "[t]his action has been taken because of the general pattern of unacceptable conduct by the People's Bureau of the Social People's Libyan Arab Jamahiriya which is contrary to United States interest and in violation of acceptable norms of diplomatic behavior.").

Diplomatic visas are *sui generis* from other classes of visas. The screening procedures are generally based on the applicant's diplomatic credentials and the country's diplomatic status with the U.S. in order to issue the visa. *See* INA § 101(a)(15)(A), 8 U.S.C. § 1101(a)(15)(A); 8 C.F.R. § 214.2(a)(1) ("A visas" for diplomats and certain recognized foreign government employees); *see also* INA § 101(a)(15)(G), 8 U.S.C. § 1101(a)(15)(G) ("G visas" for certain international organization members); 9 FAM 402.4. Furthermore, these revocations only occurred after the U.S. formally severed ties with a particular nation, consistent with international customary law and the Vienna Conventions on Diplomatic Relations and Consular Relations. *See Introduction and Summary to Opinions of the Office of Legal Counsel Relating to the Iranian Hostage Crisis*, 4A U.S. Op. Off. Legal Counsel 7, 84, 1894 WL 54314 (Oct. 1, 1984).

[86] 22 C.F.R. § 41.122(b)(1); 22 C.F.R. §§ 42.82(b).

[87] 22 C.F.R. § 41.122(c); 22 C.F.R. §§ 42.82(c).

[88] AILA/DOS Liaison Meeting (Apr. 7, 2016), *published on* AILA Doc. No. 16041133.

[89] *See Smith v. United States*, 508 U.S. 223, 234 (1993) ("Just as a single word cannot be read in isolation, nor can a single provision of a statute"); *United Sav. Ass'n v. Timbers of Inwood Forest*

it does so explicitly, as in INA § 212(f), which permits the President to suspend entry for "any aliens or of any class of aliens."[90] The term "class of aliens" is notably absent from INA § 221(i) which only provides for the revocation of the visa of "any alien."[91] Reading INA § 221(i) as a basis for DOS to revoke visas for classes of individuals under the language "any alien" would render the language in INA § 212(f) suspending entry to "any alien or of any class of aliens," superfluous.[92] Such a reading would allow the federal government to combine the authority to "revoke visas" on an individualized basis[93] and the authority to suspend entry for a "class of aliens"[94] to justify revoking visas on a classwide basis—an impermissible statutory authority mashup. Such a reading therefore cannot be squared with the statute or regulations as a whole.

Legislative history also reveals that when drafting INA § 221(i), Congress considered visa revocation to be an individualized procedure. Congress first recognized the authority of DOS to revoke visas in 1952, when it passed the Immigration & Nationality Act (also known as the McCarran-Walter Act), the text of which is included in section 221(i).[95] The House

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Assocs., 484 U.S. 365, 371 (1988) ("statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme").

[90] INA § 212(f).

[91] INA § 221(i).

[92] *See Ratzlaf v. United States*, 510 U.S. 135, 140 (1994); *Kungys v. United States*, 485 U.S. 759, 778 (1988) (Scalia, J., plurality opinion); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986) (for statutory interpretation canon of avoiding interpreting provision in a way that would render other provisions of the statute superfluous or unnecessary).

[93] INA § 221(i); 22 C.F.R. §§ 41.122 and 42.82.

[94] INA § 212(f).

[95] The original text of Section 221(i) stated in full:

> After the issuance of a visa or other documentation to any alien, the consular officer of the Secretary of State may at any time, in his discretion, revoke such visa or other documentation. Notice of such revocation shall be communicated to the Attorney General, and such revocation shall invalidate that visa or other documentation from the date of issuance: *Provided*, That carriers or transportation companies, and masters, commanding officers, agents, owners, charterers, or consignees,

Committee on the Judiciary Report indicates that the drafters apparently considered, but never implemented, the creation of a semi-judicial board similar to the Board of Immigration Appeals that would have jurisdiction to review consular decisions pertaining to the granting or refusal of visas.[96] The drafters of the statute however, declined to do so because they concluded that "the Secretary of State will have under this bill ample authority to provide within the Department of State for a system of cooperation . . . so as to be able to advise and assist such officers in reaching their decision in more complex individual cases pending before them."[97] Furthermore, when the INA was amended in 2004 to make visa revocation a ground of deportability and to drastically reduce judicial review of those visa decisions, the drafters explained that the changes stemmed from concern about the threat posed by *individuals* who might take advantage of loopholes in the immigration system to remain in the country while on a revoked visa.[98] Thus § 221(i) revocation has historically been understood by Congress to require individualized determinations.

Finally, the canon of constitutional avoidance requires courts to read provisions so that they do not pose constitutional questions. *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) ("[w]hen deciding which of two plausible statutory constructions to adopt, a court must consider

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> shall not be penalized under section 273 (b) for action taken in reliance on such visas or other documentation, unless they received due notice of such revocation prior to the alien's embarkation."

Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 192.

[96] *See* H.R. Rep. No. 1365, at 36 (1952) ("[m]any suggestions were made to the committee with a view toward creating in the Department of State a semi judicial board, similar to the Board of Immigration Appeals, with jurisdiction to review consular decisions pertaining to the granting or refusal of visas . . .").

[97] *See id*.

[98] *See* H. Rep. 108-723, pt. 5 at 189 (2004) ("The section will prevent an alien whose visa has been revoked to challenge the underlying revocation in court, where the government might again be placed in a position of either exposing its sources or permitting a potentially dangerous alien to remain in the U.S.").

the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems—the other should prevail."); *Pierre v. Holder*, 738 F.3d 38, 48 (2d Cir. 2013). As petitioners ably argue, the Executive Order in this case has serious constitutional defects, which, in turn, infect the Visa Revocation Memo.

First, blatant animus towards Muslims motivates the EO and thus the Visa Revocation Memo, in violation of both the Establishment Clause of the First Amendment and the equal protection component of the Due Process Clause, both of which prohibit the government from disfavoring one religious group over another. *Cf. Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) ("The Constitution's guarantee of equality must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot justify disparate treatment of that group."). On December 7th 2015, then presidential candidate Donald Trump posted a press statement on his website that called for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."[99] In a June 2016 speech responding to the terror attack in Orlando, Florida, Mr. Trump pledged to suspend immigration from areas of the world where there is a "proven history of terrorism against the United States, Europe, or our allies."[100] According to public statements by Mr. Trump's advisor, Rudolph Giuliani, on the day the Executive Order was signed, this new formulation reflected an

[99] Press Release, *Donald J. Trump Statement on Preventing Muslim Immigration*, (Dec. 7, 2015), https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration

[100] Press Release, *Donald J. Trump Addresses Terrorism, Immigration and National Security*, (June 13, 2016), https://www.donaldjtrump.com/press-releases/donald-j.-trump-addresses-terrorism-immigration-and-national-security.

instruction by Mr. Trump to his advisors to find a way to implement the "Muslim ban" "legally."[101]

Second, the EO and thus the Visa Revocation Memo raise serious due process concerns. The Due Process Clause applies to all persons in the United States, regardless of immigration status. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Burger v. Gonzales*, 498 F.3d 131, 134 (2d Cir. 2007). A temporary absence from the country does not deprive residents of their right to due process. *See*, *e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 33 (1982) ("[T]he returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him.") (internal citation omitted). The EO and the Visa Revocation memo also infringe on the constitutionally protected liberty interest in travel. *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958) (holding that Secretary of State could not deny passports to Communists on the basis that the right to travel abroad is a constitutionally protected liberty interest). Due process requires that lawful permanent residents and visa holders not be denied re-entry to the United States without "at a minimum, notice and an opportunity to respond." *United States v. Raya-Vaca*, 771 F.3d 1195, 1204 (9th Cir. 2014); *Burger v. Gonzales*, 498 F.3d 131 (2007). By providing neither, the EO and the Visa Revocation Memo contravene the Due Process Clause.

The federal government's interpretation of its statutory authority under INA § 221(i) cannot be what Congress intended, as it results in the government violating the Constitution for the reasons stated above. Thus, applying the constitutional avoidance canon, the Court should read INA § 221(i) as requiring individualized visa revocation determinations.

[101] Rebecca Savransky, *Giuliani: Trump Asked Me How to do a Muslim Ban "Legally,"* The Hill (Jan. 29, 2017), http://thehill.com/homenews/administration/316726-giuliani-trump-asked-me-how-to-do-a-muslim-ban-legally.

In sum, the Visa Revocation Memo is an impermissible implementation of the EO and an impermissible attempt to fuse elements of INA § 212(f) with INA § 221(i)—two distinct statutory provisions, neither of which authorizes classwide visa revocation. Furthermore, the statutes and regulations governing visa revocations, as well as the canon of constitutional avoidance, only allow for individualized visa revocations.

III. The Visa Revocation Memo Has an Impermissibly Retroactive Effect In Light of Visa Holders' Settled Expectations.

The classwide basis of the Visa Revocation Memo violates the principle that agency rules should be applied prospectively, not retroactively, absent express statutory authority. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[A]dministrative rules will not be construed to have retroactive effect unless their language requires this result"). The presumption against retroactive rulemaking is rooted in critical interests in fairness and preserving settled expectations. As the Supreme Court has cautioned, "[r]etroactive statutes raise special concerns. 'The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.'" *I.N.S. v. St. Cyr*, 533 U.S. 289, 315-16 (2001) (citations omitted).

"A statute, order, or edict 'operates retroactively' when it seeks to impose 'new legal consequences to events completed before its' announcement." *De Niz Robles v. Lynch*, 803 F.3d 1165, 1168 (10th Cir. 2015) (Gorsuch, J.) (citing *I.N.S. v. St. Cyr*, 533 U.S. at 321). An agency generally does not act retroactively when it acts like a judge, that is, when it "appl[ies] preexisting rules of general applicability to discrete cases and controversies." *Id*. at 1172. However, an agency acts like a legislator, rather than a judge, when it "announc[es] a new rule of general applicability." *Id.* When acting like a legislator, an agency's rules may have retroactive

effect only when "that power is conveyed by Congress in express terms." *Bowen*, 488 U.S., at 208; *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 192 (2d Cir. 2010).

A statute may permit retroactivity for individuals while not allowing it for a class. The Supreme Court made this point in *Bowen*, where it forbid retroactive promulgation of cost-limit rules under a provision of the Medicare Act. 488 U.S., at 205. In that case, the Health Secretary attempted to reissue previously contested regulations that changed the method by which government reimbursements to health care providers would be calculated. *Id*. The Court explained that the language of the relevant provision clearly contemplated individualized assessment, noting both its use of the singular and observing that "it is difficult to see how a corrective adjustment could be made . . . without performing an individual examination of the provider's expenditures in retrospect." *Id*. Thus it was permissible for the Department of Health and Human Services (HHS) to request reimbursement from health care providers it determined, after individualized consideration, had been overcompensated by mistake. *Id*. at 209. But it was *not* permissible for HHS to change the rules for calculating cost-limits and then retroactively request reimbursements from every health care provider on the basis of that new rule. *Id*. In other words, while the provision in question permitted individualized reimbursement payments made on a case-by-case and backward looking basis, the provision did not authorize retroactivity in the agency's *rulemaking*. *Id*.

Here, by categorically revoking the visas of nationals from the countries affected by the Executive Order without any individualized determination, the federal government is imposing new rules of general applicability that create new legal consequences for already settled behavior without express statutory authority to do so. The rationale for the anti-retroactivity rule is plainly

present in this case. Under the Visa Revocation Memo, a broad class of visa holders face revocation of their right to live in and travel in and out of the United States. They lose the money they have spent on the visa process, the educational programs they have chosen to enroll in in the U.S., the jobs they have accepted, and the lives they are living in the U.S. based on a non-individualized across-the board rule.

The Supreme Court has recognized the applicability of the anti-retroactivity principle in the specific context of a noncitizen facing a bar to travel due to a new rule. In considering a case where a permanent resident did not face deportation if he stayed in the U.S., but did if he traveled, the Court wrote:

> Beyond genuine doubt, we note, the restraint [on travel placed] on lawful permanent residents like Vartelas ranks as a "new disability." Once able to journey abroad to fulfill religious obligations, attend funerals and weddings of family members, tend to vital financial interests, or respond to family emergencies, permanent residents situated as Vartelas is now face potential banishment.

Vartelas v. Holder, 566 U.S. 257, 267-68 (2012). The Visa Revocation Memo places this same disability on thousands of lawful permanent residents, F1 student visa holders, J1 academic exchange visa holders, H1-B employees and other visa holders. Having invited these persons into the United States and encouraged them to order their lives around properly issued visas, the Visa Revocation Memo has, at a minimum, revoked the visas that allow them to travel and, at worst, subjected them to potential deportation over a past fact—their nationality—that they are powerless to change. *Id.* (noting that it is no answer to the retroactivity problem to say that the individual could have chosen not to travel after the new rule was announced). *See also Chew Heong v. United States,* 112 U.S. 536, 539 (1884) (refusing to read statute as impairing the right to Chinese immigrants who lived in the United States to return to their homes following travel due to new statute that discriminated against persons of Chinese origin).

The retroactive effects of the Visa Revocation Memo are devastating. If it is deemed valid, **Shadi Heidarifar**, the Iranian philosophy student previously introduced who spent three years researching schools and was admitted to New York University, must now either begin her student visa application process all over again or apply for higher education in a different country, resulting in a loss of thousands of dollars already spent, and the loss of potential tuition money for New York University.[102] **Murtadha al Tameemi**, the Facebook engineer who has lived in Seattle for ten years, now risks invalidating his visa if he travels to nearby Vancouver to visit his family, who are also barred from coming to Seattle to see him.[103] **Douman Khoshbakhti's** parents, the American citizen whose parents had visas to join him to live in America, would not only be unable to see their son, but cannot roll back the clock to before they sold their sole source of income, a construction supply shop, to fund a trip to America.[104] Dr. **Kamal Fadlalla**, the Sudanese medical resident, would no longer be able to return to his home, friends, patients, and life in the U.S.[105] Part of the motivation for the presumption of nonretroactivity is to prevent a decisionmaker from "punish[ing] those who have done no more than order their affairs around existing law." *De Niz Robles v. Lynch*, 803 F.3d at 1174-75 (Gorsuch, J.). In this case, the Visa Revocation Memo punishes immigrant and nonimmigrant visa holders who did nothing more than order their affairs and develop settled expectations under

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[102] Michael D. Shear & Nicholas Kulish, *Judge Blocks Part of Trump's Immigration Order*, The Seattle Times (Jan. 29, 2017), http://www.seattletimes.com/nation-world/panic-at-airports-as-trumps-order-blocks-immigrants/.
[103] Julie Bort, *This Iraqi Facebook Engineer was Invited to the US under President Bush, and Now He's Feeling Trapped*, Business Insider (Jan. 30, 2017), http://www.businessinsider.com/iraqi-facebook-engineer-caught-in-the-immigration-ban-2017-1.
[104] *Lives Rewritten with the Stroke of a Pen*, N.Y. Times (Jan. 29, 2017), https://www.nytimes.com/interactive/2017/01/29/nyregion/detainees-trump-travel-ban.html.
[105] Charles Ornstein, *Trump's Executive Order Strands Brooklyn Doctor in Sudan*, ProPublica (Jan. 29, 2017), https://www.propublica.org/article/trumps-executive-order-strands-brooklyn-doctor-in-sudan.

the pre-order regime. In addition, the motivation behind the EO and the Memo reflect exactly what the Supreme Court has expressed worry about with retroactive legislation—that it could be used "as a means of retribution against unpopular groups or individuals." *St. Cyr*, 533 at 315-16. Here, the EO and the Memo clearly reflect the administration's animus against Muslim immigrants.

CONCLUSION

The Visa Revocation Memo called for the immediate revocation of visas for countless individuals who are integral members of our society, causing great consternation and uncertainty among those affected as well as their loved ones in the U.S. and abroad. The federal government's categorical, classwide visa revocation is an unauthorized implementation of an equally problematic Executive Order. It is not permitted by any statutory authority and is an indiscriminate blow to thousands of people who have invested time and resources in navigating the complex process of obtaining U.S. visas. For these reasons, *amici* support the relief sought by Petitioners and Intervenor-Plaintiff.

Dated: February 16, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2017, I electronically filed the foregoing with the Clerk of the court for United States District Court, Eastern District of New York using the CM/ECF system.

I certify that I am a registered CM/ECF user and that all parties have registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATED: February 16, 2017

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HAMEED KHALID DARWEESH, et al., Petitioners, and PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK, Intervenor-Plaintiff, v. DONALD TRUMP, President of the United States, et al., Respondents.	Civil Action No. 1:17-cv-00480 (Amon, J.) **NOTICE OF APPEARANCE**

PLEASE TAKE NOTICE that Alina Das of Washington Square Legal Services, Inc., a member of this Court in good standing, respectfully enters her appearance as counsel for *Amici Curiae*: Arab American Association of New York, Brooklyn Defender Services, Immigrant Rights Clinic of Washington Square Legal Services, Legal Services NYC, the National Organization of Women – New York State, the New York Immigration Coalition, Muslim Bar Association of New York, and Tamizdat, in the above-entitled action and requests that all notices given or required to be given and all papers served in this case be given to and served upon the following:

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served electronically through the Court's CM/ECF system on all registered participants this 16th day of February 2017.

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