Nos. 17-2231 (L), 17-2232, 17-2233, 17-2240 (Consolidated)

In the

United States Court of Appeals

for the

Fourth Circuit

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, et al.,

Plaintiffs-Appellees,

and ALLAN HAKKY and SAMANEH TAKALOO,

Plaintiffs,

– v. –

DONALD J. TRUMP, et al.,

Defendants-Appellants.

No. 17-2231 (L)

On Cross-Appeal from the United States District Court
for the District of Maryland, Southern Division

[Caption continued on inside cover]

BRIEF OF TECHNOLOGY COMPANIES AS *AMICI CURIAE* IN SUPPORT OF APPELLEES IN 17-2231 (L), 17-2232, 17-2233 AND APPELLANTS IN 17-2240

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No. 17-2232

IRANIAN ALLIANCES ACROSS BORDERS, et al.,
Plaintiffs-Appellees,

– v. –

DONALD J. TRUMP, et al.,
Defendants-Appellants.

No. 17-2233

EBLAL ZAKZOK, et al.,
Plaintiffs-Appellees,

– v. –

DONALD J. TRUMP, et al.,
Defendants-Appellants.

No. 17-2240

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, et al.,
Plaintiffs-Appellants
and PAUL HARRISON, et al.,
Plaintiffs,

– v. –

DONALD J. TRUMP, et al.,
Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENTS

Amici curiae submit their corporate disclosure statements, as required by Fed. R. App. P. 26.1 and 29(c), in Appendix B.

/s/ Andrew J. Pincus

TABLE OF CONTENTS

Corporate Disclosure Statements i
Table of Authorities iii
Interest of *Amici Curiae* 1
Introduction 1
Argument 5
I. The Proclamation Harms American Innovation And Economic Growth. 5
II. The Proclamation Is Unlawful. 13
A. The INA does not authorize the executive branch to implement unilateral, permanent revisions of the Nation's immigration laws. 13
B. The Proclamation exceeds the authority conferred by Section 1182. 16
1. The Proclamation does not contain a finding sufficient to justify exercise of the authority conferred by Section 1182(f). 16
2. The Proclamation conflicts with other provisions of the INA. 21
3. The Proclamation is procedurally unreasonable. 23
C. The Proclamation violates Section 1152's non-discrimination requirement. 25
Conclusion 28
Appendix A 1a
Appendix B 6a

TABLE OF AUTHORITIES

Cases

Abourezk v. Reagan,
785 F.2d 1043 (D.C. Cir. 1986) 14, 22

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567 U.S. 387 (2012).....15

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482 U.S. 437 (1987).....27

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859 F.3d 741 (9th Cir. 2017) .....*passim*

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448 U.S. 607 (1980).....17

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498 U.S. 211 (1991) 17

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463 U.S. 29 (1983) 24

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88 F.3d 1105 (D.C. Cir. 1996) 17

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353 U.S. 194 (1957) 16, 17

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2017 WL 396531 (C.D. Cal. Jan. 29, 2017) 26

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531 U.S. 457 (2001) 16

Zemel v. Rusk,
381 U.S. 1 (1965) 16, 18

Statutes, Rules, and Regulations

5 U.S.C. § 553(c) 24

8 U.S.C.
§ 1152 ..... *passim*
§ 1152(a) 27
§ 1152(a)(1)(A) 25
§ 1152(a)(1)(B) 26
§ 1182 ..... *passim*
§ 1182(a) 14, 22
§ 1182(f) ..... *passim*
§ 1182(a)(3)(B) 21
§ 1182(a)(3)(B)(i)(II) 21
§ 1185(a) ..... *passim*
§ 1185(a)(1) 15

Pub. L. 114-113, div. O, tit. II, § 203, 129 Stat. 2242 22

Fed. R. App. 29(a)(4)(E) 1

82 Fed. Reg.
8977 (Jan. 29, 2017) 2, 3
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INTEREST OF *AMICI CURIAE*

Amici curiae are 96 of the Nation's leading technology companies. A complete list of *amici* is set forth in Appendix A.[1]

INTRODUCTION

For decades, stable U.S. immigration policy has embodied the principles that we are a people descended from immigrants, that we welcome new immigrants, and that we provide a home for refugees seeking protection. As President Reagan noted when rededicating the Statue of Liberty in 1986, "which of us does not think of … grandfathers and grandmothers, from so many places around the globe, for whom this statue was the first glimpse of America?" Remarks at the Opening Ceremonies of the Statute of Liberty Centennial Celebration (July 3, 1986), https://goo.gl/1qwq5N; *see also Foley v. Connelie*, 435 U.S. 291, 294 (1978) (describing America as "a nation of immigrants").

At the same time, America has long recognized the importance of protecting ourselves against those who would do us harm. But it has done so while maintaining our fundamental commitment to welcoming immigrants—through increased background checks and other controls on people seeking to

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[1] Counsel for *amici* certify that counsel for the other parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no person other than *amici* or its counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. 29(a)(4)(E).

enter our country.[2] For more than fifty years, moreover, immigration rules have been based on input from, and consideration of views advanced by, all relevant stakeholders—through congressional legislation and agency notice-and-comment rulemakings—with exceptions limited to temporary measures addressing emergency situations.

On January 27, 2017, "[o]ne week after inauguration and without interagency review," Executive Order 13,769, 82 Fed. Reg. 8977 (Jan. 29, 2017) ("First Executive Order"), was issued. *Hawaii v. Trump*, 859 F.3d 741, 756 (9th Cir.), *vacated*, 2017 WL 4782860 (U.S. 2017). That Order altered immigration policy in significant respects: it barred nationals of seven countries—Syria, Libya, Iran, Iraq, Somalia, Yemen, and Sudan—from entering the United States for at least 90 days (First Executive Order § 3(c)), with the possibility of expansion to additional countries (*id.* § 3(e)-(f)), and it gave the Secretaries of State and Homeland Security discretion to issue visas to affected nationals "on a case-by-case basis" (*id.* § 3(g)).

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[2] "In the decade since 9/11," immigration policy has incorporated, among other things, "major new border security and law enforcement initiatives, heightened visa controls and screening of international travelers and would-be immigrants, the collection and storage of information in vast new interoperable databases used by law enforcement and intelligence agencies, and the use of state and local law enforcement as force multipliers in immigration enforcement." Muzaffar Chishti & Claire Bergeron, Migration Pol'y Inst., *Post-9/11 Policies Dramatically Alter the U.S. Immigration Landscape* (Sept. 8, 2011), https://goo.gl/6rdagt.

On March 6, 2017, the First Executive Order was rescinded, and Executive Order 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) ("Second Executive Order"), was issued. That Order banned nationals from six countries for 90 days beginning on March 16—the same countries as the first order, omitting Iraq, but subjecting nationals from Iraq to intensive scrutiny—and otherwise contained many of the same deficiencies as the First Executive Order. Second Executive Order §§ 2(c), 4. That Order, too, was enjoined by multiple courts. *See, e.g.*, *Hawaii*, 859 F.3d 741; *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017).

On September 24, 2017, the Second Executive Order was supplanted by Presidential Proclamation 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (the "Proclamation"). The Proclamation bans nationals, in whole or in part, from *eight* countries: Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen. Proclamation § 2. The Proclamation again confers discretion on consular officers to "grant waivers on a case-by-case basis" to nationals from the designated countries. *Id.* § 3(c). And the Proclamation creates a procedure by which the Secretaries of Homeland Security and State can identify new countries to subject to the ban. *Id.* § 4(a)(ii). The Proclamation does not have an expiration date.

Like its prior iterations, the Proclamation effects a significant shift in the rules governing entry into the United States; injects substantial uncertainty and instability into the Nation's immigration system; and inflicts harm

on American companies, their employees, and the entire economy. It hinders the ability of American companies to attract talented employees; increases costs imposed on business; makes it more difficult for American firms to compete in the international marketplace; and gives global enterprises a new, significant incentive to build operations—and hire new employees—outside the United States.

The Proclamation is unlawful because it exceeds the executive branch's authority under the Nation's immigration laws. Narrow statutory provisions that authorize the executive branch to address emergency circumstances on a temporary basis do not license significant, permanent alterations to the immigration landscape.

Moreover, to bar a class of aliens from the United States, the executive branch must reasonably determine that their entry would be detrimental to the Nation, and then craft an order that reasonably addresses any threat that those individuals might pose. But the Proclamation neither explains why the targeted individuals' entry would be detrimental to the United States nor imposes reasonable restrictions.

Finally, Congress in 1965 prohibited discrimination in immigration decisions on the basis of national origin precisely so that the Nation would not shut its doors to immigrants based on where they come from—but the Proclamation does just that. It would turn the clock back and restore the national-origins system that Congress expressly abolished.

The Court accordingly should affirm the decision below barring enforcement of the Proclamation.

ARGUMENT

I. THE PROCLAMATION HARMS AMERICAN INNOVATION AND ECONOMIC GROWTH.

Immigration has a positive impact on the U.S. economy. The Proclamation, both via its direct effects and by its signaling to the world as a whole, hinders American innovation and economic growth.

A. Immigration provides significant benefits to the U.S. economy.

To begin with, immigrants are leading entrepreneurs. "The American economy stands apart because, more than any other place on earth, talented people from around the globe want to come here to start their businesses." P'ship for a New Am. Econ., *The "New American" Fortune 500*, at 5 (2011), http://goo.gl/yc0h7u. Indeed, "[i]mmigrants continue to be a lot more likely than the native-born to become entrepreneurs." Robert W. Fairlie et al., Ewing Marion Kauffman Found., *The 2016 Kauffman Index: Startup Activity* 7 (Aug. 2016), https://goo.gl/6Wr5Mc.

Some of these businesses are large. "Immigrants have started more than half (44 of 87) of America's startup companies valued at $1 billion dollars"—so-called "unicorns"—"and are key members of management and product development teams in over 70 percent (62 of 87) of these companies." Stuart Anderson, Nat'l Found. for Am. Pol'y, *Immigrants and Billion Dollar*

Startups 1 (Mar. 2016), https://goo.gl/Mk7iJM. Immigrants or their children founded more than 200 of the companies on the Fortune 500 list, including Apple, Kraft, Ford, General Electric, AT&T, Google, McDonald's, Boeing, and Disney. P'ship for a New Am. Econ., *supra*, at 1-2. Collectively, these companies generate annual revenue of $4.2 trillion and employ millions of Americans. *Id*. at 2.

Many of these businesses are small. "While accounting for 16 percent of the labor force nationally and 18 percent of business owners, immigrants make up 28 percent of Main Street business owners." Americas Soc'y & Council of the Americas, *Bringing Vitality to Main Street* 2 (2015), https://goo.gl/i9NWc9. These are "the shops and services that are the backbone of neighborhoods around the country." *Id*. In 2011, immigrants opened 28% of all new businesses in the United States. *See* P'ship for a New Am. Econ., *Open For Business: How Immigrants Are Driving Small Business Creation in the United States* 3 (Aug. 2012), https://goo.gl/zqwpVQ.

Immigrant entrepreneurs come from all parts of the world. In 2014, "19.1 percent of immigrants from the Middle East and North Africa were entrepreneurs." New Am. Econ., *Reason for Reform: Entrepreneurship* 2 (Oct. 2016), https://goo.gl/QRd8Vb.

Immigrants also fuel the growth of the economy as a whole. "When immigrants enter the labor force, they increase the productive capacity of the economy and raise GDP. Their incomes rise, but so do those of natives." Pia

Orrenius, George W. Bush Inst., *Benefits of Immigration Outweigh the Costs*, The Catalyst (2016), https://goo.gl/qC9uOc. Immigrants thus create new jobs for U.S. citizens "through the businesses they establish … [and] play an important role in job creation in both small and large businesses." U.S. Chamber of Commerce, *Immigration: Myths and Facts* 3 (2016), https://goo.gl/NizPEQ.

Immigrants are also innovators. Since 2000, more than one-third of all American Nobel Prize winners in Chemistry, Medicine, and Physics have been immigrants. *See* Stuart Anderson, *Immigrants Flooding America with Nobel Prizes*, Forbes (Oct. 16, 2016), http://goo.gl/RILwXU. Among individuals with advanced educational degrees, immigrants are nearly three times more likely to file patents than U.S.-born citizens. Michael Greenstone & Adam Looney, The Hamilton Project, *Ten Economic Facts About Immigration* 11 (Sept. 2010), https://goo.gl/3zpdpn. By one estimate, noncitizen immigrants were named on almost a quarter of all U.S.-based international patent applications filed in 2006. Vivek Wadhwa et al., *America's New Immigrant Entrepreneurs* 4 (Jan. 4, 2007), https://goo.gl/wCIySz. And children of immigrants made up 83% of the top-performing students in the well-known Intel high school science competition. Stuart Anderson, Nat'l Found. for Am. Pol'y, *The Contributions of the Children of Immigrants to Science in America* 1-3, 5, 12 (Mar. 2017), https://goo.gl/7noMyC.

B. The Proclamation abandons the principles that have undergirded U.S. immigration policy for more than half a century—clear, settled standards and constrained discretion. It introduces sudden changes without an opportunity for affected parties to inform decisionmakers of the consequences of those changes before their adoption, provides unclear standards for implementation, and leaves entirely to individual officers' discretion the exercise of case-specific waiver authority.

Moreover, nothing limits future executive branch changes in the immigration system to the matters addressed in this Proclamation. Businesses need a predictable, stable system so they can make long-term personnel and investment decisions and be certain that they will be able to interact with their global customers. The continuing risk of additional, unanticipated changes in immigration rules creates significant uncertainty that imposes a substantial burden on managing global businesses and planning for the future. The Proclamation will make it more difficult and expensive for U.S. companies to recruit, hire, and retain some of the world's best employees. It will disrupt ongoing business operations—making it harder for U.S. companies to compete in today's global markets. And it will inhibit investment in the United States. That will inflict significant harm on American business, innovation, and economic growth.

The Proclamation does so by injecting intolerable uncertainty in the immigration system. It impairs necessary business travel. And it creates a

strong incentive for businesses and entrepreneurs to grow their companies outside the United States.

First, the Proclamation establishes a system of "case-by-case" exceptions from its ban on nationals from eight countries, but leaves the application of those exceptions to the discretion of Customs and Border Protection—setting forth a non-exhaustive list of circumstances in which such exceptions "*may be* appropriate." Proclamation § 3(c) (emphasis added). Because individual immigration officers retain broad discretion in issuing these individual-by-individual exceptions, it is unclear what exemptions will actually be given, or why—and whether that authority is being exercised fairly and without discrimination or favoritism.

Even more important, the Proclamation provides that the ban, and its accompanying standardless exception process, may be expanded to include an unspecified number of additional countries if those nations do not provide information the Secretaries of Homeland Security and State deem necessary to approve visas. *See* Proclamation § 4(a). Individuals and businesses thus face the significant risk that new, as-yet-unidentified countries will be added to the ban—all without any governing standard.

The Proclamation will have the immediate, adverse consequences of making it far more difficult and expensive for U.S. companies to hire the world's best talent and compete effectively in the global marketplace. Businesses and employees have little incentive to go through the laborious process

of sponsoring or obtaining a visa, and relocating to the United States, if an employee may be unexpectedly halted at the border. Skilled individuals will not wish to immigrate to this country if they may be cut off without warning from their spouses, grandparents, relatives, and friends—they will not pull up roots, incur significant economic risk, and subject their family to considerable uncertainty to immigrate to the United States in the face of this instability. Seth Fiegerman, *Former Google Exec Calls Trump Travel Ban an 'Enormous Problem,'* CNN Tech (Jan. 30, 2017), https://goo.gl/vNVgLt. The Proclamation therefore significantly disadvantages U.S. companies in the global competition for talent.

Second, the Proclamation's bans on travel also will significantly impair day-to-day business. The marketplace for today's businesses is global. Companies routinely send employees across borders for conferences, meetings, or job rotations, and invite customers, clients, or users from abroad. Global mobility is critical to businesses whose customers, suppliers, users, and workforces are spread all around the world. *See, e.g.*, BGRS, *Breakthrough to the Future of Global Talent Mobility* (2016), http://goo.gl/ZhIxSr; Harv. Bus. Rev., *Strategic Global Mobility* (2014), http://goo.gl/AV3nhJ.

Global business travel enables employees to develop new skills, take on expanded roles, and stay abreast of new technological or business developments. It also facilitates new markets and business partnerships. Indeed, one study has shown that each additional international business trip increases

exports from the United States to the visited country by, on average, over $36,000 per year. Maksim Belenkiy & David Riker, *Face-to-Face Exports: The Role of Business Travel in Trade Promotion*, 51 J. Travel Res. 632, 637 (2012); *see also* Nune Hovhannisyan & Wolfgang Keller, *International Business Travel: An Engine of Innovation?*, 20 J. Econ. Growth 75 (2015).

But the Proclamation will mean that many companies and employees (both inside and outside the United States) would be unable to take advantage of these opportunities. The Proclamation will prevent companies from inviting customers to the United States and prevent employees from outside the United States from traveling here. That is true even for persons or countries not currently covered by the Proclamation because there is no way to know whether or when a country may be added to the no-entry list.

The Proclamation also could lead to retaliatory actions by other countries, which would seriously hinder U.S. companies' ability to do business or negotiate business deals abroad. U.S. companies' deals have already been threatened. *See, e.g.*, Jeff Daniels, *Trump Immigration Ban Puts $20 Billion in Boeing Aircraft Sales to Iran, Iraq at Risk*, CNBC (Jan. 30, 2017), https://goo.gl/uT2goG; Tara Palmeri & Bryan Bender, *U.S. Diplomats Warning GE's Major Deals in Iraq at Risk over Travel Ban*, Politico (Feb. 1, 2017), http://goo.gl/nhj9CZ.

***Third*,** the Proclamation will incentivize both immigration to and investment in foreign countries rather than the United States. Highly skilled

individuals will be more interested in working elsewhere, in places where they and their colleagues can travel freely and with assurance that their immigration status will not suddenly be revoked. Other countries have already begun "actively pursuing foreign investors and entrepreneurs, with the aim of increasing investment and creating jobs for the benefit of the national economy." *International Migration Outlook 2017*, Org. Econ. Co-operation & Dev. 46 (41st ed. 2017).

Non-U.S. companies have taken note, too. Multinational companies will have strong incentives, including pressure from their own employees, to base operations outside the United States or to move or hire employees and make investments abroad. Foreign companies will have significantly less incentive to establish operations in the United States and to hire American citizens, because the Proclamation will preclude the ability of those companies to employ their world-class talent within their U.S. subsidiaries. Ultimately, American workers and the economy will suffer as a result.

Of course, the federal government can and should implement targeted, appropriate adjustments to our country's immigration system to enhance the Nation's security. But a broad, open-ended ban—together with the indication that the ban could be expanded to other countries, or that additional, different restrictions could be adopted, without notice—will undermine rather than protect American interests, producing serious, widespread adverse conse-

quences without any reasonable relationship to the goal of making the country more secure.

II. THE PROCLAMATION IS UNLAWFUL.

The Proclamation is unlawful for several reasons. We focus on three. *First*, the Immigration and Nationality Act ("INA") does not authorize the use of unilateral executive action to fundamentally and permanently change the character of the Nation's immigration laws. *Second*, the Proclamation is not authorized by Section 1182 or the Immigration and Nationality Act as a whole; the Proclamation lacks an adequate finding of detriment; it conflicts with other relevant statutory provisions; and it fails to comply with necessary procedural requirements. And *third*, the Proclamation violates the nondiscrimination requirement of Section 1152.

A. The INA does not authorize the executive branch to implement unilateral, permanent revisions of the Nation's immigration laws.

The government relies primarily on the President's power under the INA to "suspend the entry of … any class of aliens" whose entry he finds "would be detrimental to the interests of the United States … for such period as he shall deem necessary." 8 U.S.C. § 1182(f). It also points to Section 1185(a), which permits the President to issue "reasonable rules, regulations, and orders" and "limitations and exceptions" for the entry of immigrants and nonimmigrants. Those grants of authority, the government claims, give the

executive branch unilateral authority to put in place a permanent ban on admitting any category of aliens, for any reason.

But these statutory provisions do not confer such unlimited authority. No other administration has used these statutes to presumptively prohibit the entry of millions of foreign nationals solely on the basis of their nationality—and in perpetuity. The text and context of Sections 1182(f) and 1185(a) make clear that an exercise of authority must be limited to a specific, emergency situation. The Proclamation here exceeds those limitations.

By its terms, Section 1182(f) allows the executive branch to "suspend" the entry of certain aliens for a designated "period"—not to prohibit entry by those aliens in perpetuity. In other words, Section 1182(f) is a gap-filler provision, authorizing targeted, temporary action to respond to an emergency situation. *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (explaining that Section 1182(f) "provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the [inadmissibility] categories in [S]ection 1182(a)").

That was the context in which the language contained in Section 1182(f) was enacted. *See* page 18, *infra*. And it is how past administrations have employed this authority since 1952, each time issuing a targeted restriction, usually limited to dozens or hundreds of people on the grounds that each affected person had engaged in culpable conduct, such as human trafficking, illegal entry, or corruption. *See* Kate M. Manuel, Cong. Research

Serv., *Executive Authority to Exclude Aliens: In Brief* 6-10 (Jan. 23, 2017), https://goo.gl/D0bRkS. This consistent executive branch practice is powerful evidence of the limited reach of the provision, and it is consistent with the context of Section 1182(f)—as one provision in an extraordinarily detailed set of statutory rules, elaborated in administrative regulations, that govern the issuance of visas and entry of aliens.

Similarly, Section 1185(a) permits the President to issue "*reasonable* rules, regulations, and orders" regarding the entry of aliens into the United States. 8 U.S.C. § 1185(a)(1) (emphasis added). It does not purport to give the executive branch authority to engage in wholesale, permanent revision of the Nation's immigration laws. Were it otherwise, the executive could usurp Congress's power under Article I, Section 8 to "establish a uniform rule of naturalization." *See also Arizona v. United States*, 567 U.S. 387, 409 (2012) ("Policies pertaining to the entry of aliens and their right to remain here are … entrusted exclusively to Congress.") (quotation omitted).

The Proclamation here exceeds the powers granted under these two statutory headings. It applies to millions of people, sweeping them in because of their nationality, rather than on the basis of culpable conduct. And unlike the first two executive actions, the Proclamation does not expire—meaning that it is the polar opposite of a time-limited, gap-filling measure. It is, instead, the replacement of the scheme devised by Congress with a new system crafted by the executive branch. That the INA does not permit.

B. The Proclamation exceeds the authority conferred by Section 1182.

Even assuming that Section 1182 confers authority to permanently revise the Nation's immigration laws, the Proclamation fails to do so in a manner that comports with the statute.

1. The Proclamation does not contain a finding sufficient to justify exercise of the authority conferred by Section 1182(f).

The text of Section 1182(f) is clear: the President may only suspend the entry of aliens if he "finds" that their entry "would be detrimental to the interests of the United States." Congress could not have made it more plain that it did not intend to confer upon the executive branch unbounded power to bar aliens, and instead conditioned authority under Section 1182(f) upon an adequate finding of detriment.

That Congress required such a finding is unsurprising, for Congress may delegate power only if "the executive judgment is limited by adequate standards." *Carlson v. Landon*, 342 U.S. 524, 544 (1952). An "intelligible principle" must guide the exercise of delegated power. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). For this reason, the Court has consistently identified limits on discretionary authority delegated by Congress, even when confronted with a clause that seems "limitless" when read "in isolation and literally." *United States v. Witkovich*, 353 U.S. 194, 198-202 (1957); *see, e.g.*, *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (rejecting the view that "simply be-

cause a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice"); *Kent v. Dulles*, 357 U.S. 116, 127, 128 (1958) (considering the power to issue passports, the Court observed that the executive's authority was "expressed in broad terms," but refused to "impute to Congress … a purpose to give [the executive] unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose").

Here, moreover, the text contains a clear limitation on presidential action: authority under Section 1182 is contingent on finding that the specified aliens' entry would be "detrimental to the interests of the United States." A reasonable finding of the requisite "detriment[]" thus "constitute[s] a condition precedent to embarking upon the exercise of regulatory power"—and such action is invalid in the absence of such a reasonable determination. *Amoco Oil Co. v. Envtl. Prot. Agency*, 501 F.2d 722, 736 (D.C. Cir. 1974). Indeed, courts in a variety of contexts analyze whether the executive branch has reasonably made the findings specified by Congress as prerequisites for executive action. *See, e.g., Mobil Oil Expl. & Producing Se. Inc. v. United Distribution Cos.*, 498 U.S. 211, 227 (1991); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 642 (1980); *United Distribution Cos. v. F.E.R.C.*, 88 F.3d 1105, 1139 (D.C. Cir. 1996).

The executive branch must therefore meet a standard of reasonableness in exercising Section 1182(f) authority. *Witkovich*, 353 U.S. at 198-202 (hold-

ing that authority to request information that the Attorney General "may deem fit and proper" had an implicit limit of reasonableness). That conclusion accords with the longstanding interpretation of the statute by the Executive Branch. *See Immigration Laws and Iranian Students*, 4A Op. O.L.C. 133, 140 (1979) (recognizing that any suspension under Section 1182(f) "must meet the test of 'reasonableness'").

In addition, the permissible justifications for the exercise of this authority are limited by the context in which Congress acted when it adopted the language codified in Section 1182(f). Congress drew that text from a series of narrowly drawn wartime statutes, proclamations, and regulations permitting the executive branch to exclude only limited classes of aliens, for limited periods of time, to address emergency situations. *See* Br. for Resp'ts at 31-36, *Hawaii v. Trump*, No. 16-1540 (U.S. Sept. 11, 2017). That context restricts how the authority conferred by Section 1182 may be employed. *Zemel*, 381 U.S. at 17-18 (statute "must take its content from history"); *Kent*, 357 U.S. at 128 (grounds for refusing passport limited to those that "it could fairly be argued were adopted by Congress in light of prior administrative practice").

The Proclamation transgresses this limitation on executive authority. It provides barely any justification for why the admission of aliens it bans from the United States—based on nothing more than their national origin—would be detrimental to the Nation. Its express aim is to protect U.S. "citizens from terrorist attacks and other public-safety threats," by preventing "foreign na-

tionals who may … pose a safety threat … from entering the United States." Proclamation, pmbl. But it "makes no finding that nationality alone renders entry of this broad class of individuals a heightened security risk to the United States." *Hawaii*, 859 F.3d at 772; *see also IRAP*, 857 F.3d at 610 (Keenan, J., concurring).

Certainly there is no reasonable basis to conclude that nationals of Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen, simply by virtue of their national origin, will commit terrorist activities upon entry to the United States.[3] Indeed, the ban applies to hundreds of thousands of students, employees, and family members of citizens who have been previously admitted to the United States—and thus who the United States, after careful, individualized review, concluded that their admission to the United States posed no security risk to the Nation.

The past history of admitting these individuals is especially important because "[t]here is no finding that present vetting standards are inadequate." *Hawaii*, 859 F.3d at 771. The Proclamation simply recites well-known facts

[3] Indeed, the administration itself did not think so until it found itself embroiled in litigation. As the Ninth Circuit noted, "a draft report from DHS, prepared about one month after EO1 issued and two weeks prior to EO2's issuance, concluded that citizenship 'is unlikely to be a reliable indicator of potential terrorist activity' and that citizens of countries affected by EO1 are '[r]arely [i]mplicated in U.S.-[b]ased [t]errorism.'" *Hawaii*, 859 F.3d at 759 (alterations in original).

regarding these countries *as a whole*, ignoring that no alien from these countries admitted to the United States has engaged in terroristic activity.

The Proclamation's purported rationale falls short for other reasons. It "contains internal incoherencies" (*Hawaii v. Trump*, --- F. Supp. 3d ---, 2017 WL 4639560, at *11 (D. Haw. Oct. 17, 2017)): some countries that failed to meet the government's information-sharing standards are not included in the ban, and vice versa, and the Proclamation offers no rationale for banning some types of visitors from some countries but not others. It is both overinclusive and underinclusive: its focus on nationality "could have the paradoxical effect of barring entry by a Syrian national who has lived in Switzerland for decades, but not a Swiss national who has immigrated to Syria during its civil war." *Hawaii*, 859 F.3d at 773 (quotation omitted). And its reliance on the exclusion of several listed countries from the Visa Waiver Program is unconvincing: "[r]ather than setting an outright ban on entry of nationals from those countries, Congress … instead required that persons who are nationals of or have recently traveled to these countries enter the United States with a visa." *Id.* at 774.

It is no surprise that the Proclamation falls back on a different rationale: that the designated countries, with the exception of Somalia "continue to have 'inadequate' identity-management protocols, information-sharing practices, and risk factors." Proclamation § 1(g). But "the statutory text plainly requires more than vague uncertainty regarding whether their [nationals']

entry might be detrimental to our nation's interest." *IRAP*, 857 F.3d at 610 (Keenan, J., concurring). Nor does the purported need to encourage these countries to improve their practices amount to the statutorily required finding that the entry of nationals from these countries "would be detrimental" to the United States. Claimed "uncertainty" cannot constitute a reason for banning 140 million people from the United States based on nothing more than their nationality.

2. The Proclamation conflicts with other provisions of the INA.

The Proclamation also displaces the INA's specific requirements for excluding aliens on the basis that they might commit acts of terrorism. *See* 8 U.S.C. § 1182(a)(3)(B). That statute—"a complex provision with 10 different subsections" that "cover[s] a vast waterfront of human activity" (*Kerry v. Din*, 135 S. Ct. 2128, 2145 (2015) (Breyer, J., dissenting))—provides a detailed scheme for determining when an alien may be excluded based on a potential to commit terrorist acts. Specifically, an alien who has never before engaged in terrorist activities or joined a terrorist organization may be excluded only if the government has a "reasonable ground to believe" that the alien "is likely to engage after entry in any terrorist activity." 8 U.S.C. § 1182(a)(3)(B)(i)(II).

The Proclamation's system of ad hoc waivers turns that provision on its head. Instead of creating a presumption of *admittance* absent any "reasona-

ble ground" to think an alien will commit terrorist activities—as Section 1182(a)(3)(B) requires—the Proclamation creates a presumption of *exclusion* and leaves it to Customs and Border Protection to decide whether an alien has demonstrated, "to the consular officer's … satisfaction," that he or she would not threaten national security. Proclamation § 3(c)(i).

The Proclamation thus eliminates Congress's substantive requirement that there be reasonable grounds to exclude an alien on the basis of the threat of future acts of terrorism. And it does so without even attempting to explain why changed circumstances or other facts make Congress's determinations inadequate to protect the Nation.[4]

As construed by the government, therefore, Section 1182(f) would allow the executive branch to rewrite *all* of Congress's detailed rules for when aliens may be excluded, set forth in detail in Section 1182(a). "[T]he statute lists thirty-three distinctly delineated categories that conspicuously provide standards to guide the Executive in its exercise of the exclusion power." *Abourezk*, 785 F.2d at 1051. But if the executive may ban groups of aliens at will, even for reasons that contradict the standards specified by Congress, it could "thereby effectively nullify[] that complex body of law." *IRAP*, 857 F.3d

[4] In addition, Congress in 2015 specifically considered the risk that travelers from these countries might engage in terrorism, and addressed it by exempting them from the visa waiver program. *See* Pub. L. 114-113, div. O, tit. II, § 203, 129 Stat. 2242 (codified at 8 U.S.C. § 1187(a)(12)). That congressional determination, too, is overridden by the Proclamation without any justification or explanation.

at 609 (Keenan, J., concurring); *see also Abourezk*, 785 F.2d at 1057 ("The Executive may not use subsection (27) to evade the limitations Congress appended to subsection (28).").

Indeed, were the Court to uphold the Proclamation here, an administration could use Section 1182(f) to rewrite the immigration laws in their entirety, prescribing via executive order an entire new regime—with standards for issuing visas and excluding aliens wholly different from those prescribed by Congress. Section 1182(f) does not, as the government would have it, empower the executive to nullify duly enacted immigration laws at will. If it did, such a delegation of authority would pose severe constitutional concerns.

3. The Proclamation is procedurally unreasonable.

The comprehensive revision of the immigration system effected by the Proclamation—and the executive orders that apparently will follow—improperly circumvents Congress's directive that significant changes in immigration rules be implemented through notice and comment rulemaking.

Sections 2(a) to 2(f) of the Proclamation effectively create a new immigration system pursuant to which the Secretary of Homeland Security, the Secretary of State, and the Director of National Intelligence determine what unspecified "information" countries must share with the United States in order to allow their nationals to enter this country. Then, these officials may

recommend to the President an expansion or extension of the ban on entry to the United States.

In addition, the Proclamation confers effectively unconstrained discretion on consular officers and customs officials to "grant waivers on a case-by-case basis to permit the entry of foreign nationals for whom entry is otherwise suspended or limited." Proclamation § 3(c). Other than listing a series of nonexclusive considerations, the Proclamation neither proscribes a procedural mechanism for this exercise of discretion, nor establishes substantive guideposts to govern the exercise of this broad discretion.

Congress expressly identified the need for rulemaking in the INA, authorizing the President to impose "reasonable rules, regulations, and orders." 8 U.S.C. § 1185(a). But no such rulemaking occurred here, notwithstanding the Proclamation's broad applicability. Moreover, while the Administrative Procedure Act does not generally apply to the President's actions (*see Dalton v. Specter*, 511 U.S. 462, 469 (1994)), it *does* apply to the subsequent conduct of the Departments of State and Homeland Security, which must ultimately implement the Proclamation.

Rulemaking "foster[s] … fairness and deliberation" (*United States v. Mead Corp.*, 533 U.S. 218, 230 (2001)), and gives "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (rulemaking process

ensures that an agency has not "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency").

Here, the notice-and-comment process is particularly important given the huge range of individuals and entities affected by these rules, such as families seeking to reunite, or even just to have the opportunity to visit one another; businesses wishing to interact with customers, to enable employees to obtain experience at their home offices in the United States, or to hire individuals with expertise not otherwise available; and cultural institutions planning performances by artists from outside the United States. For these reasons, Section 1182(f) does not provide a means of circumventing the ordinary rulemaking process for promulgating legal principles of general applicability.

C. The Proclamation violates Section 1152's non-discrimination requirement.

The Proclamation separately contravenes 8 U.S.C. § 1152(a)(1)(A), which provides that "no person shall … be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." "Congress could hardly have chosen more explicit language" to "unambiguously direct[] that no nationality-based discrimination" shall occur with respect to immigration. *Legal Assistance for Viet-*

namese Asylum Seekers v. *Dep't of State*, 45 F.3d 469, 473 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996).

Congress enacted Section 1152 "to eliminate the 'national origins system as the basis for the selection of immigrants to the United States.'" J.A. 1209 (quoting H.R. Rep. No. 89-745, at 8 (1965)). That system, as President Johnson explained, "was incompatible with our basic American tradition" that we "ask not where a person comes from but what are his personal qualities." H.R. Rep. No. 89-745, at 11. Congress replaced the national origins system with "a new system of selection designed to be fair, rational, humane, and in the national interest" (S. Rep. No. 89-748, at 13 (1965)), based largely on "the advantage to the United States of the special talents and skills of the immigrant." H.R. Rep. No. 89-745, at 18.

On its face, the Proclamation discriminates on the basis of nationality and therefore violates Section 1152. Although the Proclamation purports to bar only the entry of designated foreign nationals, "the denial of entry to immigrants would generally have the effect of causing the denial of immigrant visas." J.A. 1037. That is precisely what Section 1152 prohibits. *Id.*; *accord Vayeghan v. Kelly*, 2017 WL 396531, at *1 (C.D. Cal. Jan. 29, 2017).[5]

[5] The Proclamation also cannot be defended as creating "procedures for the processing of immigrant visa applications" (8 U.S.C. § 1152(a)(1)(B)). That statute—at most—permits the executive to regulate the manner in which foreign nationals can receive visas or enter the United States, but does not authorize a sweeping ban on nationals from eight countries.

Section 1152 must be understood to constrain the powers granted by Section 1182(f). As the Ninth Circuit explained, Section 1152 was enacted after Section 1182, "and sets a limitation on the President's broad authority to exclude aliens—he may do so, but not in a way that discriminates based on nationality." *Hawaii*, 859 F.3d at 778; *see, e.g.*, *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("[W]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.") (quotation omitted). And Section 1152 also "specifically identifies exemptions from the non-discrimination mandate, implying that unmentioned sections are not exempted." *Hawaii*, 859 F.3d at 778.

The government asserts that there is no conflict between the Proclamation and Section 1152 because "Section 1152(a) does not even require issuing immigrant visas to aliens whose entry has been validly suspended based on nationality under Sections 1182(f) and 1185(a)." Gov. Opening Br. 35. That, as Judge Wynn explained before, "is nonsensical." *IRAP*, 857 F.3d at 636 (Wynn, J., concurring). It makes no difference that the aliens who are banned by the Proclamation cannot receive visas because they are barred from entering the United States when the *reason* for that bar is their national origin. And now that "the Proclamation has effectively imposed a permanent, rather than temporary, ban on immigrants from the Designated Countries, … the

bar on entry is the equivalent of a ban on issuing immigrant visas based on nationality." J.A. 1038.

The executive branch may not use Section 1182 to circumvent Congress's express prohibition on nationality-based discrimination by shifting the step in the process at which that discrimination occurs. Congress could not have intended to prohibit discrimination at the embassy but permit it at the airport gate. Congress instead commanded "that government must not discriminate against particular individuals because of the color of their skin or the place of their birth," because such discrimination "is unfair and unjustified" wherever it occurs. *Olsen v. Albright*, 990 F. Supp. 31, 39 (D.D.C. 1997).

In sum, the Proclamation exceeds the authority conferred by Section 1182—but even if it does not, it nonetheless violates the ban on nationality-based discrimination codified in Section 1152.[6]

CONCLUSION

The Court should affirm the district court's decision enjoining enforcement of the Proclamation.

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[6] To be sure, the text of Section 1152 only prohibits discrimination with respect to immigrant visas. But the basic nondiscrimination principle that it embodies is reflected throughout U.S. law. *Olsen*, 990 F. Supp. at 33 (addressing nonimmigrant visas). Section 1182(f) therefore does not confer authority to discriminate on this basis with respect to nonimmigrant visas in the absence of a reasonable justification for displacing this fundamental principle. Such a justification is lacking here.

Respectfully submitted,

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Dated: November 17, 2017

APPENDIX A

LIST OF *AMICI CURIAE*

1. A Medium Corporation
2. Adobe Systems Incorporated
3. AdRoll, Inc.
4. Affirm, Inc.
5. Airbnb, Inc.
6. Akamai Technologies, Inc.
7. Alation, Inc.
8. Amazon.com, Inc.
9. Ampush LLC
10. Atlassian Corp. Plc
11. Automattic/WordPress.com
12. Azavea Inc.
13. Bigtooth Ventures
14. Box, Inc.
15. Braze, Inc. (formerly Appboy, Inc.)
16. Brightcove Inc.
17. Brocade Communications Systems, Inc
18. CareZone Inc.

19. Casper Sleep Inc.
20. Castlight Health
21. Cavium, Inc.
22. Checkr Inc.
23. Chegg, Inc.
24. Chobani, LLC
25. Cloudera, Inc.
26. Cloudflare, Inc.
27. Codecademy
28. Color Genomics, Inc.
29. Credit Karma, Inc.
30. DoorDash
31. Dropbox, Inc.
32. eBay Inc.
33. Electronic Arts Inc.
34. Evernote
35. General Assembly Space, Inc.
36. Glassdoor
37. Google Inc.
38. Greenough Consulting Group

39. HP Inc.

40. IDEO LLP

41. Imgur, Inc.

42. Indiegogo, Inc.

43. Intel Corporation

44. Kargo

45. Knotel

46. Levi Strauss & Co.

47. Linden Research, Inc. d/b/a Linden Lab

48. LinkedIn Corporation

49. Lithium Technologies, LLC

50. Lyft, Inc.

51. Mapbox, Inc.

52. Marin Software Incorporated

53. Medallia, Inc.

54. Medidata Solutions, Inc.

55. Microsoft Corporation

56. MongoDB, Inc.

57. Mozilla Corporation

58. MPOWERD Inc.

59. NETGEAR, Inc.

60. NewsCred, Inc.

61. NIO USA, Inc.

62. Oath, Inc.

63. Pandora Media, Inc.

64. PayPal Holdings, Inc.

65. Pinterest, Inc.

66. Pixability, Inc.

67. Postmates Inc.

68. Quantcast Corp.

69. RealNetworks, Inc.

70. Redfin Corporation

71. Salesforce.com, Inc.

72. Scopely, Inc.

73. Shutterstock, Inc.

74. Sizmek, Inc.

75. Snap Inc.

76. Spacex

77. Spokeo, Inc.

78. Spotify USA Inc.

79. Stripe, Inc.

80. SugarCRM

81. SurveyMonkey Inc.

82. Tesla, Inc.

83. TripAdvisor, Inc.

84. Turo Inc.

85. Twilio Inc.

86. Twitter Inc.

87. Uber Technologies, Inc.

88. Udacity, Inc.

89. Verizon Communications Inc.

90. Via Transportation, Inc.

91. Warby Parker

92. Wikimedia Foundation, Inc.

93. Work & Co.

94. Yelp Inc.

95. Zendesk, Inc.

96. Zymergen Inc.

APPENDIX B

CORPORATE DISCLOSURE FOR *AMICI CURIAE*

1. A Medium Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.

2. Adobe Systems Incorporated has no parent corporation and no publicly held corporation owns 10% or more of its stock.

3. AdRoll, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

4. Affirm, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

5. Airbnb, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

6. Akamai Technologies, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

7. Alation, Inc. has no parent company and no publicly held company holds 10% or more of its stock.

8. Amazon.com, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

9. Ampush LLC has no parent corporation and no publicly held corporation owns 10% or more of its stock.

10. Atlassian Corp. Plc has no parent corporation and no publicly held corporation owns 10% or more of its stock

11. Automattic Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

12. Azavea Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

13. Bigtooth Ventures has no parent corporation and no publicly held corporation owns 10% or more of its stock.

14. Box, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

15. Braze, Inc. (formerly Appboy, Inc.) has no parent corporation and no publicly held corporation owns 10% or more of its stock.

16. Brightcove Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

17. Brocade Communications Systems, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

18. CareZone Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

19. Casper Sleep Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

20. Castlight Health has no parent corporation and no publicly held corporation owns 10% or more of its stock.

21. Cavium, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

22. Checkr, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

23. Chegg, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

24. Chobani Global Holdings, LLC is the sole member of Chobani, LLC and no publicly held corporation owns 10% or more of the membership interest in either entity.

25. Cloudera, Inc. has no parent corporation and the following publicly held corporation own 10% or more of its stock: Intel Corporation.

26. Cloudflare, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

27. Ryzac, Inc. d/b/a Codecademy has no parent corporation and Naspers, Ltd., a publicly held corporation, indirectly owns 10% or more of its stock.

28. Color Genomics, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

29. Credit Karma, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

30. DoorDash has no parent corporation and no publicly held corporation owns 10% or more of its stock.

31. Dropbox, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

32. eBay Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

33. Electronic Arts Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

34. Evernote Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.

35. General Assembly Space, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

36. Glassdoor, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

37. Google Inc. is a wholly owned subsidiary of Alphabet Inc. Alphabet Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

38. Greenough Consulting Group has no parent corporation and no publicly held corporation owns 10% or more of its stock.

39. HP Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

40. IDEO LLP has no parent corporation and the following publicly held corporation owns 10% or more of its stock: Steelcase, Inc.

41. Imgur, Inc. is a privately-held Delaware corporation. No public corporation owns 10% or more of its stock.

42. Indiegogo, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

43. Intel Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.

44. Kargo has no parent corporation and no publicly held corporation owns 10% or more of its stock.

45. Knotel has no parent corporation and no publicly held corporation owns 10% or more of its stock.

46. Levi Strauss & Co. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

47. Linden Research, Inc. d/b/a Linden Lab has no parent corporation and no publicly held corporation owns 10% or more of its stock.

48. LinkedIn Corporation's parent corporation is Microsoft Corporation, and the following publicly held corporation owns 10% or more of its stock: Microsoft Corporation.

49. Lithium Technologies, LLC's parent corporation is Vista Equity Partners and no publicly held corporation owns 10% or more of its stock.

50. Lyft, Inc. has no parent corporation and the following publicly held corporation own 10% or more of its stock: Rakuten, Inc., a publicly held corporation traded on the Tokyo Stock Exchange, and General Motors Company, a publicly held corporation traded on the New York Stock Exchange, each own more than ten percent of Lyft's outstanding stock, in each case through a subsidiary.

51. Mapbox, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

52. Marin Software Incorporated has no parent corporation and no publicly held corporation owns 10% or more of its stock.

53. Medallia, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

54. Medidata Solutions, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

55. Microsoft Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.

56. MongoDB, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

57. Mozilla Corporation's parent corporation is Mozilla Foundation and no publicly held corporation owns 10% or more of its stock.

58. MPOWERD Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

59. NETGEAR, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

60. NewsCred, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

61. NIO USA, Inc. is a wholly-owned subsidiary of NIO Limited, a Hong Kong company, which is a wholly-owned subsidiary of NIO Inc., a Cayman company.

62. Oath Inc's parent corporation is Verizon Business Network Services Inc. No publicly held corporation owns 10% or more of its stock.

63. Pandora Media, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

64. PayPal Holdings, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

65. Pinterest, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

66. Pixability, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

67. Postmates Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

68. Quantcast Corp. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

69. RealNetworks, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

70. Redfin Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.

71. Salesforce.com, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

72. Scopely, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

73. Shutterstock, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

74. Sizmek, Inc. is owned by Vector Capital. No public company owns 10% or more of its stock.

75. Snap Inc. has no parent corporation and the following publicly held corporation owns 10% or more of its stock: Tencent Holdings Ltd., together with its affiliates.

76. Space Exploration Technologies Corp. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

77. Spokeo, Inc. has no parent corporation and there are no publicly-held corporations that own 10% or more of Spokeo, Inc.'s stock.

78. Spotify USA Inc. is a wholly-owned subsidiary of Spotify AB, a company organized under the laws of Sweden. Spotify AB is a wholly-owned subsidiary of Spotify Technology S.A., a company organized under the laws of the Grand Duchy of Luxembourg. Spotify Technology S.A. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

79. Stripe, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

80. SugarCRM has no parent corporation and no publicly held corporation owns 10% or more of its stock.

81. SurveyMonkey Inc.'s parent corporation is SVMK Inc. and no publicly held corporation owns 10% or more of its stock.

82. Tesla, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

83. TripAdvisor, Inc. has no parent corporation and the following publicly held corporation owns 10% or more of its stock: Liberty TripAdvisor Holdings, Inc.

84. Turo Inc. has no parent corporation and no publicly help corporation owns 10% or more of its stock.

85. Twilio Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

86. Twitter Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

87. Uber Technologies, Inc. has no parent entity and no publicly held corporation holds 10% or more of its stock.

88. Udacity, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

89. Verizon Communications Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

90. Via Transportation, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

91. JAND, Inc. d/b/a Warby Parker has no parent corporation and no publicly held corporation owns 10% or more of its stock.

92. Wikimedia Foundation, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

93. WorkAndCo International Inc. d/b/a Work & Co. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

94. Yelp Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

95. Zendesk, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

96. Zymergen Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

CERTIFICATE OF COMPLIANCE

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

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 6,482 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) 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 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: November 17, 2017 /s/ *Andrew J. Pincus*

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2017, I filed the foregoing Brief of Technology Companies As *Amici Curiae* via the CM/ECF system and served the foregoing via the CM/ECF system on all counsel who are registered CM/ECF users.

Dated: November 17, 2017 /s/ *Andrew J. Pincus*

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

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COUNSEL FOR: Technology Companies

_____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

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I certify that on November 17, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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