No. 17-35105

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON, *ET AL*

Plaintiffs-Appellees

v.

DONALD J. TRUMP, *ET AL*.

Defendants-Appellants

ON APPEAL FROM THE WESTERN DISTRICT OF WASHINGTON

RAISING POLITICAL QUESTION NONJUSTICIABILITY, A BRIEF FROM AMICUS CURIAE PROFESSOR VICTOR WILLIAMS OF THE AMERICA FIRST LAWYERS ASSOCATION IN SUPPORT OF DEFENDANTS-APPELLANTS DONALD TRUMP, ET AL'S MOTION FOR RECONSDERATION EN BANC OF THE STAY PENDING APPEAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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A. Parties and Amici**.** All parties, interveners, and amici appearing in this Court are listed in the briefing for Plaintiffs and Defendants except that this brief is filed on behalf of Professor Victor Williams in support of Defendants.

B. Rulings Under Review. The Ninth Circuit's panel decision and the TRO Decisions and Orders issued by U.S. District Judge James Robart.

C. Related Cases. Other related cases of which is Amicus are aware are referenced the briefing offered by Plaintiffs and Defendants.

Dated: February 16, 2017

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Plaintiffs State of Washington, *et al* (States)

Defendants Donald J. Trump, *et al* (President Trump)

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTION

This brief is offered by Amicus as an individual No party's counsel authored this brief in whole or in part, and no party, nor other person, contributed money intended to fund the preparation or submission of this brief.

STATEMENT OF AUTHORITY, IDENTITY, AND INTEREST

. In attached Motion, leave of the Court is requested to file this Brief. In accord with Circuit Rule 29-3, prospective Amicus asked for party consent to this filing through email. Counsel for Washington State and Donald Trump have consented. Professor Victor Williams is longtime Washington, D.C. attorney and law professor formerly affiliated as fulltime faculty with both the City University of New York's John Jay College of Criminal Justice and the Catholic University of America's Columbus School of Law. Victor Williams, now Chair of the America First Lawyers Association, the In past, he has been granted leave to file Amicus Briefs in this and other circuits as well as by the U.S. Supreme Court. Since his undergraduate law studies (J.D. University of California-Hastings College of the Law), Professor Williams has researched and published in the area of constitutional law for twenty-five years. With advanced training in economic analysis of the law (LL.M. George Mason University Scalia School of Law) and federal jurisdiction (LL.M. Columbia University School of Law), Amicus' published scholarship and commentary has offered support for the constitutional authorities prerogatives of five presidents (without regard to their party affiliation). He has particular knowledge and expertise regarding the text, history and interpretation of Article II of the U.S. Constitution.

In note: After his first-year of law school at U.C. Hastings, Victor Williams had the honor to serve as an extern for the late U.S. Court of Appeals for the Ninth Circuit Judge Joseph P. Sneed. Professor Williams continues to hold the Ninth Circuit in the deepest regard – a sentiment which further prompts the filing of this Brief.

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ARGUMENT

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Thus, neither the trial court nor the Ninth Circuit panel should have reviewed the challenges (including the Executive Order and/or relevant statutory language) beyond that examination needed to recognize the patent political question presented.

The political-question doctrine is fundamental to separation of powers and American self-governance. Answers to political questions should come only from elected political leaders. The Constitution textually grants the president the exclusive responsibility to implement war strategy and foreign policy to defeat

America's foreign enemies. The president, not the judiciary, has the institutional competence to know what specific actions are required to fulfill those responsibilities.

America is a nation at war with radical Islamic terrorists. The judiciary has no role in overseeing the president (acting as Commander-in-Chief, implementing war strategy and Chief Executive implementing security-related foreign policy) in matters related to allowing foreign aliens entry onto America soil.

Defending the nation against foreign enemies during a time of war is the highest mandate of the president who is vested with all executive power by Article II, Section 1 and made Commander-in-Chief of the Army and Navy by Article II, Section 2. In carrying out these duties, the president has a most unique duty to protect the Republic and its citizens from potential harm from foreign enemies. Providing such Executive energy was a fundamental reason for the 1787 Constitution's replacement of the failed Articles of Confederation. Consider Alexander Hamilton's ratification argument in Federalist 23:

> The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, *because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this

> reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.

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Throughout our Republic's history, the Supreme Court has recognized that some issues are committed by the Constitution's text to the exclusive discretion of the elected political branches. When these political questions manifest, the judiciary must keep out of any such dispute for it lacks subject matter jurisdiction to act in its limited role as a court. Any such action remains extra-judicial in nature – although the judiciary's "opinions and orders" may still be enforced by the U.S. Marshall's bayonet. All the more reason for judicial self-restraint.

Congressman John Marshall, in 1800, warned his U.S. House colleagues that the political branches would be "swallowed-up by the judiciary" without such abstention. Chief Justice John Marshall then provided early guidance as to the "rule of law to guide the court in the exercise of its jurisdiction." Marshall offered this political question description: "By the constitution of the United States, the president is invested with certain important political powers, in the exercise of

which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Marbury v. Madison*, 5 U.S. 137, 165 (1803).

From *Marbury* forward, the abstention theory has since developed to preclude judicial consideration in a variety of issues. *See e.g.*, *Colegrove v. Green*, 328 U.S. 549, 552–56 (1946) (legislative apportionment); *Coleman v. Miller*, 307 U.S. 433, 450 (1939)(constitutional amendment ratification challenge); *Luther v. Borden*, 48 U.S. (7 How.) 1, 40–43 (1849) (asserting of the Guarantee Clause); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918) (foreign relations); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133–37 (1912) (processes of referenda and initiative requirements).

In the modern case of *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court identified six independent characteristics "[p]rominent on the surface of any case held to involve a political question," including:

> [1] a textually demonstrable commitment of the issue to a coordinate political department;
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> [2] or a lack of judicially discoverable and manageable standards for resolving it;
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> [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;

> [4] or the impossibility of a court's undertaking of independent resolution without expressing lack of the respect due to coordinate branches of government;
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Baker, 369 U.S. at 217. Not one, not two, but all six *Baker* characteristics are patent in the lower court's initial consideration of the Plaintiffs' challenge to the travel restriction.

If this Circuit allows the lower court to go beyond the textually-committed Article II authority of the president as Commander-in-Chief and Chief Executive, the trial court will be lost in the densest of a modern political thicket. The lower court will find no manageable standards to competently decide the challenge and will be forced to make initial policy determinations -- without the skills or information need for such determinations. Particularly for questioning the underlying motives of the newly elected President Donald Trump in deciding to implement the Executive Order, the lower court and the Circuit panel have already expressed a lack of the respect due the coordinate branch of government. Sadly, to some observers and commentators, it even appears that such disrespect against Donald Trump was purposeful.

With little or no concern for "adherence" to the president's political decision already made, the lower court threw this nation in chaos by issuing its Temporary Restraining Order and immediately applying the TRO nationally. Then Judge James Robart refused to grant the government's request for a weekend stay pending an emergency appeal to this Circuit. The Ninth Circuit panel has now worsened this chaos by its ruling affirming the rejection of a stay on appeal.

And the lower court and Circuit panel ruling have now only added to the "multifarious pronouncements" of courts across the nation regarding the travel restriction. Although it is the federal judiciary which suffers "embarrassment" from this usurpation, it is the American people who suffer a great danger of terrorist violence.

Subsequent to *Baker*, the Supreme Court in *Nixon v. United States*, 506 U.S. 224 (1993) applied these *Baker* factors by instructing that the political question analysis begins by "determin[ing] whether and to what extent the issue is textually committed." 506 U.S. at 228. The Supreme Court rejected, as nonjusticiable, a debenched federal judge's challenge to the Senate's exercise of its Article I, Section 3, Clause 6 "sole" duty to "try" all impeachments. The Court refused to review a procedurally problematic Senate impeachment trial process in which an "evidence committee" of only 12 senators heard testimony while 88 senators avoided jury duty. All 100 Senators were ultimately allowed to vote --

thumbs up or down -- rendering the final removal verdict. The Court determined that it did not have authority to review the shortcut Senate trial process used to strip U.S. District Judge Walter Nixon of his tenured office and salary. The Court explicitly ruled "the word 'try' in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority which is committed to the Senate" *Id.* at 239. The nation's highest court would not attempt to impose a definition of the word "try" on the upper chamber or critique the shortcut manner in which the upper chamber transformed itself into the nation's High Court of Impeachment.

Neither should the lower court review the president's exercise of his exclusive textual authority to implement war strategy and develop related national security foreign policy. Just as the Supreme Court did in *Nixon*, this Court should readily determine that "there is no separate provision of the Constitution that could be defeated" by allowing the President's "authority" to utilize his war strategy powers. 506 U.S. at 237.

As an additional preliminary point of authority, *Goldwater v. Carter* is an example of the Supreme Court's most efficient political question determination. 444 U.S. 996 (1979). *Goldwater* involved a group of senators, led by Barry Goldwater, who sued President Jimmy Carter for his controversial abrogation of a United States treaty with the Republic of China (Taiwan). The Supreme Court firmly rejected the senators' attempt to interfere with an exclusive Executive

authority. Without oral argument, the high court announced: "The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the complaint." *Id.* In a concurring statement, Associate Justice William Rehnquist explained: "[T]he basic question presented by the petitioners in this case is 'political' and therefore nonjusticiable." *Id*. at 1002. "Here, while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty." *Id* at 1003.

In cheering the Supreme Court's quick and final decision not to review the merits of the senators' challenge for fear it would "spawn legal consequences," Rehnquist's statement should now guide this Court : "An Art. III court's resolution of a question that is 'political' in character can create far more disruption among the three coequal branches of Government than the resolution of a question presented in a moot controversy. Since the political nature of the questions presented should have precluded the lower courts from considering or deciding the merits of the controversy, the prior proceedings in the federal courts must be vacated, and the complaint dismissed." *Goldwater*, 444 U.S. at 1005-06.

Perhaps less "domesticated" abstention advocacy is needed for this Circuit's consideration of this matter; "something greatly more flexible, something of prudence, not construction and not principle." The purest prudential strain of nonjusticiability still incubates in Alexander Bickel's THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS. Professor Bickel discussed political questions are those issues which ask the courts to evaluate policy and choose between outcomes – functions which the judiciary as an institution is functionally incompetent to carry out. In unmatched aesthetic, Alexander Bickel offered a foundation instead of *Baker*-like criteria:

> In a mature democracy, choices such as this must be made by the executive…" Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.

Alexander Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (Yale 1986). Admittedly, the late Yale University Law professor's prudential poetry continues to unnerve the judge-centric consciousness so predominant in our age. All the more reason for the Ninth Circuit *en banc*'s deep consideration of its truths.

There is a related -- but separate –consideration: The nation's extreme need for finality in the president's alien vetting practices as a part of his war strategy. This need for finality weighs very heavily in favor of a political question determination. As Judge Steven Williams reasoned in 1991, when *Nixon v. United States* was before the D.C. Circuit:" Although the primary reason for invoking the political question doctrine in our case is the textual commitment…the need for finality also demands it." *Nixon v. United States*, 938 F.2d 239, 245-46 (D.C. Cir. 1991)(citations omitted). The cost is chaos:

> If claims such as Nixon's were justiciable, procedural appeals from every impeachment trial would become routine….[F]or the impeachments that are anything but routine, those of presidents and chief justices, the intrusion of the courts would expose the political life of the country to months, or perhaps years, of chaos.

Id at 246.

Challenges to the president's Executive Order are now becoming "routine" with adjudications challenging the travel restriction ongoing in several sister circuits. It must be clearly seen that "the intrusion of the courts would expose the political life [and national security] of the country to months, or perhaps years, of [dangerous] chaos." *Id.*.

As Trump derangement syndrome appears virulently contagious among the intellectual and political elites – particularly among lawyers who need only the

federal court filing fee to make manifest their disorder -- finality in this area is needed to help retard future frivolous litigation against Donald Trump's governance.

Lastly, perhaps it would help for this Circuit to consider the reality that the president has inherent, unreviewable constitutional authority to take military action to obliterate airports in all seven listed nations if and when he judges it necessary for our national security in this continued war -- even if that action results in the certain death of aliens sitting in those airports who are holding boarding passes and who are eager to visit the United States for whatever purpose. The past two presidents have dropped tonnage of bombs on certain of those listed nations. Many would-be visitors to the United States from certain of the listed nations have been killed by the relatively indiscriminate bombs and particularized drone-strike of past two presidents – without any review of their actions by the federal courts. Certainly, the new president has inherent, unreviewable constitutional authority to simply suspend visitations of foreign aliens coming from the listed seven nations.

Article II grants the president exclusive war strategy and security-related foreign relations authorities "the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Marbury v. Madison*. 5 U.S. 137, 165 (1803). Plaintiffs' challenge to

President Donald John Trump's exercise of those authorities raise a nonjusticiable political question and their complaint is due for immediate dismissal.

Dated: February 16, 2017

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 29 [c] 2 and 32 [a] as this brief contains 3157 words, as determined by the word-count function of Microsoft Word 2010.
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) this brief has been prepared in a proportionally spaced typeface Microsoft Word 2010 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2017, the foregoing brief with motion was filed with the Clerk of this Court using the appellate CM/ECF system. All parties or their counsel are registered users.

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As an additional preliminary point of authority, *Goldwater v. Carter* is an example of the Supreme Court's most efficient political question determination. 444 U.S. 996 (1979). *Goldwater* involved a group of senators, led by Barry Goldwater, who sued President Jimmy Carter for his controversial abrogation of a United States treaty with the Republic of China (Taiwan). The Supreme Court firmly rejected the senators' attempt to interfere with an exclusive Executive

authority. Without oral argument, the high court announced: "The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the complaint." *Id.* In a concurring statement, Associate Justice William Rehnquist explained: "[T]he basic question presented by the petitioners in this case is 'political' and therefore nonjusticiable." *Id*. at 1002. "Here, while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty." *Id* at 1003.

In cheering the Supreme Court's quick and final decision not to review the merits of the senators' challenge for fear it would "spawn legal consequences," Rehnquist's statement should now guide this Court : "An Art. III court's resolution of a question that is 'political' in character can create far more disruption among the three coequal branches of Government than the resolution of a question presented in a moot controversy. Since the political nature of the questions presented should have precluded the lower courts from considering or deciding the merits of the controversy, the prior proceedings in the federal courts must be vacated, and the complaint dismissed." *Goldwater*, 444 U.S. at 1005-06.

Perhaps less "domesticated" abstention advocacy is needed for this Circuit's consideration of this matter; "something greatly more flexible, something of prudence, not construction and not principle." The purest prudential strain of nonjusticiability still incubates in Alexander Bickel's THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS. Professor Bickel discussed political questions are those issues which ask the courts to evaluate policy and choose between outcomes – functions which the judiciary as an institution is functionally incompetent to carry out. In unmatched aesthetic, Alexander Bickel offered a foundation instead of *Baker*-like criteria:

> In a mature democracy, choices such as this must be made by the executive…" Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.

Alexander Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (Yale 1986). Admittedly, the late Yale University Law professor's prudential poetry continues to unnerve the judge-centric consciousness so predominant in our age. All the more reason for the Ninth Circuit *en banc*'s deep consideration of its truths.

There is a related -- but separate –consideration: The nation's extreme need for finality in the president's alien vetting practices as a part of his war strategy. This need for finality weighs very heavily in favor of a political question determination. As Judge Steven Williams reasoned in 1991, when *Nixon v. United States* was before the D.C. Circuit:" Although the primary reason for invoking the political question doctrine in our case is the textual commitment…the need for finality also demands it." *Nixon v. United States*, 938 F.2d 239, 245-46 (D.C. Cir. 1991)(citations omitted). The cost is chaos:

> If claims such as Nixon's were justiciable, procedural appeals from every impeachment trial would become routine….[F]or the impeachments that are anything but routine, those of presidents and chief justices, the intrusion of the courts would expose the political life of the country to months, or perhaps years, of chaos.

Id at 246.

Challenges to the president's Executive Order are now becoming "routine" with adjudications challenging the travel restriction ongoing in several sister circuits. It must be clearly seen that "the intrusion of the courts would expose the political life [and national security] of the country to months, or perhaps years, of [dangerous] chaos." *Id.*.

As Trump derangement syndrome appears virulently contagious among the intellectual and political elites – particularly among lawyers who need only the

federal court filing fee to make manifest their disorder -- finality in this area is needed to help retard future frivolous litigation against Donald Trump's governance.

Lastly, perhaps it would help for this Circuit to consider the reality that the president has inherent, unreviewable constitutional authority to take military action to obliterate airports in all seven listed nations if and when he judges it necessary for our national security in this continued war -- even if that action results in the certain death of aliens sitting in those airports who are holding boarding passes and who are eager to visit the United States for whatever purpose. The past two presidents have dropped tonnage of bombs on certain of those listed nations. Many would-be visitors to the United States from certain of the listed nations have been killed by the relatively indiscriminate bombs and particularized drone-strike of past two presidents – without any review of their actions by the federal courts. Certainly, the new president has inherent, unreviewable constitutional authority to simply suspend visitations of foreign aliens coming from the listed seven nations.

Article II grants the president exclusive war strategy and security-related foreign relations authorities "the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Marbury v. Madison*. 5 U.S. 137, 165 (1803). Plaintiffs' challenge to

President Donald John Trump's exercise of those authorities raise a nonjusticiable political question and their complaint is due for immediate dismissal.

Dated: February 16, 2017

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 29 [c] 2 and 32 [a] as this brief contains 3157 words, as determined by the word-count function of Microsoft Word 2010.
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) this brief has been prepared in a proportionally spaced typeface Microsoft Word 2010 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2017, the foregoing brief with motion was filed with the Clerk of this Court using the appellate CM/ECF system. All parties or their counsel are registered users.

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