UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

ARMANDO VILASECA, YURISLEIDIS LEYVA MORA, JARED KINGSBURY CARTER, AND MARICEL LUCERO KENISTON,

Plaintiffs,

v.

HENRY M. PAULSON, JR., in his capacity as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY, ADAM J. SZUBIN, in his capacity as DIRECTOR OF THE OFFICE OF FOREIGN ASSETS CONTROL,

Defendants.

Civil Action No. 2:08-CV-53

BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VERMONT, CENTER FOR CONSTITUTIONAL RIGHTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES AND STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This case presents a novel question: Can the government prevent United States residents and citizens from visiting Cuba to be with a Cuban-national family member during exigent circumstances (i.e., illness or death), particularly in circumstances where the government permits a United States citizen to visit Cuba to be with a family member who is not a Cuban national during exigent circumstances? The regulations violate the fundamental constitutional right to maintain family relationships and the equal protection component of the Fifth Amendment's due process guarantee. Claiming (i) the fundamental right to preserve and maintain family relationships does not extend to cross-border travel, (ii) equal protection is not implicated, and (iii) that the restrictions on family visits would in any event satisfy the rational basis test and/or intermediate scrutiny, the government seeks dismissal of the complaint. The government's position is at odds with well-established case law and universally accepted respect for the integrity of the family unit, and it creates dangerous precedent. Tellingly, the government does not even attempt to argue that the restrictions would satisfy the strict scrutiny test.

INTEREST OF *AMICI*

The American Civil Liberties Union of Florida, Inc., the American Civil Liberties Union of Massachusetts, the American Civil Liberties Union Foundation of Vermont, and the Center for Constitutional Rights file this brief as *amici curiae* in support of Plaintiffs' Motion for Preliminary Injunction. The *amici* bring a special interest in the protection of civil rights and civil liberties to this case, which concerns restrictions on the right to visit close family members in Cuba. This case raises issues of fundamental importance to our society—the right to maintain close family ties without government interference except when adequately justified by compelling government interests, and the right to equal treatment under the law. The challenged

regulations are not narrowly tailored to justify the inhumane separation of families permanently or for unbearably long periods of time or at times of family emergency.

SUMMARY OF ARGUMENT

In 2004, the Treasury Department restricted the ability of United States residents and citizens to visit family members who are Cuban nationals. 31 C.F.R. §515.561 ("2004 Amendments"). The purported justification for the 2004 Amendments was to reduce the hard flow of currency into Cuba while promoting legitimate family ties. *See* Administrative Record ("A.R.") at 45, COMM'N FOR ASSISTANCE TO A FREE CUBA, REPORT TO THE PRESIDENT 40 (May 6, 2004). The 2004 Amendments prohibit United States residents and citizens from visiting extended family members (including aunts, uncles, and cousins) because travel is only permitted to visit immediate family members. 31 C.F.R. §515.561. Even with respect to immediate family members, United States residents and citizens may only travel to Cuba once every three years. *Id.* There are no exemptions to visit immediate family members more than once every three years in the event of exigent circumstances such as death or illness of a family member. *Id.*

Each of the Plaintiffs has been denied the right to visit beloved Cuban-national family members in Cuba as a result of 2004 Amendments. Plaintiffs Carter and Mora were recently married and have been denied the right to celebrate their marriage with Ms. Mora's family because Ms. Mora immigrated to the United States fewer than three years ago. Plaintiff Vilaseca's aunt is dying, and he is unable to visit her at all before she passes away, or to even attend her funeral, because travel to Cuba is restricted to visiting Cuban nationals who are immediate family members. None of the Plaintiffs may apply for an exigent-circumstances permit because the 2004 Amendments abolished exigent circumstance permits in connection with visiting Cuban-national family members.

The government does not deny in its moving papers that each of the Plaintiffs is attempting to visit Cuba to promote legitimate family ties or that its regulations completely defeat the family ties being sought—visiting a sick relation before she dies or attending a wedding celebration. Instead, the government claims that no constitutional rights are implicated and that, in any event, its regulations are rational. The government's position is plainly wrong.

The 2004 Amendments violate Plaintiffs' fundamental constitutional rights, guaranteed by both the First and Fifth Amendments, to preserve and maintain family relationships. The 2004 Amendments to the regulations cannot satisfy strict scrutiny because they do not serve their stated objectives: there is no evidence that the Amendments have had any impact (much less a meaningful impact) on the flow of hard currency into Cuba, and there is ample evidence that the Amendments have undercut family ties. Moreover, there are narrower means of achieving the stated objectives without banning travel within the first three years after immigration, prohibiting the grant of exigent-circumstances permits in connection with visiting Cuban nationals, or prohibiting travel to visit extended family members such as aunts and uncles.

The 2004 Amendments also violate the Constitution's guarantee of equal protection. While the Treasury Department amendments accept some applications to visit family in Cuba during exigent circumstances, they do so only if the family member "is not a National of Cuba." For this reason too, the Court should enjoin enforcement of the regulations, as they improperly draw distinctions based on national origin, a protected class, and arbitrarily allocate burdens on fundamental rights.

ARGUMENT

I. THE TREASURY DEPARTMENT REGULATIONS INFRINGE ON THE CONSTITUTIONAL RIGHT TO MAINTAIN AND PRESERVE FAMILY RELATIONS.

A. The Right to Preserve Family Relationships is a Fundamental Constitutional Right.

Plaintiffs' due-process right to preserve family relationships is well established. Substantive due process is defined by "solid recognition of the basic values that underlie our society." *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (citation omitted). Thus, "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* This right to preserve family relationships has been reaffirmed often by the Supreme Court. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (citing cases for the proposition that "our laws and tradition afford constitutional protection" to "family relationships."). Moreover, this constitutional tradition extends beyond the immediate family. *See Moore*, 431 U.S. at 504 ("Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family.").

Plaintiffs' right to family association is also rooted in the First Amendment. The Court has concluded that "maintain[ing] certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. United States Jaycees*, 468 U.S. 609, 617–18 (1984). And because close family relationships are "among the most intimate of relationships," they are afforded the highest Constitutional protection. *Patel v. Searles*, 305 F.3d 130, 135–136 (2d Cir. 2002).[1] Indeed, the relationships that "attend the . . .

[1] The complaint alleges facts sufficient to assert a burden on Plaintiffs' First Amendment rights, despite not expressly invoking that legal theory. Under the notice pleading standard, courts ask only whether "the facts [plaintiff] has presented would entitle him to relief under any applicable legal theory." *McCullah v. Gadert*, 344 F.3d 655, 659 (7th Cir. 2003) (recognizing that "it is well established that plaintiffs are under no obligation to plead legal theories"). Indeed, the complaint need only "set forth *minimal facts* as to who did what to whom, when,

sustenance of a family" exemplify the "freedom of intimate association" because "[f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *U.S. Jaycees*, 468 U.S. at 619–20.

The right to preserve family relationships also finds support in international law, to which federal courts have long looked in defining the scope of constitutional provisions. *See, e.g.*, *Poole v. Fleeger's Lessee*, 36 U.S. (11 Pet.) 185, 209 (1837) (Story, J.) (invoking a "doctrine universally recognized in the law and practice of nations" in defining the scope of the Compact Clause).[2] Most relevant here, in the context of substantive due process, the Supreme Court has relied heavily on foreign sources for principles "implicit in the concept of ordered liberty." *Palko v. Conn.*, 302 U.S. 319, 325, 326 n.3 (1937) (Cardozo, J.) (demonstrating that liberty under the Fourteenth Amendment is an evolving concept and looking to foreign sources in defining the scope of due process); *see also Lawrence*, 539 U.S. 558, 577 (invalidating a law criminalizing homosexual sodomy by looking, in part, to the European Court of Human Rights, and concluding that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries"); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) (upholding a due process challenge to the indefinite detention of an undocumented alien by explaining that "[d]ue process is not a static concept, it undergoes

---

where, and why.'" *Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61, 68 (1st Cir. 2004) (emphasis added). Moreover, the Court "read[s] the pleadings of a pro se plaintiff liberally and interpret them to raise the strongest arguments that they suggest." *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999) (internal quotations and citation omitted).

[2] *See also Pennoyer v. Neff*, 95 U.S. 714, 720–22, 723 (1877) (Field, J.) (looking to public international law rules on territorial jurisdiction to define the reach of state personal jurisdiction); *Haddock v. Haddock*, 201 U.S. 562, 576 (1906) (White, C.J.) (looking to "principles of international law" in defining the scope of the Full Faith and Credit Clause); *Roper v. Simmons*, 125 S.Ct. 1183, 1198 (2005) (looking to foreign and international sources in assessing evolving standards of decency under the Eighth Amendment).

evolutionary change to take into account accepted current notions of fairness" and that "[i]t seems proper then to consider international law principles for notions of fairness as to propriety of holding aliens in detention.").[3]

International law confirms that the preservation of family relationships is "implicit in the concept of ordered liberty." As the International Court of Justice affirmed in 1989, "[t]he integrity of a person's family and family life is a basic human right protected by the prevailing principles of international law which derive not only from conventional international law or customary international law but from general principles of law recognized by civilized nations." Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, advisory opinion 1989 ICJ 177, 210 (separate opinion of J. Evensen). The Universal Declaration of Human Rights[4] expressly states that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State," and that "[n]o one shall be subjected to arbitrary interference with his family." UDHR Arts. 12, 16(3). *See Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) (recognizing that observers consider the Declaration of Human Rights as binding customary international law). The UDHR also recognizes that "[e]veryone has the right to leave any country, including his own, and to return to his country." *Id.* Art. 13(2).

The Helsinki Accords, to which the United States is a signatory, enshrines the right to preserve cross-border family relationships, providing that "[i]n order to promote further development of contacts on the basis of family ties the participating States will favourably

[3] This is not an isolated practice. *See, e.g.*, *Block v. Hirsh*, 256 U.S. 135, 154–55, 158 (1921) (Holmes, J.) (rejecting a claim that rent control was an arbitrary taking of property without due process by looking to uniform foreign practice, and noting that "legislation . . . has been resorted to for the same purpose all over the world"); *Roe v. Wade*, 410 U.S. 113, 140 (1973) (invoking foreign historical abortion practice to reject the notion that abortion was inherently a matter of state regulation).

[4] Universal Declaration on Human Rights, *adopted* Dec. 10, 1948, G.A.Res. 217A, U.N. GAOR, 3d Sess., pt.1, Resolutions, U.N.Doc. A/810 (1948).

consider applications for travel with the purpose of allowing persons to enter or leave their territory temporarily, and on a regular basis if desired, in order to visit members of their families." Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975, VII(1)(A), 14 I.L.M. 1292, 1294 (1975). This right exists "without distinction as to the country of origin or destination," and significantly, the Accord requires that "cases of urgent necessity - such as serious illness or death . . . be given priority treatment." *Id.* At the signing, President Gerald Ford announced that "the United States gladly subscribes to this document because we subscribe to every one of these principles . . . . They affirm the most fundamental human rights." President Gerald R. Ford, Address in Helsinki Before the Conference on Security and Cooperation in Europe (August 1, 1975).[5]

These foreign and international sources, along with Supreme Court case law interpreting the First and Fifth Amendments, confirm that the right to maintain and preserve family relationships is deeply rooted in our constitutional tradition.

B. The Right to Preserve Family Relationships Extends Beyond the Family Home.

The Supreme Court has defined the familial right broadly, without any suggestion that it is limited to cohabitation or custody. Indeed, it has applied the right in cases that did not involve cohabitating families. *U.S. Jaycees*, 468 U.S. at 617–18. Accordingly, the Second Circuit has explicitly rejected the government's argument to the contrary, explaining that "even though plaintiff did not live with his father and siblings, we must assume those relationships, too, were of such an intimate nature as to warrant the highest level of constitutional protection." *Patel*, 305 F.3d at 136. In light of modern family living arrangements, the constitutional right to associate

[5] Available at http://www.fordlibrarymuseum.gov/library/speeches/750459.htm.

with close family would be stripped of content if it were actually as limited as the government suggests.

Citing inapposite cases that reject a parent's right to sue prison guards who wrongfully kill their children in prison, the government also unjustly contends that the right to maintain family relationships is a custody right only. *See, e.g.*, *Pizzuto v. Cty. of Nassau*, 240 F.Supp.2d 203, 209 (E.D.N.Y. 2002). These cases are inapposite. They address family members suing prison officials for loss of companionship as a result of the death of their children in prison. These cases have no bearing on the right of an individual to travel to visit family members (attending a wedding, attending a funeral, attending to them while ill, etc.). Nor do they purport to address the right for an individual to travel internationally to visit family members. Even if they did, these cases are inapposite because they apply only "where the state action at issue was not aimed specifically at interfering with the relationship." *Russ v. Watts*, 414 F.3d 783, 787 (7th Cir. 2005); *see also Valdivieso Ortiz v. Burgos*, 807 F.2d 6, 9 (1st Cir. 1986) (holding that the beating death of a relative in prison is an "incidental deprivation" of the family relationship).[6] The Treasury Department's interference with the familial bond is direct—one of the stated purposes of the Treasury regulations is "promote . . . family ties" that the government deems "legitimate." A.R. at 45, COMM'N FOR ASSISTANCE TO A FREE CUBA, REPORT TO THE PRESIDENT 40 (May 6, 2004). Toward that end, the 2004 Amendments *expressly regulate* the family relationship: defining who is "family," 31 C.F.R. §515.561(c), restricting visitation only to relatives who meet that definition, *id.* §515.561(a), and further limiting those visits in both duration and frequency. *Id.* Where the government directly regulates the definition of family, and the frequency of family visits, it faces strict constitutional limits on its actions.

[6] *See also McCurdy v. Dodd*, 352 F.3d 820, 830 (3d Cir. 2003) (where officer shot and killed individual after he refused demands to hold up his hands, father could not recover for deprivation of his relationship with his son because the official action was not "directed at the parent-child relationship").

C. Strict Scrutiny Applies to Any Government Action that Burdens the Fundamental Right to Preserve Family Relationships.

Whether analyzed under the First Amendment or due process, regulations that burden the right to preserve family relationships must satisfy strict scrutiny. The Supreme Court has explained that First Amendment associational freedoms exist upon a continuum of intimacy, on which the right to family relationships is afforded the highest Constitutional protection. *See U.S. Jaycees*, 468 U.S. at 619-20 (1984) ("Between these poles, of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State."). Likewise, substantive due process protection for the "sanctity of the family" is "deeply rooted in this Nation's history and tradition" and is therefore subject to "particularly careful scrutiny." *Moore*, 431 U.S. at 502–03; *see also id.* at 503 n.10 (comparing to other strict scrutiny cases).

The government incorrectly assumes that deeply-rooted traditions must bend when foreign affairs are implicated, arguing that rational basis review should substitute. Mot. at 29–30. The government has already lost this argument in the Supreme Court, which held that reduced scrutiny in response to military affairs and national security would offend both substantive due process and stare decisis. *See Rostker v. Goldberg*, 453 U.S. 57, 69 (1981). *Rostker* involved a due process challenge to the Military Selective Service Act, which authorizes the President to require selective-service registration for men but not women. *Id.* The Solicitor General argued that a "rational relation" test should apply, instead of the usual intermediate scrutiny applicable to gender distinctions, because of the "deference due Congress in the area of military affairs and national security." *Id.* Writing for the Court, Chief Justice Rehnquist rejected the government's argument, explaining, "[w]e do not think that the substantive guarantee of due process or certainty in the law will be advanced by any further 'refinement' in

the applicable tests as suggested by the Government." *Id.* The government's argument has also been rejected in the First Amendment context. *See, e.g.*, *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512 (9th Cir. 1988) ("[I]t is clear that there is no 'sliding scale' of First Amendment protection under which the decree of scrutiny fluctuates in accordance with the degree to which the regulation touches on foreign affairs."). These two outcomes, under both substantive due process and the First Amendment, are consistent with the well-understood principle that the Executive's power over international relations, "of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *Haig v. Agee*, 453 U.S. 280, 289 n.17 (1981).

The government's cases do not hold otherwise. It relies principally on immigration cases, Mot. at 30, which stand for the unremarkable principle that Congress must necessarily draw distinctions based on alienage, an otherwise protected class, when it exercises its immigration powers, and therefore that removal statutes which facially discriminate against aliens are subject only to rational basis review. In the remaining cases, rational basis was applied not because of foreign affairs exceptionalism, but rather because it was the correct standard under the established constitutional framework. *See United States v. Plummer*, 221 F.3d 1298 (11th Cir. 2000) (rejecting a due process challenge to restrictions on transporting Cuban cigars, which does not implicate any fundamental due process right); *Able v. United States*, 155 F.3d 628 (2d Cir. 1998) (rejecting a challenge to the "don't ask, don't tell" policy, in which the plaintiff conceded at oral argument that rational basis review was appropriate because homosexuality was not a protected class).

Finally, the government cites cases applying *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) and explains, immaterially, that presidential power is at its zenith when in

the Executive acts in coordination with Congress. Yet Plaintiffs do not allege that the Treasury regulations were beyond the Executive's power, they challenge the constitutionality of those regulations under the First and Fifth Amendments. As the government's cited cases make clear, these are very separate inquiries. *See Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 166 (D.C. Cir. 2003) (addressing, first, the question of Executive power, and concluding that an act of Congress "clothes the President with extensive authority," then addressing, second, a RFRA challenge, without deferring to the Executive's determinations); *Palestine Info. Office v. Shultz*, 853 F.2d 932, 936, 939 (D.C. Cir. 1988) (addressing, first, Plaintiffs' challenge to the State Department's authority to take the challenged action, and concluding that the agency was acting "at the apex of its power," then addressing, second, Plaintiffs' First Amendment challenge to the regulations, applying well-established First Amendment scrutiny, and deferring to the agency only on the limited question of whether the foreign-policy interest exists). Consistent with this usual practice, the Court should apply strict scrutiny to the Treasury regulations.[7]

D. The Treasury Regulations, Which Cannot Satisfy Strict Scrutiny, Impermissibly Infringe on Family Rights.

It is telling that the government does not even attempt to defend their regulations from strict scrutiny, the standard which ordinarily applies to government action that burdens fundamental due process rights. *Reno v. Flores*, 507 U.S. 292, 301-302 (1993). Strict scrutiny requires that the Treasury Department show: (1) the 2004 amendments have a compelling objective; (2) the amendments serve those stated objectives; and (3) the amendments are narrowly tailored to meet those objectives. *Id.*

[7] The government also cites international travel cases, Mot. at 24–26, which have no bearing in this First and Fifth Amendment challenge invoking the right to preserve family relationships. Beyond restricting leisure and educational travel, the 2004 Amendments have separated plaintiffs from their family.

The stated objective of the regulations is to reduce the flow of hard currency into Cuba while preserving efforts to promote legitimate family ties. A.R. at 45, COMM'N FOR ASSISTANCE TO A FREE CUBA, REPORT TO THE PRESIDENT 40 (May 6, 2004). For the purposes of this brief, *amici* will not challenge whether these objectives are compelling.[8] As demonstrated below, the regulations fail strict scrutiny because they neither serve the government's stated objective nor are narrowly tailored.

All three of the provisions challenged by Plaintiffs fail to actually serve the government's stated objectives, a showing that it must make. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2759–60 (2007) (holding that the Seattle school district's diversity plan was unconstitutional, in part, because the district offered no evidence, as it must, that the plan had been an effective means of achieving its stated objective). The provision denying exigent-circumstances visits to Cuban nationals does not achieve its stated objectives because it neither reduces the flow of hard currency into Cuba nor promotes legitimate family ties. The General Accounting Office has concluded that it is impossible to credit the 2004 Amendments with restricting the flow of currency into Cuba. *See* GAO REPORT at 26. If there is no evidence that the entire Embargo (including restriction on educational travel) has any impact on the flow of currency into Cuba, there is certainly no basis to conclude that prohibiting exigent-circumstances permits can have any meaningful impact on the absolute or relative flow of currency into Cuba. Indeed, the recent GAO report indicates that the government cannot make this showing, noting that "U.S. officials do not know whether the rule changes have reduced the hard currency available to the Castro regime as intended." *See id.* The report further

[8] Although *amici* do not write to challenge the government on this point, they deny that the government has shown, as it must, that its regulations address a "compelling purpose." *See, e.g.*, Plaintiffs' Resp., Exhibit pt. 1, U.S. GOV'T ACCOUNTABILITY OFFICE, ECONOMIC SANCTIONS: AGENCIES FACE COMPETING PRIORITIES IN ENFORCING THE U.S. EMBARGO ON CUBA, GAO-08-80, at 26 (Nov. 2007), available at www.gao.gov/new.items/d0880.pdf [hereinafter "GAO REPORT"].

finds the impact of the 2004 Amendments "deeply troubling," noting that inspection of Cuban travelers has undermined Homeland Securities ability to "keep[] terrorists, criminals, and inadmissible aliens out of the country," and criticizing OFAC for misallocating resources to Cuban embargo cases that would be better spent "on countries engaged in terrorism, weapons proliferation, and narcotics trafficking." *Id.* at 60. Likewise, prohibiting travel for exigent circumstances clearly undercuts the government's stated objective of promoting legitimate family ties. Because the 2004 amendments do not serve the dual purposes of the regulation, they fail to satisfy strict scrutiny.

The other two provisions challenged by plaintiffs fail for the same reasons. The dual objectives of the regulations are not advanced by the 2004 Amendment's prohibition on travel to Cuba within three years of immigration and its ban on visiting aunts and uncles (among other family members) because they are not considered immediate family members. There is no basis to conclude that either restriction has any meaningful impact in real or absolute terms on the flow of hard currency into Cuba. And it is beyond dispute that both restrictions undercut the promotion of legitimate family ties.

Even assuming that these three regulations did serve the government's objective, they fail strict scrutiny because they are not narrowly tailored to meet those objectives. A narrowly tailored regulation would address the government's purpose directly: limiting the amount of hard currency that can be spent in Cuba every three years, not the number of visits. Under such a regime, United States residents and citizens could visit family in Cuba more often by limiting their spending during those trips. Such a regulation easily could be accommodated by the Treasury Department, which already monitors and controls traveler spending, enforcing a per diem of $50 for family visits to Cuba, 31 C.F.R. §515.560(c)(2)(i), and limiting remittances to

$300 per visit. *Id.* §515.560(c)(4)(i). Moreover, a regulation that directly targeted cumulative spending would be no more difficult to enforce than the existing licensing requirement, which is easily and often circumvented by purchasing fraudulent Treasury licenses, at $250 each, GAO REPORT at 52, 57, 54 & n.111–113, or by booking a layover in Mexico or Canada, countries which actively seek to undermine the embargo by explicitly prohibiting the extraterritorial enforcement of U.S. law and by offering "loose-leaf visas" for travel to Cuba that are not reflected in the permanent pages of a U.S. passport. *Id.*

The regulations also target the wrong travelers. The 2004 Amendments allow American residents and citizens to visit Cuban nationals only if they are immediate family members, and then only every three years. Yet this class of travelers stays with family members and eat meals with family members, thus spending the least in Cuba. On the other hand, American residents and citizens can make an unlimited number of applications for Cuban-travel involving journalism, research, education, religious activities, or the participation in sporting events, public performances, or exhibitions. 31 C.F.R. §515.560(a). These travelers transfer more hard currency to Cuba, staying in hotels and eating restaurant meals, a fact that even the regulations recognize in allowing non-family travelers a per diem of $125 to $179, depending on the city, while allowing family travelers a per diem of only $50. *Compare* 31 C.F.R. §515.560(c)(2)(i) *with id.* §515.560(c)(2)(ii). A regulation limiting the cumulative amount of money that can be spent in Cuba during a three-year period would be tailored directly to the government's objective of controlling the flow of hard currency into Cuba, while at the same time allowing for more family visits.

Even if the 2004 Amendment did further the objectives of the regulations, they cannot satisfy strict scrutiny because they are too broadly conceived, imposing an unbearable burden on

the fundamental right to preserve and maintain family relationships. In recognition of this right, the Court should enjoin further enforcement of the challenged regulations.

II. THE REGULATIONS VIOLATE EQUAL PROTECTION.

The 2004 Amendments are also unconstitutional because they specifically deny U.S. residents and citizens the right to travel to Cuba to visit family members who are Cuban nationals in exigent circumstances while permitting visits in exigent circumstances to family members in Cuba who are not Cuban nationals and are in Cuba pursuant to an OFAC license. This disparate treatment is facially unconstitutional and is subject to strict scrutiny. Even if the Court concludes that the challenged regulations are not facially defective, however, the 2004 Amendments as applied to Plaintiffs are unconstitutional because the practical impact of the regulations is to discriminate on the basis of national origin. And it is obvious that the purpose of the 2004 Amendments was to disadvantage Cuban Americans whose family members are Cuban nationals.

Under either the facial or as-applied challenge, the 2004 Amendments fail to survive strict scrutiny because they are not narrowly tailored to achieve the government's interest in minimizing the flow of funds into Cuba, for the reasons set forth in Part II, Section D *supra*.

A. The 2004 Amendments Facially Discriminate on the Suspect Basis of National Origin.

"[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." *Washington v. Davis*, 426 U.S. 229, 239 (1976). Fifth Amendment equal protection analysis is the same as Fourteenth Amendment equal protection analysis. *Weinberger v. Weisenfeld*, 420 U.S. 636, 638 n. 2 (1975). In addition, the same principles of equal protection

analysis apply to both race-based and national origin-based classifications. *Jana-Rock Constr., Inc. v. N. Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 200 n.1 (2d Cir. 2006).

Statutory and regulatory classifications that operate on the basis of national origin are considered suspect and are subjected to strict scrutiny. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). *See also Attorney General of N. Y. v. Soto-Lopez*, 476 U.S. 898, 906 n. 6 (1986) ("It is well established that where a law classifies by race, alienage, or national origin . . . heightened scrutiny under the Equal Protection Clause is required."); and *Huynh v. Carlucci*, 679 F.Supp. 61, 66 (D.C. Cir. 1988).

Because the 2004 Amendments are discriminatory on their face, this Court need not inquire into legislative purpose. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S.Ct. 2738, 2764 (2007) (finding that even benign racial classifications are suspect and stating that "[o]ur cases clearly reject the argument that motives affect the strict scrutiny analysis."). The Treasury Department's purpose in enacting and enforcing the 2004 Amendments may be entirely benign, but because national origin is "so seldom relevant to the achievement of any legitimate state interest", courts deem any laws embodying distinctions of national origin to reflect a view that "those in the burdened class are not as worthy or deserving as others." *Cleburne*, 473 U.S. at 440. Whatever the motive behind their promulgation, the OFAC regulations at issue here clearly distinguish between persons traveling to Cuba to visit family members who are nationals of Cuba and persons traveling to Cuba to visit non-Cuban national family members. *Compare* 31 C.F.R. §515.561(a) *with id.* §515.561(b). Nor is there any question that the regulations create a two-tiered system of travel permits that gives U.S. residents and citizens wishing to visit non-Cuban national family members who are in Cuba pursuant to an OFAC license an opportunity to do so in exigent circumstances that is completely

unavailable to those same residents and citizens if their family members happen to be Cuban nationals. 31 C.F.R. §515.561(b) (providing that exigent circumstances licenses are available to those seeking to visit "a member of the person's immediate family who is not a national of Cuba" if the person to be visited is in Cuba under an OFAC license).

The government's primary argument for why the regulations do not violate equal protection is that under 31 C.F.R. §515.302(a)(1), the term "Cuban national" is defined broadly enough to include persons of French or any other non-Cuban origin. Thus, according to the government, if the family member you seek to visit in Cuba is of French descent, you are barred from obtaining an exigent circumstances license to visit that family member just as if she was a Cuban citizen of Cuban descent. But the thrust of this provision is clear from that fact that it goes on to specifically exempt from its scope "persons who were permanent residents of or domiciled in the service of the U.S. Government and persons whose transactions in that country were authorized by the Office of Foreign Assets Control." Read against the backdrop of this definition, 31 C.F.R. §515.561(a) and (b) would still prohibit every U.S. resident and citizen wishing to visit a Cuban national immediate family member from doing so in exigent circumstances, while permitting residents and citizens to visit a non-Cuban national immediate family in the same circumstances.

The government's argument suffers from two fatal weaknesses. First, there is absolutely no evidence in the record that any meaningful number of U.S. residents or citizens has ever sought to visit family members in Cuba of French or other non-Cuban origin who were deemed to be Cuban nationals. Second, the Supreme Court has very recently made clear that fanciful hypotheticals of this nature have no bearing on a facial challenge to the constitutionality of a statute or regulation. *See Wash. State Grange v. Wash. State Republican Party*, 128 S.Ct. 1184,

1190 (2008) ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases."). *See also United States v. Raines*, 362 U.S. 17, 21-22 (1960) ("[I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation. The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.") (internal quotations and citations omitted).

The government's second argument for why the regulations do not violate equal protection appears to be that all U.S. residents and citizens (including Cuban American residents and citizens) have an equal opportunity to visit family members in exigent circumstances who are not Cuban nationals and are in Cuba pursuant to an OFAC license. This argument misses the mark. Plaintiffs' equal protection challenge is based on the fact of disparate treatment depending on whether U.S. residents and citizens seek to visit family members in Cuba who are Cuban Nationals or instead seek to visit family members in Cuba who are not Cuban nationals and are in Cuba pursuant to an OFAC license—not whether the Treasury Department discriminates with respect to granting permits to visit relatives in Cuba pursuant to an OFAC license. It is beyond dispute that the government denies U.S. citizens and residents the right to an exigent circumstances permit if the family members they seek to visit are Cuban nationals. Unquestionably, discriminating based on whether one's immediate family members are or are not Cuban nationals in and of itself constitutes national origin discrimination and also raises first amendment issues. Plainly and simply, any law or regulation that grants or denies a fundamental right based on whether or not one's family are Cuban nationals is facially discriminating on the basis of national origin. *See United States v. Lue*, 134 F.3d 79, 85-86 (2d Cir. 1998) ("There is

little doubt, despite government protestations to the contrary, that the Hostage Taking Act discriminates against offenders on the basis of alienage. If the hostage-taking victim is a national, the Act criminalizes conduct by an alien that would not be sanctionable if undertaken by a United States citizen.").

The government posits that this is not national origin discrimination because Cuban Americans with family members in Cuba who are not Cuban nationals can still travel to visit those family members in exigent circumstances. In other words, the government's position is that in order for there to be national origin discrimination, the government would have to impose a complete ban on travel to Cuba in exigent circumstances by all persons of Cuban descent. By contrast, Plaintiffs contend that once the government takes the step of barring a certain class of Cuban Americans from going to Cuba because their immediate family members are Cuban nationals, the government has facially discriminated on the basis of national origin and its regulations must be subjected to strict scrutiny. *See Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 88 (1973) ("The term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came."). In other words, there is a threshold issue that can resolve this case. In determining whether the 2004 Amendments facially discriminate based on national origin, the issue is whether denying the grant of exigent circumstances permits because immediate family members are "nationals" of Cuba constitutes national origin discrimination on its face. It is frankly inconceivable that this is not facial national origin discrimination.[9]

[9] The government also seems to suggest that the 2004 Amendments actually *favor* Plaintiffs relative to U.S. residents and citizens seeking to visit non-Cuban national family members because the regulations permit Plaintiffs to visit their Cuban national family members once every three years. This assertion overlooks that U.S. residents and citizens granted licenses pursuant to 31 C.F.R. §515.561(b) are able to travel to Cuba without frequency limitations. An entire class of residents and citizens is completely prevented from being with loved ones at unforeseeable moments of crisis for no other reason than that they are of Cuban descent. The practical import of this discrimination, which applies on an across-the-board, automatic basis, so as to deny even the most compelling of

B. Even If This Court Finds That the Regulations Are Not Facially Discriminatory, the Regulations Discriminate as Applied on the Basis of National Origin.

Even if facially neutral, a statute or regulation discriminates on the basis of national origin if its practical impact, as applied to a specific individual or an identifiable class of persons, is to discriminate on the basis of national origin. *Jana Rock Constr.*, 438 F.3d at 204 ("[A] law which is facially neutral violates equal protection if it is applied in a discriminatory fashion.") (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886)). If it can be further shown that a facially neutral regulation not only discriminates as applied to a suspect class of persons, but also has a discriminatory purpose, then the regulation is subjected to strict scrutiny and will be held unconstitutional unless narrowly tailored to further a compelling state interest. *Cleburne*, 473 U.S. at 440. Thus, even if this Court concludes that disparate treatment in the granting of exigent circumstances licenses based on whether one's immediate family members are Cuban nationals does not facially discriminate based on national origin, the regulations as applied still discriminate with respect to American citizens and residents of Cuban descent.

Plaintiffs have not had an opportunity to conduct discovery in this matter. Moreover, the government has made clear that it does not intend to provide any discovery relating to Plaintiffs' constitutional claims other than what can be found in the administrative record as defined by the government. *See* Affidavit of Jared K. Carter (Dkt. #27, Ex. 2, filed May 12, 2008); Defendants' Motion to Dismiss at 19. At the same time, the government has submitted a declaration containing assertions that go beyond the evidence contained in the administrative record as

---

circumstances, is obvious to anyone who has ever had to worry about the well-being of her family. It is this classification *per se*—and not its context, purposes, or offsetting consolations—that offends the equal protection clause. *See Parents Involved*, 127 S.Ct. at 2767 ("[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."). As the Supreme Court recently admonished in *Parents Involved*, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Id.* at 2768. The same standard applies to national origin discrimination. *Jana-Rock Constr.*, 438 F.3d at 200 n.1.

defined by the government. *See* Declaration of Adam J. Szubin. In these circumstances, a motion for summary judgment is premature. *See, e.g.*, *Sirmans v. Caldera*, 27 F.Supp.2d 248, 251 (D.D.C. 1998) ("Plaintiffs are entitled to discovery relating to all materials outside of the administrative record on which defendant relies in its motion for summary judgment."). For purposes of an as-applied challenge, the Court and the parties must be able to inquire, through the discovery process, into the intent and impact of the regulations at issue. *Foster v. Delo*, 130 F.3d 307, 308 (8th Cir. 1997).

C. The Challenged Regulations Should Also Be Subjected to Strict Scrutiny on Equal Protection Grounds Because They Impose Disparate Treatment in Connection with Basic Civil Rights.

Even assuming that the challenged regulations did not implicate a suspect classification, an additional argument for applying strict scrutiny is that they selectively impinge upon the exercise of a protected constitutional right. *See Cleburne*, 473 U.S. at 440 ("Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution."); *Skinner v. State of Okla.*, 316 U.S. 535, 542 (1942) ("The equal protection clause would indeed be a formula of empty words if . . . conspicuously artificial lines could be drawn."). For the reasons set forth *supra* at Part I, the challenged regulations inhibit the exercise of Plaintiffs' fundamental right to preserve and maintain family relations. And the regulations deprive Plaintiffs of this right on the basis of their national origin, which is all that the Constitution requires to trigger strict scrutiny. *See also Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) ("Where a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests"); *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (holding that law denying welfare benefits to residents of less than a year creates a class denied equal protection of the laws); and *Kramer v. Union Free School Dist. No. 15*, 395 U.S.

621, 630-33 (1969) (holding that law restricting franchise in school districts to certain residents does not promote a compelling government interest and violates equal protection.)

D. The Government's Argument That Strict Scrutiny Does Not Apply Here Rests on Case Law Involving Classifications Based on Alienage Where Immigration and Foreign Policy Are Concerned.

The government argues that rational basis review should apply to the challenged regulations, citing *Lue*, 134 F.3d at 179, and *Olegario v. United States*, 629 F.2d 204 (2d Cir. 1980). Both of these cases are inapposite as they do not involve government attempts to restrict the conduct of U.S. citizens and residents on the basis of national origin. *Lue* stands for the proposition that courts should defer to the will of Congress where Congress is attempting to regulate the activities of non-citizens within U.S. borders. *See Lue*, 134 F.3d at 86 (noting that the Supreme Court has recognized alienage as a suspect class only when state or local governments employ classifications to disadvantage foreign nationals); *id.* ("Judicial deference to the federal government in this context is tied to Congress's express Constitutional authority to regulate the conduct of noncitizens within our borders"). The OFAC regulations at issue here do not distinguish between U.S. citizens and aliens, but rather between classes of U.S. citizens/residents. *Olegario* involved, *inter alia*, an equal protection challenge to the denial of an alien's naturalization petition by the Immigration and Naturalization Service. *See Olegario*, 629 F.2d at 229 (noting that heightened judicial scrutiny is not warranted for federal policies and regulations in the areas of immigration of naturalization).[10]

[10] Defendants also cite to *Harris v. McRae*, 448 U.S. 297 (1980), which applied rational basis review on an equal protection challenge, but only because the Court found that the statutory classification in that case neither burdened a fundamental right nor implicated a suspect class. *Harris*, 448 U.S. at 322. The same is true of *Miranda v. Sec'y. of Treasury*, 766 F.2d 1, 6 (1st Cir. 1985), a case that involves restrictions on the transfer of property under the CACR.

III. THE REGULATIONS ARE UNCONSTITUTIONAL EVEN IF THE COURT APPLIES RATIONAL BASIS TO BOTH THE FAMILY RELATIONS AND EQUAL PROTECTION CLAIMS.

Even if the Court decides that strict scrutiny does not apply here, the 2004 Amendments are not rationally related to the government's interest and should be enjoined. Under rational basis review, a statute will be sustained only if it is rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985). The rational basis test is not a free pass for the government, and it has been used with some frequency to invalidate government action.[11] Indeed, two situations typically call for a heightened form of rational basis review. The Court applies "a more searching form of rational basis review" where, as here, "the challenged legislation inhibits personal relationships." *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring). And rational basis is also used to invalidate statutes where, as here, both liberty and equality interests are at stake. For example, the Court will strike down as irrational a law that imposes a significant burden, without burdening a fundamental right, and also draws a distinction based on an immutable characteristic, without targeting a protected class. *See Plyler v. Doe*, 457 U.S. 202 (1982) (striking down a statute that authorized school districts to deny enrollment to the children of undocumented immigrants, despite the Court's conclusion that

[11] *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 632 (1996) (invaliding a statute barring antidiscrimination ordinances for homosexuals and bisexuals); *Quinn v. Millsap*, 491 U.S. 95, 109 (1989) (striking down a property ownership requirement for service on a government board); *Allegheny Pittsburg Coal Co. v. County Comm'n*, 488 U.S. 336, 345 (1989) (striking down a Virginia law that arbitrarily undervalued certain real property); *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 448 (1985) (striking down an ordinance that imposed unique zoning requirements on individuals with mental retardation); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985) (invalidating a New Mexico tax preference that distinguished between long-term resident and short-term resident Vietnam veterans); *Williams v. Vermont*, 472 U.S. 14, 27 (1985) (invalidating a tax that burdened out-of-state car buyers); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (striking down a Texas law that denied public education to undocumented children); *Zobel v. Williams*, 457 U.S. 55, 65 (1982) (invalidating Alaska's dividend distribution system favoring long-term residents); *O'Brien v. Skinner*, 414 U.S. 524, 530 (1974) (invalidating a law that allowed prisoners to vote only if they were detained outside of their county of residence); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (invalidating a statute that prevented cohabitating "hippies" from getting food stamps).

public education was not a fundamental right and that undocumented immigrants were not a protected class).

Both situations calling for the more-searching form of rational-basis review apply here. Not only do the 2004 Amendments inhibit the most intimate of personal relationships—family bonds—but they also offend both liberty and equality, burdening Plaintiffs' right to maintain family relationships and violating equal protection by drawing distinctions based on national origin and by arbitrarily allocating a fundamental right.

Applying heightened rational basis review, the Amendments are irrational to the extent that they inhibit family relationships in exigent circumstances for only a certain class of citizen. The Treasury Department has already created a board to review applications for exigent circumstances, 31 C.F.R. §515.561, and to review applications for "specific licenses" to travel for other purposes as well. *Id.* §515.560. Because the number of exigent-circumstances applications approved would be entirely within the agency's control, so too would the amount of hard currency flowing into Cuba. Under such circumstances, it is irrational to prohibit a certain class of people from even presenting their case to the government for review. Moreover, as explained in Part I, Section D, *supra*, the regulations target the wrong travelers from the point of view of the government's stated objective. The 2004 Amendments adversely affect those U.S. residents and citizens most likely to spend the least amount of money in Cuba (because they would be traveling to visit family members with homes in Cuba) while permitting exigent circumstances licenses to those U.S. residents and citizens most likely to spend great amounts of money (because they would be traveling to visit family members who are themselves in transit). Where the government's regulation is not rationally related to its purpose, it should be enjoined as unconstitutional.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC., ACLU OF MASSACHUSETTS, ACLU FOUNDATION OF VERMONT, and CENTER FOR CONSTITUTIONAL RIGHTS

By their attorneys,

/s/ Mitchell L. Pearl
Mitchell L. Pearl
LANGROCK SPERRY & WOOL, LLP
P.O. Drawer 351
Middlebury, VT 05753
mpearl@langrock.com
(802) 388-6356

James L. Messenger
Malick W. Ghachem
Okey Onyejekwe
Wasif Qureshi
Arthur D'Andrea
WEIL, GOTSHAL & MANGES LLP
100 Federal St.
Boston, MA 02110
617-772-8300

John Reinstein, Legal Director
Sarah Wunsch, Staff Attorney
ACLU OF MASSACHUSETTS
211 Congress St.
Boston, MA 02110
617-472-3170

Randall C. Marshall, Legal Director
ACLU OF FLORIDA
4500 Biscayne Boulevard -- Suite 340
Miami, FL 33137-3227
786-363-2700

Darius Charney
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6475

Dated: May 16, 2008