IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MOHAMMED ABDULLAH TAWFEEQ,	)	
Plaintiff.	)	**Case No. 1:17-cv-353**
v.	)	
U.S. DEPARTMENT OF HOMELAND SECURITY ("DHS"); **JOHN F. KELLY,** Secretary of DHS; **U.S. CUSTOMS AND BORDER PROTECTION** ("CBP"); **KEVIN K. MCALEENAN,** Acting Commissioner of CBP; **CAREY DAVIS,** Port Director, CBP ; **ANDY PRYOR,** Manager, CBP; **SHANA WELLS,** Manager, CBP; **U.S. DEPARTMENT OF STATE** ("Department of State"); **THOMAS A. SHANNON, JR.,** Acting Secretary of State, Department of State.	)	**PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**
Defendants.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff Mohammed Abdullah Tawfeeq is a prominent journalist and a lawful permanent resident ("LPR") from Iraq. On January 27, 2017, President Donald J. Trump issued an Executive Order ("EO") that purports to ban, *inter alia*, all aliens from Iraq—including LPRs—from entering the United States. *See* ECF No. 1-1. Defendants improperly applied the EO to Mr. Tawfeeq upon his return

from Iraq on January 29, 2017, instead of permitting his return pursuant to his rights under the Immigration and Nationality Act ("INA"). Plaintiff brought the instant action for declaratory, mandamus, and other relief the following day.

Defendants now seek dismissal of Plaintiff's case because they claim that subsequent events have mooted his claims. *See* ECF No. 19. Factual jurisdictional challenges that are inextricably linked to the merits of a case, however, are disfavored, and Defendants bear a heavy burden of persuasion because this is precisely such a challenge. *See U.S. v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968); *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). Defendants essentially argue that the case is now moot because they have voluntarily ceased their unlawful conduct. Defendants bear a "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000).

Defendants attempt to carry their heavy burden by citing three documents: (1) a White House Counsel memorandum (hereinafter the "memorandum") that interprets the EO to exclude LPRs, (2) a Department of Homeland Security ("DHS") press release regarding the memorandum, and (3) a District Court opinion from Massachusetts that declined to extend a temporary restraining order ("TRO")

based on the memorandum. Those documents fall far, far short of carrying Defendants' burden for numerous reasons.

First, the text of the EO itself has not changed and still purports to exclude all "immigrants" (*i.e.* LPRs) like Plaintiff. Second, the memorandum and press release to which Defendant point are of dubious legal import—they are not binding policy, cannot amend the EO's clear language, and need not be followed by admitting officers at the border. Third, the cited documents only claim that the EO's clear language somehow does not apply to LPRs—not that application of the language to Plaintiff would be illegal, as Plaintiff contends. Fourth, at least three other Federal Courts—the Western District of Washington, the Ninth Circuit, and the Eastern District of Virginia—have now rejected the Government's nearly identical mootness arguments. The District of Massachusetts' opinion does not appear to have fully considered these arguments, and in any case that ruling issued in a TRO context is inapposite here.

Moreover, even if Defendants *could* carry their heavy mootness burden here, the Court should still deny the Motion because several exceptions to mootness apply. Defendants have not established full voluntary cessation of their conduct, as the underlying EO remains in effect. The conduct here falls under the mootness exception for conduct capable of repetition yet evading review. And Defendants'

conduct unlawfully imposes a "brooding presence" concerning Plaintiff's legal rights, particularly given his professional need to travel.

Defendants could take steps designed to provide Plaintiff with the assurances he seeks by withdrawing the EO, clarifying that the EO cannot legally apply to him, presenting binding policy guidance to field officers, or agreeing that Plaintiff's rights under INA § 101(a)(13)(C), trump the authority cited in the EO. Defendants have thus far refused to take any of these steps and have relied instead on convoluted, nonbinding reinterpretations of clear language.

Plaintiff thus remains in the same position as when he filed his Complaint—unable to travel outside of the United States with assurances that he will be permitted to return under applicable law. If Plaintiff travels abroad, Defendants could bar him from the country without any due process under the terms of the EO and notwithstanding any of the subsequent documents they now cite. Defendants could also apply a separate EO that similarly bars Plaintiff based on their litigation position that they possess such power. Defendants' non-binding assurances that they will not apply the current EO to LPRs provides cold comfort in light of their recent positions and conduct. Plaintiff deserves an adjudication of his statutory and constitutional rights and the certainty that this Court can provide via the

requested declaratory, mandamus, and injunctive relief. Plaintiff respectfully requests that the Court deny the Motion to Dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is a prominent journalist for Cable News Network, Inc. ("CNN") specializing in the regions of the Middle East and North Africa. Since 2013, Plaintiff has been stationed at CNN's Atlanta offices, but he must regularly travel abroad as part of his job duties. ECF No. 1 at ¶¶ 40-47; ECF No. 5-2, at ¶ 5.[1] Plaintiff is an LPR who resides in Atlanta. ECF No. 1, at ¶¶ 37-38.

On January 27, 2017, President Donald J. Trump signed an Executive Order entitled "Protecting the Nation from Foreign Terrorist Entry Into the United States." ECF No. 1-1. That EO, *inter alia*, "suspend[ed] entry into the United States, as immigrants and nonimmigrants" aliens from seven nationalities, including Iraq, for a period of 90 days. *Id.*; ECF No. 1, at ¶¶ 60-61. Subsequent to the EO's issuance, Defendants issued various statements indicating that the EO would be applied to LPRs—*i.e.* immigrants—like Plaintiff. ECF No. 1, at ¶¶ 11-

[1] Plaintiff assumes that the allegations from his Complaint cited herein will not be disputed by Defendants. If Defendants dispute these facts and thereby create contested facts concerning this motion, Plaintiff requests an evidentiary hearing on the motion. *See Williamson v. Tucker*, 645 F.2d 404, 414 ("[T]he district court must give the plaintiff an opportunity for discovery and for a hearing that is appropriate to the nature of the motion to dismiss.").

14, 63-70. On information and belief (and as has been widely reported in the press and other lawsuits around the country), Defendants actually did apply the EO to refuse entry or otherwise impede the travel of numerous LPRs. *Id.* at ¶ 9.

Defendants then applied the EO to Plaintiff upon his return to the United States from a trip to Iraq on the evening of January 29, 2017. Specifically, Customs and Border Protection ("CBP") officials at Atlanta Hartsfield/Jackson International Airport informed Plaintiff that he could be denied entry under the EO and forced him to wait while CBP obtained an unspecified "e-mail" concerning whether he would be allowed into the United States. *Id.* at ¶¶ 48-56. The next day, Plaintiff filed the instant suit seeking declaratory, mandamus, and injunctive relief for the violation of his statutory and constitutional rights. *Id.* at ¶¶ 105-132.

On February 1, 2017—two days after Plaintiff filed this suit and after numerous similar suits had been filed around the country—White House Counsel Donald F. McGahn II issued a "Memorandum to the Acting Secretary of State, the Acting Attorney General, and the Secretary of Homeland Security" purporting to issue "Authoritative Guidance" regarding the EO. ECF No. 19-2. That memorandum stated:

> *I understand that there has been reasonable uncertainty about whether [Sections 3(c) and 3(e) of the Executive Order] apply to lawful permanent residents of the United States. Accordingly, to remove any confusion I now clarify that Sections 3(c) and 3(e) do not apply to such individuals. Please*

> *immediately convey this interpretive guidance to all individuals responsible for the administration and implementation of the Executive Order.*

Id. Two days after the White House Counsel issued his memorandum, DHS issued a "Statement on Countries Currently Suspended from Travel to the United States" from its Office of the Press Secretary stating that the travel "pause does not apply to Lawful Permanent Residents." ECF No. 19-4 at 1.

ARGUMENT

I. Defendants—not Plaintiff—bear the mootness burden.

In the Memorandum accompanying their Motion, Defendants assert the basic principle that "the party invoking federal jurisdiction bears the burden of proving its existence." ECF No. 19-1 at 3-4. Defendants appear to suggest that the burden with respect to their Motion rests on Plaintiff. It does not.

Defendants do not levy a "facial" mootness challenge in their Motion. Defendants do not contest that the Complaint alleges numerous bases for this Court's jurisdiction. *See* ECF No. 1, at ¶¶ 29-32. Defendants also provide the Court with no reason to believe that Plaintiff's case was moot when filed, as their Motion acknowledges that there might have been "a question as to the applicability of the [EO] to Plaintiff Mr. Tawfeeq on the day he filed the instant complaint." ECF No. 19-1 at 6.

Instead, Defendants rely on post-filing evidence from outside the complaint to levy a "factual challenge" to the Complaint. *Id.* at 4-5. Defendants—not Plaintiff—bear the burden on such a challenge. As the Eleventh Circuit has cautioned, "it is extremely difficult to dismiss a claim for lack of subject matter jurisdiction." *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256, 1260 (11th Cir. 1997). The test for mootness is a "stringent one," and the party arguing in favor of mootness must "satisfy [a] heavy burden of persuasion." *U.S. v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968). Indeed, "[t]he formidable, heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1184 (11th Cir. 2007) (quotations omitted). "[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000).

II. The Government has not carried its stringent burden.

Defendants primarily base their mootness arguments on two documents that post-date Plaintiff's Complaint: (1) the White House Counsel memorandum and (2)

the DHS press statement. ECF Nos. 19-2, 19-4. These documents cannot carry Defendant's heavy burden of persuasion on mootness for several reasons.

A. Defendants fail to establish that the documents cited have any legal import or power to bind relevant authorities.

First, Defendants provide no basis on which this Court can assess the legal import of either the memorandum or the DHS press statement. The White House Counsel is not charged with the inspection and admission of aliens, is not a party to this suit, and cannot alone bind any of Defendants to his interpretation of the EO. As the Ninth Circuit recently stated regarding the Government's nearly identical arguments in *Washington v. Trump*, No. 17-35105 (9th Cir. 2017):

> *The Government has offered no authority establishing that the White House counsel is empowered to issue an amended order superseding the Executive Order signed by the President…, and that proposition seems unlikely.*
>
> *Nor has the Government established that the White House counsel's interpretation of the Executive Order is binding on all executive branch officials responsible for enforcing the Executive Order. The White House counsel is not the President, and he is not known to be in the chain of command for any of the Executive Departments.*

Ex. A at 21-22.

Indeed, Defendants give this Court no basis on which to conclude that the White House Counsel memorandum bears legal significance at all. At least one court has cast doubt on the White House Counsel's ability to bind the President to an interpretation of a memorandum published with the White House Counsel's

blessing. *See New York Times Co. v. U.S. Dep't of Justice*, No. 12 Civ. 3215, 2013 WL 174222, at *8 (S.D.N.Y. Jan. 7, 2013) (fact that White House Counsel consented to Office of Legal Counsel's publication of a memorandum "cannot be read as the President expressly adopting [that memorandum's] reasoning"). The White House Counsel memorandum poses more questions than it answers. Does the White House Counsel purport to amend the EO or bind the President to his interpretation of the EO? Does the White House Counsel's interpretation of the EO supersede other interpretations previously advanced by Defendants, and—if so—on what legal authority? Neither Defendants nor the White House Counsel's statement offers any insight.

The DHS "statement" on which Defendants rely is similarly unavailing. Defendants characterize the document as a "policy statement," ECF No. 19-1 at 2, but they do not explain why a press release binds any DHS agent to any "policy." Defendants provide no evidence, for example, that adjudicators in the field—*e.g.* CBP officials who would inspect Plaintiff upon his return to Atlanta Hartsfield-Jackson Airport—are either aware of or would be bound to implement a DHS press release concerning the Executive Order. *Cf. Broadgate Inc. v. U.S. Citizenship & Immigration Servs.*, 730 F. Supp. 2d 240, 245 (D.D.C. 2010) (finding "no

evidence" that an internal memorandum "either binds USCIS adjudicators or requires a different outcome" than the underlying regulation).

Defendants further fail to even mention a separate DHS press release from DHS Secretary Kelly dated January 29, 2017 and that is still available on DHS's website at the time of this filing. *See* Ex. B. That press release suggests that the EO *does* apply to LPRs but that LPR status will generally be a determinative factor in DHS's "case-by-case determinations" under the EO. Are CBP agents to examine DHS's dueling press releases and determine which of them correctly interprets the EO? Defendants again do not say. In short, Defendants provide no basis for this Court to conclude that the memorandum or press statement have any legal import whatsoever—much less that they combine to form the "absolutely clear" showing required for mootness. *Friends of the Earth*, 528 U.S. at 190.

B. The documents cited are part of an ever-shifting interpretation of the EO.

Second, the memorandum and press release are best viewed as Defendants' latest musings regarding the EO's application to LPRs. As alleged in Plaintiff's complaint:

- On January 28, 2017, the acting DHS spokeswoman stated to Reuters that the Executive Order would bar green card holders. ECF No. 1 at ¶ 65.

- The Department of State confirmed to the press that the Executive Order would be applied to lawful permanent residents. *Id.* at ¶ 66.

- On the morning of January 29, 2017, White House Chief of Staff Reince Priebus said on national television that the Executive Order would not "affect" green card holders "moving forward." *Id.* at ¶ 67.

- Later in the day on January 29, 2017, DHS Secretary John Kelly issued a press release indicating that the Executive Order would in fact apply to green card holders but that "absent the receipt of significant derogatory information" lawful permanent resident status would be "a dispositive factor in [DHS's] case-by-case determinations" under the Executive Order. *Id.* at ¶ 68. *See* Ex. B.

Thus, within just the six-day period from January 27 to February 1, the Government thus took at least three positions regarding the applicability of the EO to LPRs. As the Ninth Circuit held, "in light of the Government's shifting interpretations of the Executive Order, we cannot say that the current interpretation by White House counsel, even if authoritative and binding, will persist past the immediate stage of these proceedings." Ex. A at 22.[2]

Defendants must show that their conduct "cannot reasonably be expected to start up again." *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1184 (11th Cir. 2007) (quotations omitted). Defendants have made *no* showing that the

[2] Defendants recently stated to the Ninth Circuit that a new EO is forthcoming, *see* ECF No. 23-2 at 4, but such an EO has not yet issued and its content is unclear today.

White House Counsel's interpretation of the EO will last any longer than the other interpretations they had previously adopted, much less the "formidable" showing required here. *Id.* Plaintiff's ability to seek an adjudication of his rights does not rest on the Executive's unsettled interpretation of language that it promulgated.

C. Defendants provide no reason for their interpretive changes, and thus no assurance that their interpretation is final.

Defendants ever-shifting interpretations of the EO are particularly perplexing in light of a fundamental underlying fact—the EO has facially applied to LPRs since its promulgation, and its language has never been changed. The EO purports to suspend the entry of both "immigrants and nonimmigrants." ECF No. 1-1 at § 3(c) ("I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order[.]"). LPRs are "immigrants" under the INA. *See* 8 U.S.C. § 1101(a)(15).

The memorandum and statement on which Defendants here rely state simply that the relevant EO provisions "do not" apply to LPRs without any accompanying legal analysis. *See* ECF No. 19-2 ("Sections 3(c) and 3(e) do not apply to [LPRs]."); ECF No. 19-4 at 1 ("This pause does not apply to Lawful Permanent Residents[.]"). This careful phrasing provides no legal basis for Defendants' decision to ignore the EO's plain language, and no reason for the government's apparent change of heart regarding that language. *Cf. Motor Vehicle Mfrs. Ass'n of*

U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) ("[A]n agency changing its course…is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."). As such, the statements provide no assurances to Plaintiff that the interpretations will not change again at a moment's notice or that a CBP officer would choose those non-binding interpretations over the EO's clear language.

Indeed, the Government has argued before the Ninth Circuit that the President retains vast authority to engage in "the categorical, temporary suspension the President has adopted" in the EO. Ex. C at 4. The Government has also contended that restrictions on nationality-based discrimination against LPRs do not impede the EO. *See id.* at 4-5. Defendants thus appear to believe that they *could* bar Plaintiff—they are just choosing not to apply the EO's plain language this time. Plaintiff's rights hang by a thread made up of Defendants' current assurances that they will not illegally ban him from the country without process—for the moment.

D. The documents on which Defendants rely do not address Plaintiff's rights.

Finally, neither of the documents on which Defendants rely address the rights that Plaintiff asserts in his suit. A rote conclusion that the EO "does not" apply to LPRs does not show that Defendants believe that this EO or a subsequent one *cannot* so apply. Plaintiff seeks a declaration that an EO *cannot* breach the

process due to returning LPRs under law, and his right to such a declaration is not affected by the Government's temporary promise that the EO "does" not apply to him now. The documents simply do not bind the Government to what Plaintiff submits is the only legal interpretation of the INA—that the EO (and any subsequent EO based on the same authority) cannot be applied to him as a matter of law, not just as a matter of government whim. The documents do not, for instance, direct Defendants' agents to permit the entry of returning permanent residents like Plaintiff pursuant to § 101(a)(13)(C) of the INA, 8 U.S.C. § 1101. Until Defendants are willing to clarify that they will inspect Plaintiff pursuant to that provision, Plaintiff still faces uncertainty regarding his return and whether Defendants intend to respect his full legal rights.

III. Several exceptions to mootness apply here.

Even if the Court is inclined to find that Defendants have carried their steep burden on mootness, several mootness exception doctrines apply to Plaintiff's case.

A. Even if Defendants have voluntarily ceased their conduct, the Court lacks a reasonable basis to conclude that the conduct will not recur.

First, Defendants' arguments in their Motion fall within the mootness exception for voluntary cessation. "It long has been the rule that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear

and determine the case, *i.e.*, does not make the case moot." *Troiano v. Supervisor of Elections in Palm Beach County, Fla.*, 382 F.3d 1276, 1283 (11th Cir. 2004) (quoting *Sec'y of Labor v. Burger King Corp.*, 955 F.2d 681, 684 (11th Cir. 1992) (internal quotation marks omitted)). Courts must consider three factors in such cases: "(1) whether the challenged conduct was isolated or intentional, as opposed to a continuing and deliberate practice; (2) whether the defendant's cessation of the conduct was motivated by a genuine change of heart or timed to anticipate suit; and (3) whether, in ceasing the conduct, the defendant has acknowledged liability." *Thomas v. Branch Banking & Trust Co.*, 32 F. Supp. 3d 1266, 1268-69 (N.D. Ga. 2014).

Here, Defendants' conduct was—and is—continuing and deliberate. The EO is an intentional policy intended to circumvent the rights of LPRs, and Defendants have only stated that they will not apply the EO as written. Even if this Court finds that Defendants have ceased their unlawful conduct, the timing of that cessation suggests that it was related to the numerous lawsuits filed to challenge the EO rather than a true "change of heart." Indeed Defendants do not fully concede in their Motion that their conduct was ever unlawful. *See* ECF No. 19-1 at 6 ("*if there was a question* as to the applicability of the Executive Order to Plaintiff Mr. Tawfeeq on the day he filed the instant Complaint") (emphasis added).

Moreover, Defendants have argued in the Ninth Circuit for broad authority that would permit them to enforce the current EO against LPRs, or to issue further EOs that cover LPRs. Ex. C at 4-5. Defendants' actions establish neither a change of heart nor an acknowledgement of liability.

Admittedly, a government is generally entitled to a presumption that once it has voluntarily ceased an illegal action, the objectionable behavior will not recur. *Troiano*, 382 F.3d at 1283. Critically, though, the government does not enjoy that presumption until the faulty policy has been "unambiguously terminated." *Id.* at 1283, 1285. As argued above, the termination here is ambiguous because the underlying EO remains in force with language dictating that LPRs will be barred. And even if the EO were revised to eliminate reference to immigrants, Defendants' position in the Ninth Circuit proceeding – that the government retains expansive powers to bar all immigrants—flies in the face of INA § 101(a)(13)(C), which states that returning residents like Plaintiff do not seek readmission upon their return to the United States and are treated as if they never left. Plaintiff seeks a declaration of his rights on precisely this point of law.

And in any case, Plaintiff has given the Court ample reason to overcome any presumption that the Government will not resume the unlawful behavior. Defendants have taken numerous positions on the current EO and have not yet

consistently applied their new policy. *Compare, e.g., Jews for Jesus, Inc. v. Hillsborough County Aviation Authority*, 162 F.3d 627, 629-30 (11th Cir.) (finding no reasonable expectation of a return to a prior policy when the change occurred as a result of "substantial deliberation" and the new policy was consistently applied for three years). Defendants' actions before the Ninth Circuit and in the EO itself suggest that they hope to press forward with subsequent EOs that apply to LPRs. *See* ECF No. 1-1 at § 3(e) (contemplating a subsequent EO against countries to be determined); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 and n. 11 (1982) (finding no mootness when a city had indicated it would reenact a challenged ordinance). These factors give the Court much more than the required "reasonable basis" needed to conclude that the Government's voluntary cessation has not mooted Plaintiff's suit. *Troiano*, 382 F.3d at 1285.

B. The Government's actions constitute conduct capable of repetition yet evading review.

The Court should also decline to find mootness because Defendants' conduct here fits the "capable of repetition, yet evading review" exception to mootness. This exception requires that the Court find: (1) a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party, and (2) the challenged action was too short in duration to be fully litigated prior to its cessation or expiration. *See News-Journal Corp. v.*

Foxman, 939 F.2d 1499, 1507 (11th Cir. 1991). Plaintiff can make such a showing here.

First, the Government's conduct to date gives rise to a reasonable expectation that the conduct will recur. Defendants elsewhere argue for broad authority to promulgate subsequent EOs that apply to LPRs. Defendants: (i) have not made a clear statement of the law that applies to returning LPRs, (ii) cite no authoritative instructions to their employees implementing the EO that are based on such a legal finding, and (iii) are taking litigation positions that confirm that the Defendants wish to reserve their rights to ignore applicable law—thus putting Plaintiff directly at risk of further injury in a future overseas trip.

Second, Defendants appear to be trying to evade proper judicial review by constantly shifting the playing field. Defendants clearly violated the rights of Plaintiff and other LPRs in the days after the EO's issuance, but they changed their tune as soon as litigation was filed around the country. Plaintiff timely filed this case the day after his rights were violated and almost immediately sought expedited consideration, which Defendants opposed. Defendants issued the documents it relies on for mootness mere days after the deluge of lawsuits. And now Defendants have suggested they may withdraw the EO and replace it with a new EO of unknown content but that is intended, in the words of Senior White

House Policy Adviser Stephen Miller, to achieve the "same basic policy outcome." ECF No. 23-2 at 4; Ex. D.[3] Defendants seek to evade judicial review through the seriatim enactment of policies of short duration that cause tremendous harm, and the mootness exception cited here forbids that.

C. The Government's misconduct is a "brooding presence" in Plaintiff's life.

The Supreme Court has indicated that mootness should not bar a suit when "the challenged governmental activity…is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974). One court in the Eleventh Circuit considered *Super Tire* in allowing a First Amendment challenge relating to a special election even after that election had passed, based on the likelihood that the government would hold future, similar special elections. *See Hall v. Bennett*, 999 F. Supp. 2d 1266, 1269-70 (M.D. Ala. 2014).

Here Defendants clearly believe that the President has the ability to unilaterally suspend the entry of returning LPRs into the United States on a whim. Defendants are circumventing judicial review of the EO by reinterpreting its clear

[3] Should the President issue a new EO, Plaintiff contends that any mootness arguments based on that EO should be brought as a separate motion to dismiss.

language without withdrawing it. Plaintiff deserves to have his statutory and constitutional rights adjudicated to avoid the "brooding presence" both for the next 90 days and from a future EO that could unilaterally bar him from the country at a moment's notice.

IV. Plaintiff continues to seek meaningful relief from this Court.

Defendants contend that this Court can only now issue an "impermissible advisory opinion" that "cannot affect the rights of the litigants" because, Defendants claim, any ambiguity regarding Mr. Tawfeeq was "resolved—in his favor" upon issuance of the White House Counsel's memorandum. ECF No. 19-1 at 6. For the reasons stated above, the issues raised by the EO are far from settled. This Court can still award numerous forms of relief for Plaintiff's situation. For instance, the Court could issue a declaration that Plaintiff's rights under the INA prevent Defendants from applying the EO to him, which would prevent Defendants from again changing course and applying the EO to LPRs. The Court can also award mandamus or injunctive relief requiring Defendants to issue guidance to the ports of entry that require them to inspect LPRs under INA § 101(a)(13)(C), regardless of this or any similar future EO to the contrary.

Defendants cite an inapposite Fourth Amendment case for the proposition that the Plaintiff seeks only redress for future harm and that a "30 minute delay is

not a constitutionally-cognizable injury." ECF No. 19-1 at 7 n.3 (citing *United States v. Flores-Montano*, 541 U.S. 149, 154 n.3 (2004)). That case, however, concerned whether the Plaintiff had "some sort of Fourth Amendment right not to be subject to delay at the international border." *Flores-Montano*, 541 U.S. at 154 n.3. Mr. Tawfeeq here asserts no Fourth Amendment claims but instead complains of violations of various statutes and of his procedural due process rights. *See* ECF No. 1 at ¶¶ 105-129.

Flores-Montano suggests that the duration of a delay might impact the analysis of whether a Fourth Amendment violation has occurred. Defendants give the Court no reason to believe, however, that the quantity of time Mr. Tawfeeq spent at the airport impacts his claims here, which center on statutory and due rights. If Defendants had carried through on their threats to send Mr. Tawfeeq back to Iraq without proper process, his rights would have been violated if Defendants took five minutes or five days to make that decision. Here, the government violated Mr. Tawfeeq's clear rights—including his right to return to the United States under 8 U.S.C. § 1101(a)(13)(C) rather than be subjected to inquiry under the EO—the moment they told him the EO applied to him and sought an "e-mail" concerning whether he could enter the country. ECF No. 1 at ¶ 51-54. That the e-mail arrived in 30 minutes in no way renders Defendants

application of the EO proper. And, in any case, Mr. Tawfeeq has properly alleged that LPRs were turned away from the United States or not permitted to board flights bound for the United States under the EO. *See* ECF 1 at ¶ 69-70. Plaintiff seeks to remedy both the harm that already has occurred and the harm currently occurring—his inability to travel with certainty that he will be permitted to return.[4]

V. Courts have largely sided against the Government's mootness claims.

Defendants also draw the Court's attention to a recent District Court decision from the District of Massachusetts in support of their mootness claims. *See* ECF No. 19-1 at 6; ECF No. 19-3. That Court found no further conduct to

[4] Defendants make the puzzling argument in a footnote that Plaintiff has raised "no claims relating to any action taken by Department of State with respect to Mr. Tawfeeq" and that the Department of State thus should be dismissed as a named Defendant. ECF No. 19-1 at 1 n.1. That contention is incorrect, as Plaintiff has alleged that all Defendants have and will violate his rights, *see* ECF No. 1 at ¶¶ 105-129, and has also alleged several facts that specifically relating to the Department of State's role in that scheme. *See*, *e.g.*, *id.* at ¶¶ 27-28, 59, 66.

Moreover, while Plaintiff does not currently possess knowledge about which Defendant bears responsibility for each of the actions taken pursuant to the EO, the Department of State almost certainly plays at least some role in, for instance, preventing airlines abroad from allowing LPRs on flights. *See id.* at ¶ 70. It will be cold comfort to Plaintiff if the Court awards him the requested remedies as to the DHS, but the Department of State thereafter improperly revokes his visa or takes actions to prevent him from boarding a plane under the EO. Defendant Department of State is a proper party here. *See* Fed. R. Civ. Pro. 20(a)(2).

enjoin based on the Government's contention that the EO would no longer be applied to LPRs. That Court, however was deciding merely whether to extend a previously-granted TRO—which needless to say uses under a different standard than a motion to dismiss. And the Massachusetts Court gave no discussion whatsoever to the practical import of the White House Counsel's memorandum or the serious questions regarding its legal validity raised above.

Moreover, three other Courts now have examined that memorandum and have concluded that it *does not* remove LPRs from legal jeopardy. The Western District of Washington granted a TRO despite the White House Counsel's memorandum. *See* Ex. E (government opposition arguing that plaintiffs could not rely on injuries to LPRs in light of the White House counsel guidance); Ex. F (granting TRO). The Ninth Circuit then upheld that TRO—again despite mootness arguments based on the White House Counsel's memorandum. *See* Ex. A at 21-22. Those same arguments were again rejected in the Eastern District of Virginia, which issued a preliminary injunction because "the EO presents an ongoing risk to the status of LPRs from the seven countries covered by the EO." *See* Ex. G (memorandum in support of preliminary injunction) at 4; Ex. H (preliminary injunction). To Plaintiff's knowledge, all Federal Courts that have considered the

mootness issue more fully than the Massachusetts Court have rejected Defendants' nearly identical mootness claims.

VI. Conclusion

For the foregoing reasons, Plaintiff requests that the Court deny Defendants' Motion to Dismiss.

DATED February 27, 2017

Respectfully submitted,

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CERTIFICATE OF FONT AND POINT SELECTION

Undersigned counsel hereby certifies, pursuant to L.R. 7.1(D), N.D. Ga., that the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** was prepared in Times New Roman, 14 point font, which is one of the font and point selections approved in L.R. 5.1, N.D. Ga.

/s/ Daniel P. Pierce
Daniel P. Pierce

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed a true and correct copy of the within and foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** by using the Court's CM/ECF, which will automatically send e-mail notification of this filing to the following counsel of record:

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This 27th day of February 2017.

/s/ Daniel P. Pierce
Daniel P. Pierce

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EXHIBIT A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON; STATE OF MINNESOTA, *Plaintiffs-Appellees*, v. DONALD J. TRUMP, President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; REX W. TILLERSON, Secretary of State; JOHN F. KELLY, Secretary of the Department of Homeland Security; UNITED STATES OF AMERICA, *Defendants-Appellants.*	No. 17-35105 D.C. No. 2:17-cv-00141 ORDER

Motion for Stay of an Order of the
United States District Court for the
Western District of Washington
James L. Robart, District Judge, Presiding

Argued and Submitted February 7, 2017

Filed February 9, 2017

Before: William C. Canby, Richard R. Clifton, and Michelle T. Friedland, Circuit Judges

Per Curiam Order

COUNSEL

August E. Flentje (argued), Special Counsel to the Assistant Attorney General; Douglas N. Letter, Sharon Swingle, H. Thomas Byron, Lowell V. Sturgill Jr., and Catherine Dorsey, Attorneys, Appellate Staff; Chad A. Readler, Acting Assistant Attorney General; Noel J. Francisco, Acting Solicitor General; Civil Division, United States Department of Justice, Washington, D.C., for Defendants-Appellants.

Noah G. Purcell (argued), Solicitor General; Marsha Chien and Patricio A. Marquez, Assistant Attorneys General; Colleen M. Melody, Civil Rights Unit Chief; Anne E. Egeler, Deputy Solicitor General; Robert W. Ferguson, Attorney General; Attorney General's Office, Seattle, Washington; for Plaintiff-Appellee State of Washington.

Jacob Campion, Assistant Attorney General; Alan I. Gilbert, Solicitor General; Lori Swanson, Attorney General; Office of the Attorney General, St. Paul, Minnesota; for Plaintiff-Appellee State of Minnesota.

ORDER

PER CURIAM:

At issue in this emergency proceeding is Executive Order 13769, "Protecting the Nation From Foreign Terrorist Entry Into the United States," which, among other changes to immigration policies and procedures, bans for 90 days the entry into the United States of individuals from seven countries. Two States challenged the Executive Order as unconstitutional and violative of federal law, and a federal district court preliminarily ruled in their favor and

temporarily enjoined enforcement of the Executive Order. The Government now moves for an emergency stay of the district court's temporary restraining order while its appeal of that order proceeds.

To rule on the Government's motion, we must consider several factors, including whether the Government has shown that it is likely to succeed on the merits of its appeal, the degree of hardship caused by a stay or its denial, and the public interest in granting or denying a stay. We assess those factors in light of the limited evidence put forward by both parties at this very preliminary stage and are mindful that our analysis of the hardships and public interest in this case involves particularly sensitive and weighty concerns on both sides. Nevertheless, we hold that the Government has not shown a likelihood of success on the merits of its appeal, nor has it shown that failure to enter a stay would cause irreparable injury, and we therefore deny its emergency motion for a stay.

I. Background

On January 27, 2017, the President issued Executive Order 13769, "Protecting the Nation From Foreign Terrorist Entry Into the United States" (the "Executive Order"). 82 Fed. Reg. 8,977. Citing the terrorist attacks of September 11, 2001, and stating that "numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes" since then, the Executive Order declares that "the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles." *Id.* It asserts, "Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States. The United

States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism." *Id.*

The Executive Order makes several changes to the policies and procedures by which non-citizens may enter the United States. Three are at issue here. First, section 3(c) of the Executive Order suspends for 90 days the entry of aliens from seven countries: Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen. 82 Fed. Reg. 8,977-78 (citing the Immigration and Nationality Act (INA) § 217(a)(12), codified at 8 U.S.C. § 1187(a)(12)). Second, section 5(a) of the Executive Order suspends for 120 days the United States Refugee Admissions Program. 82 Fed. Reg. 8,979. Upon resumption of the refugee program, section 5(b) of the Executive Order directs the Secretary of State to prioritize refugee claims based on religious persecution where a refugee's religion is the minority religion in the country of his or her nationality. *Id.* Third, section 5(c) of the Executive Order suspends indefinitely the entry of all Syrian refugees. *Id.* Sections 3(g) and 5(e) of the Executive Order allow the Secretaries of State and Homeland Security to make case-by-case exceptions to these provisions "when in the national interest." 82 Fed. Reg. 8,978-80. Section 5(e) states that situations that would be in the national interest include "when the person is a religious minority in his country of nationality facing religious persecution." 82 Fed. Reg. 8,979. The Executive Order requires the Secretaries of State and Homeland Security and the Director of National Intelligence to evaluate the United States' visa, admission, and refugee programs during the periods in which entry is suspended. 82 Fed. Reg. 8,977-80.

The impact of the Executive Order was immediate and widespread. It was reported that thousands of visas were

immediately canceled, hundreds of travelers with such visas were prevented from boarding airplanes bound for the United States or denied entry on arrival, and some travelers were detained. Three days later, on January 30, 2017, the State of Washington filed suit in the United States District Court for the Western District of Washington, challenging sections 3(c), 5(a)-(c), and 5(e) of the Executive Order, naming as defendants the President, the Secretary of the Department of Homeland Security, the Secretary of State, and the United States (collectively, "the Government"). Washington alleged that the Executive Order unconstitutionally and illegally stranded its residents abroad, split their families, restricted their travel, and damaged the State's economy and public universities in violation of the First and Fifth Amendments, the INA, the Foreign Affairs Reform and Restructuring Act, the Religious Freedom Restoration Act, and the Administrative Procedure Act. Washington also alleged that the Executive Order was not truly meant to protect against terror attacks by foreign nationals but rather was intended to enact a "Muslim ban" as the President had stated during his presidential campaign that he would do.

Washington asked the district court to declare that the challenged sections of the Executive Order are illegal and unconstitutional and to enjoin their enforcement nationwide. On the same day, Washington filed an emergency motion for a temporary restraining order (TRO) seeking to enjoin the enforcement of sections 3(c), 5(a)-(c), and 5(e) of the Executive Order. Two days later, Washington's Complaint was amended to add the State of Minnesota as a plaintiff and to add a claim under the Tenth Amendment. Washington and Minnesota (collectively, "the States") jointly filed an amended motion for a TRO. The Government opposed the

motion the next day, and the district court held a hearing the day after that.

That evening, the court entered a written order granting the TRO. *Washington v. Trump*, No. C17-0141-JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). The district court preliminarily concluded that significant and ongoing harm was being inflicted on substantial numbers of people, to the detriment of the States, by means of an Executive Order that the States were likely to be able to prove was unlawful. *Id.* at *2. The district court enjoined and restrained the nationwide enforcement of sections 3(c) and 5(a)-(c) in their entirety. *Id.* It enjoined section 5(e) to the extent that section "purports to prioritize refugee claims of certain religious minorities," and prohibited the government from "proceeding with any action that prioritizes the refugee claims of certain religious minorities." The court also directed the parties to propose a briefing schedule for the States' request for a preliminary injunction and denied the Government's motion to stay the TRO pending an emergency appeal. *Id.* at *3.

The Government filed a notice of appeal the next day and sought an emergency stay in this court, including an immediate stay while its emergency stay motion was under consideration. We denied the request for an immediate stay and set deadlines for the filing of responsive and reply briefs on the emergency stay motion over the next two days.[1] *Washington v. Trump*, No. 17-35105, 2017 WL 469608 (9th Cir. Feb. 4, 2017). The motion was submitted after oral argument was conducted by telephone.

[1] We have also received many amicus curiae briefs in support of both the Government and the States.

II. Appellate Jurisdiction

The States argue that we lack jurisdiction over the Government's stay motion because the Government's appeal is premature. A TRO is not ordinarily appealable. *See Bennett v. Medtronic, Inc.*, 285 F.3d 801, 804 (9th Cir. 2002). We may nonetheless review an order styled as a TRO if it "possesses the qualities of a preliminary injunction." *Serv. Emps. Int'l Union v. Nat'l Union of Healthcare Workers*, 598 F.3d 1061, 1067 (9th Cir. 2010). This rule has ordinarily required the would-be appellant to show that the TRO was strongly challenged in adversarial proceedings before the district court and that it has or will remain in force for longer than the fourteen-day period identified in Federal Rule of Civil Procedure 65(b). *See, e.g.*, *id.*

We are satisfied that in the extraordinary circumstances of this case, the district court's order possesses the qualities of an appealable preliminary injunction. The parties vigorously contested the legal basis for the TRO in written briefs and oral arguments before the district court. The district court's order has no expiration date, and no hearing has been scheduled. Although the district court has recently scheduled briefing on the States' motion for a preliminary injunction, it is apparent from the district court's scheduling order that the TRO will remain in effect for longer than fourteen days. In light of the unusual circumstances of this case, in which the Government has argued that emergency relief is necessary to support its efforts to prevent terrorism, we believe that this period is long enough that the TRO

should be considered to have the qualities of a reviewable preliminary injunction.[2]

III. Standing

The Government argues that the district court lacked subject matter jurisdiction because the States have no standing to sue. We have an independent obligation to ascertain our jurisdiction, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006), and we consider the Government's argument de novo, *see, e.g.*, *Hajro v. U.S. Citizenship & Immigration Servs.*, 811 F.3d 1086, 1098 (9th Cir. 2016). We conclude that the States have made a sufficient showing to support standing, at least at this preliminary stage of the proceedings.

Article III, section 2 of the Constitution allows federal courts to consider only "Cases" and "Controversies." *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). "Those two words confine 'the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.'" *Id.* (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). "Standing is an essential and unchanging part of the case-or-controversy requirement" and is therefore a prerequisite to our jurisdiction. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). The "gist of the question of standing" is whether the plaintiff has a sufficiently "personal stake in the outcome of the controversy" to ensure that the parties will be truly adverse and their legal

[2] Our conclusion here does not preclude consideration of appellate jurisdiction at the merits stage of this appeal. *See Nat'l Indus., Inc. v. Republic Nat'l Life Ins. Co.*, 677 F.2d 1258, 1262 (9th Cir. 1982).

presentations sharpened. *Massachusetts*, 549 U.S. at 517 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

To establish Article III standing, a plaintiff must demonstrate "that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Id.* (citing *Lujan*, 504 U.S. at 560-61).

Because standing is "an indispensable part of the plaintiff's case," it "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. At this very preliminary stage of the litigation, the States may rely on the allegations in their Complaint and whatever other evidence they submitted in support of their TRO motion to meet their burden. *See id.* With these allegations and evidence, the States must make a "clear showing of each element of standing." *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013).[3]

The States argue that the Executive Order causes a concrete and particularized injury to their public universities, which the parties do not dispute are branches of the States under state law. *See, e.g.*, *Hontz v. State*, 714 P.2d 1176, 1180 (Wash. 1986) (en banc); *Univ. of Minn. v. Raygor*, 620 N.W.2d 680, 683 (Minn. 2001).

[3] Our decision in *Townley* concerned a motion for a preliminary injunction, but the legal standards applicable to TROs and preliminary injunctions are "substantially identical." *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001).

Specifically, the States allege that the teaching and research missions of their universities are harmed by the Executive Order's effect on their faculty and students who are nationals of the seven affected countries. These students and faculty cannot travel for research, academic collaboration, or for personal reasons, and their families abroad cannot visit. Some have been stranded outside the country, unable to return to the universities at all. The schools cannot consider attractive student candidates and cannot hire faculty from the seven affected countries, which they have done in the past.

According to declarations filed by the States, for example, two visiting scholars who had planned to spend time at Washington State University were not permitted to enter the United States; one was informed he would be unable to obtain a visa. Similarly, the University of Washington was in the process of sponsoring three prospective employees from countries covered by the Executive Order for visas; it had made plans for their arrival beginning in February 2017, but they have been unable to enter the United States. The University of Washington also sponsored two medicine and science interns who have been prevented by the Executive Order from coming to the University of Washington. The University of Washington has already incurred the costs of visa applications for those interns and will lose its investment if they are not admitted. Both schools have a mission of "global engagement" and rely on such visiting students, scholars, and faculty to advance their educational goals. Students and faculty at Minnesota's public universities were similarly restricted from traveling for academic and personal reasons.

Under the "third party standing" doctrine, these injuries to the state universities give the States standing to assert the

rights of the students, scholars, and faculty affected by the Executive Order. *See Singleton v. Wulff*, 428 U.S. 106, 114-16 (1976) (explaining that third-party standing is allowed when the third party's interests are "inextricably bound up with the activity the litigant wishes to pursue"; when the litigant is "fully, or very nearly, as effective a proponent of the right" as the third party; or when the third party is less able to assert her own rights). Vendors, for example, "have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Craig v. Boren*, 429 U.S. 190, 195 (1976). Likewise, doctors have been permitted to assert the rights of their patients. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965). And advocacy organizations such as the NAACP have been permitted to assert the constitutional rights of their members. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449 (1958).

Most relevant for our purposes, schools have been permitted to assert the rights of their students. *See, e.g.*, *Runyon v. McCrary*, 427 U.S. 160, 175 & n.13 (1976) ("It is clear that the schools have standing to assert these arguments [asserting free-association rights, privacy rights, and 'a parent's right to direct the education of his children'] on behalf of their patrons."); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 536 (1925) (allowing a school to assert the "right of parents to choose schools where their children will receive appropriate mental and religious training [and] the right of the child to influence the parents' choice of a school"); *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1487-88 (9th Cir. 1995) (citing *Pierce* and rejecting the argument that the plaintiff school had no standing to assert claims of discrimination against its minority students); *see also Ohio Ass'n of Indep. Sch. v. Goff*, 92 F.3d 419, 422 (6th Cir. 1996) (citing similar authorities). As in those cases, the interests

of the States' universities here are aligned with their students. The students' educational success is "inextricably bound up" in the universities' capacity to teach them. *Singleton*, 428 U.S. at 115. And the universities' reputations depend on the success of their professors' research. Thus, as the operators of state universities, the States may assert not only their own rights to the extent affected by the Executive Order but may also assert the rights of their students and faculty members.[4]

We therefore conclude that the States have alleged harms to their proprietary interests traceable to the Executive Order. The necessary connection can be drawn in at most two logical steps: (1) the Executive Order prevents nationals of seven countries from entering Washington and Minnesota; (2) as a result, some of these people will not enter state universities, some will not join those universities as faculty, some will be prevented from performing research, and some will not be permitted to return if they leave. And we have no difficulty concluding that the States' injuries would be redressed if they could obtain the relief they ask for: a declaration that the Executive Order violates the Constitution and an injunction barring its enforcement. The Government does not argue otherwise.

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[4] The Government argues that the States may not bring Establishment Clause claims because they lack Establishment Clause rights. Even if we assume that States lack such rights, an issue we need not decide, that is irrelevant in this case because the States are asserting the rights of their students and professors. Male doctors do not have personal rights in abortion and yet any physician may assert those rights on behalf of his female patients. *See Singleton*, 428 U.S. at 118.

We therefore hold that the States have standing.[5]

IV. Reviewability of the Executive Order

The Government contends that the district court lacked authority to enjoin enforcement of the Executive Order because the President has "unreviewable authority to suspend the admission of any class of aliens." The Government does not merely argue that courts owe substantial deference to the immigration and national security policy determinations of the political branches—an uncontroversial principle that is well-grounded in our jurisprudence. *See, e.g.*, *Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016) (recognizing that "the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control" (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977))); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010) (explaining that courts should defer to the political branches with respect to national security and foreign relations). Instead, the Government has taken the position that the President's decisions about immigration policy, particularly when motivated by national security concerns, are *unreviewable*, even if those actions potentially contravene constitutional rights and protections. The Government indeed asserts that it violates separation of powers for the

[5] The States have asserted other proprietary interests and also presented an alternative standing theory based on their ability to advance the interests of their citizens as *parens patriae*. Because we conclude that the States' proprietary interests as operators of their public universities are sufficient to support standing, we need not reach those arguments.

judiciary to entertain a constitutional challenge to executive actions such as this one.

There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy. *See Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (rejecting the idea that, even by congressional statute, Congress and the Executive could eliminate federal court habeas jurisdiction over enemy combatants, because the "political branches" lack "the power to switch the Constitution on or off at will"). Within our system, it is the role of the judiciary to interpret the law, a duty that will sometimes require the "[r]esolution of litigation challenging the constitutional authority of one of the three branches." *Zivotofsky* ex rel. *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)). We are called upon to perform that duty in this case.

Although our jurisprudence has long counseled deference to the political branches on matters of immigration and national security, neither the Supreme Court nor our court has ever held that courts lack the authority to review executive action in those arenas for compliance with the Constitution. To the contrary, the Supreme Court has repeatedly and explicitly rejected the notion that the political branches have unreviewable authority over immigration or are not subject to the Constitution when policymaking in that context. *See Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (emphasizing that the power of the political branches over immigration "is subject to important constitutional limitations"); *Chadha*, 462 U.S. at 940-41 (rejecting the argument that Congress has "unreviewable authority over the regulation of aliens," and affirming that courts can review "whether Congress has chosen a constitutionally

permissible means of implementing that power").[6] Our court has likewise made clear that "[a]lthough alienage classifications are closely connected to matters of foreign policy and national security," courts "can and do review foreign policy arguments that are offered to justify legislative or executive action when constitutional rights are at stake." *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1056 (9th Cir. 1995).

Kleindienst v. Mandel, 408 U.S. 753 (1972), does not compel a different conclusion. The Government cites *Mandel* for the proposition that "'when the Executive exercises' immigration authority 'on the basis of a facially legitimate and bona fide reason, the courts will [not] look behind the exercise of that discretion.'" The Government omits portions of the quoted language to imply that this standard governs judicial review of *all* executive exercises of immigration authority. In fact, the *Mandel* standard applies to lawsuits challenging an executive branch official's decision to issue or deny an individual visa based on the

[6] *See also, e.g.*, *Galvan v. Press*, 347 U.S. 522, 530 (1954) (reaffirming the broad power of Congress over immigration, but observing that "[i]n the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process"); *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903) (reaffirming, in the context of adjudicating a constitutional challenge to an immigration policy, that "this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution"); *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889) ("The powers to declare war, make treaties . . . and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.").

application of a congressionally enumerated standard to the particular facts presented by that visa application. The present case, by contrast, is not about the application of a specifically enumerated congressional policy to the particular facts presented in an individual visa application. Rather, the States are challenging the President's *promulgation* of sweeping immigration policy. Such exercises of policymaking authority at the highest levels of the political branches are plainly not subject to the *Mandel* standard; as cases like *Zadvydas* and *Chadha* make clear, courts can and do review constitutional challenges to the substance and implementation of immigration policy. *See Zadvydas*, 533 U.S. at 695; *Chadha*, 462 U.S. at 940-41.

This is no less true when the challenged immigration action implicates national security concerns. *See Ex parte Quirin*, 317 U.S. 1, 19 (1942) (stating that courts have a duty, "in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty"); *Ex parte Milligan*, 71 U.S. 2, 120-21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace . . . under all circumstances."). We are mindful that deference to the political branches is particularly appropriate with respect to national security and foreign affairs, given the relative institutional capacity, informational access, and expertise of the courts. *See Humanitarian Law Project*, 561 U.S. at 33-34.

Nonetheless, "courts are not powerless to review the political branches' actions" with respect to matters of national security. *Alperin v. Vatican Bank*, 410 F.3d 532, 559 n.17 (9th Cir. 2005). To the contrary, while counseling deference to the national security determinations of the political branches, the Supreme Court has made clear that

the Government's "authority and expertise in [such] matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals," even in times of war. *Humanitarian Law Project*, 561 U.S. at 34 (quoting *id.* at 61 (Breyer, J., dissenting)); *see also United States v. Robel*, 389 U.S. 258, 264 (1967) ("'[N]ational defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("[S]imply because a statute deals with foreign relations [does not mean that] it can grant the Executive totally unrestricted freedom of choice.").

Indeed, federal courts routinely review the constitutionality of—and even invalidate—actions taken by the executive to promote national security, and have done so even in times of conflict. *See, e.g.*, *Boumediene*, 553 U.S. 723 (striking down a federal statute purporting to deprive federal courts of jurisdiction over habeas petitions filed by non-citizens being held as "enemy combatants" after being captured in Afghanistan or elsewhere and accused of authorizing, planning, committing, or aiding the terrorist attacks perpetrated on September 11, 2001); *Aptheker v. Sec'y of State*, 378 U.S. 500 (1964) (holding unconstitutional a statute denying passports to American members of the Communist Party despite national security concerns); *Ex parte Endo*, 323 U.S. 283 (1944) (holding unconstitutional the detention of a law-abiding and loyal American of Japanese ancestry during World War II and affirming federal court jurisdiction over habeas petitions by such individuals). As a plurality of the Supreme Court cautioned in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), "Whatever power the United

States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Id.* at 536 (plurality opinion).

In short, although courts owe considerable deference to the President's policy determinations with respect to immigration and national security, it is beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action.

V. Legal Standard

The Government moves to stay the district court's order pending this appeal. "A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). "It is instead 'an exercise of judicial discretion,' and 'the propriety of its issue is dependent upon the circumstances of the particular case.'" *Id.* (quoting *Virginian*, 272 U.S. at 672-73) (alterations omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34.

Our decision is guided by four questions: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken*, 556 U.S. at 434). "The first two factors . . . are the most critical," *Nken*, 556 U.S. at 434, and the last two steps are reached "[o]nce an applicant satisfies the first two

factors," *id.* at 435. We conclude that the Government has failed to clear each of the first two critical steps. We also conclude that the final two factors do not militate in favor of a stay. We emphasize, however, that our analysis is a preliminary one. We are tasked here with deciding only whether the Government has made a strong showing of its likely success in this appeal and whether the district court's TRO should be stayed in light of the relative hardships and the public interest.

The Government has not shown that it is likely to succeed on appeal on its arguments about, at least, the States' Due Process Clause claim, and we also note the serious nature of the allegations the States have raised with respect to their religious discrimination claims. We express no view as to any of the States' other claims.

VI. Likelihood of Success—Due Process

The Fifth Amendment of the Constitution prohibits the Government from depriving individuals of their "life, liberty, or property, without due process of law." U.S. Const. amend. V. The Government may not deprive a person of one of these protected interests without providing "notice and an opportunity to respond," or, in other words, the opportunity to present reasons not to proceed with the deprivation and have them considered. *United States v. Raya-Vaca*, 771 F.3d 1195, 1204 (9th Cir. 2014); *accord Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1073 (9th Cir. 2015).

The Government has not shown that the Executive Order provides what due process requires, such as notice and a hearing prior to restricting an individual's ability to travel. Indeed, the Government does not contend that the Executive

Order provides for such process. Rather, in addition to the arguments addressed in other parts of this opinion, the Government argues that most or all of the individuals affected by the Executive Order have no rights under the Due Process Clause.

In the district court, the States argued that the Executive Order violates the procedural due process rights of various aliens in at least three independent ways. First, section 3(c) denies re-entry to certain lawful permanent residents and non-immigrant visaholders without constitutionally sufficient notice and an opportunity to respond. Second, section 3(c) prohibits certain lawful permanent residents and non-immigrant visaholders from exercising their separate and independent constitutionally protected liberty interests in travelling abroad and thereafter re-entering the United States. Third, section 5 contravenes the procedures provided by federal statute for refugees seeking asylum and related relief in the United States. The district court held generally in the TRO that the States were likely to prevail on the merits of their due process claims, without discussing or offering analysis as to any specific alleged violation.

At this stage of the proceedings, it is the Government's burden to make "a strong showing that [it] is likely to" prevail against the States' procedural due process claims. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)). We are not persuaded that the Government has carried its burden for a stay pending appeal.

The procedural protections provided by the Fifth Amendment's Due Process Clause are not limited to citizens. Rather, they "appl[y] to all 'persons' within the United States, including aliens," regardless of "whether their

presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). These rights also apply to certain aliens attempting to reenter the United States after travelling abroad. *Landon v. Plasencia*, 459 U.S. 21, 33-34 (1982). The Government has provided no affirmative argument showing that the States' procedural due process claims fail as to these categories of aliens. For example, the Government has failed to establish that lawful permanent residents have no due process rights when seeking to re-enter the United States. *See id.* ("[T]he returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him." (quoting *Rosenberg v. Fleuti*, 374 U.S. 449, 460 (1963))). Nor has the Government established that the Executive Order provides lawful permanent residents with constitutionally sufficient process to challenge their denial of re-entry. *See id.* at 35 ("[T]he courts must evaluate the particular circumstances and determine what procedures would satisfy the minimum requirements of due process on the re-entry of a permanent resident alien.").

The Government has argued that, even if lawful permanent residents have due process rights, the States' challenge to section 3(c) based on its application to lawful permanent residents is moot because several days after the Executive Order was issued, White House counsel Donald F. McGahn II issued "[a]uthoritative [g]uidance" stating that sections 3(c) and 3(e) of the Executive Order do not apply to lawful permanent residents. At this point, however, we cannot rely upon the Government's contention that the Executive Order no longer applies to lawful permanent residents. The Government has offered no authority establishing that the White House counsel is empowered to issue an amended order superseding the Executive Order

signed by the President and now challenged by the States, and that proposition seems unlikely.

Nor has the Government established that the White House counsel's interpretation of the Executive Order is binding on all executive branch officials responsible for enforcing the Executive Order. The White House counsel is not the President, and he is not known to be in the chain of command for any of the Executive Departments. Moreover, in light of the Government's shifting interpretations of the Executive Order, we cannot say that the current interpretation by White House counsel, even if authoritative and binding, will persist past the immediate stage of these proceedings. On this record, therefore, we cannot conclude that the Government has shown that it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc., v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (emphasis added).

Even if the claims based on the due process rights of lawful permanent residents were no longer part of this case, the States would continue to have potential claims regarding possible due process rights of other persons who are in the United States, even if unlawfully, *see Zadvydas*, 533 U.S. 693; non-immigrant visaholders who have been in the United States but temporarily departed or wish to temporarily depart, *see Landon*, 459 U.S. 33-34; refugees, *see* 8 U.S.C. § 1231 note 8; and applicants who have a relationship with a U.S. resident or an institution that might have rights of its own to assert, *see Kerry v. Din*, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring in judgment); *id.* at 2142 (Breyer, J., dissenting); *Kleindienst v. Mandel*, 408 U.S. 753, 762-65 (1972). Accordingly, the Government has not demonstrated that the States lack viable claims based

on the due process rights of persons who will suffer injuries to protected interests due to the Executive Order. Indeed, the existence of such persons is obvious.

The Government argues that, even if the States have shown that they will likely succeed on some of their procedural due process claims, the district court nevertheless erred by issuing an "overbroad" TRO. Specifically, the Government argues that the TRO is overbroad in two independent respects: (1) the TRO extends beyond lawful permanent residents, and covers aliens who cannot assert cognizable liberty interests in connection with travelling into and out of the United States, and (2) the TRO applies nationwide, and enjoins application of the Executive Order outside Washington and Minnesota. We decline to modify the scope of the TRO in either respect.

First, we decline to limit the scope of the TRO to lawful permanent residents and the additional category more recently suggested by the Government, in its reply memorandum, "previously admitted aliens who are temporarily abroad now or who wish to travel and return to the United States in the future." That limitation on its face omits aliens who are in the United States unlawfully, and those individuals have due process rights as well. *Zadvydas*, 533 U.S. at 693. That would also omit claims by citizens who have an interest in specific non-citizens' ability to travel to the United States. *See Din*, 135 S. Ct. at 2139 (Kennedy, J., concurring in judgment); *id.* at 2142 (Breyer, J., dissenting) (six Justices declining to adopt a rule that would categorically bar U.S. citizens from asserting cognizable liberty interests in the receipt of visas by alien spouses). There might be persons covered by the TRO who do not have viable due process claims, but the Government's proposed revision leaves out at least some who do.

Second, we decline to limit the geographic scope of the TRO. The Fifth Circuit has held that such a fragmented immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and policy. *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016). At this stage of the litigation, we do not need to and do not reach such a legal conclusion for ourselves, but we cannot say that the Government has established that a contrary view is likely to prevail. Moreover, even if limiting the geographic scope of the injunction would be desirable, the Government has not proposed a workable alternative form of the TRO that accounts for the nation's multiple ports of entry and interconnected transit system and that would protect the proprietary interests of the States at issue here while nevertheless applying only within the States' borders.

More generally, even if the TRO might be overbroad in some respects, it is not our role to try, in effect, to rewrite the Executive Order. *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 (1995) (declining to rewrite a statute to eliminate constitutional defects); *cf. Aptheker v. Sec'y of State*, 378 U.S. 500, 516 (1964) (invalidating a restriction on freedom of travel despite the existence of constitutional applications). The political branches are far better equipped to make appropriate distinctions. For now, it is enough for us to conclude that the Government has failed to establish that it will likely succeed on its due process argument in this appeal.

VII. Likelihood of Success—Religious Discrimination

The First Amendment prohibits any "law respecting an establishment of religion." U.S. Const. amend. I. A law that has a religious, not secular, purpose violates that clause,

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), as does one that "officially prefer[s] [one religious denomination] over another," *Larson v. Valente*, 456 U.S. 228, 244 (1982). The Supreme Court has explained that this is because endorsement of a religion "sends the ancillary message to . . . nonadherents 'that they are outsiders, not full members of the political community.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). The Equal Protection Clause likewise prohibits the Government from impermissibly discriminating among persons based on religion. *De La Cruz v. Tormey*, 582 F.2d 45, 50 (9th Cir. 1978).

The States argue that the Executive Order violates the Establishment and Equal Protection Clauses because it was intended to disfavor Muslims. In support of this argument, the States have offered evidence of numerous statements by the President about his intent to implement a "Muslim ban" as well as evidence they claim suggests that the Executive Order was intended to be that ban, including sections 5(b) and 5(e) of the Order. It is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) ("The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. . . . Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."); *Larson*, 456 U.S. at 254-55 (holding that a facially neutral statute violated the Establishment Clause in light of legislative history demonstrating an intent to apply regulations only to minority religions); *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266-

68 (1977) (explaining that circumstantial evidence of intent, including the historical background of the decision and statements by decisionmakers, may be considered in evaluating whether a governmental action was motivated by a discriminatory purpose).

The States' claims raise serious allegations and present significant constitutional questions. In light of the sensitive interests involved, the pace of the current emergency proceedings, and our conclusion that the Government has not met its burden of showing likelihood of success on appeal on its arguments with respect to the due process claim, we reserve consideration of these claims until the merits of this appeal have been fully briefed.

VIII. The Balance of Hardships and the Public Interest

The Government has not shown that a stay is necessary to avoid irreparable injury. *Nken*, 556 U.S. at 434. Although we agree that "the Government's interest in combating terrorism is an urgent objective of the highest order," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010), the Government has done little more than reiterate that fact. Despite the district court's and our own repeated invitations to explain the urgent need for the Executive Order to be placed immediately into effect, the Government submitted no evidence to rebut the States' argument that the district court's order merely returned the nation temporarily to the position it has occupied for many previous years.

The Government has pointed to no evidence that any alien from any of the countries named in the Order has

perpetrated a terrorist attack in the United States.[7] Rather than present evidence to explain the need for the Executive Order, the Government has taken the position that we must not review its decision at all.[8] We disagree, as explained above.

To the extent that the Government claims that it has suffered an institutional injury by erosion of the separation of powers, that injury is not "irreparable." It may yet pursue and vindicate its interests in the full course of this litigation. *See, e.g.*, *Texas v. United States*, 787 F.3d 733, 767-68 (5th Cir. 2015) ("[I]t is the resolution of the case on the merits, not whether the injunction is stayed pending appeal, that will affect those principles.").

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[7] Although the Government points to the fact that Congress and the Executive identified the seven countries named in the Executive Order as countries of concern in 2015 and 2016, the Government has not offered any evidence or even an explanation of how the national security concerns that justified those designations, which triggered visa requirements, can be extrapolated to justify an urgent need for the Executive Order to be immediately reinstated.

[8] In addition, the Government asserts that, "[u]nlike the President, courts do not have access to classified information about the threat posed by terrorist organizations operating in particular nations, the efforts of those organizations to infiltrate the United States, or gaps in the vetting process." But the Government may provide a court with classified information. Courts regularly receive classified information under seal and maintain its confidentiality. Regulations and rules have long been in place for that. 28 C.F.R. § 17.17(c) (describing Department of Justice procedures to protect classified materials in civil cases); 28 C.F.R. § 17.46(c) ("Members of Congress, Justices of the United States Supreme Court, and Judges of the United States Courts of Appeal and District Courts do not require a determination of their eligibility for access to classified information . . . ."); W.D. Wash. Civ. L.R. 5(g) (providing procedures governing filings under seal).

By contrast, the States have offered ample evidence that if the Executive Order were reinstated even temporarily, it would substantially injure the States and multiple "other parties interested in the proceeding." *Nken*, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). When the Executive Order was in effect, the States contend that the travel prohibitions harmed the States' university employees and students, separated families, and stranded the States' residents abroad. These are substantial injuries and even irreparable harms. *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))).

The Government suggests that the Executive Order's discretionary waiver provisions are a sufficient safety valve for those who would suffer unnecessarily, but it has offered no explanation for how these provisions would function in practice: how would the "national interest" be determined, who would make that determination, and when? Moreover, as we have explained above, the Government has not otherwise explained how the Executive Order could realistically be administered only in parts such that the injuries listed above would be avoided.

Finally, in evaluating the need for a stay, we must consider the public interest generally. *See Nken*, 556 U.S. at 434. Aspects of the public interest favor both sides, as evidenced by the massive attention this case has garnered at even the most preliminary stages. On the one hand, the public has a powerful interest in national security and in the ability of an elected president to enact policies. And on the other, the public also has an interest in free flow of travel, in avoiding separation of families, and in freedom from

discrimination. We need not characterize the public interest more definitely than this; when considered alongside the hardships discussed above, these competing public interests do not justify a stay.

IX. Conclusion

For the foregoing reasons, the emergency motion for a stay pending appeal is **DENIED.**

EXHIBIT B

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Statement By Secretary John Kelly On The Entry Of Lawful Permanent Residents Into The United States

Release Date: January 29, 2017

For Immediate Release
Office of the Press Secretary
Contact: 202-282-8010

WASHINGTON – In applying the provisions of the president's executive order, I hereby deem the entry of lawful permanent residents to be in the national interest.

Accordingly, absent the receipt of significant derogatory information indicating a serious threat to public safety and welfare, lawful permanent resident status will be a dispositive factor in our case-by-case determinations.

# # #

Topics: International (/topics/international)

Keywords: international (/keywords/international), Legal Permanent Residents (/keywords/legal-permanent-residents)

Last Published Date: January 29, 2017

EXHIBIT C

No. 17-35105

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON, et al.,
Plaintiffs-Appellees,
v.

DONALD TRUMP, President of the United States, et al.
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING APPEAL

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The Executive Order is a lawful exercise of the President's authority over the entry of aliens into the United States and the admission of refugees. Relying on his express statutory authority to suspend entry of any class of aliens to protect the national interest, the President has directed a temporary suspension of entries through the refugee program and from countries that have a previously identified link to an increased risk of terrorist activity, *see* 8 U.S.C. § 1187(a)(12). The purpose of that temporary suspension is to permit an orderly review and revision of screening procedures to ensure that adequate standards are in place to protect against terrorist attacks. As a different district court recently concluded, that objective provides a "facially legitimate and bona fide" justification that satisfies any constitutional scrutiny that applies. *Louhghalam v. Trump*, Civ. Action No. 17-10154-NMG, Order 18-19 (D. Mass. Feb. 3, 2017); *see id.* at 10-11, 15-16.

The district court therefore erred in entering an injunction barring enforcement of the order. But even if some relief were appropriate, the court's sweeping nationwide injunction is vastly overbroad, extending far beyond the State's legal claims to encompass numerous applications of the Order that the State does not even attempt to argue are unlawful.

1. As an initial matter, the State cannot challenge the denial of entry or visas to third-party aliens. It is well-settled that a State lacks authority to sue "as the representative of its citizens" to protect them from the operation of federal law.

Massachusetts v. Mellon, 262 U.S. 447, 485-86 (1923); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). The State invokes the "special solicitude" for States referred to in *Massachusetts v. EPA*, but there, Massachusetts sought to enforce a congressionally created "procedural right" to protect a loss of "sovereign territory." 549 U.S. 497, 519-20, 522-23 (2007). Here, by contrast, the State's interest in protecting its own territory is not at issue. Instead, the Constitution vests the federal government with exclusive power over immigration for the Nation as a whole, and Congress did not create any "procedural right" for States to sue the federal government to challenge its decisions to deny the entry of (or revoke visas held by) third-party aliens.

To the contrary, an alien outside the United States has no substantive right or basis for judicial review in the denial of a visa at all. *See Brownell v. Tom We Shung*, 352 U.S. 180, 184 n.3, 185 n.6 (1956). Moreover, Congress has been clear that the issuance of a visa to an alien does not confer upon that alien any right of admission into the United States, 8 U.S.C. § 1201(h), and that the Secretary of State "may, at any time, in his discretion, revoke such visa or other documentation." *Id.* § 1201(i). If a visa is revoked, even the alien himself has no right of judicial review "except in the context of a removal proceeding," and only if the visa revocation "provides the sole ground for removal." *Id.* And even an alien who has been admitted to and developed significant ties with this country, who has as a result come within the

protection of the Fifth Amendment's Due Process Clause, has no protected property or liberty interest in the retention of his visa. *Knoetze v. U.S. Dep't of State*, 634 F.2d 207, 212 (5th Cir. 1981). A fortiori, the State cannot challenge the revocation of third-party aliens' visas here. The State likewise cannot challenge the Executive's decision not to admit a refugee.

The Supreme Court's decisions in *Kerry v. Din*, 135 S. Ct. 2128 (2015), and *Kleindienst v. Mandel*, 408 U.S. 753 (1972), also do not support even limited judicial review of the State's claims here. In those cases, U.S. citizens sought review of the denial of a third-party visa on the ground that the citizens had an independent constitutionally-protected interest in the third-party's admission to the country—either a marital relationship or a First Amendment interest. The State, in contrast, has no independent constitutional rights to invoke with respect to the denial of admission of aliens affected by the Order.

2. Even if it could establish standing and a right of judicial review, the State would be unlikely to succeed on the merits of its claims.

a. Congress has granted the President broad discretion under 8 U.S.C. § 1182(f) to suspend the entry of "any class of aliens" into the United States, and independently broad discretion over the refugee program under 8 U.S.C. § 1157. The exclusion of aliens is also "a fundamental act of sovereignty * * * inherent in the executive power to control the foreign affairs of the nation." *United States ex*

rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950). The State does not address the text of § 1182(f), or the extensive caselaw relating to the exclusion of aliens from the United States. And although the State suggests (Response 23) that it is somehow impermissible for the President to rely on § 1182(f) "to impose a *categorical* ban on admission," the statute's broad grant of authority to suspend the entry "of any class of aliens," "for such period as [the President] shall deem necessary," whenever the President finds that it would be "detrimental to the interests of the United States," clearly authorizes the categorical, temporary suspension the President has adopted here.

b. The State continues to argue that Section 3(c)'s temporary suspension of the entry of aliens from seven countries contravenes the restriction on nationality-based distinctions in 8 U.S.C. § 1152(a)(1)(A). But that restriction applies only to "the issuance of an immigrant visa," *Id.*, not to the President's restrictions on the right of entry. It also has no application at all to aliens who hold or seek *non-immigrant* visas, such as student visas or work visas. And § 1152(a)(1)(B) permits, as here, a temporary suspension of entry pending completion of a review and revision of procedures for processing visa applications.

Furthermore, even if it applied, § 1152(a)(1)(A) would not restrict § 1182(f)'s broad grant of discretionary authority. A court should, whenever possible, "interpret two seemingly inconsistent statutes to avoid a potential conflict," *California ex rel.*

Sacramento Metro. Air Quality Mgmt. Dist. v. United States, 215 F.3d 1005, 1012 (9th Cir. 2000), and should interpret "the specific [to] govern[] the general." *RadLAX Gateway Hotel v. Amalgamated Bank*, 132 S. Ct. 2065, 2070-71 (2012). Here, § 1152(a)(1)(A) establishes a general rule governing the issuance of immigrant visas, whereas § 1182(f) governs the specific instance in which the President determines that entry of a "class of aliens" would be "detrimental to the interests of the United States." The State's assertion that § 1152(a)(1)(A) limits that authority would mean that the President would be statutorily disabled from barring the entry of nationals of a country with which the United States was at war—a result that would raise serious constitutional questions, which is itself a sufficient reason to reject the State's reading. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

c. The State asserts that the Order violates the constitutional rights of lawful permanent residents (LPRs). Response at 10, 15 & n.3, 16. But the Order does not apply to LPRs. Exhibit D. It applies only to aliens who lack LPR status. And most of those aliens are outside the United States and have never been admitted to this country. The Supreme Court "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

The State argues (Response 9) that "courts routinely review executive decisions with far greater security implications than this Order." In those cases, however, the courts were reviewing government actions taken against individuals who had rights under the U.S. Constitution or federal statutes with respect to the adverse actions they faced. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality op.) (reviewing indefinite detention of U.S. citizen); *Boumediene v. Bush*, 553 U.S. 723 (2008) (reviewing detention of aliens held to have constitutionally protected interest in habeas corpus review). Those cases do not override the longstanding rule that aliens outside the United States have no right or interest in their admission to the United States protected by the Due Process Clause, *Knauff*, 338 U.S. at 543, or the rule that non-immigrants do not have a liberty or property interest in the retention of a visa.

d. The State's constitutional challenges lack merit.

i. The State first asserts that the Order violates the Establishment Clause and equal protection principles because it was assertedly based on animus against Muslims. That is incorrect. There are two separate aspects of the Order challenged here, and both are neutral with respect to religion.

First, Section 3(c) temporarily suspends entry of aliens from seven countries previously identified under 8 U.S.C. § 1187(a)(12). Those countries were identified by Congress and the Executive Branch as being associated with a heightened risk of

terrorism. Congress itself identified Iraq and Syria, where "the Islamic State of Iraq and the Levant (ISIL) * * * maintain[s] a formidable force." U.S. Department of State, *Country Reports on Terrorism 2015* 6 (June 2016). *See* 8 U.S.C. § 1187(a)(12)(A)(i)(I), (ii)(I). Congress also incorporated countries designated as state sponsors of terrorism: Iran, Sudan, and Syria. *Id.* § 1187(a)(12)(A)(i)(II) and (ii)(II). And in 2016, the Executive Branch added Libya, Somalia, and Yemen after a review that considered "whether the country or area is a safe haven for terrorists" and "whether the presence of an alien in the country or area increases the likelihood that the alien is a credible threat to the national security of the United States." 8 U.S.C. § 1187(a)(12)(D)(iii); https://www.dhs.gov/news/20016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program.

Second, Section 5(a) temporarily suspends the refugee program as to refugees from *all* countries, not just the seven countries identified in Section 3(c). Section 5(b) further provides that, when the refugee program resumes, the Secretary of State shall "make changes, to the extent permitted by law, to prioritize refugee claims" by members of persecuted minority religions. Laws that "give relief to a religious minority" "are in tune with the Bill of Rights," *Kong v. Scully*, 341 F.3d 1132, 1141 (9th Cir. 2003), and Section 5(b) of the Order applies equally to *all* religious minorities seeking refugee status "on the basis of religious-based persecution." As the district court recognized in *Louhghalam*, Section 5(b) "could be invoked to give

preferred refugee status to a Muslim individual in a country that is predominantly Christian." Order 13.[2]

Accordingly, as the district court held in *Louhghalam*, Order 13, the Executive Order is "neutral with respect to religion." And under *Mandel*, the Order's national-security basis for the temporary suspension amply establishes its constitutionality. *See also Louhghalam*, Order 18-19. The State asserts (Response 10) that the Court should "look behind" the stated basis for the Order to probe its subjective motivations because the State claims to have made "an affirmative showing of bad faith." *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring). But the State's allegations of bad faith are not meaningfully different from the allegations deemed insufficient in *Mandel*, where the plaintiff asserted that the visa was denied because of the alien's advocacy of revolutionary Marxism and world communism, rather than his failure to comply with the terms of prior visas. 408 U.S. at 756; *see Din*, 135 S. Ct. at 2141-2142 (Kennedy, J., concurring) (endorsing *Mandel*). And here, the State asks the courts to take the extraordinary step of second-guessing a formal national-security judgment made by the President himself pursuant to broad grants of statutory authority.

[2] Washington relies on *Larson v. Valente*, 456 U.S. 228 (1982), but that holding is limited to cases where a government statute or practice "explicitly discriminates against a certain religious group." *Sep. of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 623 (9th Cir. 1996) (O'Scannlain, J., concurring).

ii. The State also argues (Response 14-18) that the order violates aliens' procedural due process rights. But as explained above, aliens outside the United States have no due process rights with respect to their attempt to gain entry into this country. And regardless, "notice and an opportunity to respond" is not required where, as here, the challenged rule reflects a categorical judgment. *Cf. Bi-Metallic Inv. Co. v. State Bd. Of Equalization*, 239 U.S. 441, 445 (1915) ("[w]here a rule of conduct applies to more than a few people," individuals affected do not "have a constitutional right to be heard before a matter can be decided"); *see also Din*, 135 S. Ct. at 2144 (Breyer, J., dissenting) (citing *Bi-Metallic*).

3. The State argues (Response 7-8) that the injunction does not impose any irreparable harm. But the injunction reinstates procedures that the President determined should be temporarily suspended in the interest of national security. Order § 1; *see also id.* § 2. The Order temporarily suspends entry of aliens from seven countries previously identified by Congress and the Executive Branch as raising heightened terrorism-related concerns. The suspension terminates in 90 days, once concerns relating to screening practices can be addressed, as necessary "to prevent infiltration [into this Nation] by foreign terrorists or criminals," Order § 3(c). Similarly, the temporary suspension of the U.S. refugee program will be lifted after 120 days, once the Secretaries of State and Homeland Security, in consultation with the Director of National Intelligence, determine "what additional

procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States." Order § 5(a). The potential national-security risks and harms resulting from the compelled application of procedures that the President has determined must be reexamined, for the purpose of ensuring an adequate measure of protection for the Nation, cannot be undone. Nor can the effect on our constitutional separation of powers.

4. Regardless of the plaintiff's likelihood of success, the injunction court is, at a minimum, vastly overbroad. The State has made clear that it is seeking to protect LPRs and other nationals from the seven identified countries who were previously admitted to the United States and are either temporarily abroad or are here now and wish to travel outside this country—*not* aliens who are attempting to enter the country for the first time. *See* Response 11-12, 15-16; Transcript 7-8, 15-16. That makes sense because the latter class of aliens have no constitutional rights with respect to entry into the country—a point the State largely conceded below. *See* Transcript 7, 15. The injunction, however, bars *all* applications of Section 3(c)—even as to aliens who have never previously visited this country, and have not yet begun the process of obtaining a visa. It also bars all applications of Section 5, even though there is no indication that any of the aliens affected by the temporary

suspension of the refugee program have been previously admitted to this country.[3] That is plainly impermissible. At most, the injunction should be limited to the class of individuals on whom the State's claims rest—previously admitted aliens who are temporarily abroad now or who wish to travel and return to the United States in the future.

[3] Indeed, the district court even enjoined a provision that will not go into effect for 120 days, a provision as to which even plaintiffs conceded that their challenge is not ripe for review. Transcript 15 (Section 5(b) claim "does not necessarily require immediate injunction").

CONCLUSION

For the foregoing reasons, defendants respectfully request a stay pending appeal of the district court's February 3, 2017 injunctive order.

Respectfully submitted,

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* The Acting Solicitor General and Acting Assistant Attorney General have refrained from signing this brief, out of an abundance of caution, in light of a last-minute filing of an amicus brief by their former law firm.

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2017, I filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply in Support of Emergency Motion for Stay Pending Appeal complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 2,599 words. This Motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

s/ Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.

EXHIBIT D

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Trump adviser says new travel ban will have 'same basic policy outcome'

Published February 21, 2017

FoxNews.com

Senior White House Policy Adviser Stephen Miller told Fox News' "First 100 Days" Tuesday that a revised version of President Donald Trump's travel ban would "have the same basic policy outcome."

Miller claimed that the new executive order would be "responsive" to federal court rulings which halted the original order and resolve "a lot of very technical issues that were brought up by the court."

However, Miller also insisted that the court ruling staying the original order was "flawed" and "erroneous" and that Trump's action was "clearly legal and constitutional."

DHS SECRETARY ORDERS IMMIGRATION AGENT HIRING SURGE, END TO 'CATCH-AND-RELEASE'

"Here's the reality," Miller said. "We've got a serious problem in our country of terrorism, radicalization and serious problems of people joining ISIS, joining terror groups, joining Al Qaeda and committing or attempting to commit acts of crime and terror against our nation."

Miller indicated the revised order would apply to the same seven majority-Muslim countries — Iran, Iraq, Syria, Yemen, Somalia, Sudan and Libya — as the previous order.

Miller spoke to host Martha MacCallum at the top of an hour-long immigration town hall in Jacksonville, Fla. hours after Homeland Security Secretary John Kelly directed agency heads to hire thousands more immigration officers, end so-called "catch-and-release" policies and begin work on the president's promised U.S.-Mexico border wall.

NEW IMMIGRATION POLICIES DRAW PRAISE AND ALARM

Through a show of hands, most of the town hall audience indicated that they supported Trump's tough stance on illegal immigration.

"I think [Miller's] main argument was right on point," said audience member Jack Capra. "Securing our borders is a national security issue [and] it's the federal government's job to keep our citizens safe from external and internal threats. I think immigration is a big contributor to that."

However, immigration attorney Francisco Hernandez told MacCallum that Trump's ordered immigration enforcement changes had "written a blank check that he can't cash."

"He's going to have to get the money from somewhere," Hernandez said, "and we don't have the money."

In last year's presidential election, a Fox News exit poll found that 10 percent of Florida voters said immigration was the biggest issue facing the country. Of those voters, 69 percent backed Trump over Hillary Clinton.

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URL

http://www.foxnews.com/politics/2017/02/21/trump-adviser-says-new-travel-ban-will-have-same-basic-policy-outcome.html

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EXHIBIT E

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON and STATE OF MINNESOTA,

Plaintiffs,

v.

DONALD TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of the Department of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State;[1] and the UNITED STATES OF AMERICA,

Defendants.

No. 2:17-cv-00141 (JLR)

DEFENDANTS' OPPOSITION TO PLAINTIFF STATE OF WASHINGTON'S MOTION FOR TEMPORARY RESTRAINING ORDER

Noted For Consideration:
February 3, 2017

[1] Rex W. Tillerson, Secretary of State, has been substituted for Tom Shannon pursuant to Federal Rule of Civil Procedure 25(d).

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INTRODUCTION

A provision of the Immigration and Nationality Act (INA) titled "Suspension of entry or imposition of restrictions by President," 8 U.S.C. § 1182(f), authorizes the President to "suspend the entry of . . . any class of aliens" whenever the President determines their entry "would be detrimental to the interests of the United States[.]" Invoking that authority, on January 27, 2017, the President issued an Executive Order titled "Protecting the Nation from Foreign Terrorist Entry into the United States." *See* ECF No. 1-7. The Executive Order's purpose is "to protect the American people from terrorist attacks by foreign nationals admitted to the United States," *id.* pmbl., and as pertinent here it directs the following actions:

- a 90-day suspension of entry for individuals from certain countries, during which time the Secretary of Homeland Security and other officials must review whether the United States has adequate information to determine that an individual seeking an immigration benefit "is not a security or public-safety threat," *see id.* § 3(a), (c);
- a 120-day suspension of the U.S. Refugee Admissions Program ("USRAP" or "refugee program"), during which time the Secretary of State and other officials must "review the USRAP application and adjudication process to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures," *see id.* § 5(a); and
- a suspension of entry of Syrian nationals as refugees, until such time as the President determines "that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest," *see id.* § 5(c).

The Executive Order also contains waiver provisions permitting exceptions from some of these actions. *See, e.g.*, *id.* §§ 3(g), 5(e).

Despite this plain congressional authorization to the President to make determinations regarding national security and the admissibility of aliens, the State of Washington (hereafter, "the State") requests entry of a temporary restraining order prohibiting enforcement nationwide of the President's Executive Order. *See* Proposed Order (ECF No. 3-1) at 3 ¶ 2. The State does so despite the heavy burden it carries to justify such an "extraordinary remedy," particularly

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where the remedy would interfere with Congress' determination that it is the President, not a court or a single state, that should make the relevant judgments over national security and foreign affairs. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 22, 25-26 (2008).

At the outset, the State's motion for a temporary restraining order (ECF No. 3, hereafter "TRO Mot.") overlooks whether the State even has standing to pursue its claims. It is well-established that a state cannot sue the Federal Government on a *parens patriae* theory. And the State's attempts to manufacture standing in its own right—*i.e.*, through lost tax revenues, or reputational injury to its universities—are not concrete, particularized harms cognizable under Article III. Many of the State's claimed harms, moreover, simply do not exist. Most significantly, the State cannot rely on injuries to lawful permanent residents ("LPRs"), as it seeks to do, in light of guidance from the White House clarifying that the 90-day suspension of entry does not apply to those individuals.[1]

The State's claims likewise fails on the merits. Congress has "plenary power" over the admission and exclusion of aliens, *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972), and here expressly has delegated to the President the broad power to suspend entry "of any class of aliens into the United States." 8 U.S.C. § 1182(f). The President's exercise of his Section 1182(f) authority is committed to his discretion by law, and thus judicial review is precluded. Moreover, that delegation, combined with the President's own Article II powers in this realm, placed the President at the apex of his authority when issuing the Executive Order. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). The Order was well within the President's authority under Congress' delegation, particularly in an area, like immigration, in which the admission to the United States of foreign aliens is subject to plenary

[1] *See* Memorandum from Donald F. McGahn II, Counsel to the President (Feb. 1, 2017) (filed herewith as Exhibit A) (hereafter "Feb. 1, 2017 Memorandum").

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control by the political branches. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."). In light of these principles, the State's claims on the merits cannot succeed, for they would force this Court to override the plenary power of the political branches to determine which aliens should be admitted into this Nation's borders according to those branches' assessments of the foreign policy and national security interests of the United States.

Indeed, the State's likelihood of success faces a particularly insurmountable barrier because the State is bringing a facial challenge to the Executive Order. To prevail on its facial challenge, the State must prove that the Executive Order is unconstitutional in all (or at least most) of its applications. It cannot do so. At a minimum, because there are unquestionably a significant number of lawful applications of the Executive Order—*e.g.*, to non-resident unadmitted aliens—the State's facial challenge necessarily must fail.

Nor can the State sustain its other burdens. The State's claimed irreparable harm is vague and abstract, and certainly not occurring with the immediacy necessary to warrant a temporary restraining order (*i.e.*, within the coming days or weeks). The balance of the equities and the public interest also decisively favor the United States, given that the State's requested relief would interfere with the President's exercise of plenary power delegated by Congress. As these factors, like the merits, weigh squarely against judicial relief, the State's motion should be denied.

BACKGROUND

I. THE IMMIGRATION AND NATIONALITY ACT

The Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. §§ 1101 *et seq.*, as amended, provides the legal framework under which Congress has exercised and delegated its

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constitutional authority to determine who is permitted to enter the United States, who is permitted to remain in the United States, and for what reasons persons may be admitted to or removed from the United States. Central to the Court's consideration of the issues before it is Section 212(f) of the INA, 8 U.S.C. § 1182(f), which provides broad authority to the President to suspend or impose restrictions on the entry of aliens into the United States:

> **(f) Suspension of entry or imposition of restrictions by President**
> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. . . .

Every President over the last thirty years has invoked this authority to suspend or impose restrictions on the entry of certain aliens or classes of aliens,[2] in some instances including classifications based on nationality. For example, in 1986, President Reagan (through Presidential Proclamation 5517) invoked section 212(f) to suspend entry of Cuban nationals as immigrants into the United States, subject to certain exceptions. *See Suspension of Cuban Immigration*, 1986 WL 796773 (Aug. 22, 1986). In 1996, President Clinton (through Presidential Proclamation 6958) invoked section 212(f) to suspend entry, subject to certain exceptions, of members of the Government of Sudan, officials of that Government, and members of the Sudanese armed forces as immigrants or nonimmigrants into the United States. *See Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Are Members or Officials of the Sudanese Government or Armed Forces*, 1996 WL 33673860 (Nov. 22, 1996).

[2] *See, e.g.*, Presidential Proclamation 5517 (President Reagan); Exec. Order No. 12,324 (President Reagan); Exec. Order No. 12,807 (President George H.W. Bush); Presidential Proclamation 6958 (President Clinton); Presidential Proclamation 8342 (President George W. Bush); Presidential Proclamation 8693 (President Obama); Exec. Order No. 13,694 (President Obama); Exec. Order No. 13,726 (President Obama). The Department of States maintains a list of Section 212(f) Presidential Proclamations that currently affect the issuance of United States visas at https://travel.state.gov/content/visas/en/fees/presidential-proclamations.html.

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Congress likewise has expressly drawn distinctions based on nationality. For example, in 2015, Congress amended the INA to exclude certain individuals from a visa waiver program (*i.e.*, the ability to enter the United States as a nonimmigrant without a visa) on the basis of nationality.[3] *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2990 (2015) (codified at 8 U.S.C. § 1187(a)(12)). Congress expressly excluded nationals of Iraq and Syria from the program, *see* 8 U.S.C. § 1187(a)(12)(A)(ii), and created a process by which the Secretary of Homeland Security could designate additional "Countries or areas of concern," for exclusion of a country's nationals. *See id*. § 1187(a)(12)(D). As of February 2016, the exclusion applied to nationals of Iraq and Syria (pursuant to the statute's plain text), as well as nationals of Iran, Sudan, Libya, Somalia, and Yemen (pursuant to Executive Branch designations under the statutory scheme). *See* Dep't of Homeland Sec., *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016).[4] These seven countries excluded from the visa waiver program are the same seven countries that are covered by Section 3 of the President's January 27, 2017 Executive Order. *See* Executive Order § 3(c) (incorporating by reference "countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12)").

II. PRESIDENTIAL AUTHORITY OVER FOREIGN AFFAIRS AND NATIONAL SECURITY

These delegations of authority to deny entry to certain classes of aliens, based on the President's findings regarding the national interest, fall in the heartland of (and are bolstered by)

[3] The INA sets out several terms of art. An "alien" is any person who is neither a citizen nor a national of the United States. *See* 8 U.S.C. § 1101(a)(3). A "nonimmigrant" is an alien admitted to the United States on a temporary basis, with one of the visa categories established for particular purposes under 8 U.S.C. § 1101(a)(15). On the other hand, an "immigrant" is an individual who is permitted to stay in the United States on a permanent basis. Within the category of "immigrant," an individual may be admitted with the privilege of residing permanently in the United States, thereby acquiring LPR status. *See* 8 U.S.C. § 1101(a)(20). LPRs are authorized to work in the United States, as are some aliens temporarily admitted pursuant to certain nonimmigrant categories. *See generally* 8 C.F.R. § 274a.12 (Classes of aliens authorized to accept employment).

[4] https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program

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the President's broad authority under Article II relating to foreign affairs and national security. *See* U.S. Const., art. II, § 2 ("Commander in Chief" power, and authority to "make treaties" and "appoint ambassadors"), § 3 (power to "receive ambassadors"). As the Supreme Court repeatedly has held, Article II confers upon the President expansive authority over foreign affairs, national security, and immigration. *See Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) ("The exclusion of aliens is a fundamental act of sovereignty . . . inherent in the executive power to control the foreign affairs of the nation."); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (discussing "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress").

III. THE PRESIDENT'S EXECUTIVE ORDER OF JANUARY 27, 2017

Invoking these constitutional and statutory authorities, on January 27, 2017, the President issued an Executive Order titled: "Protecting the Nation from Foreign Terrorist Entry into the United States." *See* ECF No. 1-7, *also available at* 2017 WL 394075. The Executive Order is intended "to protect the American people from terrorist attacks by foreign nationals admitted to the United States." Executive Order § 2.

To accomplish this purpose, the Executive Order directs a number of actions. *See id.* §§ 2-11. First, Section 3 of the Executive Order directs the Secretary of Homeland Security (in consultation with other Executive Branch officials) to immediately conduct a review to identify the "information needed from any country . . . to determine that [an] individual seeking [an immigration-related] benefit is who the individual claims to be and is not a security or public-safety threat." *Id.* § 3(a). The Secretary must, within 30 days of the Executive Order, "submit to the President a report on the results of the review," as well as "a list of countries that do not

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provide adequate information[.]" *Id.* § 3(b). During the next 60 days, the Executive Order directs a process for requesting necessary information from foreign governments that do not supply such information, and consequences for countries not providing the information. *See id.* § 3(d)-(f).

While this review is ongoing, the Executive Order, pursuant to section 212(f) of the INA, suspends entry for 90 days of aliens from the seven countries covered by 8 U.S.C. § 1187(a)(12). *Id.* § 3(c). During this period, exceptions may be made (on a case-by-case basis) by the Secretaries of State or Homeland Security. *Id.* § 3(g). The suspension of entry in Section 3(c) does not apply to lawful permanent residents of the United States. *See* Feb. 1, 2017 Memorandum (Exhibit A).

The Executive Order also suspends the U.S. Refugee Admissions Program for 120 days, while the Secretary of State (in conjunction with other Executive Branch officials) reviews "the USRAP application and adjudication process to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States," and then "implement[s] such additional procedures." Executive Order § 5(a). Upon resumption of the refugee program—*i.e.*, no sooner than 120 days after issuance of the Executive Order—the Order directs the Secretary of State to "make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." *Id.* § 5(b). Again, during the 120-day suspension of the refugee program, the Executive Order allows the Secretaries of State and Homeland Security to permit entry of individual refugees on a case-by-case basis. *Id.* § 5(e).

Finally, notwithstanding the general resumption of the refugee program after 120 days, the Executive Order directs, pursuant to Section 212(f), a suspension of entry of nationals of

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Syria as refugees based upon the President's finding that such entry "is detrimental to the interests of the United States." *Id.* § 5(c). Such suspension will continue until such time as the President determines "that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest." *Id.*

STANDARD OF REVIEW

A temporary restraining order is "an extraordinary and drastic remedy[.]" *Munaf v. Geren*, 553 U.S. 674, 689 (2008). A party seeking such relief "must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that [a temporary restraining order] is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008). Further, injunctive relief that would "deeply intrude[] into the core concerns of the executive branch"—such as foreign affairs and national security—may be awarded only where the plaintiff "make[s] an extraordinarily strong showing" as to each element. *Adams v. Vance*, 570 F.2d 950, 954-55 (D.C. Cir. 1978); *see Winter*, 555 U.S. at 32-33.

The State raises only facial challenges to the Executive Order, which are "the most difficult challenge[s] to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987). To demonstrate that it is likely to prevail on the merits, the State must show more than that the Executive Order "might operate unconstitutionally under some conceivable set of circumstances." *Id.* Instead, the State bears the "heavy burden" of "establish[ing] that no set of circumstances exist under which the [Executive Order] would be valid." *Id.*; *see also Puente Arizona v. Arpaio*, 821 F.3d 1098, 1104 (9th Cir. 2016).

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ARGUMENT

I. THE STATE LACKS STANDING TO INVOKE THE COURT'S JURISDICTION

The State of Washington pursues two theories of standing. First, it purports to sue on its own behalf, alleging various injuries to its "proprietary interests." Pl.'s Supp. Br. at 2-3 (ECF No. 17). Second, it seeks to bring a *parens patriae* action on behalf of its residents. *Id*. at 3-5. Neither theory satisfies the State's burden to demonstrate standing.

A. The State Lacks Standing on Its Own Behalf

In some circumstances, a state may have standing to challenge federal action that threatens its own distinct interests. As with any other party, however, the harm to the state's interests must be "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). A state suffers a cognizable injury when, for example, its physical territory such as its "coastal land" is harmed. *See Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007). A state likewise may challenge a measure commanding the state itself to act, *see New York v. United States*, 505 U.S. 144 (1992) (standing to challenge federal law requiring State to take title to nuclear waste or enact federally-approved regulations), or that prohibits it from acting, *see Oregon v. Mitchell*, 400 U.S. 112 (1970) (standing to challenge federal law barring literacy-test or durational-residency requirements in elections and requiring State to enfranchise 18-year-olds).

The State's allegations of harm here are insufficient to establish Article III standing. Most fundamentally, the State's allegations of standing rely on downstream, incidental effects stemming from the Federal Government's regulation of immigration as to third-party aliens. The State has no legally cognizable interest in ensuring that the Federal Government issue any

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particular alien any particular visa or admit any particular alien into the United States. The State's conception of standing miscomprehends the Nation's constitutional structure: under our federal system of separate sovereigns, a State has no legally protected interest in avoiding indirect and incidental consequences (allegedly) flowing from the United States' regulation of individuals' conduct pursuant to the powers vested in the Federal Government by the Constitution. And it would be especially inconsistent with the constitutional structure to allow such claims to proceed when they involve immigration, which is a subject uniquely committed to the Federal Government, and in which the State has no role. *See Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012) ("The federal power to determine immigration policy is well settled."). Thus, the State's incidental, indirect injuries from federal immigration policies simply cannot establish standing here.

Even so, the State's alleged harms are neither concrete nor particularized. The State first asserts that it will "lose . . . tax revenue" from tourists who, absent the Executive Order, would visit the State and purchase goods and services there. Pl.'s Supp. Br. at 2; Decl. of Kathy Oline, ECF No. 17-1. But allegations of a reduction in a State's tax revenues (particularly where, as here, there is no "direct link between the state's status as a collector and recipient of revenues and the . . . action being challenged") is a "generalized grievance about the conduct of government," not the sort of particularized injury necessary to establish standing. *Pennsylvania v. Kleppe*, 533 F.2d 668, 672 (D.C. Cir. 1976) (rejecting similar allegations by analogy to taxpayer standing cases); *see Florida v. Mellon*, 273 U.S. 12, 17-18 (1927) (rejecting standing despite Florida's allegation that challenged federal law would induce citizens to remove property from the state thereby diminishing the state's tax revenues); *Iowa ex rel. Miller v. Block*, 771 F.2d 347, 353 (8th Cir. 1985) (concluding state lacked standing despite claim that challenged

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action would "forc[e] unemployment up and state tax revenues down"). Were the Court to find standing based on incidental impacts to the State's treasury without any direct link to the action challenged, virtually any change in federal policy could prompt an Article III dispute, which is an approach to standing the Supreme Court decisively has rejected. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006); *Kleppe*, 533 F.2d at 672.[5]

The State next claims that the "mission" of various state universities and "their attractiveness to international students" may be "damage[d]" because some students and faculty members may be prevented from attending the universities or from travelling abroad for research. Pl.'s Supp. Br. at 3. This argument fails for two reasons. First, most (if not all) of the students and faculty members the State identifies are not actually prohibited from entering the United States, and others' alleged difficulties are hypothetical or speculative.[6] That is particularly true given the waiver authority granted to the Secretaries of Homeland Security and State under the Executive Order when entry of an alien would be in the national interest. *See* Executive Order §§ 3(g), 5(e). And second, even if the State could piggyback on these individuals to establish an injury to the State itself, the State's assertions of injury are too abstract. *See Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Vague allegations about the universities' reputations and ability to attract students are not sufficiently concrete to show standing. The State's reliance on *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480 (9th Cir. 1995), *see* Pl.'s Supp. Br. at 3 n.3, is inapposite. The school's injury in that case was that it had been terminated from the

[5] *City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004), *see* Pl.'s Supp. Br. at 2, is not to the contrary. In that case, there was a direct link between the challenged construction project and the alleged injury to the adjacent City's natural resources, aesthetic, and economy. *See O'Neill*, 386 F.3d at 1199.

[6] *See, e.g.*, Second Riedinger Decl. ¶¶ 3-7, ECF No. 17-2 (allegations about lawful permanent residents, who are not impacted by the Executive Order); Boesenberg Decl. ¶ 6, ECF No. 17-3 (same); Second Riedinger Decl. ¶ 8 (asserting that certain countries may "ban . . . U.S. travelers" in response to the Executive Order); Second Chaudhry Decl. ¶ 8, ECF No. 17-4 (alleging one faculty member may not be able to return to the university at a future date).

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defendant's loan guarantee program, *id*. at 1483, not that its reputation or attractiveness to students had been incidentally diminished by some action that did not directly affect the school.

Additionally, the State asserts that it "expects" the Executive Order will have effects on its agency recruitment efforts and its child welfare system. Pl.'s Supp. Br. at 3 n.4. But the State concedes that it cannot identify any State agency employees that are currently affected by the Executive Order, *see* Schumacher Decl. ¶ 7, ECF No. 17-5, nor any specific and actual impact on its child welfare system, *see* Strus Decl., ECF No. 17-6. Speculation about possible future events does not constitute an injury in fact. *Whitmore*, 495 U.S. at 158.

Finally, the State cites no case recognizing the standing of a state government to bring an Establishment Clause challenge, and it is not clear how a state can suffer "spiritual or psychological harm" or have "religious beliefs" that can be "stigmatized." *Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d 1043, 1051-52 (9th Cir. 2010).

B. The State Cannot Bring a *Parens Patriae* Action Here

The State cannot convert its political dispute with the Federal Government into a legal claim through the vehicle of a *parens patriae* suit brought on behalf of its residents. The Supreme Court made clear more than eighty years ago that a state cannot bring a *parens patriae* action against federal defendants. *See Massachusetts v. Mellon*, 262 U.S. at 485-86. In dismissing an action brought by Massachusetts to exempt its citizens from a federal statute designed to "protect the health of mothers and infants," the Court explained that the citizens of a state "are also citizens of the United States," and therefore "[i]t cannot be conceded that a state, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof." *Id*. at 479, 485. "[I]t is no part of [a state's] duty or power to enforce [its

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citizens'] rights in respect of their relations with the federal government;" "it is the United States, and not the state, which represents [its citizens] as *parens patriae*." *Id*. at 485-86.[7]

Contrary to the State's assertion, the "special solicitude" for states referred to in *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007), did not "eradicate[]" the bar on *parens patriae* actions against the Federal Government, Pl.'s Supp. Br. at 4 n.5. Indeed, *Massachusetts* recognized that *Mellon* "prohibits" allowing a state "'to protect her citizens from the operation of federal statutes.'" *Massachusetts*, 549 U.S. at 520 n.17; *see also Del. Dep't of Nat. Res. & Envtl. Control v. FERC*, 558 F.3d 575, 579 n.6 (D.C. Cir. 2009) (*Massachusetts* "does not eliminate the state [plaintiff's] obligation to establish a concrete injury, as Justice Stevens' opinion amply indicates"). The special solicitude afforded in *Massachusetts* was based on the "unique circumstances" of that case, *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 476 (D.C. Cir. 2009), wherein Massachusetts sought to assert its own rights to ensure the protection of the land and air within its "sovereign territory," which was protected by a special "procedural right." 549 U.S. at 519-20; *see id*. at 522-23 (explaining that Massachusetts "owns a substantial portion of the state's coastal property" that was harmed by EPA's inaction). Here, the State's interest in protecting its territorial sovereignty is not at issue, and the State has identified no other injury to any legally protected rights. Moreover, Congress has not created any protection for states against the incidental impacts asserted by the State here.[8] Because a

[7] The Supreme Court has repeatedly applied this principle since *Mellon* to dismiss actions brought by a state as *parens patriae* against federal defendants. *See Florida*, 273 U.S. at 18 (relying on *Mellon* to dismiss Florida's challenge to a federal inheritance tax based on alleged injury to its citizens); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (concluding South Carolina lacked standing as *parens patriae* to invoke the Due Process Clause or the Bill of Attainder Clause against the Federal Government); *see also Snapp*, 458 U.S. at 610 n.16 ("A State does not have standing as *parens patriae* to bring an action against the Federal Government.").

[8] The generic cause of action under the Administrative Procedure Act, 5 U.S.C. § 702, is no substitute for the necessary conditions for standing in *Massachusetts*. *See* Pl.'s Supp. Br. at 4 n.5. It would have made little sense for the Supreme Court to attach "critical importance" to Congress's creation of a particular procedural right, *Massachusetts*, 549 U.S. at 516, if the APA already made that right available generally. The State's reliance on the

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state cannot bring a *parens patriae* suit against federal defendants, the State lacks standing and thus the Court should deny the State's motion for lack of jurisdiction.

II. THE STATE DOES NOT DEMONSTRATE IT IS LIKELY TO PREVAIL ON THE MERITS

The State falls far short of carrying its "heavy burden" to demonstrate that it is likely to prevail on the merits of its facial challenge by "establish[ing] that no set of circumstances exist under which the [Executive Order] would be valid." *Salerno*, 481 U.S. at 745. To the contrary, the Executive Order fits within the express delegation of authority in Section 212(f). The State's constitutional and statutory claims additionally fail pursuant to their individual elements.

A. The Executive Order Is a Valid Exercise of Congress' Broad Delegation of Authority to the President, and His Own Constitutional Powers

The Executive Order was issued pursuant to Congress' broad delegation of authority to the President to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. § 1182(f). The express delegation from Congress, coupled with the President's own Article II powers over foreign affairs and national security, mean that the President's "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.'" *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015) (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)).

Indeed, in the immigration context specifically, "[t]he Supreme Court has 'long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, also is unavailing, as that statute only provides a cause of action for persons that exercise religion.

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(1977)). "Congress has 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" *Cardenas*, 826 F.3d at 1169 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972)). "When Congress delegates this plenary power to the Executive, the Executive's decisions are likewise generally shielded from administrative or judicial review." *Cardenas*, 826 F.3d at 1169. And "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976).[9]

Here, the President's Executive Order falls squarely within the express delegation of power granted him under Section 212(f) of the INA, codified at 8 U.S.C. § 1182(f). "[T]hat statute specifically grants the President, where it is in the national interest to do so, the extreme power to prevent the entry of any alien or groups of aliens into this country as well as the lesser power to grant entry to such person or persons with any restriction on their entry as he may deem to be appropriate." *Mow Sun Wong v. Campbell*, 626 F.2d 739, 744 n.9 (9th Cir. 1980); *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1507 (11th Cir. 1992) ("8 U.S.C. § 1182(f) clearly grants the President broad discretionary authority to control the entry of aliens into the United States.").[10]

Presidents, moreover, repeatedly have exercised authority under Section 212(f) to suspend entry of certain aliens or classes of aliens, and at least twice have drawn distinctions

[9] As an example of the judicial deference in this area, under the long-established doctrine of consular non-reviewability, a non-resident alien outside the United States has no right to judicial review of a consular officer's denial of a visa. *See Capistrano v. Dep't of State*, 267 F. App'x 593, 594 (9th Cir. 2008) ("The doctrine of consular nonreviewability predates the founding of our Republic" and "prevents [courts] from reviewing decisions reached by consular officials regarding the entry of visa applicants.").

[10] In several other statutory provisions, Congress delegated authority to the Secretaries of Homeland Security and State to, in their sole discretion, revoke visas or visa petitions. *See* 8 U.S.C. §§ 1155, 1201(i); *see also Bernardo ex rel. M & K Eng'g, Inc. v. Johnson*, 814 F.3d 481, 484 (1st Cir. 2016) (describing the unreviewability of such revocations).

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based on nationality. *See* Background, Section II.A. For example, in 1986, the President invoked Section 212(f) to suspend entry of Cuban nationals as immigrants into the United States, and in 1996, the President did something similar for Sudanese government officials. And with respect to Executive Order 12,807—which, among other things, suspended entry of undocumented aliens by sea—the Supreme Court found "[i]t is perfectly clear that 8 U.S.C. § 1182(f) . . . grants the President ample power to establish a naval blockade that would simply deny *illegal Haitian migrants* the ability to disembark on our shores." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 164 n.13, 187 (1993) (emphasis added). There can be little doubt, therefore, that 8 U.S.C. § 1182(f) authorizes the President to suspend the entry of classes of immigrants on the basis of nationality where, as here, the President has determined that their entry would be "detrimental to the interests of the United States." And it is thus untenable for the State to contend that, for countries that present a national-security risk to the United States—as judged by Congress, the State Department, and DHS—the President lacks the authority to pause the entry of aliens from those countries.

Indeed, courts repeatedly have confirmed that "[d]istinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive." *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979). "In view of the Supreme Court's repeated emphasis on the concurrent nature of executive and legislative power in this area and the sweeping congressional delegations of discretionary authority to the Executive under the INA, there is little question that the Executive has the power to draw distinctions among aliens on the basis of nationality." *Jean v. Nelson*, 727 F.2d 957, 978 n.30 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985). "[C]lassifications on the basis of nationality are frequently unavoidable in immigration matters,"

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including because "the very concept of 'alien' is a nationality-based classification." *Rajah v. Mukasey*, 544 F.3d 427, 435 (2d Cir. 2008).

Despite this wealth of authority, the State asserts that the President's authority under Section 212(f) is limited by 8 U.S.C. § 1152(a)(1)(A), another provision of the INA stating that, with certain exceptions,[11] "no person shall receive any preference or priority or 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." *See* TRO Mot. at 19-21. The State is wrong. First, as an initial matter, this provision's reach is limited to only the "issuance of an immigrant visa"—meaning that it does not apply to nonimmigrant visas or to refugees (who generally do not enter the United States with a visa), and also expressly does not extend to procedures for processing visa applications. Indeed, § 1152(a)(1)(B) clarifies that subsection (A) is not to be "construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed." This clarification suggests that the Executive Order, in part or in whole, may not be covered by the restrictions of subsection (A) because the Executive Order governs the procedures for pausing then resuming visa applications. *See, e.g.*, Executive Order §§ 3(a), 5(a). Moreover, this provision does not purport to prohibit preference, priority, or discrimination on the basis of religion, so it would provide no benefit to the State here under one of the State's theories of the case. *See* TRO Mot. at 10 ("There is little doubt that the Executive Order is prompted by animus to those of the Islamic faith[.]"). By the statute's plain terms, then, the provision could have only limited application to the State's claims here.

[11] These exceptions include most family-based, employment-based, and special immigrant visa categories. 8 U.S.C. §§ 1101(a)(27), 1151(b)(2)(A)(i), 1152(b), 1153.

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More fundamentally, however, the State misreads 8 U.S.C. § 1152(a)(1)(A) as constraining the broad delegation of authority to the President in Section 212(f) of the Act. "[I]t is a well established axiom of statutory construction that, whenever possible, a court should interpret two seemingly inconsistent statutes to avoid a potential conflict." *California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1012 (9th Cir. 2000). Likewise, it is a "well established canon of statutory interpretation . . . that the specific governs the general." *RadLAX Gateway Hotel v. Amalgamated Bank*, 132 S. Ct. 2065, 2070-71 (2012).

In light of these principles, Section 212(f) is easily reconciled with § 1152(a)(1)(A): the latter sets forth the general default rule that applies in the absence of action by the President, whereas Section 212(f) governs the specific instance in which the President proclaims that entry of a "class of aliens" would be "detrimental to the interests of the United States." Here, as the challenged Executive Order involves "detrimental" findings, Section 212(f) controls. That is precisely why (as discussed above) prior Presidents have drawn nationality-based distinctions when exercising their authority under Section 212(f). And it is likewise why the 2015 Amendment to the INA, as implemented by the Executive Branch over the past year, has drawn the exact same nationality-based distinctions as the Executive Order. Indeed, under the State's view, the United States could not suspend entry of nationals of a country with which the United States is at war. The INA plainly does not require that result.

The placement of the anti-discrimination rule within Section 1152 further indicates that the rule is not intended to curb the President's authority under Section 212(f) to suspend or impose restrictions upon entry. Section 1152 generally establishes a uniform annual numerical limit on immigrant visas for nationals of each foreign country. Had Congress intended to enact a general bar against nationality-based distinctions, it would have enacted such a bar as a general

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provision of the INA, rather than as a subpart of a subsection speaking to the implementation of nationality-based numerical limitations for the issuance of immigrant visas.

Finally, the State mischaracterizes the Executive Order as "tak[ing] us back to a period in our history when distinctions based on national origin were accepted . . . rather than outlawed." TRO Mot. at 20. As an initial matter, the State repeatedly characterizes the Executive Order as discriminating on the basis of "national origin." *See* TRO Mot. at 1, 6. But the Executive Order does not distinguish on the basis of national origin insofar as that term implicates ethnic heritage; rather, discrimination on the basis of *nationality* implicates whether "a person ow[es] permanent allegiance to a state." 8 U.S.C. § 1101(a)(21) (defining "national").

In any event, in 2015, Congress amended the INA to single out nationals of Iraq, Syria, and other to-be-designated countries for exclusion from the Visa Waiver Program. *See* Background, Section II.B. It is that same group of countries that is covered by Section 3(c) of the Executive Order, which expressly cross-references 8 U.S.C. § 1187(a)(12). And Section 5(c) of the Executive Order applies to nationals of Syria, one of the countries Congress expressly identified. Accordingly, the President has joined with Congress in selecting the seven countries whose nationals warrant different treatment on the basis of national security and foreign policy concerns.

B. This Court Cannot, and Need Not, Review the President's National Security Determinations Underlying the Executive Order

The State asks this Court to not only disregard case law, Congress' express delegation of authority to the President, and the President's own Article II powers, but indeed, to substitute the Court's own judgment regarding what is in the national security and foreign policy interests of the United States. *See, e.g.*, TRO Mot. at 8. This Court should soundly reject that invitation, for

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as courts repeatedly have recognized, these areas are within the exclusive domain of the political branches of our government.

As a statutory matter, Section 212(f), by its plain terms, vests complete discretion in the President to determine whether "the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States," for the period "as he shall deem necessary," and to impose such conditions of entry as "he may deem appropriate." 8 U.S.C. § 1182(f). The statute does not require the President to state any basis for such a finding, nor does it require ratification of such a finding by any other entity. Instead, it reflects Congress' considered judgment that these determinations should be vested exclusively in the President.

Critically, the State cites no instance where any court has reviewed presidential findings under Section 212(f) regarding what is detrimental to the interests of the United States, nor does the State explain how such an inquiry would be judicially manageable. To the contrary, one court analyzing a presidential exercise of authority under 8 U.S.C. § 1182(f) concluded that "because exercise of this discretion is not limited to circumstances defined in the statute, but rather is geared to Executive 'find[ings]' and what is 'deem[ed]' necessary or appropriate, the statute provides no discernable standards by which this court can review the challenged actions under the APA." *Haitian Refugee Ctr., Inc. v. Baker*, 789 F. Supp. 1552, 1575-76 (S.D. Fla. 1991); *see also Webster v. Doe*, 486 U.S. 592, 594, 600-01 (1988) (holding that similar statutory language vested the Director of Central Intelligence with complete discretion over employee discharges, and thus judicial review was precluded).

The State here asks the Court to evaluate whether the President's Executive Order achieves its stated purposes. *See* TRO Mot. at 9 (arguing that the Executive Order is unlawful because "there is no 'fit' between the rationales advanced to support the Executive Order and the

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means used to further those rationales"). But that would require the Court inappropriately to second-guess the underlying finding that Congress has tasked the President with making, and which lies at the heartland of his constitutional authority regarding foreign affairs, national security, and immigration. *See Mandel*, 408 U.S. at 765 ("[T]he power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers[.]"); *see also, e.g., Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."); *Knauff*, 338 U.S. at 542; *Mow Sun Wong*, 626 F.2d at 743. It is thus well-established that courts cannot evaluate the President's national security and foreign affairs judgments, especially in the immigration context. *See Knauff*, 338 U.S. at 543 ("[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'"); *see also Dep't of Navy v. Egan*, 484 U.S. 518, 529-30 (1988); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007).

It is simply not possible for the Court here to evaluate the President's Executive Order without passing judgment on the President's national security and foreign affairs determinations. *See, e.g.*, TRO Mot. at 11 (arguing that the Executive Order is unlawful because there is "no basis to conclude that existing screening procedures are uniquely failing as to individuals from the listed countries or as to refugees"). The Constitution vests the President with the duty of

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protecting our Nation's security, and Congress has specifically empowered the President to suspend the entry of categories of aliens if he finds that their entry would be detrimental to the national interest. There is accordingly no basis for the Judiciary to second-guess the President's determinations in that regard. *See Al Haramain Islamic Found., Inc. v. Dep't of Treasury*, 686 F.3d 965, 980 (9th Cir. 2012) (stating that the court "owe[s] unique deference to the executive branch's determination that we face 'an unusual and extraordinary threat to the national security' of the United States" (quoting an Executive Order)); *Harisiades*, 342 U.S. at 597 (Frankfurter, J., concurring) (noting that immigration policies have sometimes been "departures . . . from the best traditions of this country" and "may be deemed to offend American traditions," but "the place to resist unwise or cruel legislation touching aliens is the Congress, not this Court").

Finally, the State also argues that the President's stated rationale under Section 212(f) was pretextual and, instead, that the Executive Order was "prompted by animus to those of the Islamic faith." TRO Mot. at 10. But any such inquiry would be directly contrary to the Supreme Court's decision in *Kleindienst v. Mandel*, 408 US. 753 (1972), which held that "when the Executive exercises" its delegated plenary power over immigration "on the basis of a facially legitimate and bona fide reason, the courts will [not] look behind the exercise of that discretion[.]" *Id.* at 770. Here, the Executive Order undeniably states a facially legitimate and bona fide reason—protecting against terrorism—which is sufficient to end the matter. *Cf. Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring) (noting that *Mandel*'s "reasoning has particular force in the area of national security"). Accordingly, the State's references to statements outside the four corners of the Executive Order are not legally pertinent. The State, moreover, creates a constitutional separation-of-powers problem—between the Judiciary and the President, and between a state and the Federal Government—to the extent that this Court is being

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urged to allow the State to use Article III judicial process to attempt to divine the President's purported subjective motives in issuing the Executive Order.[12] The State cites no precedent for such an inquiry by the Judiciary of the President. *Cf. United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) (holding that an inquiry into the subjective motives of members of Congress is a "hazardous matter" and that courts "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive").

C. The State's Facial Constitutional Challenges Fail

Aside from its statutory argument under the INA, the State contends that the Executive Order is facially unconstitutional under the Fifth Amendment's equal protection and procedural due process doctrines, and under the First Amendment's Establishment Clause. TRO Mot. at 5-19. These claims fail for reasons in addition to those discussed above.

1. An overarching and insurmountable hurdle for the State's claims of facial unconstitutionality is that the State has the burden to show there is no constitutionally valid application of the Executive Order. *See Salerno*, 481 U.S. at 745; *United States v. Mujahid*, 799 F.3d 1228, 1233 (9th Cir. 2015). That showing is improbable—indeed, impossible—because it is clear that valid applications exist, at an absolute minimum as to unadmitted and nonresident aliens. *See Mandel*, 408 U.S. at 762 ("It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise."); *Plasencia*, 459 U.S. at 32 ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."); *United States*

[12] In addition, it is well-settled that courts have no jurisdiction "to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866). Accordingly, the President cannot be the subject of any injunctive order. *Id.*; *see Franklin v. Massachusetts*, 505 U.S. 788, 826 (1992) (Scalia, J., concurring in part and concurring in judgment).

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v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) ("[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."). The State does not dispute that the Executive Order is constitutional as applied to this category of unadmitted and nonresident aliens who have no constitutional right to entry. Whatever claims may exist in hypothetical individual cases, therefore, are irrelevant because the State must—but cannot—demonstrate that all (or even most) applications of the Executive Order are unconstitutional.[13]

The State's arguments rest heavily on the Executive Order's purported application to lawful permanent residents. *See, e.g.*, TRO Mot. at 1 (contending that the Executive Order "block[s] longtime legal permanent residents from returning to this country"). But as is now clear, the Executive Order does not apply to such individuals. *See* Feb. 1, 2017 Memorandum (Exhibit A).

2. A further problem with the State's equal protection and procedural due process claims is that they both arise under the Fifth Amendment's Due Process Clause, but the State is ineligible to assert a Fifth Amendment claim. The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot . . . be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court." *Katzenbach*, 383 U.S. at 323-24; *see also Premo v. Martin*, 119 F.3d 764, 771 (9th Cir. 1997) ("Because the State is not a 'person' for the purposes of the Fifth Amendment, the State's reliance on the Due Process Clause was misplaced."). "Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal

[13] With respect to hypothetical individual cases that may arise, the Executive Order contains an overarching direction that "[t]his order shall be implemented consistent with applicable law." Executive Order § 11(b).

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Government, the ultimate *parens patriae* of every American citizen." *Katzenbach*, 383 U.S. at 324. This defect is also fatal to the State's equal protection and due process claims.

3. The State's claim under the Establishment Clause—which is limited to Section 5(b) of the Executive Order—is likewise meritless. *See* TRO Mot. at 12. The State argues that Section 5(b) discriminates based on religion, because it "give[s] preference to Christian refugees while disadvantaging Muslim refugees." TRO Mot. at 7. That is wrong. Notably, Section 5(b) does not take effect for at least 120 days (*i.e.*, "Upon the resumption of USRAP admissions"), and thus the State cannot yet know how it will be implemented. The State's Establishment Clause claim therefore is not ripe. *See Addington v. U.S. Airline Pilots Ass'n*, 606 F.3d 1174, 1179 (9th Cir. 2010) ("A question is fit for decision when it can be decided without considering 'contingent future events that may or may not occur as anticipated, or indeed may not occur at all.'").[14]

Even if the claim were ripe, moreover, Section 5(b) is lawful. That Section applies to *all* USRAP admissions—not just admissions for nationals of the seven countries of concern—so it does not exclusively "tilt the scales in favor of Christian refugees at the expense of Muslims." TRO Mot. at 12. Moreover, Section 5(b) merely provides an accommodation to minority religions within each country participating in the refugee program. That accommodation makes eminent sense, because members of minority religions are more likely to face persecution. Such accommodations do not violate the Establishment Clause. *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) ("'[T]here is room for play in the joints between the Free Exercise and Establishment

[14] There is also an interim provision, Section 5(e), which authorizes the Secretaries of State and Homeland Security to admit refugees on a case-by-case basis, with one factor (of several) being religious persecution as a minority religion. The State does not mention this interim provision in its TRO motion, but its proposed order seeks to enjoin this section "to the extent Section 5(e) purports to prioritize only the refugee claims of certain religious minorities." ECF No. 3-1 at 3, ¶ 1(e). Obviously Section 5(e) does not prioritize *only* claims of religious minorities because that is only one of several factors expressly listed, and thus, the State does not appear to be meaningfully challenging this provision.

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Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause.'"). Because Section 5(b) is both lawful and not yet subject to challenge, therefore, the State has failed to justify any relief—let alone emergency relief—with respect to this provision.

III. THE STATE HAS MADE NO SHOWING OF IRREPARABLE HARM

The State's motion for a temporary restraining order also should be denied because the State has not "demonstrate[d]" that it will be "immediate[ly]" and "irreparabl[y]" harmed by the Executive Order if this case proceeds in the normal course. *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). The State speculates that its residents might be harmed by the Executive Order, *see* Pl.'s TRO Mot. at 22, but to obtain a temporary restraining order, the State must demonstrate irreparable harm to itself, not merely to "third parties." *Phany Poeng v. United States*, 167 F. Supp. 2d 1136, 1142 (S.D. Cal. 2001); *see, e.g.*, *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 487 (3d Cir. 2000) ("[T]he preliminary injunction device should not be exercised unless the moving party shows that it specifically and personally risks irreparable harm."). Because the State has identified no injury to itself—much less a likely, immediate, and irreparable injury—it has not met its burden.

Even if the Court could consider purported harms to non-parties, moreover, the State does no more than speculate that amorphous harms may occur at some point in time to unspecified individuals. The State claims that some "workers and students" may be harmed economically or psychologically because they will not be able to travel overseas for work or school, and that businesses' recruitment efforts may be hampered because they may not be able to hire certain aliens. *See* TRO Mot. at 21. This sort of generalized speculation is a far cry from the concrete evidence of likely immediate and irreparable harm that is necessary to obtain a temporary

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restraining order. *See Winter*, 555 U.S. at 22; *Caribbean Marine*, 844 F.2d at 674; *cf. Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 971 (9th Cir. 2009) (noting that the Supreme Court has disapproved of considering "'abstract questions of wide public significance'" amounting to "'generalized grievances'").

The State's arguments also fail to acknowledge the limited timeframe relevant to consideration of their request for a temporary restraining order. To obtain such relief, the State must show that irreparable harm will occur *in the time prior to a hearing on the preliminary injunction motion*. *Cf. Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974) ("Ex parte temporary restraining orders . . . should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer."). Here, even assuming the State's harms are both cognizable and irreparable (and they are not), those harms will be suffered over the long-term; there is no showing that harm is imminent within the next days or even weeks.

Finally, the restrictions on entry in Sections 3(c) and 5(a) of the Executive Order are both subject to exceptions to be applied by the Secretaries of State and Homeland Security on a case-by-case basis. *See* Executive Order §§ 3(g), 5(e). Therefore, none of the purported harms the State identifies will occur unless a particular individual falls within the terms of the Executive Order *and* cannot obtain an exception under these case-by-case provisions. Because of the availability of this case-by-case review, any allegations of harm to third parties are not irreparable at this time. *Cf. Leidseplein Presse, B.V. v. Does*, No. C16-5065 (BHS), 2016 WL 337267, at *1 (W.D. Wash. Jan. 28, 2016) (denying temporary restraining order based on lack of irreparable harm, because "Plaintiff has failed to show that other means of preventing the alleged [harm] are

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either unavailable or unavailing" and "Plaintiff has failed to submit evidence describing efforts made to explore other available means of preventing" the alleged harm).

IV. THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST MANDATE AGAINST A TEMPORARY RESTRAINING ORDER

The State has not demonstrated that any harm to it (and there is none) outweighs the harm that a temporary restraining order would cause the Federal Government, or that "an injunction is in the public interest." *Winter*, 555 U.S. at 20. These two factors merge where, as here, the Federal Government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Courts have accorded "great weight" to considerations of foreign policy and national security when balancing the interests and equities of the parties. *Nat'l Res. Def. Council, Inc. v. Pena*, 972 F. Supp. 9, 20 (D.D.C. 1997); *see Winter*, 555 U.S. at 24; *Comm. for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 796, 798 (D.C. Cir. 1971) (Because of "assertions of potential harm to national security and foreign policy—assertions which [the court] obviously can not appraise—and given the meager state of the record before us, we are constrained to refuse an injunction."). Moreover, in assessing the public interest, a court must heed "the judgment of Congress, deliberately expressed in legislation," and "the balance that Congress has struck." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001).

These final elements weigh heavily in favor of the Federal Government. The State asks the Court to enjoin an Executive Order that suspends the entry of certain aliens into the United States based on the President's determination that failing to do so would be detrimental to the interests of the United States, including its national security. The State of Washington disagrees with the President's determination and believes the Executive Order will harm the interests of residents in that state. The Constitution, however, commits "decision-making in the fields of

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foreign policy and national security . . . to the political branches of government," *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005), not to the states. And in 8 U.S.C. § 1182(f), Congress expressly authorized the President to do what he has done here based upon a finding, which the President has made here, that "the entry . . . of any class of aliens into the United States would be detrimental to the interests of the United States." It undoubtedly would be contrary to the public interest for this Court to ignore Congress's judgment that the President should make such determinations, to second-guess the President's determination, or to override the President's determination based on purported interests of a single state. *See, e.g.*, *Adams*, 570 F.2d at 954 (vacating preliminary injunction that directed action by the Secretary of State in foreign affairs, which "deeply intrude[d] into the core concerns of the executive branch").

Finally, even if the State satisfied the requirements for a temporary restraining order, this Court still would retain its equitable discretion—*i.e.*, the discretion to refrain from issuing relief that would interfere in the Executive Branch's foreign affairs and national security activities. In an analogous situation, the D.C. Circuit held it would be an abuse of discretion for a court to enter equitable relief against one of the President's foreign affairs policies: "At least where the authority for our interjection into so sensitive a foreign affairs matter as this are statutes no more specifically addressed to such concerns than the Alien Tort Statute and the APA, we think it would be an abuse of our discretion to provide discretionary relief." *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985). Similarly here, the Court should not intrude upon the President's efforts "to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism." Executive Order § 1.

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V. ANY RELIEF ENTERED MUST BE LIMITED IN SCOPE TO THE PLAINTIFF STATE AND TO THE SPECIFIC HARM FOUND

Even if the Court were to conclude that the State has satisfied the requirements for a temporary restraining order with respect to some or all of its claims, the Court should not enter the "nationwide injunction" the State seeks. TRO Mot. at 23; *see* Pl.'s Proposed TRO, ECF No. 3-1, at 3. "[A]n injunction must be narrowly tailored 'to affect only those persons over which it has power, and to remedy only the specific harms shown by the plaintiffs, rather than' to enjoin all possible breaches of the law." *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004). Thus, courts routinely deny requests for nationwide injunctive relief. *See Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993) (staying nationwide injunction insofar as it "grants relief to persons other than" named plaintiff); *Skydive Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105 (9th Cir. 2012) (affirming district court's refusal to grant nationwide relief).

CONCLUSION

For the reasons set forth above, the Court should deny the State of Washington's motion for a temporary restraining order.

DATED: February 2, 2017

Respectfully submitted,

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2017, I electronically filed the foregoing Opposition to Plaintiff's Motion for Temporary Restraining Order using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: February 2, 2017

/s/ Michelle R. Bennett
MICHELLE R. BENNETT

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EXHIBIT F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	CASE NO. C17-0141JLR TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

Before the court is Plaintiffs State of Washington and State of Minnesota's (collectively, "the States") emergency motion for a temporary restraining order ("TRO"). (TRO Mot. (Dkt. ## 3, 19 (as amended)).) The court has reviewed the motion, the complaint (Compl. (Dkt. # 1)), the amended complaint (FAC (Dkt. # 18)), all the submissions of the parties related to the motion, the relevant portions of the record, and the applicable law. In addition, the court heard the argument of counsel on February 3,

//

2017. (*See* Min. Entry (Dkt. # 51).) Having considered all of the foregoing, the court GRANTS the States' motion as set forth below.

II. PROCEDURAL BACKGROUND

On January 30, 2017, the State of Washington filed a complaint seeking declaratory and injunctive relief against Defendants Donald J. Trump, in his official capacity as President of the United States, the United States Department of Homeland Security ("DHS"), John F. Kelly, in his official capacity as Secretary of DHS, Tom Shannon, in his official capacity as Acting Secretary of State, and the United States of America (collectively, "Federal Defendants"). (*See* Compl.) On February 1, 2017, the State of Washington filed an amended complaint adding the State of Minnesota as a plaintiff. (*See* FAC.) The States seek declaratory relief invalidating portions of the Executive Order of January 27, 2017, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" ("Executive Order") (*see* FAC Ex. 7 (attaching a copy of the Executive Order)), and an order enjoining Federal Defendants from enforcing those same portions of the Executive Order. (*See generally* FAC at 18.)

The States are presently before the court seeking a TRO against Federal Defendants. (*See generally* TRO Mot.) The purpose of a TRO is to preserve the status quo before the court holds a hearing on a motion for preliminary injunction. *See Granny Goose Foods, Inc. v. Bhd. Of Teamsters & Auto Truck Drivers Local No. 70 of Alameda City*, 415 U.S. 423, 439 (1974); *Am. Honda Fin. Corp. v. Gilbert Imports, LLC*, No. CV-13-5015-EFS, 2013 WL 12120097, at *3 (E.D. Wash. Feb. 22, 2013) ("The purpose

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of a TRO is to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction . . . .") (internal quotation marks omitted).

Federal Defendants oppose the States' motion. (*See generally* Resp. (Dkt. # 50).)

III. FINDINGS OF FACT & CONCLUSIONS OF LAW

As an initial matter, the court finds that it has jurisdiction over Federal Defendants and the subject matter of this lawsuit. The States' efforts to contact Federal Defendants reasonably and substantially complied with the requirements of Federal Rule of Civil Procedure 65(b). *See* Fed. R. Civ. P. 65(b). Indeed, Federal Defendants have appeared, argued before the court, and defended their position in this action. (*See* Not. of App. (Dkt. ## 20, 21); Min. Entry; *see generally* Resp.;)

The standard for issuing a TRO is the same as the standard for issuing a preliminary injunction. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977). A TRO is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "The proper legal standard for preliminary injunctive relief requires a party to demonstrate (1) 'that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (citing *Winter*, 555 U.S. at 20).

As an alternative to this test, a preliminary injunction is appropriate if "serious questions going to the merits were raised and the balance of the hardships tips sharply in

the plaintiff's favor," thereby allowing preservation of the status quo when complex legal questions require further inspection or deliberation. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). However, the "serious questions" approach supports the court's entry of a TRO only so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest. *Id.* at 1135. The moving party bears the burden of persuasion and must make a clear showing that it is entitled to such relief. *Winter*, 555 U.S. at 22.

The court finds that the States have satisfied these standards and that the court should issue a TRO. The States have satisfied the *Winter* test because they have shown that they are likely to succeed on the merits of the claims that would entitle them to relief; the States are likely to suffer irreparable harm in the absence of preliminary relief; the balance of the equities favor the States; and a TRO is in the public interest. The court also finds that the States have satisfied the "alternative" *Cottrell* test because they have established at least serious questions going to the merits of their claims and that the balance of the equities tips sharply in their favor. As the court noted for the *Winter* test, the States have also established a likelihood of irreparable injury and that a TRO is in the public interest.

Specifically, for purposes of the entry of this TRO, the court finds that the States have met their burden of demonstrating that they face immediate and irreparable injury as a result of the signing and implementation of the Executive Order. The Executive Order adversely affects the States' residents in areas of employment, education, business, family relations, and freedom to travel. These harms extend to the States by virtue of

their roles as *parens patriae* of the residents living within their borders. In addition, the States themselves are harmed by virtue of the damage that implementation of the Executive Order has inflicted upon the operations and missions of their public universities and other institutions of higher learning, as well as injury to the States' operations, tax bases, and public funds. These harms are significant and ongoing. Accordingly, the court concludes that a TRO against Federal Defendants is necessary until such time as the court can hear and decide the States' request for a preliminary injunction.

IV. TEMPORARY RESTRAINING ORDER

It is hereby ORDERED that:

1. Federal Defendants and all their respective officers, agents, servants, employees, attorneys, and persons acting in concert or participation with them are hereby ENJOINED and RESTRAINED from:
   (a) Enforcing Section 3(c) of the Executive Order;
   (b) Enforcing Section 5(a) of the Executive Order;
   (c) Enforcing Section 5(b) of the Executive Order or proceeding with any action that prioritizes the refugee claims of certain religious minorities;
   (d) Enforcing Section 5(c) of the Executive Order;
   (e) Enforcing Section 5(e) of the Executive Order to the extent Section 5(e) purports to prioritize refugee claims of certain religious minorities.
2. This TRO is granted on a nationwide basis and prohibits enforcement of Sections 3(c), 5(a), 5(b), 5(c), and 5(e) of the Executive Order (as described in

the above paragraph) at all United States borders and ports of entry pending further orders from this court. Although Federal Defendants argued that any TRO should be limited to the States at issue (*see* Resp. at 30), the resulting partial implementation of the Executive Order "would undermine the constitutional imperative of 'a *uniform* Rule of Naturalization' and Congress's instruction that 'the immigration laws of the United States should be enforced vigorously and *uniformly*.'" *Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015) (footnotes omitted) (quoting U.S. CONST. art. I, § 8, cl. 4 (emphasis added) and Immigration and Reform Control Act of 1986, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384 (emphasis added)).[1]

3. No security bond is required under Federal Rule of Civil Procedure 65(c).

4. Finally, the court orders the parties to propose a briefing schedule and noting date with respect to the States' motion for a preliminary injunction no later than Monday, February 6, 2017 at 5:00 p.m. The court will promptly schedule a hearing on the States' motion for a preliminary injunction, if requested and necessary, following receipt of the parties' briefing.

V. CONCLUSION

Fundamental to the work of this court is a vigilant recognition that it is but one of three equal branches of our federal government. The work of the court is not to create policy or judge the wisdom of any particular policy promoted by the other two branches.

[1]An equally divided Supreme Court affirmed *Texas v. United States*, 809 F.3d 134, in *United States v. Texas*, --- U.S. ----, 136 S. Ct. 2271 (2016) (per curiam).

That is the work of the legislative and executive branches and of the citizens of this country who ultimately exercise democratic control over those branches. The work of the Judiciary, and this court, is limited to ensuring that the actions taken by the other two branches comport with our country's laws, and more importantly, our Constitution. The narrow question the court is asked to consider today is whether it is appropriate to enter a TRO against certain actions taken by the Executive in the context of this specific lawsuit. Although the question is narrow, the court is mindful of the considerable impact its order may have on the parties before it, the executive branch of our government, and the country's citizens and residents. The court concludes that the circumstances brought before it today are such that it must intervene to fulfill its constitutional role in our tripart government. Accordingly, the court concludes that entry of the above-described TRO is necessary, and the States' motion (Dkt. ## 2, 19) is therefore GRANTED.

Dated this 3RD day of February, 2017.

JAMES L. ROBART
United States District Judge

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

TAREQ AQEL MOHAMMED AZIZ, et al.,	)	
	)	
Plaintiffs/Petitioners	)	
	)	
v.	)	1:17-cv-116 (LMB/TCB)
	)	
DONALD TRUMP, President of the United States, et al.,	)	
	)	
	)	
Defendants/Respondents.	)	

MEMORANDUM OPINION

In this civil action, the Commonwealth of Virginia ("Commonwealth") alleges that Executive Order 13,769, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" ("the EO"), violates the First and Fifth Amendments to the United States Constitution, as well as the Immigration and Nationality Act and Religious Freedom Restoration Act. Before the Court is the Commonwealth's Motion for a Preliminary Injunction, to which defendants have responded and on which oral argument has been held. Attached to the Commonwealth's motion were multiple exhibits and declarations. The defendants have responded with no evidence other than the EO, which they have defended primarily with arguments attacking the Commonwealth's standing to oppose the EO and emphasizing the authority of the president to issue such an EO. For the reasons that follow, the Commonwealth's Motion for a Preliminary Injunction will be granted.

I. FINDINGS OF FACT

A. The Executive Order

On January 20, 2017, Donald Trump ("Trump") was inaugurated as the 45th President of the United States. On January 27, 2017, he signed the EO. Section 3 of the EO "proclaim[ed]

that the immigrant and nonimmigrant entry into the United States of aliens from" Syria, Iraq, Iran, Libya, Sudan, Yemen, and Somalia "would be detrimental to the interests of the United States" and "suspend[ed] entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order." [Dkt. 7-1] § 3(c). Although the EO specifically excludes "foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas"[1] from the ban on entry, it does not list lawful permanent residents ("LPRs") among those excluded. Id. Section 5 of the EO suspends the United States Refugee Assistance Program ("USRAP") for persons from all countries for 120 days. Id. at § 5(a). Once the suspension has ended, the EO directs the Secretaries of State and Homeland Security "to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." Id. at § 5(b).

Section 1 describes the stated purpose for the EO as follows:

> Numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program. Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism.

[Dkt. 31-1] § 1. Section 2 goes on to declare it to be "the policy of the United States to protect its citizens from foreign nationals who intend to commit terrorist attacks in the United States;

[1] The "G" series of visas are available to qualifying representatives of foreign governments and international organizations.

and to prevent the admission of foreign nationals who intend to exploit United States immigration laws for malevolent purposes." Id. § 2.

The EO was initially applied to LPRs, and the defendants have since conceded that Customs and Border Patrol ("CBP") initially stopped several LPRs at the border in the 24 to 48 hours after the EO was signed, although they represent that all such persons have since been permitted to enter the United States. After initial confusion within the executive branch, [Dkt. 61-17], Homeland Security Secretary John Kelly released a statement on Sunday, January 29, announcing that he "deem[ed] the entry of lawful permanent residents to be in the national interest" and that "lawful permanent resident status will be a dispositive factor in our case-by-case determinations," [Dkt. 61-1].

The next day, White House Counsel Donald F. McGahn II issued a memorandum stating that "there has been reasonable uncertainty about whether [Section 3 of the EO] appl[ies] to lawful permanent residents of the United States. Accordingly, to remove any confusion, I now clarify that Section 3(c) . . . do[es] not apply to such individuals." [Dkt. 34-1]. Defendants have argued that in light of this memorandum, the EO cannot be interpreted to apply to LPRs; however, a voluntary change of policy cannot be taken as binding unless it is "absolutely clear" that the government will not revert to its original position. Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc., 528 U.S. 167, 189 (2000). As the Ninth Circuit observed in related litigation, defendants have "offered no authority establishing that the White House counsel is empowered to issue an amended order superseding the Executive Order signed by the president . . . and that proposition seems unlikely," nor have they "established that the White House counsel's interpretation of the Executive Order is binding on all executive branch officials responsible for enforcing" it. Washington v. Trump, __ F.3d __, 2017 WL 526497, at *8 (9th

Cir. 2017). Accordingly, the Court finds that the EO presents an ongoing risk to the status of LPRs from the seven countries covered by the EO.

B. Injuries to the Commonwealth and its Residents

The Commonwealth has produced evidence of the EO being disruptive to the operation of its public colleges and universities. As the declaration of W. Taylor Reveley III ("Reveley"), who is president of the College of William & Mary and the chair of the Council of Presidents, a group consisting of the presidents and chancellors of Virginia's 14 public universities and colleges and 23 community colleges, [Dkt. 32] at ¶¶ 1–2, explains, the EO affects international travel of at least 350 students attending Virginia Commonwealth University, Virginia Tech, George Mason University, the University of Virginia, and William & Mary combined.[2] [Dkt. 32] at ¶ 5. That number includes at least two students who were abroad when the EO was issued and were denied reentry to the United States on its authority. Id. at ¶ 6.[3] At one university, Iranian-born faculty and students "have had to cancel their plans to present their work at an international conference on engineering" because they believe they are likely to be denied reentry to the United States. Id. at ¶ 7. The EO is also disrupting the process by which medical students "match" with academic hospitals for their residency, which takes place this month. Id. at ¶ 8. At least two Virginia universities have already had to cancel appearances by foreign scholars as a result of the EO. Id. at ¶ 9. Students have also begun withdrawing applications to attend Virginia schools as a result of the travel ban, and at least two students who had already announced an intention to enroll in Virginia schools have now abandoned those plans. Id. at

[2] At oral argument, the Commonwealth represented that across all of its schools its estimate of affected persons has grown to 1,000 students and 66 faculty and staff members.

[3] One of these students, Najwa Elyazgi, has since entered the United States, but only as a result of the District of Washington's order staying enforcement of the EO. [Dkt. 54] ¶ 11.

¶ 11. The affected students and faculty "must refrain from leaving the United States for fear of not being able to return," id. at ¶ 7, and "are unsure whether they should take the trips they had planned to visit family and fulfill research obligations, whether future trips should be planned, and whether members of their family or research partners will be able to visit the United States," id. at ¶ 14. The defendants provided no evidence to counter these representations.

The Commonwealth has also presented evidence that enforcement of § 3(c) of the EO will have a financial impact on its colleges and universities. Most concretely, the EO will result in reduced revenue from tuition money from students who cannot return to continue their studies or who are unable to enroll. [Dkt. 32] at ¶ 11. Department of Homeland Security data from 2015, the most recent year available, shows that 465 student visa holders from the affected countries were enrolled in Virginia schools. [Dkt. 61-15] at 4. College Factual, a company that specializes in higher education analytics, estimates that this could result in up to $20.8 million in lost tuition and fees. Id.; [Dkt. 61-16] at 1. Although the Commonwealth has not identified any specific grants or contracts that are in immediate jeopardy, it also argues that the EO may inhibit the ability of research universities to fulfill the terms of various grants and contracts. [Dkt. 32] at ¶ 12.

Reveley also avers that university personnel are experiencing "anxiety, confusion, and distress" because of the uncertainty introduced by the EO, such that some universities "have experienced an uptick in students, employees, and faculty using their counseling services." Id. at ¶ 14. Finally, Reveley and other administrators are concerned that the EO could imperil Virginia students who are studying abroad, by inflaming "anti-American sentiment[.]" Id. at ¶ 15. Again, defendants have not tendered any evidence to refute these concerns.

C. The Government's Asserted Rationale for the EO

Defendants have maintained that the EO is necessary to protect the United States from terrorist attacks to be carried out by nationals of the seven affected countries [Dkts. 31-1, 80]; however, they have not offered any evidence to identify the national security concerns that allegedly prompted this EO, or even described the process by which the president concluded that this action was necessary.[4]

And contrary to the national security concerns recited in the EO, the only evidence in the record on this subject is a declaration of 10 national security professionals who have served at the highest levels of the Department of State, the Department of Homeland Security, the Central Intelligence Agency, and the National Security Council through both Republican and Democratic administrations, [Dkt. 57], and at least four of whom "were current on active intelligence regarding all credible terrorist threat streams directed against the [United States] as recently as one week before the issuance of the" EO. Id. at ¶ 2. They write

> We all agree that the United States faces real threats from terrorist networks and must take all prudent and effective steps to combat them, including the appropriate vetting of travelers to the United States. We all are nevertheless unaware of any specific threat that would justify the travel ban established by the Executive Order issued on January 27, 2017. We view the Order as one that ultimately undermines the national security of the United States, rather than making us safer. In our professional opinion, this Order cannot be justified on national security or foreign policy grounds.

Id. at ¶ 3. They also observe that since September 11, 2011, "not a single terrorist attack in the United States has been perpetrated by aliens from the countries named in the Order." Id. at ¶ 4.

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[4] To the extent that such evidence might be classified, "the Government may provide a court with classified information. Courts regularly receive classified information under seal and maintain its confidentiality. Regulations and rules have long been in place for that." Washington, 2017 WL 526497, at *10 n.8.

D. The President's Public Comments

The Commonwealth's evidence also contains several statements by the president and his senior advisors on the subject of immigration to the United States by Muslims. Although defendants dispute the relevance of these statements, as discussed below, they have not contested their accuracy.

On December 7, 2015, then-candidate Trump issued a press released titled "Donald J. Trump's Statement on Preventing Muslim Immigration." [Dkt. 61-12]. In the statement, he called "for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." Id.

The latter statement is consistent with views that the president has expressed on various occasions over the last six years. A representative example[5] can be found in a 2011 interview with Fox News's Bill O'Reilly ("O'Reilly"). A portion of that interview reads:

> O'Reilly: Is there a Muslim problem in the world?
> Trump: Absolutely. Absolutely. I don't notice Swedish people knocking down the World Trade Center.
> . . .
> O'Reilly: But you do believe overall there is a Muslim problem in the world.
> Trump: Well, there is a Muslim problem. Absolutely. You just have to turn on your television set.
> O'Reilly: And do you think it encompasses all Muslims?
> Trump: No. And that's the sad part about life. Because you have fabulous Muslims. I know many Muslims and they're fabulous people. They're smart. They're industrious. They're great. Unfortunately, at this moment in time, there is a Muslim problem in the world. And by the way, and you know it and I [sic] and I know it and some people don't like saying it because they think it's not politically correct.

[Dkt. 61-19] at 5.

[5] The attachments to the Declaration of Mona Siddiqui [Dkt. 61] collect several other examples, although the Court does not consider every document in the Siddiqui declaration to be relevant.

As the campaign proceeded, there were fewer references to an outright ban on Muslim immigration, with the focus switched to a ban on persons from territories that have a Muslim majority. Mr. Trump and then-vice-presidential candidate Mike Pence ("Pence") were asked about this evolution in an interview with Lesley Stahl ("Stahl") on July 17, 2016. The relevant portion reads:

> Stahl: [I]n December, you [i.e., Pence] tweeted, and I quote you, "Calls to ban Muslims from entering the U.S. are offensive and unconstitutional."
> Trump: So you call it territories. OK? We're gonna do territories. We're not gonna let people come in from Syria that nobody knows who they are.
> . . .
> Stahl: [S]o you're changing . . . your position.
> Trump: --No, I—call it whatever you want. We'll call it territories, OK?
> Stahl: So not Muslims?
> Trump: You know—the Constitution—there's nothing like it. But it doesn't necessarily give us the right to commit suicide, as a country, OK? And I'll tell you this. Call it whatever you want, change territories [sic], but there are territories and terror states and terror nations that we're not gonna allow the people to come into our country.

[Dkt. 61-22] at 9–10.

On the morning of Friday, January 27, 2017, the president gave an interview with the Christian Broadcasting Network's David Brody ("Brody"):

> Brody: Persecuted Christians, we've talked about this, the refugees overseas. The refugee program, or the refugee changes you're looking to make. As it relates to persecuted Christians, do you see them as kind of a priority here?
> Trump: Yes.
> Brody: You do?
> Trump: They've been horribly treated. Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair [sic], everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them.

[Dkt. 61-6] at 2. That evening, the EO was signed.

On Sunday, January 29, 2017, two days after the EO was signed, former Mayor of New York City Rudolph Giuliani ("Giuliani") said in an interview on Fox News, "'I'll tell you the whole history of it[.]' . . . 'So when [Trump] first announced it, he said 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.' . . . 'And what we did was, we focused on, instead of religion, danger—the areas of the world that create danger for us[.]' . . . 'Which is a factual basis, not a religious basis. Perfectly legal, perfectly sensible. And that's what the ban is based on. It's not based on religion. It's based on places where there are [sic] substantial evidence that people are sending terrorists into our country.'" [Dkt. 61-4] at 1–2 (emphasis in original).

The president and his advisors deny that the EO represents the Muslim ban that the president spoke about during his campaign. Secretary Kelly said in an interview on Tuesday, January 31, 2017, "'This is not, I repeat not, a ban on Muslims.' . . . 'We cannot gamble with American lives. I will not gamble with American lives. These orders are a matter of national security, and it is my sworn responsibility as secretary of homeland security to protect and defend the American people.'" [Dkt. 61-17] at 3.

II. CONCLUSIONS OF LAW

A. Justiciability

As a threshold matter, defendants argue that courts "lack jurisdiction to review the Executive Branch's decisions concerning visa revocation and entry," at least in part because those decisions involve national security judgments. [Dkt. 80] at 14.

The word "jurisdiction" was once a "word of many, too many, meanings." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 90 (1998) (internal citation and quotation marks omitted). Accordingly, the Supreme Court "has endeavored in recent years to 'bring some

discipline' to the use of the term 'jurisdictional.'" Gonzalez v. Thaler, 132 S. Ct. 641, 648 (2012) (quoting Henderson v. Shinseki, 562 U.S. 428, 435 (2011)). Because the modern concept addresses "a court's adjudicatory capacity," it refers to either "subject matter jurisdiction" or "personal jurisdiction." Henderson, 562 U.S. at 435.

Defendants have argued that exercising jurisdiction in this case would be "an impermissible intrusion on the political branches' plenary constitutional authority over foreign affairs, national security, and immigration." [Dkt. 80] at 14. By advancing this argument, defendants appear to be invoking the political question doctrine, under which a court lacks subject matter jurisdiction over "a controversy . . . where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it[.]" Zivotofsky v. Clinton, 566 U.S. 189, 195 (2012) (internal quotation marks and citations omitted).

The issues in this case are not textually committed to another department by the Constitution. To the contrary, the Commonwealth argues that the EO is in violation of constitutional and statutory law, and that resolving these claims requires interpreting the EO, the Immigration and Nationality Act, and the Constitution. "This is a familiar judicial exercise." Zivotofsky, 566 U.S. at 196. "At least since Marbury v. Madison, [the Supreme Court has] recognized that when" government action "is alleged to conflict with the Constitution, 'it is emphatically the province and duty of the judicial department to say what the law is.'" Id. (quoting Marbury, 1 Cranch 137, 177 (1803)). "That duty will sometimes involve the '[r]esolution of litigation challenging the constitutional authority of one of the three branches,' but courts cannot avoid their responsibility merely 'because the issues have political implications.'" Id. (quoting INS v. Chadha, 462 U.S. 919, 943 (1983)).

At oral argument, defendants suggested that their justiciability arguments were limited to the context of 8 U.S.C. § 1182(f), which is the statutory authority that the president invokes for the EO. Section 1182(f) provides that "[w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants[.]" Defendants urge that this statutory grant of authority places the president at the zenith of his power, citing the framework first articulated by Justice Jackson in his concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Under Youngstown Sheet & Tube, "[w]hen the President acts pursuant to an express . . . authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." 343 U.S. at 635.

Maximum power does not mean absolute power. Every presidential action must still comply with the limits set by Congress' delegation of power and the constraints of the Constitution, including the Bill of Rights.[6] It is a bedrock principle of this nation's legal system that "the Constitution ought to be the standard of construction for the laws, and that wherever there is evident opposition, the laws ought to give place to the Constitution." The Federalist No. 81, at 481 (Alexander Hamilton) (Clinton Rossiter ed., 1999). Defendants have cited no authority for the proposition that Congress can delegate to the president the power to violate the

[6] Youngstown Sheet & Tube is better known as the Steel Seizure Case. In that case, President Truman ordered the Secretary of Commerce to seize control of most of the country's steel mills because he felt that an impending strike would jeopardize the military's ability to wage the Korean War. The Supreme Court struck the order, holding that although "[t]he power of Congress to . . . authorize the taking of private property for public use" was beyond question, the president did not have power to do so without Congress' approval, even in wartime. Id. at 588.

Constitution and its amendments and the Supreme Court has made it clear that even in the context of immigration law, congressional and executive power "is subject to important constitutional limitations." Zadvydas v. Davis, 533 U.S. 678, 695 (2001).

Indeed, the Supreme Court has refused to hold that the president is exempt from compliance with the Due Process Clause even when he is exercising a pure Article II power, such as the detention of persons deemed "enemy combatants." In Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004), for example, the Supreme Court was confronted with the constitutional claims of an "enemy combatant." The Court recognized the government's "critical . . . interest in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict," id., but still held that the president must comply with the Fifth Amendment, id. at 524. If the president's actions can be subject to judicial review when he is exercising his core Article II powers, as in Hamdi, it follows that his actions are also subject to such review when he exercises Article I powers delegated to him by Congress. As the Ninth Circuit has explained, "the Supreme Court has repeatedly and explicitly rejected the notion that the political branches . . . are not subject to the Constitution when policymaking in [the immigration] context." Washington, 2017 WL 526497, at *5.

The defendants also continue to dispute the Commonwealth's Article III standing to challenge the EO. The Court has already held that the Commonwealth has pleaded facts sufficient to establish standing under both a parens patriae theory and proprietary theory. See Mem. Op., [Dkt. 42] at 11. Because the pending motion is for a preliminary injunction, the Commonwealth may no longer rest on its pleadings but must "set forth by affidavit or other evidence specific facts, which for purposes of the [preliminary injunction] will be taken to be true." Cacchillo v. Insmed, Inc., 638 F.3d 401, 404 (2d Cir. 2011) (internal quotation marks and

citations omitted). As discussed above, the Commonwealth has submitted sufficient evidence in the form of Reveley's declaration to establish at this early point in the litigation standing under the standards articulated in this Court's memorandum opinion dated February 3, 2017. See Mem. Op., [Dkt. 42] at 11.

B. Preliminary Injunction

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). "While plaintiffs seeking preliminary injunctions must demonstrate that they are likely to succeed on the merits, they 'need not show a certainty of success." League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014) (internal quotation marks and citation omitted).

C. Likelihood of Success on the Merits

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.[7] "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Larson v. Valente, 456 U.S. 228, 244 (1982). The Supreme Court has articulated various tests for determining whether that command has been violated. The first such test is that the law "must have a secular . . . purpose." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[7] Although the First Amendment only addresses Congress by its terms, it has long been held to apply to executive action as well. See, e.g., New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

"In the past, [this] test has not been fatal very often, presumably because government does not generally act unconstitutionally, with the predominant purpose of advancing" one religion over another. McCreary County v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 863 (2005). The secular purpose requirement "'nevertheless serves an important function,'" id. at 859 (quoting Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring in the judgment)), because "[b]y showing a purpose to favor religion, the government sends the . . . message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members," id. at 860 (internal citations and quotation marks omitted). This message of exclusion from the political community is all the more conspicuous when the government acts with a specific purpose to disfavor a particular religion.

Defendants have argued that the Court may not go beyond the text of the EO in assessing its purpose, or look behind its proffered national security rationale,[8] but the Supreme Court has rejected that position. Although courts "often . . . accept governmental statements of purpose, in keeping with the respect owed in the first instance to such official claims, . . . in those unusual cases where the claim was an apparent sham, or the secular purpose secondary, the unsurprising results have been findings of no adequate secular object." McCreary, 545 U.S. at 865. When determining what purpose motivates governmental action, "an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." McCreary, 545 U.S. at 862. In other words, what matters is what an "objective observer" would draw from the text of the policy, enlightened by historical context and "the

[8] The District of Massachusetts apparently agreed in Louhghalam v. Trump, as it referred only to the text of the EO, but the court did not explain why it did not consider any other evidence. See __ F. Supp. 3d __, 2017 WL 479779, at *4–*5 (D. Mass 2017).

specific sequence of events leading to" its adoption. Id. (internal citations and quotation marks omitted). This historical context can include statements by relevant policymakers. Id. at 870 (considering resolutions authorizing a Ten Commandments display by county boards); see also Washington, 2017 WL 526497 at *10 (sanctioning the consideration of "statements by decisionmakers").

Defendants argue that an elected official's statements before he took the oath of office are irrelevant, but that position also runs counter to McCreary. 545 U.S. at 866. Just as the Supreme Court has held that "the world is not made brand new every morning[,]" id., a person is not made brand new simply by taking the oath of office. Limiting the temporal scope of the purpose inquiry "bucks common sense: reasonable observers have reasonable memories, and [Supreme Court] precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.'" Id. (quoting Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 315 (2000)). For example, in McCreary, the American Civil Liberties Union ("ACLU") sought to enjoin a display including the Ten Commandments in two counties' courthouses. Id. at 855. The Supreme Court examined the history of interactions between county executives, the ACLU, and the federal district court for a one-year period before the challenged display was erected, id. at 851–57, and determined from that history that "the [c]ounties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality," id. at 873. Further, in Santa Fe, the Court examined over a year's worth of events leading up to a school district's adoption of the challenged "Prayer at Football Games" policy to conclude that it "unquestionably ha[d] the purpose and create[d] the perception of encouraging the delivery of prayer at a series of important school events." Santa Fe, 530 U.S. at 294–98, 317.

This Court is similarly not free to "ignore perfectly probative evidence" from statements made by the president before he took office. See McCreary, 545 U.S. at 866.

Defendants have repeatedly cited Kleindienst v. Mandel, 408 U.S. 753 (1972), arguing that when facing constitutional scrutiny in an immigration context, the government must only supply a "facially legitimate and bona fide reason" for its action, but Mandel is inapplicable to this litigation. By its terms, Mandel does not apply to the persons who have already been granted visas because it involved an as-applied challenge to executive action by a person who had not been granted a visa. Id. at 758–60. Here, by contrast, the allegations involve persons who have passed through extensive vetting requirements and been granted visas. Accordingly, the limitation Mandel imposes on constitutional review of executive action does not apply to the class of persons relevant to this action. Moreover, even if Mandel did apply, it requires that the proffered executive reason be "bona fide." Id. at 770. As the Second and Ninth Circuits have persuasively held, if the proffered "facially legitimate" reason has been given in "bad faith," it is not "bona fide." Am. Academy of Religion v. Napolitano, 573 F.3d 115, 126 (2d Cir. 2009); Bustamente v. Mukasey, 531 F.3d 1059, 1062 (9th Cir. 2008). That leaves the Court in the same position as in an ordinary secular purpose case: determining whether the proffered reason for the EO is the real reason.

Defendants argue that permitting a court to "look behind" the president's national security judgments will result in a trial de novo of the president's national security determinations.[9] No party has asked the Court to engage in such an exercise, nor would

[9] Similar concerns were raised in one of the wartime detention cases, Boumediene v. Bush, 553 U.S. 723, 831 (2008) (Scalia, J., dissenting), but lower courts have proven capable of conducting the required due process analysis without supplanting the executive branch, see e.g., Bensayah v. Obama, 610 F.3d 718, 723–27 (D.C. Cir. 2010).

precedent permit it to do so. As in the Ninth Circuit, this court's "jurisprudence has long counseled deference to the political branches on matters of immigration and national security[.]" Washington, 2017 WL 526497, at *5. The Establishment Clause concerns discussed above do not involve an assessment of the merits of the president's national security judgment. Instead, the question is whether the EO was animated by national security concerns at all, as opposed to the impermissible motive of, in the context of entry, disfavoring one religious group and, in the area of refugees, favoring another religious group.

The Commonwealth has produced unrebutted evidence supporting its position that it is likely to succeed on an Establishment Clause claim. The "Muslim ban" was a centerpiece of the president's campaign for months, and the press release calling for it was still available on his website as of the day this Memorandum Opinion is being entered. See [Dkt. 61-12]. The president connected that policy to this EO when, asked last July if he had abandoned his plan for a Muslim ban, he responded "Call it whatever you want. We'll call it territories, OK?" [Dkt. 61-22] at 10. Giuliani said two days after the EO was signed that Trump's desire for a Muslim ban was the impetus for this policy. [Dkt. 61-4] at 1. And on the same day that the president signed the EO, he lamented that under the old policy, "If you were a Muslim you could come in, but if you were a Christian, it was almost impossible," and said his administration was "going to help" make persecuted Christians a priority. [Dkt. 61-6] at 2. Defendants have not denied any of these statements or produced any evidence, beyond the text of the EO itself, to support their contention that the EO was primarily motivated by national security concerns.[10]

[10] The Court gives little weight to the post hoc statements by Secretary Kelly and other administration officials that this is not a Muslim ban. See [Dkt. 61-17] at 3. Such rationalizations, coming after the litigation had already been challenged on First Amendment and other legal grounds, are typically afforded little weight in an intent inquiry. See Peacock v. Duval, 694 F.2d 644, 646 (9th Cir. 1982).

The "specific sequence of events" leading to the adoption of the EO bolsters the Commonwealth's argument that the EO was not motivated by rational national security concerns. As the declaration from the national security experts states, ordinarily an executive order prioritizing national security is based "on cleared views from expert agencies with broad experience on the matters presented to [the president]." [Dkt. 57] at ¶ 7. But here there is no evidence that such a deliberative process took place. Id. To the contrary, there is evidence that the president's senior national security officials were taken by surprise. See [Dkt. 61-17]. Although Giuliani suggested that the EO was formulated by a "whole group of very expert lawyers" and at least two members of Congress, this process appears to have taken place during the campaign and there is no evidence that this commission was privy to any national security information when developing the policy. See [Dkt. 61-4]. Once again, defendants have offered no evidence to the contrary.

Defendants argue that the list of countries affected by the EO was singled out by Congress and the previous administration for special scrutiny and therefore cannot reflect religious prejudice. Giuliani advanced a similar argument in his interview after the EO was signed—that as long as the policy was given an outwardly legal form, it is constitutional. [Dkt. 61-4] at 1–2. Once again, McCreary is to the contrary:

> One consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage. This presents no incongruity, however, because purpose matters.

545 U.S. at 866 n.14. Absent the direct evidence of animus presented by the Commonwealth, singling out these countries for additional scrutiny might not raise Establishment Clause concerns; however, with that direct evidence, a different picture emerges. In Giuliani's own account, the origin of this EO was a statement by the president that he wanted a legal way to

impose a ban on Muslims entering the United States. [Dkt. 61-4] at 1. The president himself acknowledged the conceptual link between a Muslim ban and the EO when, asked if he had changed his position, he said "Call it whatever you want. We'll call it territories, OK?" [Dkt. 61-22] at 10. That the same list might have been created by constitutionally legitimate concerns does not alter the legal analysis under McCreary.

The argument has also been made that the Court cannot infer an anti-Muslim animus because the EO does not affect all, or even most, Muslims. The major premise of that argument—that one can only demonstrate animus toward a group of people by targeting all of them at once—is flawed. For example, it is highly unlikely that the Supreme Court considered the displays of the Ten Commandments erected by the Kentucky counties in McCreary, which had a localized impact, to be targeted at all persons outside the Judeo-Christian traditions. See 545 U.S. at 851. Moreover, the Supreme Court has never reduced its Establishment Clause jurisprudence to a mathematical exercise. It is a discriminatory purpose that matters, no matter how inefficient the execution. See id. at 860.

Finally, defendants argue that the evidence on which the Commonwealth relies proves too much, because it would render every policy that the president makes related to Muslim-majority countries open to challenge. This fear is exaggerated. The Court's conclusion rests on the highly particular "sequence of events" leading to this specific EO and the dearth of evidence indicating a national security purpose. See McCreary, 545 U.S. at 862. The evidence in this record focuses on the president's statements about a "Muslim ban" and the link Giuliani established between those statements and the EO. Based on that evidence, at this preliminary

of the litigation, the Court finds that the Commonwealth has established a likelihood of success on the merits.[11]

D. Irreparable Harm

As a matter of law, the threat of an Establishment Clause violation in and of itself constitutes irreparable harm. Newsom v. Albemarle Cnty. Sch. Bd., 354 F.3d 249, 261 (4th Cir. 2003) (citing Elrod v. Burns, 427 U.S. 347, 373 (1976)). But it is not the only irreparable harm that the Commonwealth is experiencing. As discussed above, the travel ban applies to hundreds of students at the Commonwealth's universities, and is already preventing the exchange of faculty on which such universities thrive, by significantly straining freedom of movement. Moreover, Virginia's schools have begun to lose students, and have credibly stated that they expect to continue losing students and medical residents in the coming months if the travel ban is not lifted. Students are not fungible, thus these losses cannot be compensated by money damages, even if money damages were available in this civil action, which they are not. In light of the likelihood of an Establishment Clause violation and the restraint on liberty imposed by the travel ban, the Commonwealth has established irreparable harm.

E. Balance of the Equities

As the Fourth Circuit has held, "a state is in no way harmed by the issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional[.]" Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 521 (4th Cir. 2002) (internal quotation marks and citation omitted). Moreover, in contrast to the evidence of irreparable harm to the Commonwealth from the EO, the defendants have failed to present any

[11] Because the Commonwealth has established a likelihood of success on its Establishment Clause claim, the Court does not need to address its equal protection, due process, or statutory claims at this stage.

evidence of harm they or the nation will suffer if enforcement of § 3(c) of the EO is preliminarily enjoined beyond bare assertions that the EO is necessary for national security. Although there is no interest more weighty than a bona fide national security concern, the defendants have presented no evidence to support their contention that the EO is necessary to national security. And as the Ninth Circuit observed, there is no evidence that the procedures in place before the EO was signed were inadequate, as the government has not pointed to any attacks perpetrated by nationals of the affected countries since September 11, 2001. Washington, 2017 WL 526497 at *10. Ironically, the only evidence in this record concerning national security indicates that the EO may actually make the country less safe. As the former national security officials have stated: "[The EO] ultimately undermines the national security of the United States, rather than mak[ing] us safer. In our professional opinion, this Order cannot be justified on national security or foreign policy grounds." [Dkt. 57] at ¶ 3. The Commonwealth therefore prevails on the balance of the equities.

F. Public Interest

The Fourth Circuit has held that "upholding constitutional rights surely serves the public interest." Giovani Carandola, 303 F.3d at 521 (internal quotation marks and citation omitted). The Court therefore finds that enjoining an action that is likely a violation of the Establishment Clause serves the public interest, particularly in the absence of evidence to support the government's asserted national security interest as discussed above.

G. Scope of Relief

The Commonwealth originally sought an order enjoining enforcement of § 3(c) of the EO at any port of entry against Virginia residents who lawfully held either LPR status, a valid student visa, or a valid work visa at the time that the EO was signed. At oral argument, it

amended its request to include a request for a nationwide injunction applying to all persons, not just Virginia residents. Although "[n]ationwide injunctions are appropriate if necessary to afford relief to the prevailing party," Va. Soc'y for Human Life v. Fed. Election Comm'n, 263 F.3d 379, 393 (2001), injunctive relief must be no broader than necessary to avoid encroaching "on the ability of other circuits to consider the" questions raised. Id. The relief originally requested by the Commonwealth is appropriately tailored to the basis for the Commonwealth's standing and its claims relating to its residents, colleges, and universities. Moreover, the nationwide temporary restraining order entered in the District of Washington provides the broader protection sought by the Commonwealth. To avoid any claim that the preliminary injunction to be entered in this litigation is defective because of overbreadth, this Court declines the Commonwealth's invitation to impose broader relief.

III. CONCLUSION

For the reasons discussed in this Memorandum Opinion, the Court holds that the unrefuted evidence presented by the Commonwealth establishes that there is a likelihood the Commonwealth will prevail on the merits of its Establishment Clause claim; that it will suffer irreparable injury if the enforcement of § 3(c) of the EO is not enjoined as it relates to Virginia residents, Virginia institutions, and persons connected to those persons and institutions; that the defendants will not suffer any harm from imposing the injunction; and that enjoining unconstitutional action by the Executive Branch is always in the public's interest. Accordingly, the Court will enter a separate order granting a modified version of the injunction sought by the Commonwealth.

Entered this 13th day of February, 2017.

Alexandria, Virginia

/s/
Leonie M. Brinkema
United States District Judge

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

TAREQ AQEL MOHAMMED AZIZ, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	1:17-cv-116 (LMB/TCB)
	)	
DONALD TRUMP, President of the United States, et al.,	)	
	)	
	)	
Defendants.		

PRELIMINARY INJUNCTION

For the reasons stated in the accompanying Memorandum Opinion, the Court finds that the Commonwealth of Virginia has standing to maintain this civil action and has established that it is likely to prevail on the merits, that it is likely to suffer irreparable harm in the absence of injunctive relief, and that the balance of the equities and the public interest favor an injunction. Accordingly, the Commonwealth's Motion for a Preliminary Injunction [Dkt. 23] is GRANTED and it is hereby

ORDERED that respondents, and all officers, agents, and employees of the Executive Branch of the United States government, and anyone acting under their authorization or direction be and are ENJOINED from enforcing § 3(c) of Executive Order 13,769 against any person who has a Virginia residence or is employed by or attends an educational institution administered by the Commonwealth of Virginia, and who, as of 5:00 p.m. Eastern Standard Time on Friday, January 27, 2017, was lawfully admitted for permanent residency in the United States, held an immigrant visa that would entitle the bearer to be lawfully admitted for permanent residency upon admission to the United States, held a valid student visa (or accompanying family or spousal visa), or held a valid work visa (or accompanying family or spousal visa); and it is further

ORDERED that nothing in this Order affects the statutes or regulations relating to immigration in effect before Executive Order 13,769 went into effect; and it is further

ORDERED that the Commonwealth of Virginia is not required to deposit a security.

The Clerk is directed to forward copies of this Preliminary Injunction and the accompanying Memorandum Opinion to counsel of record.

Entered this 13th day of February, 2017.

Alexandria, Virginia

/s/
Leonie M. Brinkema
United States District Judge