The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JUWEIYA ABDIAZIZ ALI, *et al*.,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, *et al*.,

Defendants.

Case No. 2:17-cv-00135-JLR

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

The President is authorized by statute to "suspend the entry of . . . any class of aliens" whenever he determines their entry "would be detrimental to the interests of the United States[.]" 8 U.S.C. § 1182(f). Invoking that statutory authority and his constitutional authority to control the entry of aliens into this country, on January 27, 2017, the President issued Executive Order 13,769, titled "Protecting the Nation from Foreign Terrorist Entry into the United States" ("Executive Order" or "Order) (*see* Plaintiffs' Complaint, ECF No. 1 ("Compl."), Ex. A.)

U.S. Department of Justice
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 305-7171

The Executive Order's stated purpose is "to protect the American people from terrorist attacks by foreign nationals admitted to the United States" by taking steps "to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism." *Id.* The President directed, *inter alia*, a temporary 90-day suspension of entry for aliens from seven countries previously identified by Congress or the Executive Branch as posing a heightened risk of terrorism. *See* Exec. Order § 3(c).

In their putative class action lawsuit, Plaintiffs request a preliminary injunction prohibiting enforcement of Section 3(c) of the Executive Order. They claim that the Executive Order violates the Immigration and Nationality Act ("INA"), the Administrative Procedure Act, and due process rights because they have a constitutionally protected liberty interest in their family life, and equal protection under the Fifth Amendment because it is allegedly motivated by animus toward Muslims. However, because this Court enjoined Section 3(c) of Executive Order 13,769 in a parallel case, Plaintiffs cannot demonstrate any immediately threatened injury to them in the absence of a second injunction being entered. Rather, the existing injunction already gives Plaintiffs the benefit of whatever relief their requested preliminary injunction could provide.

Even if Section 3(c) were not currently enjoined, Plaintiffs could not carry the heavy burden that must be met to justify such an "extraordinary remedy," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 22, 25-26 (2008), particularly where, as here, no constitutional violation exists because the Executive Order expressly incorporated a facially neutral statutory provision identifying the countries and areas of concern whose nationals were suspended from entry. *See* 8 U.S.C. § 1187(a)(12)(D)(ii). Plaintiffs' proposed remedies suffer from numerous deficiencies. First, Plaintiffs' legal arguments contravene the general principle in immigration

U.S. Department of Justice
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 305-7171

law 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," *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), and that "it is not within the province of any court, unless expressly authorized by law, to review [that] determination," *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). Moreover, Plaintiffs seek an injunction that is vastly overbroad—it is untethered to Plaintiffs' particular claims; extends to unadmitted aliens abroad, who are outside the territory of the United States; and "deeply intrudes into the core concerns of the executive branch." *Adams v. Vance*, 570 F.2d 950, 954-55 (D.C. Cir. 1978).

Aside from the fact that Plaintiffs fail to meet the necessary criteria for obtaining a preliminary injunction and that a second injunction from this Court enjoining Section 3(c) would be duplicative, this Court need not rule on the question at this time because the President intends in the near future to rescind the Executive Order and replace it with a new, substantially revised Executive Order. Accordingly, the government respectfully submits that the most appropriate course would be for the Court to hold in abeyance its consideration of Plaintiffs' motion for a preliminary injunction while the current injunction remains in place or at least until the President issues the new Executive Order. To facilitate that disposition, the government will notify the Court of the new Order as soon as it is issued.

BACKGROUND

1. Executive Order 13,769

Executive Order 13,769 directs a number of actions in the interests of national security. Executive Order §§ 2-11. The Secretary of Homeland Security is directed to conduct an immediate 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

U.S. Department of Justice
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 305-7171

not a security or public-safety threat." *Id.* § 3(a). The Order also directs a process for requesting necessary information from foreign governments that do not supply such information, and consequences for countries not providing it. *See id.* § 3(d)-(f).

While that review is ongoing, the Executive Order suspends entry for 90 days of aliens from seven countries previously identified as being associated with a heightened risk of terrorism pursuant to 8 U.S.C. § 1187(a)(12). Executive Order § 3(c). Section 1187(a)(12), enacted in 2015, modifies the Visa Waiver Program ("VWP"). Pub. L. No. 114-113, 129 Stat. 2242, 2990 (2015). The VWP allows nationals of certain countries to travel to and apply for admission to the United States without a visa. *See* 8 U.S.C. § 1187. Section 1187(a)(12) restricts use of the VWP for individuals from one of the 38 VWP countries who are dual nationals of, or have recently travelled to, certain countries. For purposes of the dual national or travel-related restriction, the statute identified Iraq and Syria, and also included countries that have been designated by the Secretary of State as state sponsors of terrorism: Iran, Syria and Sudan. *Id.* § 1187(a)(12)(A)(i)(I)-(II), (ii)(I)-(II).

In addition, the law provided that the Secretary of Homeland Security could designate additional "countries or areas of concern" and shall consider "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," "whether a foreign terrorist organization has a significant presence in the country or area," and "whether the country or area is a safe haven for terrorists." *Id.* § 1187(a)(12)(D)(ii). In February 2016, the Secretary of Homeland Security exercised that authority to restrict use of the VWP for individuals from one of the 38 VWP countries who had recently travelled to Libya, Somalia, or Yemen, in an effort to ensure that the Visa Waiver

U.S. Department of Justice
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 305-7171

Program's "requirements are commensurate with the growing threat from foreign terrorist fighters."[1]

2. Timeline Of Significant Events And Procedural History

On January 30, 2017, Plaintiffs filed their Complaint—Class Action for Declaratory and Injunctive Relief, ("Compl.") on behalf of a putative class. (ECF No. 1.) Included as named plaintiffs are three children, each of whom is a nonresident of the United States and an unadmitted national of one of the seven identified countries. Two of the children allegedly have not received immigrant visa interviews (*id*. at ¶¶ 60, 73), and one allegedly received an immigrant visa but was unable to travel to the United States as of the date Plaintiffs filed their Complaint (*id*. at ¶¶ 86, 89). The remaining named plaintiffs are parents, all of whom allegedly filed visa petitions on behalf of their children. These plaintiffs include a U.S. citizen who is the mother of one of the two named plaintiffs who has allegedly not received a visa interview (*id*. at ¶¶ 51, 54); a Lawful Permanent Resident ("LPR") who is the mother of the other named plaintiff who allegedly has not received a visa interview (*id*. at ¶¶ 63, 65); and a U.S. citizen who is the father of the named plaintiff who allegedly received a visa (*id*. at ¶¶ 77, 79.)[2]

Plaintiffs argue that Section 3(c) of the Executive Order violates 8 U.S.C. § 1152(a)(1), the Administrative Procdure Act, the Mandamus Act, and equal protection and due process under

---

[1] *DHS Announces Further Travel Restrictions for the Visa Waiver Program*, Feb. 18, 2016, https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program. Exemptions from the Executive Order's suspension of the entry of aliens from the seven countries identified under § 1187(a)(12) can be made on a case-by-case basis. Executive Order § 3(g).

[2] In their preliminary injunction motion, Plaintiffs allude, for the first time, to "[p]roposed class members that are U.S. based-employers" that "similarly have constitutionally protected interests." (ECF No. 9 at 6, 13.) However, no U.S.-based employers are mentioned in Plaintiffs' Complaint and none are listed anywhere as named plaintiffs. Thus, under Federal Rule of Civil Procedure 23(a), no such employers are parties to the lawsuit at this time.

U.S. Department of Justice
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 305-7171

the Fifth Amendment. (Compl. at ¶¶ 3-5.) Although Defendants were not properly served with the Complaint until February 9, 2017 (ECF No. 30), Plaintiffs filed a motion for class certification on February 2, 2017. (ECF No. 3.) On February 6, 2017, Plaintiffs filed their motion for a preliminary injunction. (ECF No. 9.)

In another case before this Court, the State of Washington—later joined by the State of Minnesota—challenged the Executive Order, filing suit on January 30, 2017, and seeking a temporary restraining order that same day. *See Washington v. Trump*, Case No. 2:17-cv-141-JLR (W.D. Wash.). On February 3, 2017, the Court in that case enjoined, on a nationwide basis, enforcement of Section 3(c)—at issue in this case—along with Sections 5(a)-(c), and 5(e) of the Executive Order. *Wash. v. Trump* (W.D. Wash.), ECF No. 52. The Court's injunctive order did not contain an expiration date.

On appeal, a panel of the Ninth Circuit denied the government's emergency motion for a stay of the nationwide injunction. *See Wash. v. Trump*, --- F.3d ----, 2017 WL 526497 (9th Cir. Feb. 9, 2017) ("9th Cir. Op."). This Court has since concluded that, based on the Ninth Circuit panel's ruling, the temporary restraining order should be construed as a preliminary injunction. *See Wash. v. Trump* (W.D. Wash.), ECF No. 78 at 4. Based on the government's representation that President intends to rescind and replace the Executive Order in the near future, the Ninth Circuit stayed *en banc* proceedings. *Wash v. Trump* (9th Cir.), ECF No. 161.

Despite the existing injunction of portions of Executive Order 13,769 and the forthcoming rescission and replacement of that Executive Order, Plaintiffs' counsel has not agreed to stay the briefing deadlines in this case. Defendants now file this opposition to Plaintiffs' request for a preliminary injunction, but maintain that the interests of judicial economy weigh against the practicability of deciding the issue at this time.

U.S. Department of Justice
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 305-7171

3. Legal Background on Foreign Affairs Power

The power to control the admission of aliens is an inherent attribute of national sovereignty. *See, e.g.*, *Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). The Supreme Court has long recognized that the political branches of the federal government have plenary authority to establish and implement substantive and procedural rules governing the admission of aliens to this country. *Id.*; *see also Kleindienst v. Mandel*, 408 U.S. 753, 765–66 & n.6 (1972); *Fiallo v. Bell*, 430 U.S. 787, 792, 794 (1977). The political branches of the federal government therefore possess concurrent authority over immigration matters. *Jean v. Nelson*, 727 F.2d 957, 964 (11th Cir. 1984) (en banc) (collecting cases), *aff'd on non-constitutional grounds*, 472 U.S. 846 (1985).

Congress has delegated wide discretion to the President over aliens whom he believes are a threat to national security, reinforcing the President's inherent authority over foreign affairs. *See* 8 U.S.C. § 1182(f); *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (noting how, when "the President acts pursuant to an express or implied 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" (emphasis added)).

Viewing this case in terms of Justice Jackson's framework in *Youngstown*, Congress has supplemented the Executive Branch's inherent Article II authority over foreign affairs by delegating broad authority on two key issues—suspension of entry of aliens and revocation of visas held by aliens. *See* 8 U.S.C. §§ 1182(f) (allowing the President to "suspend the entry of all aliens or any class of aliens . . . or . . . impose on the entry of aliens any restrictions he may deem to be appropriate" for as long as he considers necessary upon a finding that "the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the

U.S. Department of Justice
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 305-7171

United States."), 1201(i) (granting the Secretary of State discretionary authority to revoke visas). The President is also best situtated to make these complex risk assessments, given his access to intelligence assessments and reports from advisors across the national security spectrum.

Here, the Executive Order stems from the President's constitutional authority, along with that delegated to him under the INA pursuant to 8 U.S.C. § 1182(f), with respect to the suspension of entry of certain classes of aliens. The purposes of the suspension are to "temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening of foreign nationals, and to ensure that adequate standards are established to prevent infiltration by foreign terrorists or criminals." Executive Order § 3(c). The Order seeks "to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism," *id.* § 1, and "to prevent the admission of foreign nationals who intend to exploit United States immigration laws for malevolent purposes." *Id.* § 2.

LEGAL STANDARD

A preliminary injunction 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 an injunction is in the public interest." *Winter*, 555 U.S. at 7, 20. Moreover, given the "remarkably broad delegations of its authority" Congress has provided the Executive Branch, as well as the authority under Article II for the President to conduct affairs involving matters of national sovereignty, *Jean*, 727 F.2d at 965, courts have consistently "recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425

U.S. Department of Justice
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 305-7171

(1999); *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."); *see also Dep't of the Navy v. Egan*, 484 U.S. 518, 529-30 (1988); *cf. Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) ("[W]e acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena."). Thus, 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*, 570 F.2d at 954-55 (emphasis added); *see Palestine Info. Office v. Shultz*, 674 F. Supp. 910, 917 (D.D.C. 1987) ("[B]y seeking injunctive relief against the Executive's foreign policy action, plaintiffs ask this Court to approach the outer limit of its constitutional authority.").

ARGUMENT

1. Plaintiffs Cannot Sustain The Requirements For a Preliminary Injunction

A. There is no Likelihood Of Success On The Merits

Under *Winter*, Plaintiffs must establish that their success is *likely*, not just possible, in order to obtain a preliminary injunction. 555 U.S. at 24. Any inquiry into the merits must first consider threshold issues such as Article III standing and subject matter jurisdiction, which if not satisfied by the movant, require finding in the government's favor. If the plaintiff lacks standing under Article III, then the court lacks subject matter jurisdiction, and the case must be dismissed. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998). Here, Plaintiffs fail to establish a likelihood of success on the merits.

U.S. Department of Justice
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 305-7171

i. Due Process Claims

The due process claims of the nonresident, unadmitted alien plaintiffs must fail at the threshold for the simple reason that aliens outside our borders have no constitutional right to entry or to a visa. *See Landon*, 459 U.S. at 32 ("[A]n 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."). Even at ports of entry, nonresident aliens have not entered the country and have no due process rights with respect to their request for admission beyond what Congress has affirmatively provided. *See id.*; *Mezei v. Shaughnessy*, 345 U.S. 206, 213; *accord. United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (noting how "aliens receive constitutional protections [once] they have come *within* the territory of the United States and developed substantial connections with this country" (emphasis added)).

Under the INA, Congress has given the President broad discretion to suspend the entry of classes of aliens whom he believes would be "detrimental to the interests of the United States." 8 U.S.C. § 1182(f). And under decisions such as *Mezei*, excludable aliens do not have a constitutional right to enter or be admitted to the United States. *See Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1107 (9th Cir. 2001). This is particularly true where Congress has delegated to the Executive Branch authority over decisions to admit or exclude aliens. *See Castro v. United States Dep't of Homeland Sec.*, 835 F.3d 422, 439-44 (3d Cir. 2016) (collecting cases).

In these circumstances, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Mezei*, 345 U.S at 212 (quoting *Knauff*, 338 U.S. at 544). The Ninth Circuit has adhered to *Mezei* and its progeny. *See Barrera-Echavarria v. Rison*, 14 F.3d 1414, 1448-49 (9th Cir. 1995) (quoting *Mezei* and *Knauff*).

U.S. Department of Justice
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 305-7171

Congress has not provided for any judicial review of a visa refusal, *see, e.g.*, 6 U.S.C. § 236(f) (providing that the designation of authorities in Section 236 does not give rise to a private right of action against a consular officer to challenge a decision to grant or deny a visa), or a visa revocation, *see, e.g.*, 8 U.S.C. § 1201(i). The nonresident, unadmitted alien plaintiffs thus cannot demonstrate a likelihood of success on the merits of their due process claim.[3]

The U.S. citizen and LPR plaintiffs' due process claims are also unavailing. (Compl. at ¶ 121 (alleging that the Executive Order violates their "constitutionally protected liberty interest in their family life.").) The Ninth Circuit has allowed very limited review of a consular officer's decision to deny an unadmitted, nonresident alien's visa application when the denial is alleged to implicate the rights of a United States citizen *spouse*.[4] *See Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016); *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008).[5] None of the named plaintiffs allege that their family members' visas were denied—two of the

---

[3] Plaintiffs find no support in the Supreme Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), which they cite for the proposition that nonresident, unadmitted aliens may challenge the Executive Order. (ECF No. 9 at 5.) Although the Court in *Rasul* did find that "[t]he courts of the United States have traditionally been open to nonresident aliens," 542 U.S. at 484, such aliens have no rights regarding their admission to the country. *See, e.g.*, *Landon*, 459 U.S. at 32; *Mezei*, 345 U.S. at 213.

[4] The Ninth Circuit suggested that *Mandel*'s "facially legitimate and bona fide" standard would not apply in this case because it is limited to "lawsuits challenging an executive branch official's decision to issue or deny an individual visa" rather than broad "immigration polic[ies]" like the Order. Ninth Cir. Op. at 15-16 (quotation marks and citation omitted). But the Supreme Court itself, in *Fiallo v. Bell*, applied *Mandel* to reject challenges to an immigration *statute*, which obviously involved questions of immigration policy rather than individualized executive adjudications. 430 U.S. at 794-95 ("We can see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in * * * *Mandel*.").

[5] The Supreme Court's recent decision in *Kerry v. Din* did nothing to change the calculus. 135 S. Ct. 2128 (2015). In that case, Justice Kennedy, in his concurring and controlling opinion, did not opine as to whether a U.S. citizen has a protected liberty interest in her marriage entitling her to limited judicial review. *Din*, 135 S.Ct. at 2139. Instead, Justice Kennedy concluded that "even assuming" Din had such an interest, "the notice she received regarding her husband's visa denial satisfied due process." *Id.*

U.S. Department of Justice
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 305-7171

nonresident, unadmitted plaintiffs have not yet completed the visa process, and one may have had her visa revoked.

Even assuming *arguendo* that the Order has implicated the U.S. citizen and LPR plaintiffs'[6] due process rights and that judicial review were available, this Court's review of the Executive Order would be strictly limited.[7] When the Executive exercises its immigration authority "on the basis of a facially legitimate and bona fide reason, the courts will [not] look behind the exercise of that discretion." *Mandel*, 408 U.S. at 770; *Cardenas*, 826 F.3d at 1170. Here, the Executive Order states a facially legitimate and bona fide reason. By expressly relying upon the President's authority under § 1182(f), the Executive Order explains that the temporary suspension is intended "to ensure the proper review and maximum utilization of available resources for the screening of foreign nationals, and to ensure that adequate standards are established to prevent infiltration by foreign terrorists or criminals." Executive Order § 3(c). Accordingly, even if this Court were to undertake the type of limited review contemplated by *Mandel* and *Din*, Plaintiffs' challenge would lack merit.

ii. Equal Protection Under the Fifth Amendment

Plaintiffs claim that the Executive Order violates the equal protection component of the Fifth Amendment's Due Process Clause. (Compl. at ¶¶ 115-118). But again, the nonresident, unadmitted alien plaintiffs do not have rights under the Due Process Clause with respect to their request for entry into the United States, and the resident Plaintiffs are only entitled, if anything, to review under the "facially legitimate and bona fide" standard. In any event, contrary to

---

[6] To be clear, the decisions in *Din*, *Cardenas*, and *Bustamante* concerned the constitutional interests of U.S. citizens, not LPRs.

[7] The LPR plaintiffs in this case assert putative due process claims based solely on their relationship to family members. Their own ability to reenter the country is not at issue. *Cf.* 9th Cir. Op. 21-22.

U.S. Department of Justice
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 305-7171

Plaintiffs' contention that strict scrutiny is the appropriate standard (ECF No. 9 at 14), where an equal protection claim is made to an immigration law, only rational basis review applies. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 83 (1976) (considering whether a law that made distinctions based on alien status was "wholly irrational"); *Jimenez–Angeles v. Ashcroft*, 291 F.3d 594, 603 (9th Cir. 2002) (reasoning that nationality-based classification of noncitizens satisfies equal protection if it is rationally related to a legitimate government interest.).

Under highly deferential rational basis scrutiny, a statutory classification must be upheld so long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *see also See Yao v. I.N.S.*, 2 F.3d 317, 321 (9th Cir. 1993). The Equal Protection Clause is satisfied so long as there is "a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992).

The Executive Order easily satisfies this relevant standard. From a constitutional perspective, the Executive Branch is permitted to draw distinctions based on nationality in the context of immigration and entry into the United States. *See, e.g.*, *Jean*, 727 F.2d at 978 n.30 ("[T]here is little question that the Executive has the power to draw distinctions among aliens on the basis of nationality."); *Narenji v. Civiletti*, 617 F.2d 745, 748 (D.C. Cir. 1979) ("[C]lassifications among aliens based upon nationality are consistent with due process and equal protection if supported by a rational basis."). Here, the President's determination that nationals

U.S. Department of Justice
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 305-7171

from the seven countries identified are associated with a heightened risk of terrorism creates a rational basis for the Executive Order.

Plaintiffs next allege that the Order stems from an "animus toward—and has a disparate effect on—Muslims." (Compl. at ¶ 118.) But the plain language of the Executive Order includes nothing discussing Islam or any other particular religion, and Plaintiffs cannot establish animus here. The Order references countries subject to an existing statutory provision that restricted VWP travel for individuals traveling to one of the countries, based on terrorism-related concerns.

Even if there is a disparate impact, that does not call the validity of the Executive Order into question under the *Mandel* standard of review. The Executive Order "temporarily reduce[s] investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening of foreign nationals, and to ensure that adequate standards are established to prevent infiltration by foreign terrorists or criminals." Executive Order § 3(c). The courts must exercise restraint when faced with facially legitimate and bona fide decisions made by the Executive Branch. *See Fiallo*, 430 U.S. at 794.

iii. Claims under the Administrative Procedure Act and Mandmus Act

Plaintiffs fail to establish a substantial likelihood of success on the merits under the APA and the Mandamus Act for several reasons. First, Plaintiffs cannot state a claim under the APA against the Executive Order because the President is not an "agency" for the purposes of the APA. In *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992), the United States Supreme Court concluded that the Presidency is not an "agency" as defined in the APA, § 701(b)(1). Courts have interpreted *Franklin* to prohibit review under the APA of actions by the President

U.S. Department of Justice
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 305-7171

when he is exercising discretionary authority. *See, e.g.*, *Detroit Int'l Bridge Co. v. Gov't of Canada*, 189 F. Supp. 3d 85, 104 (D.D.C. 2016). Here, Congress has granted the President authority to suspend entry for any class of aliens if he finds that such entry would be "detrimental to the interests of the United States." 8 U.S.C. § 1182(f). Pursuant to, and without exceeding, that grant of discretionary authority, the President issued the Executive Order and suspended entry of aliens from the seven subject countries. The President's action is thus unreviewable under the APA. *See Detroit Int'l Bridge*, 189 F. Supp. 3d at 104-05.[8]

Second, Plaintiffs cannot assert a claim under the APA if the claim is precluded by another statute. *See* 5 U.S.C. § 701(a)(1). Here, to the extent that Plaintiffs purport to challenge the State Department's provisional revocation of any visa, such challenge is precluded by 8 U.S.C. § 1201(i), which states in relevant part:

> [T]he consular officer or the Secretary of State *may* at any time, *in his discretion*, revoke such visa or other documentation . . . . There shall be no means of judicial review (including review pursuant to section 2241 of Title 28 or any other habeas corpus provision, and sections 1361 and 1651 of such title) of a revocation under this subsection, except in the context of a removal proceeding if such revocation provides the sole ground for removal under section 1227(a)(1)(B) of this title.

---

[8] In addition, the APA precludes judicial review of any agency action that is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *see Webster v. Doe*, 486 U.S. 592, 594, 600-01 (1988) (holding that the Director of Central Intelligence had complete discretion over employee discharges, and thus judicial review was precluded). By its plain terms, 8 U.S.C. § 1182(f) vests 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." As a result, there is no discernable standard for judicial review of the President's determinations. *See Haitian Refugee Ctr., Inc. v. Baker*, 789 F. Supp. 1552, 1575-76 (S.D. Fla. 1991). Thus, even if Plaintiffs could challenge a presidential finding under the APA, the challenge would necessarily fail under these circumstances.

U.S. Department of Justice
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 305-7171

8 U.S.C. § 1201(i) (emphasis added). Based on the plain language of 8 U.S.C. § 1201(i), Plaintiffs cannot establish a substantial likelihood of success on the merits with respect to any APA claim challenging the revocation of a visa.[9]

Third, to the extent Planitiffs purport to challenge a consular officer's denial of or failure to adjudicate their visa applications, as explained *supra*, an alien has no right of admission into this country.[10] Thus, Plaintiffs have no likelihood of success on the merits of a claim under the APA seeking to require the government to admit them into this country. The INA confers upon consular officers the exclusive authority to adjudicate visa applications. *See* 8 U.S.C. §§ 1104(a), 1201(a); *see also* 6 U.S.C. § 236(b), (c). It is well established, however, that "[o]btaining a visa from an American consul has never guaranteed an alien's entry into the United States. A visa merely gives the alien permission to arrive at a port of entry and have an immigration officer independently examine the alien's eligibility for admission." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1157 (D.C. Cir. 1999) (citing 8 U.S.C. § 1201(h)). Any suggestion to the contrary by Plaintiffs is incorrect.

Fourth, the APA affords no relief to the U.S. citizen and LPR plaintiffs who claim a constitutionally-protected interest in their family life that would entitle them to judicial review of a consular officer's visa refusal decision. APA review for arbitrary and capricious decision-making is incompatible with the limitations imposed by the doctrine of consular nonreviewability, which qualifies as one of the "limitations on judicial" review that overcomes the APA's presumption of reviewability. *See* 5 U.S.C. § 702(1) ("Nothing herein . . . affects other limitations on judicial review . . . ."); *Saavedra Bruno*, 197 F.3d at 1160-62 (the APA does

[9] Again, no plaintiff alleges that her visa application has been denied.

[10] Insofar as Plaintiffs are reasserting constitutional claims under the APA, their claims necessarily fail for the reasons stated earlier.

U.S. Department of Justice
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 305-7171

not disturb the general rule that no judicial review is available regarding the decision to exclude an alien from the United States). Because any judicial review of those plaintiffs' claims would necessarily be limited to whether the decisions qualify as facially legitimate and bona fide, review under the APA does not apply. *Id.*; *Mandel*, 408 U.S. at 770.

Finally, with respect to Plaintiffs' request for relief under the Mandamus Act, their claim fails because they do not identify any discrete agency action that is legally required. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004). To the extent Plaintiffs claim that Congress's delegation through § 1182(f) is limited by 8 U.S.C. § 1152(a)(1)(A), § 1152(a)(1)(A) does not address—and thus does not circumscribe—the President's authority under § 1182(f). Indeed, an immigrant visa does not entitle an alien to admission to the United States, and even if an alien is issued a valid visa, he is subject to being denied admission to this country when he arrives at the border. 8 U.S.C. § 1201(h); *see, e.g.*, *Khan v. Holder*, 608 F.3d 325, 330 (7th Cir. 2010). There is thus no inconsistency between § 1152(a)(1)(A) and the President's issuance of the Executive Order under § 1182(f).

B. The Plaintiffs Have Not Shown Any Irreparable Harm

At this time, Plaintiffs cannot show irreparable harm. Irreparable harm represents a loss that cannot possibly be remedied at the conclusion of the litigation: "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 90 (1974). Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984). Plaintiffs must do more than merely allege imminent harm sufficient to establish standing; they must demonstrate immediate threatened injury as a prerequisite to

U.S. Department of Justice
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 305-7171

preliminary injunctive relief. *Los Angeles Mem. Coliseum Comm. v. Nat'l Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980).

In the first instance, given that Section 3(c) of Executive Order 13,769 is presently enjoined by this Court, Plaintiffs cannot demonstrate any immediately threatened injury to them in the absence of a second injunction being entered. Rather, the existing injunction already gives Plaintiffs the benefit of whatever relief their requested preliminary injunction could provide. "Under these circumstances . . . injunctive relief 'is not now needed to guard against any present or imminent risk of likely irreparable harm.'" *Center for Food Safety v. Vilsack*, 636 F.3d 1166, 1174 (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 142 (2010)). At this time, "Plaintiffs are unliklely to face irreparable substantive harm," but "if a subsequent" development brings Section 3(c) back into force, Plaintiffs "then may challenge it and seek appropriate preliminary relief." *Center for Food Safety*, 636 F.3d at 1174.

Even putting aside the threshold problem of an already-existing injunction, Plaintiffs do not meet their burden of demonstrating irreparable harm. Plaintiffs' claims of injury relate to immigrant visa-holding and non-visa-holding individuals' inability to enter the United States. (*See generally* Compl. ¶¶ 51-92.) These claims fail for several reasons. First, with respect to the non-visa-holding individuals who have not completed the steps to perfect the visa application process, they are not affected by any provision of the Executive Order and therefore lack standing. (*See* Compl. ¶ 51-76.) Second, the Executive Order imposes only a suspension, not a permanent ban, on entry of individuals from the designated countries. Third, any claim that a visa applicant or her petitioning U.S. citizen or LPR parent will suffer irreparable harm as a result of the 90-day suspension period is too attenuated to satisfy standing. An applicant for an immigration benefit has no entitlement to approval of such, and certainly the petitioner has no

U.S. Department of Justice
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 305-7171

cognizable right to have an application adjudicated within 90 days. Nor can Plaintiffs base their request for injunctive relief on the claim that other entities that are not before this Court will suffer irreparable harm in the absence of preliminary injunctive relief.[11] *E.g.*, *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) ("At a minimum, a plaintiff seeking preliminary injunctive relief must demonstrate that *it* will be exposed to irreparable harm.") (emphasis added). Finally, to the extent that there are aliens with concrete travel plans who have not been permitted to enter the country, Plaintiffs do not allege that those aliens have sought, let alone been denied, a case-specific waiver as provided for in the Executive Order.

C. The Balance of Harms and Public Interest Require Denial of Relief

The final two factors required for preliminary injunctive relief—balancing of the harm to the opposing party and the public interest—merge when the government is the opposing party. *See, e.g.*, *Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, courts must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312–13 (1982).

Plaintiffs cannot and do not make any concrete showing of how their alleged irreparable harm will outweigh the threatened harm that an injunction would cause. Indeed, Plaintiffs fail to acknowledge any significant potential harm to them or the public. Any order that enjoins a governmental entity from lawfully enforcing our immigration laws and executive orders related to national security and foreign policy constitutes an irreparable injury that weighs heavily against the entry of injunctive relief. *See, e.g.*, *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977). In this vein, the Supreme Court has specifically acknowledged that "[f]ew interests can be more compelling than a nation's need to ensure its own security." *Wayte*

[11] *See supra* at n.2.

U.S. Department of Justice
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20044
(202) 305-7171

v. United States, 470 U.S. 598, 611 (1985). What was true then is still true today: the Court should not enter injunctive relief that overrides the President's national security and foreign policy decision.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' request for a preliminary injunction.

DATED this 27th day of February, 2017.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

WILLIAM C. PEACHEY
Director
Office of Immigration Litigation
District Court Section

GISELA A. WESTWATER
Assistant Director

/s/ Stacey I. Young
STACEY I. YOUNG, DC Bar #499324
Senior Litigation Counsel
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 598-2445
Fax: (202) 305-7000
stacey.young@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorneys of record for the Plaintiffs.

DATED this 27th day of February, 2017.

/s/ Stacey I. Young

STACEY I. YOUNG, DC Nar #499324
Senior Litigation Counsel
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 305-7171
Fax: (202) 305-7000
stacey.young@usdoj.gov