Honorable James L. Robart

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Juweiya Abdiaziz ALI; A.F.A., a minor; Reema Khaled DAHMAN; G.E., a minor; Ahmed Mohammed Ahmed ALI; E.A., a minor; on behalf of themselves as individuals and on behalf of others similarly situated,

Plaintiffs,

v.

Donald TRUMP, President of the United States of America; U.S. DEPARTMENT OF STATE; Rex W. TILLERSON, Secretary of State; U.S. DEPARTMENT OF HOMELAND SECURITY; John F. KELLY, Secretary of Homeland Security; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; Lori SCIALABBA, Acting Director of USCIS; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; Michael DEMPSEY, Acting Director of National Intelligence,

Defendants.

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

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

NOTED ON MOTION CALENDAR: MARCH 3, 2017

ORAL ARGUMENT REQUESTED

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
206-957-8611

I. INTRODUCTION

Plaintiffs seek to enjoin enforcement of Executive Order 13,769 (EO). 82 Fed. Reg. 8977 (2017). Defendants argue that there is no likelihood of success on the merits despite the fact that both this Court and the Ninth Circuit already have held to the contrary. *Washington v. Trump*, No. 2:17-cv-00141-JLR, 2017 U.S. Dist. LEXIS 16012 (W.D. Wash. Feb. 3, 2017); *Washington v. Trump*, 847 F.3d. 1151, 2017 U.S. App. LEXIS 2369 (9th Cir. Feb. 9, 2017). Moreover, despite Defendants' protestations, the injunction sought is narrowly focused on a particular harm: the EO's unlawful discrimination targeting Plaintiffs and proposed class members seeking immigrant visas, purporting to bar the entry and suspend adjudication of all immigrant visa applications based—not on any individual determination, but instead—on the applicants' nationality or country of birth. This invidious form of discrimination harkens back to the original immigration laws that tainted our country's history by giving preference to western Europeans. *See*, *e.g.*, Immigration Act of 1924, including the National Origins Act, and Asian Exclusion Act, Pub. L. 68–139, 43 Stat. 153 (May 26, 1924). Fortunately, Congress long ago rejected such a system, and, in further acknowledgement of the injustice of this history, introduced an anti-discrimination provision in the Immigration and Nationality Act (INA). The law now explicitly states that no person shall be "discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). Tellingly, Defendants do not attempt to explain how the EO can be interpreted to comply with the anti-discrimination statute. This is critical, as the Ninth Circuit in *Washington*, to date, has not addressed any statutory claims challenging the EO. It is also critical because Defendants, while vigorously disputing the standing of the plaintiffs in *Washington*, admitted in oral argument before the Ninth Circuit in that case that individuals like Plaintiffs and proposed class members would have standing to seek injunctive relief.

Moreover, as both this Court and the Ninth Circuit have recognized, Plaintiffs are likely to prevail on their claims that Defendants' policies violated fundamental constitutional rights.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
206-957-8611

Defendants continue to defend their actions, however, by relying on 8 U.S.C. § 1187(a)(12)(D)(ii), a provision that relates only to whether individuals may enter the country on a temporary basis without filing any application (under the visa waiver program), which is completely untethered from the immigrant visa process. Dkt. 40 at 2.

Until there is an order from the Court addressing the merits of the legal challenges to the Defendants' program discriminating against persons seeking immigrant visas based on their national origin or place of birth and religion, Plaintiffs and proposed class members remain in imminent danger and continue to face irreparable harm, regardless of any future successor orders.

II. ARGUMENT

A. Defendants Do Not Rebut Plaintiffs' Showing of Likely Success on The Merits.

1. Plaintiffs Are Likely to Succeed on Their INA, APA, and Mandamus Claims.

Plaintiffs have shown that they are likely to succeed on their claims that Defendants violated both 8 U.S.C. § 1152(a)(1)(A), Dkt. 1 ¶¶107-109, and the Administrative Procedure Act (APA), *id*. ¶110, and that they warrant mandamus relief, *id.* ¶¶111-114. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (requiring only "serious questions going to the merits" where "balance of hardships tips sharply towards the plaintiffs" and other factors are met). Significantly, Defendants do not challenge the substance of Plaintiffs' argument that § 1152(a)(1)(A) prohibits a nationality-based bar on adjudication and issuance of, and entry on, immigrant visas, beyond a brief and unsupported allegation that the statute "does not circumscribe" 8 U.S.C. § 1182(f). *See* Dkt. 40 at 17. However, a plain reading of the statute in light of the canons of statutory interpretation demonstrates that § 1152(a)(1)(A) *does* limit executive authority to suspend entry pursuant to § 1182(f). *See* Dkt. 9 at 10-11.

Rather than addressing Plaintiffs' independent claim regarding the statutory bar on national origin-based discrimination, Defendants conflate this with Plaintiffs' APA claim and attempt to challenge the scope of review over the latter on four grounds. Even combined, these arguments are unavailing. First, 8 U.S.C. § 1201(i) does not bar an APA claim. On its face, that

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
206-957-8611

statute speaks only to Defendants' authority to "revoke" an individual visa, while Plaintiffs here challenge a broader array of actions, including categorical revocation. *See, e.g.*, Dkt. 1 ¶110 (challenging "suspending the processing of Plaintiffs' immigrant visas, and/or categorically invalidating or revoking already issued immigrant visas"). The text and history of § 1201(i) and regulations referring to the statute further show that it authorizes, and correspondingly limits judicial review of, *individualized* visa revocation decisions—not a class-wide revocation of visas based on national origin. *See, e.g.*, 8 U.S.C. § 1201(i) (referring only to issuance and revocation of "a visa" to "any alien"); 22 C.F.R. § 41.122 (same); H.R. Rep. No. 1365, 1952 U.S.C.C.A.N. 1653, 1688 (1952) (legislative history of predecessor version of § 1201(i), considering need for administrative review body for individual visa adjudications but deciding that the existing system would allow for sufficient advice to officers deciding "complex individual cases").

Second, Plaintiffs do not purport to rely upon a "right of admission" into the United States for their APA claim. *See* Dkt. 40 at 16. Instead, they challenge the failure to lawfully adjudicate and issue immigrant visas and the unlawful class-wide invalidation and revocation of visas. Plaintiffs seek an injunction against Defendants' resulting denial of their (or their family member's or employee's) opportunity to seek admission and have their applications for admission lawfully adjudicated—*not* a guarantee that they will be admitted to the United States after an individualized inspection. *Cf. St. Cyr v. INS*, 533 U.S. 289, 307 (2001) (acknowledging the "distinction between eligibility for discretionary relief . . . and the favorable exercise of discretion"); *United States v. Copeland*, 376 F.3d 61, 72 (2d Cir. 2004) (discussing "the distinction between a right to seek relief and the right to that relief itself").

Third, Plaintiffs are not barred from seeking APA review of the categorical denial of entry and visa issuance even under the separate standards which govern review of individualized visa determinations. *See Washington*, 2017 U.S. App. LEXIS 2369 at *18 (distinguishing between challenges to the "*promulgation* of sweeping immigration policy," and "the application of a specifically enumerated congressional policy to the particular facts presented in an

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
206-957-8611

individual visa application"); *see also infra* at 6 (discussing *Fiallo v. Bell*, 430 U.S. 787 (1977), and the applicability of *Kleindienst v. Mandel*, 408 U.S. 753 (1972)).

Defendants' assertion that Plaintiffs failed to state an APA claim because the President is not an agency under the statute misapprehends Plaintiffs' distinct statutory and APA claims. Plaintiffs challenge Defendant Trump's issuance of the EO under the INA, as it clearly violates § 1152(a)(1)(A).[1] Plaintiffs' APA claim, Dkt. 1 ¶110, concerns implementation of the EO by the other Defendants. Defendants make no claim that the actions of these Defendants—including the U.S. Department of State, which revoked and suspended processing and issuance of visas on a class wide-basis—are not subject to APA review. Nor do Defendants suggest that the applicability of the APA to the presidency impacts the remaining claims against Defendant Trump. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (permitting review of a president's actions for constitutionality and statutory authority).[2]

Finally, Defendants' challenge to the mandamus claim is also insufficient, because it is based on a misstatement of the required agency action at issue. *See* Dkt. 40 at 17. Plaintiffs challenge Defendants' blanket refusal to lawfully—i.e., consistent with the INA and the Constitution—adjudicate both their immigrant visa applications and their applications for admission at U.S. ports of entry; they do not challenge the denial of an immigrant visa application or application for admission in one particular case. *See supra* at 3 (discussing the difference between denial of the opportunity to seek admission and denial of admission). Thus, Plaintiffs are likely to prevail on their INA, APA, and mandamus claims.

2. Plaintiffs Ali, Dahman, and Ali Are Likely to Succeed on Their Due Process Claims.

[1] For this claim, the APA serves to waive sovereign immunity only. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 510 n.4 (1999) (Souter, J., dissenting) ("This waiver of immunity [under § 702] is not restricted by the requirement of final agency action that applies to suits under the [APA].") (citing *Presbyterian Church (U.S.A.)* v. *United States*, 870 F.2d 518, 523-526 (9th Cir. 1989)); *Raz v. Lee*, 343 F.3d 936, 938 (8th Cir. 2003) (§ 702's waiver of sovereign immunity not limited to cases brought under the APA).

[2] In a footnote, Defendants argue that there is no standard under which to review Defendant Trump's determinations. *See* Dkt. 40 at 15 n.8; *but see Estate of Saunders v. C.I.R.*, 745 F.3d 953, 962 n.8 (9th Cir. 2014) ("Arguments raised only in footnotes . . . are generally deemed waived."). This is patently inaccurate where Plaintiffs allege that the determinations violated a clear statutory standard. *See* 8 U.S.C. § 1152(A)(1)(a).

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
206-957-8611

Plaintiffs Juweiya Ali, Reema Dahman, and Ahmed Ali allege, on behalf of themselves and other U.S. citizen and LPR immigrant visa petitioners, that the EO infringes on their due process rights to be free from arbitrary government action that—without regard for the constraints Congress has imposed or the boundaries of the Constitution—deprives them of their liberty interest in their family lives, marriages, and ability to raise children. Dkt. 1 ¶¶119-123. As plainly stated in the Complaint, Plaintiffs A.F.A., G.E., and E.A., all of whom were outside the United States at the time the complaint was filed, are not raising due process claims. *Id.*[3] For this reason, Defendants' argument that "[t]he due process claims of the nonresident, unadmitted [noncitizen] plaintiffs must fail" is nonsensical. Dkt. 40 at 10-11.

Furthermore, Defendants do not dispute that Plaintiffs Ali, Dahman, and Ali may properly raise due process claims. Nor could they; Defendants already have acknowledged that U.S. citizens can raise constitutional challenges to the EO. *See* Feb. 7, 2017 oral argument in *Washington*, No. 17-35105 (9th Cir.), at 24:25-24:41, *available at* http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010885 (Judge Clifton: "If the order said Muslims cannot be admitted, would anybody have standing to challenge that?" August E. Flentji, Special Counsel: "I think *Mandel* and *Din* give a route to make a constitutional challenge that if there were such an order. It would be by U.S. citizen with a connection to someone seeking entry"). Because strong constitutional protections likewise extend to LPRs, it follows that this "route" is similarly available to Plaintiff Dahman. *See Washington*, 2017 U.S. App. LEXIS 2369 at *24 (holding that "[t]he procedural protections provided by the Fifth Amendment's Due Process Clause are not limited to citizens" and discussing cases).[4]

Plaintiffs have established a strong likelihood that they will prevail on their due process argument. *See id.* at *29 ("[I]t is enough for us to conclude that the Government has failed to

[3] Plaintiff E.A. reunited with her family in the U.S. on February 5, 2017 under the *Washington* injunction.

[4] *See also Washington*, 2017 U.S. App. LEXIS 2369 at *27-28 (rejecting the government's request to narrow the temporary restraining order because it "extends beyond [LPRs], and covers aliens who cannot assert cognizable liberty interests in connection with travelling into and out of the United States").

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
206-957-8611

establish that it will likely succeed on its due process argument in this appeal."). It is well established that the federal courts review due process claims under a *de novo*—not a "facially legitimate and bona fide"—standard of review. *See, e.g.*, *McNary v. Haitian Refugee Ctr*., 498 U.S. 479, 493 (1991); *Yan Liu v. Holder*, 640 F.3d 918, 930 (9th Cir. 2011).

Contrary to Defendants' assertions, *see* Dkt. 40 at 11 n.4, the Supreme Court's decision in *Fiallo*, does not support review of the EO under a facially legitimate and bona fide standard. In *Fiallo*, the Court upheld the constitutionality of an immigration statute that defined the terms "child" and "parent" as applied to three sets of unwed biological fathers who sought to immigrate their offspring. 430 U.S. at 788-90. Significantly, the constitutional claim at issue in that case was whether the statutory provisions violated the First, Fifth, and Ninth Amendments. *Id*. at 791. Here, there is no comparable constitutional challenge to any *statutory* provisions; rather, the constitutional claim is whether the *EO* violates the Fifth Amendment, and indeed, whether it conflicts with 8 U.S.C. § 1152(a)(1)(A).

Furthermore, the Ninth Circuit *held*—rather than simply "suggest[ed]," Dkt. 40 at 11 n. 4—that the facially legitimate and bona fide standard set forth in *Mandel* does not apply to a challenge to the EO. *Washington*, 2017 U.S. App. LEXIS 2369 at *17-18. As Plaintiffs argue but Defendants seem to ignore, the Ninth Circuit clarified that *Mandel* is limited to review of individualized visa denials. *Id.* The EO, in contrast, is a categorical bar to entry of immigrant visa holders and bar to adjudication of immigrant visa applications: it is not individualized at all.[5] What is more, *Mandel* actually supports Plaintiffs' standing. Dkt. 9 at 6-7.

3. Plaintiffs Are Likely to Prevail on their Equal Protection Claim.

Plaintiffs and proposed class members who are outside of the United States may challenge an order that blatantly discriminates against them on the basis of national origin and religion. Although both Congress and the Executive have plenary power over immigration,

[5] Moreover, even under the facially legitimate and bona fide standard the EO is unlawful because, on its face, it discriminates on the basis of national origin in conflict with 8 U.S.C. § 1152(a)(1)(A) and on the basis of religion, and is motivated, at least in part, by an animus against a religion and nationalities. *See* Dkt. 9 at 7.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
206-957-8611

neither branch may execute this power in violation of the Constitution. Dkt. 9 at 13 (citing cases); *see also Kwai Fun Wong v. United States*, 373 F.3d 952, 974 (9th Cir. 2004) ("[T]the entry fiction does not preclude substantive constitutional protection."). In addition, *Rasul v. Bush*, 542 U.S. 466, 484 (2004), further stands for the proposition that constitutional protections extend to noncitizens outside the United States who are subject to an abuse of plenary power.

Moreover, because nationality and religion are "suspect classifications," claims of discrimination on these bases are subject to strict scrutiny. *See* Dkt. 9 at 13-15 (citing cases); *United States v. Barajas-Guillen*, 632 F.2d 749, 753 (9th Cir. 1980) (applying rational basis review in an immigration case because no "suspect classification"—which would "demand" strict scrutiny—was involved); *Gonzalez-Medina v. Holder*, 641 F.3d 333, 336 (9th Cir. 2011) (same). Defendants have not rebutted Plaintiffs' showing that the EO fails under this test because: 1) it discriminates, on its face, based on nationality; and 2) animus against Muslims was a motivating factor. *See* Dkt. 9 at 14 (citing *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015)).

Defendants attempt to dismiss the facially discriminatory nature of the EO by arguing that it satisfies rational basis review. Dkt. 40 at 13-14. But even under this standard, the EO fails, for it is "ludicrously ineffectual." *Plyler v. Doe*, 457 U.S. 202, 228 (1982). Defendants contend that the EO—which targets all nationals of the seven countries, including children and anyone who derived citizenship from any of the seven countries but never resided in any of them, *see* Omar Decl., Dkt. 19 at 2—satisfies rational basis because Defendant Trump has determined that nationals from these countries "are associated with a heightened risk of terrorism." Dkt. 40 at 13-14. Because there is no support for this determination, it has no "plausible" policy basis and, furthermore, the "relationship of the classification to its goal [is] so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992).

Defendants have submitted no evidence supporting the alleged national security rationale here or to the Ninth Circuit. *See, e.g., Washington*, 2017 U.S. App. LEXIS 2369 at *32 ("The Government has pointed to no evidence that any alien from any of the countries named in the

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
206-957-8611

Order has perpetrated a terrorist attack in the United States"). To the contrary, leading national security experts, including former Secretary of State John Kerry, indicate there is no plausible policy basis, including security justification, for the EO. *See Joint Declaration of Madeleine K. Albright et al.* at 2, *Washington*, No. 17-35105 (9th Cir. 2017), ECF 28-2. Even a draft of Defendants' own post-hoc review concluded that the ban was ineffective. *See* Salama & Caldwell, *AP Exclusive: DHS report disputes threat from banned nations*, ASSOC. PRESS (Feb. 24, 2017), *available at* http://apne.ws/2ldKZtf. Thus, the relationship between the blanket ban on *all* nationals from the seven countries and the alleged security risk is both arbitrary and irrational.

With respect to Plaintiffs' claim of religious discrimination, Defendants cite no cases rebutting the application of strict scrutiny review. Religion is an "inherently suspect" classification, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), and such classifications must be narrowly tailored and justified by a compelling government interest. *See, e.g., Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001). Defendants' sole defense against Plaintiffs' allegation of animus is to claim that the order is facially neutral. Dkt. 40 at 14. Under well-established equal protection law, courts may look behind a facially neutral law to determine whether animus inhered in its passage. *See, e.g.*, *Washington*, 2017 U.S. App. LEXIS 2369 at *30-31; *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266–268 (1977). In examining whether a facially neutral action impermissibly targets a religion, a court may consider "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (summarizing *Village of Arlington Heights*).

Here, Defendant Trump's animus towards Islam is well-documented and the specific series of events leading to the EO makes the anti-Islam animus clear. *See, e.g.*, Dkt 1. ¶¶48-50;

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
206-957-8611

Dkt. 9 at 14-15.[6] Defendants' suggestion that the EO is not motivated by animus against Islam simply because "the plain language of the Executive Order includes nothing discussing Islam," Dkt. 40 at 14, is squarely foreclosed by the evidence and the fact Defendant Trump stated, *while signing the EO*, that he was "establishing new vetting measures to keep radical Islamic terrorists out." Dan Merica, *Trump signs executive order to keep out 'radical Islamic terrorists'*, CNN (Jan. 30, 2017), *available at* http://cnn.it/2jeLXsW. These contemporaneous statements are of the type that courts routinely examine in determining whether animus exists. *See, e.g.*, *Lukumi*, 508 U.S. at 541-542 (finding animus behind a facially neutral law after examining the statements city councilmembers made disparaging Santeria).

B. Plaintiffs Have Shown Irreparable Harm, Warranting Preliminary Injunctive Relief.

Plaintiffs have provided ample evidence showing the irreparable harm they will suffer in the absence of preliminary relief. These harms—most notably, prolonged family separation, emotional distress and anxiety, extended absences, lost employment, deprivation of opportunities for professional advancement, and not least of all, violation of constitutional rights, *see* Dkt. 9 at 18-22—are not the types of harm that "would be easily calculable and compensable in damages." *Goldie's Bookstore, Inc. v. Superior Court of State of Cal.*, 739 F.2d 466, 471 (9th Cir. 1984). Such harms are precisely what preliminary injunctive relief is designed to address. *See, e.g.*, *Washington*, 2017 U.S. App. LEXIS 2369 at *33 (recognizing that "separated families," inter alia, constitute "substantial injur[y] and even irreparable harm[]"); *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (loss of opportunity to pursue professional advancement can constitute irreparable harm).

[6] In addition, Defendant Trump has previously said there was "no way" he would allow Muslims to "flow in" to the United States, *see* Donald Trump (@realDonaldTrump), Twitter (Mar 22, 2016, 09:59 PM), https://twitter.com/realdonaldtrump/status/712473816614772736, and linked his proposed nationality-based ban to Islam by claiming that "[w]e are importing Radical Islamic Terrorism into the West through a failed immigration system," *Donald J. Trump Addresses Terrorism, Immigration, and National Security*, Donald Trump Campaign (June 13, 2016). More than three weeks after signing the EO, Defendant Trump continued to link it to Islam: "I've taken decisive action to keep radical Islamic terrorist[s] the hell out of our country." President Donald Trump, Remarks at Rally in Melbourne, Florida (Feb. 18, 2017), *available at* http://pbpo.st/2kLCMfr.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
206-957-8611

Defendants' threshold argument—that Plaintiffs "cannot demonstrate any immediately threatened injury" because Section 3(c) of the EO is currently enjoined, Dkt. 40 at 18—fails to cite any case law for the novel proposition that temporary injunctive relief provided in a separate case obviates the need for action to enjoin the conduct in question on behalf of the parties before the Court. This is especially true where Defendants vigorously assert that the plaintiffs in *Washington* do not have standing to seeking injunctive relief, and explicitly acknowledged that individuals like Plaintiffs have standing to present the instant claims. *See* Feb. 7, 2017 oral argument in *Washington* at 24:25-24:41. That case is being heard on an expedited schedule, with the parties due to complete their briefing by April 5, 2017. *Washington*, No. 17-35105 (9th Cir. 2017), ECF 180. Given the grave interests at stake and the irreparable harm faced by Plaintiffs and proposed class members in this case, time spent subsequently litigating this motion could, *again*, wreak havoc on their lives, including the lives of those most vulnerable—the young, the elderly and those in dangerous, war-torn countries. *See, e.g.*, Dkts. 11-25. An injunction in this case could remain in place, however, even if the Ninth Circuit ruled against the *Washington* plaintiffs, because the Ninth Circuit did not address one of the primary claims in this case, the statutory claim under 8 U.S.C. § 1152(a)(1). Moreover, Defendants continue to threaten to unleash a successor EO which could similarly target immigrant visa petitioners and beneficiaries based on their nationality or country of birth. Dkt. 40 at 3. In light of the rapid pace at which *Washington* is progressing before the Ninth Circuit, and Defendants' ongoing assertions that they have the authority to suspend adjudication and issuance of visas based on nationality or country of birth, Plaintiffs and proposed class members are readily able to demonstrate that they are threatened with imminent harm.

Defendants' remaining arguments fail to acknowledge the injurious effect of delay. The allegation that "non-visa-holding individuals" are not affected by the EO, Dkt. 40 at 18, is belied by the fact that, pursuant to the EO, Defendants *suspended* the processing of immigrant visa applications. *See* Dkt. 10, Ex. A at 1 (announcing that Department of State had "temporarily

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
206-957-8611

stopped scheduling appointments and halted processing of immigrant visa applications" for those from the countries listed in the EO). Thus, Plaintiffs Ali and Dahman face further agony caused by prolonged separation from Plaintiffs A.F.A. and G.E., respectively. And while Defendants highlight that the EO "imposes only a suspension, not a permanent ban," presently the EO imposes a ban of indefinite duration. *See, e.g.*, Dkt. 10, Ex. A at 1 (Department of State noting that "we cannot predict when" new appointments will be scheduled again and urging those with medical appointments to cancel them, as the results are "only valid for six (6) months and we cannot predict when your visa interview will be rescheduled"). Indeed, the EO itself contemplates delay beyond the initial 90-day period. *See* EO § 3(e). This is especially true where the EO establishes prerequisite conditions for lifting the stay that countries without a fully functioning central government, such as Somalia, Syria, and Yemen, have no practical possibility of meeting. Such additional, potentially indefinite, delay in the processing of their immigrant visa applications will result in irreparable harm to the named Plaintiffs and putative class members, prolonging their separation from family members, safety, healthcare, and professional opportunities. *See, e.g.*, Dkt. 9 at 21-22 (summarizing declarations decrying missed childbirths, graduations, and special holidays); *see generally* Dkts. 11-25.[7]

These harms are not speculative or attenuated. They do not rest on unsupported factual allegations, but on declarations from Plaintiffs and putative class members *directly* harmed by the EO. *See* Dkts. 11-25. Defendants attempt to obfuscate the issue by suggesting that Plaintiffs are alleging an entitlement to approval of their applications and to their adjudication within 90 days. Dkt. 40 at 18-19. But Plaintiffs are simply demanding that the government process their applications in the non-discriminatory manner mandated by Congress and the Constitution.[8]

[7] Defendants ask the Court to ignore the harms of U.S.-based employers, erroneously asserting that they "are not before this Court." Dkt. 40 at 19. In fact, they are encompassed within the class definition, which includes all "immigrant" visa petitioners and applicants and is not limited to family-based immigrant visas. Dkt. 1 ¶97. *See also, e.g.*, Dkt. 1 ¶28; Dkt. 3 at 1; Dkt. 21; Dkt. 24 ¶8.

[8] Nor does the fact that Plaintiffs have not alleged that immigrant visa holders have sought or been denied a "case-specific waiver," Dkt. 40 at 19, make their harm any less direct. First, it is unclear whether the waivers are being granted, or what the proper mechanism for requesting such a waiver is. *Cf. Washington*, 2017 U.S. App.

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
206-957-8611

Plaintiffs and putative class members are thus asking to not be made to suffer unnecessary and wanton harm because of an unlawful executive order.

C. The Balance of Harms and Public Interest Require a Grant of Injunctive Relief.

Plaintiffs have demonstrated that the balance of harms and public interest strongly favor granting injunctive relief. National security is not the public's only interest: the public also has strong interests "in avoiding separation of families, and in freedom from discrimination," *Washington*, 2017 U.S. App. LEXIS 2369 at *34, and in ensuring that the Government's conduct comports with the requirements of the law, *see, e.g.*, *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1197 (9th Cir. 2011) ("[T]he public interest favors applying federal law correctly.").

Defendants' argument to the contrary fails. It ignores the ample evidentiary support Plaintiffs provided in support of their motion. *Compare* Dkt. 40 at 19 *with* Dkt. 9 at 18-22 *and* Dkts. 11-25. Instead, Defendants argue only that courts should refrain from entering injunctive relief "that overrides the President's national security and foreign policy decision," Dkt. 40 at 20, relying on the disputed assumption that the president acts in a lawful manner. The Ninth Circuit, moreover, has made clear that any suggestion that executive actions in the field of immigration policy and national security are unreviewable by the judiciary "runs contrary to the fundamental structure of our constitutional democracy." *Washington*, 2017 U.S. App. LEXIS 2369 at *15.

III. CONCLUSION

For the reasons stated in Plaintiffs' original motion and herein, the Court should grant Plaintiffs' motion.

Dated this 3rd day of March, 2017.

s/*Matt Adams*
Matt Adams, WSBA No. 28287

s/Mary Kenney
Mary Kenney, *pro hac vice*

LEXIS 2369 at *33 (noting the Government "has offered no explanation for how [the discretionary waiver] provisions would function in practice"). Second, in dismissing a similar argument, the Ninth Circuit stated that the Government has not "explained how the Executive Order could realistically be administered only in parts such that the injuries [to affected individuals and entities] would be avoided." *Id.*

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
206-957-8611

s/*Glenda Aldana*
Glenda M. Aldana Madrid, WSBA No. 46987

s/Maria Lucia Chavez
Maria Lucia Chavez, WSBA No. 43826

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 2nd Avenue, Suite 400 Seattle, WA 98104 (206) 957-8611
(206) 587-4025 (fax)

s/Trina Realmuto
Trina Realmuto, *pro hac vice*

s/Kristin Macleod-Ball
Kristin Macleod-Ball, *pro hac vice*

NATIONAL IMMIGRATION PROJECT
OF THE NATIONAL LAWYERS GUILD
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727
(617) 227-5495 (fax)

s/Aaron Reichlin-Melnick
Aaron Reichlin-Melnick, *pro hac vice*

s/Melissa Crow
Melissa Crow, *pro hac vice*

AMERICAN IMMIGRATION COUNCIL
1331 G Street, NW, Suite 200
Washington, D.C. 20005
(202) 507-7512
(202) 742-5619 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record.

s/ Glenda Aldana
Glenda M. Aldana Madrid, WSBA No. 46987
NORTHWEST IMMIGRANT RIGHTS PROJECT

NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Ste. 400
Seattle, WA 98104
206-957-8611