

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNIVERSAL MUSLIM ASSOCIATION
OF AMERICA; JOHN DOE; and JANE
DOE,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States; U.S.
DEPARTMENT OF HOMELAND
SECURITY; U.S. CUSTOMS AND
BORDER PROTECTION; U.S.
DEPARTMENT OF STATE; U.S.
DEPARTMENT OF JUSTICE; JOHN
KELLY, in his official capacity as Secretary
of the Department of Homeland Security;
KEVIN K. MCALEENAN, in his official
capacity as Acting Commissioner of U.S.
Customs and Border Protection; REX W.
TILLERSON, in his official capacity as
Secretary of State; and JEFFERSON
BEAUREGARD SESSIONS III, in his
official capacity as Attorney General of the
United States,

Defendants.

Civil Action No.: _____

**PLAINTIFFS' MOTION FOR A TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiffs – the Universal Muslim Association of America and John and Jane Doe –
hereby move for a temporary restraining order and preliminary injunction as set forth below and
for the reasons set forth in the accompanying Memorandum of Law in Support of Plaintiffs'
Motion for a Temporary Restraining Order and Preliminary Injunction ("Memorandum"). *See*
Fed. R. Civ. P. 65. Plaintiffs seek to restrain and enjoin Defendants from enforcing or
implementing President Donald J. Trump's Executive Order No. 13,780, 82 Fed. Reg. 13,209,

§§ 2, 4 (Mar. 6, 2017), entitled “Protecting the Nation from Foreign Terrorist Entry into the United States,” (the “Executive Order”). As demonstrated in the Memorandum, the Executive Order and Defendants implementation of it, violate the First and Fifth Amendments of the U.S. Constitution and the Immigration and Nationality Act and its implementing regulations.

Pursuant to Local Rule 7(m), counsel for Plaintiffs state that they were unable to discuss this motion with opposing counsel because the initial Complaint was filed today and opposing counsel has not yet been identified.

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their Motion for a Temporary Restraining Order and Preliminary Injunction.

A proposed Order is attached.

Dated: March 23, 2017

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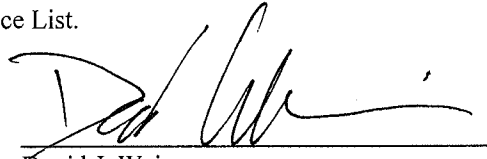
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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 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 the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

A handwritten signature in black ink, appearing to read 'David J. Weiner', is written over a horizontal line.

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DEPARTMENT OF STATE; U.S.)
DEPARTMENT OF JUSTICE; JOHN)
KELLY, in his official capacity as Secretary)
of the Department of Homeland Security;)
KEVIN K. MCALEENAN, in his official)
capacity as Acting Commissioner of U.S.)
Customs and Border Protection; REX W.)
TILLERSON, in his official capacity as)
Secretary of State; and JEFFERSON)
BEAUREGARD SESSIONS III, in his)
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Civil Action No.: _____

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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The Universal Muslim Association of America and individual plaintiffs John and Jane Doe respectfully request a temporary restraining order and preliminary injunction preventing Defendants from implementing or enforcing sections 2 and 4 of President Donald J. Trump's Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017), entitled "Protecting The Nation From Foreign Terrorist Entry Into The United States" (the "replacement Executive Order"). The replacement Executive Order and Defendants' implementation of it violate the First and Fifth Amendments of the U.S. Constitution and the Immigration and Nationality Act and its implementing regulations. Absent preliminary injunctive relief, the replacement Executive Order and its implementation will irreparably harm Plaintiffs.

I. INTRODUCTION

In the United States, the principle that all people are created equal is more than mere words: It is the bedrock of our Constitution, and it is why so many people come from every part of the world to make their lives in America.

President Donald J. Trump's replacement Executive Order tramples on this constitutional principle. If not restrained, the replacement Executive Order will inflict great harm on people for one reason and one reason alone: their chosen faith. Parents like the Does will remain separated from their children living in danger halfway around the world. Students who sought out educational opportunities in the United States will be denied contact with their families. People attempting to escape poverty, famine, and war will be denied the chance to make new lives in the land of opportunity. And all will suffer these consequences for the lone reason that they are Muslim.

At the same time, Muslims in America receive an impermissible message of disfavor. The replacement Executive Order tells them that they are outsiders, not real Americans. It unequivocally conveys that the United States does not want or need Muslims—that America

would be better off if they were not here. And it communicates that America's rich religious tapestry has no space for Islam.

Our Constitution unequivocally prohibits all these messages. Yet one week into his presidency, President Trump barred from the United States nationals of seven overwhelmingly Muslim countries and implemented a system to ban even more Muslims from other countries in the future, thus fulfilling his campaign promise to exclude Muslims from the United States. *See* Executive Order 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017). Within days, federal courts across the country held that President Trump's Muslim ban could not stand. *See, e.g., Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017); *Washington v. Trump*, Case No. 2:17-cv-00141-JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017); *Aziz v. Trump*, Case No. 1:17-cv-00116-LMB-TC, 2017 WL 580855 (E.D. Va. Feb. 13, 2017).

Blocked in court, President Trump withdrew the first ban and issued its replacement: Executive Order 13,780. This replacement Executive Order continues to single out for disapprobation and exclusion persons from six of the same overwhelmingly Muslim countries, while creating special enhanced screening and exclusion procedures for persons from the seventh. By its own terms, the replacement Executive Order is the original Executive Order repackaged to "avoid spending additional time pursuing litigation" (Exec. Order 13,780 § 1(i))—or, in President Trump's words, "a watered-down version of the first one."¹ But nothing of substance has changed. In the words of President Trump's Senior Policy Analyst, the

¹ Alexander Burns, *2 Federal Judges Rule Against Trump's Latest Travel Ban*, N.Y. TIMES (Mar. 15, 2017), <https://www.nytimes.com/2017/03/15/us/politics/trump-travel-ban.html>; Declaration of David Weiner ("Weiner Decl."), attached hereto as Exhibit A, ¶ 3.

replacement Executive Order is designed to produce, and does produce, the “same basic policy outcome” as the first:² the promised ban on Muslims.

The replacement Executive Order, if implemented, will inflict certain, imminent, irreparable, and unconstitutional harms on countless individuals. This Court should grant a temporary restraining order and preliminary injunction against enforcement of the Muslim ban.

II. FACTUAL BACKGROUND

A. Mr. Trump’s Pledge to Ban Muslims from the United States

Long before becoming President, then-candidate Donald Trump made discrimination against Muslims a cornerstone of his campaign.

On November 15, 2015, Mr. Trump stated that the United States would have “absolutely no choice” but to close down mosques, where “some bad things are happening.”³ Three weeks later, on December 7, in the wake of the shooting in San Bernardino, California, Mr. Trump released a written statement, entitled “Donald J. Trump Statement on Preventing Muslim Immigration,” in which 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.”⁴ In other words, his first press release on immigration policy documented his belief that all Muslims should be categorically barred from entering the United States, based on his view that Muslims collectively bear hostile attitudes toward the United States and favor violent ideologies over the

² Matt Zapposky, *A New Travel Ban with ‘Mostly Minor Technical Differences’? That Probably Won’t Cut It, Analysts Say*, WASH. POST (Feb. 22, 2017), <http://wapo.st/2mmmECm>; Weiner Decl. ¶ 4.

³ Nick Gass, *Trump: ‘Absolutely no choice’ but to close mosques*, POLITICO (Nov. 18, 2015), <http://www.politico.com/story/2015/11/trump-close-mosques-216008>; Weiner Decl. ¶ 5.

⁴ Donald J. Trump, *Donald J. Trump Statement on Preventing Muslim Immigration*, DONALDJTRUMP.COM (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>; Weiner Decl. ¶ 6.

American legal system.⁵ The day after issuing the press release, Mr. Trump defended his proposed Muslim ban, falsely accusing American Muslims of failing to report the perpetrators of the San Bernardino shooting.⁶

During a televised debate on January 14, 2016, when asked whether he had rethought his “comments about banning Muslims from entering the country,” Mr. Trump unequivocally responded, “No.”⁷ On March 9, 2016, in a televised interview, Mr. Trump stated, “I think Islam hates us [T]here’s a tremendous hatred. And we have to be very vigilant. We have to be very careful. And we can’t allow people coming into this country who have this hatred of the United States. . . and of people that are not Muslim.” When asked if he made a distinction between Islam and radical Islam, Mr. Trump responded, “It’s very hard to separate, because you don’t know who is who.”⁸

On June 13, after the attack on a nightclub in Orlando, Florida, Mr. Trump, then the Republican Party’s presumptive nominee for President, delivered a speech in which he accused Muslims of “trying to take over our children and convince them how wonderful ISIS is and how

⁵ As of the date of filing of this memorandum, this press release remains on the Donald J. Trump campaign website and on President Trump’s Twitter page, which he has continued to use with regularity even after taking office. See *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>, and <https://twitter.com/realdonaldtrump/status/673993417429524480>; Weiner Decl. ¶ 7.

⁶ Jon Greenberg, *Christie says neighbors of San Bernardino shooters knew more than they did*, (Jan. 28, 2016), <http://www.politifact.com/truth-o-meter/statements/2016/jan/28/christie/christie-says-neighbors-san-bernardino-shooters-kn/>; Weiner Decl. ¶ 8.

⁷ Gerhard Peters & John T. Wooley, *Presidential Candidate Debates: Republican Candidates Debate in North Charleston, South Carolina*, THE AMERICAN PRESIDENCY PROJECT (Jan. 14, 2016), <http://www.presidency.ucsb.edu/ws/index.php?pid=111395>; Weiner Decl. ¶ 9.

⁸ *Exclusive Interview with Donald Trump: Aired March 9, 2016 - 20:00 ET*, CNN (Mar. 9, 2016), <http://www.cnn.com/TRANSCRIPTS/1603/09/acd.01.html>; Weiner Decl. ¶ 10.

wonderful Islam is.”⁹ Mr. Trump also stated, “I called for a ban after San Bernardino, and was met with great scorn and anger, but now many are saying I was right to do so.”¹⁰ Mr. Trump then pledged to suspend immigration where “there is a proven history of terrorism against the United States, Europe or our allies, until we understand how to end these threats.”¹¹ Later in the summer, he candidly explained that because “[p]eople were so upset when [he] used the word Muslim,” he would henceforth be “talking territory instead of Muslim.”¹²

According to public statements made by the co-chair of Mr. Trump’s transition team, Rudy Giuliani, Mr. Trump’s reformulation of the “Muslim ban” into a ban on immigration from specific countries was the product of an instruction from Mr. Trump to find a way to implement the Muslim ban. According to Mr. Giuliani, “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.’”¹³

Key advisers and members of the Trump administration have also consistently espoused an anti-Muslim viewpoint. On August 10, 2016, after the Republican Party had officially nominated Mr. Trump as its candidate for President, Mr. Trump’s future first National Security

⁹Steve Holland and Ginger Gibson, *After Florida shooting, Trump hardens stance on Muslims* (June 14, 2016), <http://www.reuters.com/article/us-usa-election-clinton-idUSKCN0YZ1GE>; Weiner Decl. ¶ 11.

¹⁰*Transcript: Donald Trump’s national security speech*, POLITICO (Jun. 13, 2016, 3:06 PM), <http://www.politico.com/story/2016/06/transcript-donald-trump-national-security-speech-224273>; Weiner Decl. ¶ 12.

¹¹*Id.*

¹²*Meet the Press*, NBC NEWS (July 24, 2016), <http://nbcnews.to/29TqPnp>; Weiner Decl. Ex. ¶ 13.

¹³See Rebecca Savransky, *Giuliani: Trump asked me how to do a Muslim ban ‘legally,’* THE HILL (Jan. 29, 2017), <http://thehill.com/homenews/administration/316726-giuliani-trump-asked-me-how-to-do-a-muslim-ban-legally>; Weiner Decl. Ex. ¶ 14.

Advisor, Michael Flynn, referred to Islam as “a cancer” during remarks before an anti-Muslim group.¹⁴ He made similar remarks at another speech later that month: “This is Islamism, it is a vicious cancer inside the body of 1.7 billion people on this planet and it has to be excised.”¹⁵

Steve Bannon, a key adviser to the Trump campaign and now White House Chief Strategist, has referred to Islam as “the most radical” religion¹⁶ and has declared that the United States is “at the beginning stages of a global war against Islamic fascism.”¹⁷ And Sebastian Gorka, appointed three days before the first travel ban as Deputy Assistant to the President and a member of the “Strategic Initiatives Group” tasked with advising the President outside the structure of the National Security Council, has stated in an interview with Mr. Bannon: “[W]hat the bad guys do—what al-Qaeda does or what ISIS is doing right now—is not fundamentally un-Islamic.”¹⁸

B. The January 27 Executive Order

On January 27, 2017, less than a week after his inauguration, President Trump fulfilled his campaign promise to ban Muslims from entering the United States by signing Executive

¹⁴ Mariam Khan, *Donald Trump National Security Adviser Mike Flynn Has Called Islam “a Cancer”* (Nov. 18, 2016), <http://abcnews.go.com/Politics/donald-trump-national-security-adviser-mike-flynn-called/story?id=43575658>; Weiner Decl. ¶ 15.

¹⁵ Andrew Kaczynski, *Michael Flynn in August: Islamism a “vicious cancer” in body of all Muslims that “has to be excised”* (Nov. 22, 2016), <http://www.cnn.com/2016/11/22/politics/kfile-michael-flynn-august-speech/>; Weiner Decl. ¶ 16.

¹⁶ Steve Reilly & Brad Heath, *Steve Bannon’s own words show sharp break on security issues* (Jan. 31, 2017), <http://www.usatoday.com/story/news/2017/01/31/bannon-odds-islam-china-decades-us-foreign-policy-doctrine/97292068/>; Weiner Decl. ¶ 17.

¹⁷ Tom McCarthy, *Steve Bannon’s Islamophobic film script just one example of anti-Muslim views* (Feb. 3, 2017), <https://www.theguardian.com/us-news/2017/feb/03/steve-bannon-islamophobia-film-script-muslims-islam>; Weiner Decl. ¶ 18.

¹⁸ Steve Reilly, *Bannon, Flynn and Sessions: How Trump’s top advisers view Muslims, in their own words* (Feb. 9, 2017), <http://www.usatoday.com/story/news/2017/02/09/how-some-trump-advisors-see-islam-their-own-words/97662862/>; Weiner Decl. ¶ 19.

Order 13,769. Among other things, this first Executive Order immediately, if temporarily, banned entry of all nationals from seven overwhelmingly Muslim countries (Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen), including lawful permanent residents of the United States. It also temporarily suspended the U.S. Refugee Admissions Program for 120 days, gave priority to the refugee applications of “religious minorities”—which President Trump clarified was intended to benefit Christian refugees¹⁹—and indefinitely barred entry of Syrian refugees. It also mandated that the Secretary of Homeland Security, in consultation with the Attorney General, collect and publicize information about “foreign nationals in the United States who have been radicalized after entry into the United States” and “honor killings in the United States by foreign nationals.” Exec. Order 13,769 § 10.

So zealously did the Trump administration act to ban Muslims from the country that it did not adequately inform or consult the senior (or any) government officials responsible for the country’s defense and border security ahead of time, leading to chaos regarding the first Executive Order’s implementation.²⁰ U.S. Customs and Border Patrol officials immediately blocked both visa holders and lawful permanent residents from entering the country—even those who were already in transit when the first Executive Order was issued—without any consideration of the personal circumstances of the affected travelers.²¹ And the State Department, “in implementation of section 3(c) of the first Executive Order,” issued a one-page

¹⁹ David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority as Refugees*, CBN NEWS (Jan. 27, 2017), <http://bit.ly/2kCqG8M>; Weiner Decl. ¶ 20.

²⁰ See *Int’l Refugee Assistance Project v. Trump*, No. TDC-17-0361, slip. op at 5 (D. Md. Mar. 16, 2017).

²¹ See, e.g., Ron Nixon, *More People Were Affected by Travel Ban Than Trump Originally Said*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/politics/trump-ban-immigrants-refugees.html>; Weiner Decl. ¶ 21.

document “provisionally revok[ing] all valid nonimmigrant and immigrant visas of nationals of” the seven designated majority-Muslim countries.²² That revocation affected tens of thousands of valid visas held by students, workers, and families, both in the United States and around the world—again with no consideration of individual circumstances.

The hasty implementation of the discriminatory policy sparked protests around the country and bipartisan criticism from members of Congress and other federal officeholders.²³

The first Executive Order also spawned lawsuits across the country seeking immediate injunctive relief, including suits by States against the federal government. The courts responded with injunctions to halt implementation. *See, e.g., Darweesh v. Trump*, No. 1:17-cv-00480, ECF 8 at 2 (E.D.N.Y. Jan. 28, 2017); *Washington v. Trump*, 2017 WL 462040, at 5; *Washington v. Trump*, 847 F.3d at 1156; *Aziz*, 2017 WL 580855, at 7-9, 20 (E.D. Va. Feb. 13, 2017).

C. The March 6 Executive Order

In response to the Ninth Circuit’s ruling, President Trump declared his intention to continue litigating the first Executive Order, tweeting to the Ninth Circuit, “SEE YOU IN COURT, THE SECURITY OF OUR NATION IS AT STAKE!”²⁴ One week later, however, the

²² *See* <https://www.documentcloud.org/documents/3440712-DOS-letter.html>; Weiner Decl. ¶ 22.

²³ For example, on January 29, U.S. Senators John McCain and Lindsey Graham issued a statement that “[i]t is clear from the confusion at our airports across the nation that President Trump’s executive order was not properly vetted. We are particularly concerned by reports that this order went into effect with little to no consultation with the Departments of State, Defense, Justice, and Homeland Security.... This executive order sends a signal, intended or not, that America does not want Muslims coming into our country. That is why we fear this executive order may do more to help terrorist recruitment than improve our security.” Statement by Senators McCain & Graham on Executive Order on Immigration (Jan. 29, 2017); Weiner Decl. ¶ 23.

²⁴ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 9, 2017), <https://twitter.com/realdonaldtrump/status/829836231802515457>; Weiner Decl. ¶ 24.

Department of Justice informed the Ninth Circuit that the Trump administration would instead withdraw and replace the first Executive Order with a “new substantially revised Executive Order to eliminate what the panel erroneously thought were constitutional concerns.”

Defendants-Appellants’ Supplemental Brief on En Banc Consideration, No. 17:35105, ECF 154 at 4 (9th Cir. Feb. 16, 2017).

Meanwhile, however, the White House has repeatedly stated that the “revised” replacement Executive Order would remain effectively the same as the original. According to Stephen Miller, a White House Senior Policy Advisor, the revised Executive Order would include “mostly minor technical differences” but “fundamentally” reflect “the same basic policy outcome for the country.”²⁵ As President Trump himself put it, the replacement Executive Order is just “a watered-down version of the first one.”²⁶

On March 6, President Trump revoked Executive Order 13,769 and issued the replacement Executive Order, which bears the same name as the first: “Protecting The Nation From Foreign Terrorist Entry Into The United States.” The replacement continues the ban on entry to the United States of persons from six of the same seven predominantly Muslim countries, while creating special enhanced procedures for addressing persons from the seventh.²⁷ To be sure, the replacement purports to address some concrete failings of the original version that the courts have identified, such as the exclusion of legal permanent residents and those who already possess visas,²⁸ but these changes do not address the basic defect: The replacement

²⁵ See *supra* n. 2.

²⁶ See *supra* n. 1.

²⁷ Executive Order 13,780 §§ 1(f), 1(g), 2(c), 4.

²⁸ *Id.* § 3(b).

Executive Order is still, as President Trump and his surrogates have always intended, a Muslim ban. And despite the removal of Iraq from the list of targeted countries, the replacement Executive Order still affects nationals solely from countries that are more than 90% Muslim, and it does so with no valid national security justification. It also still contains increased vetting procedures for Iraqis and a requirement that Secretary of Homeland Security collect and publicize information related to “honor killings in the United States by foreign nationals.”

D. The Sham “National Security” Purpose of the Executive Orders

While national security is the stated purpose of both Executive Orders, the evidence is overwhelming that this is merely a pretext for discrimination. The first Executive Order was developed by the President’s political advisors, without consulting the agencies tasked with the nation’s security.²⁹ Nor did the government present evidence in court of national-security threats that would support an absolute travel and immigration ban. *See, e.g., Washington v. Trump*, 847 F.3d at 1168 n.7. (noting that “the Government has not offered any evidence or even an explanation” that would “justify an urgent need for the Executive Order to be immediately reinstated”).

The first Executive Order did require the Secretary of Homeland Security to conduct an immediate review to determine the information needed from any country to make visa and immigration decisions, and to report to the President within thirty days a list of countries that do not provide adequate information³⁰—the type of information that should have been gathered *before* all travel from the seven countries was prohibited. The thirty days for that review and report have come and gone, but no report has been disclosed to the public, presented to any

²⁹ Evan Perez et al., *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017), <http://cnn.it/2kGdcZy>; Weiner Decl. ¶ 25.

³⁰ Executive Order 13,769 § 3(a), (b).

court, or referred to in the replacement Executive Order. Instead, according to a document published by the Associated Press on February 24, the Department of Homeland Security has concluded that citizenship from one of the seven countries identified in President Trump's first Executive Order is "*unlikely* to be a reliable indicator of potential terrorist activity."³¹ And rather than complete its review of the information available to adjudicate admissions before issuing a replacement Executive Order, the administration reinstituted the ban and gave the Department of Homeland Security twenty more days to carry out the review.³²

What is more, current and former national security officials at all levels have expressed grave doubts regarding the stated purpose of the Executive Orders. Within days of the first Executive Order's issuance, more than 1,000 diplomats and other State Department officials, including current foreign service officers responsible for processing visas, signed a dissent cable warning that the travel ban "will not achieve its stated aim . . . to protect the American people from terrorist attacks by foreign nationals admitted to the United States" but instead will render the United States less safe from terrorist attacks.³³

In a joint declaration filed in the Ninth Circuit, former national security, foreign policy, and intelligence officials, including former Secretaries of State Madeleine Albright and John Kerry, stated:

³¹ See <https://www.documentcloud.org/documents/3474730-DHS-intelligence-document-on-President-Donald.html> (emphasis added); Weiner Decl. ¶ 26.

³² Executive Order 13,780 § 2(a), (b).

³³ Jeffrey Gettleman, *State Dept. Dissent Cable on Trump's Ban Draws 1,000 Signatures*, New York Times (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/world/americas/state-dept-dissent-cable-trump-immigration-order.html> (Weiner Decl. ¶ 27); *Dissent Channel: Alternatives to Closing Doors in Order to Secure Our Borders*, <https://assets.documentcloud.org/documents/3438487/Dissent-Memo.pdf>; Weiner Decl. ¶ 28.

We . . . are . . . 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. It does not perform its declared task of “protecting the nation from foreign terrorist entry into the United States.” To the contrary, the Order disrupts thousands of lives, including those of refugees and visa holders all previously vetted by standing procedures that the Administration has not shown to be inadequate. It could do long-term damage to our national security and foreign policy interests

There is no national security purpose for a total bar on entry for aliens from the seven named countries. . . . [T]he Administration offers no reason why it abruptly shifted to group-based bans when we have a tested vetting system developed and implemented by national security professionals across the government to guard the homeland, which is continually re-evaluated to ensure that it is effective. . . .

The Order will disrupt key counterterrorism, foreign policy, and national security partnerships. . . .

As a national security measure, the Order is unnecessary. . . .

[I]n our professional opinion, the January 27 Executive Order does not further—but instead harms—sound U.S. national security and foreign policy.³⁴

And more than 100 former national security officials from both Republican and Democratic administrations authored a letter to Secretary of Homeland Security John F. Kelly, then-Acting Attorney General Sally Yates, and then-Acting Secretary of State Thomas Shannon to express concern regarding the “long-term damage to our national security” that the first Executive Order would cause. The letter urged the cabinet to “recommend that the President revisit and rescind

³⁴ Joint Declaration of Madeleine K. Albright, Avril D. Haines, Michael V. Hayden, John F. Kerry, John E. McLaughlin, Lisa O. Monaco, Michael J. Morell, Janet A. Napolitano, Leon E. Panetta, and Susan E. Rice, *Washington v. Trump*, No. 17-35105, ECF 28-2 (9th Cir. Feb. 6, 2017), <http://cdn.ca9.uscourts.gov/datastore/general/2017/02/06/17-35105%20opposition%20exhibit.pdf>; Weiner Decl. ¶ 29.

this Order. Blanket bans of certain countries or classes of people is inhumane, unnecessary and counterproductive from a security standpoint, and beneath the dignity of our great nation.”³⁵

The replacement Executive Order met with a similar response from the experts responsible for keeping the country safe. On March 10, more than 130 of the nation’s foreign policy and national security officials wrote a letter to President Trump denouncing the replacement Executive Order as counterproductive to the nation’s domestic security and strategic foreign interests.³⁶

The replacement Executive Order’s national-security justification purports to rely on a State Department report that focuses largely on conditions in each country.³⁷ Yet the ban applies even to nationals who have not lived in or had any contact with those countries for decades. In addition, the replacement Executive Order does not explain why the six countries present a greater threat to national security than do other countries (or their nationals) also identified in the report but not covered by the ban. The replacement Executive Order purports to justify the

³⁵ See <https://lofgren.house.gov/uploadedfiles/finalrefugeeletter01302017.pdf>; Weiner Decl. ¶ 30. See also Scott Shane, *Immigration Ban Is Unlikely to Reduce Terrorist Threat, Experts Say*, New York Times (Jan. 28, 2017), <https://www.nytimes.com/2017/01/28/us/politics/a-sweeping-order-unlikely-to-reduce-terrorist-threat.html> (Weiner Decl. ¶ 31), citing Charles Kurzman, *Muslim-American Involvement with Violent Extremism, 2016*, Dep’t of Sociology, University of North Carolina, Chapel Hill (Jan. 26, 2017), https://sites.duke.edu/tcths/files/2017/01/FINAL_Kurzman_Muslim-American_Involvement_in_Violent_Extremism_2016.pdf (Weiner Decl. ¶ 32); Peter Bergen & David Serman, *Trump’s travel ban wouldn’t have stopped these deadly terrorists*, CNN (Jan. 30, 2017), <http://www.cnn.com/2017/01/30/opinions/travel-ban-wouldnt-have-stopped-these-deadly-terrorists-bergen-serman/> (Weiner Decl. ¶ 33), citing *Terrorism in America After 9/11, Part II: Who are the Terrorists?*, New America, <https://www.newamerica.org/in-depth/terrorism-in-america/who-are-terrorists/> (Weiner Decl. ¶ 34).

³⁶ Lara Jakes, *Trump’s Revised Travel Ban Is Denounced by 134 Foreign Policy Experts*, N.Y. TIMES (Mar. 11, 2017), <https://www.nytimes.com/2017/03/11/us/politics/trump-travel-ban-denounced-foreign-policy-experts.html>; Weiner Decl. ¶ 35.

³⁷ Executive Order 13,780 § 1(e).

selection of these countries by stating that each is “a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones.”

Executive Order § 1(d). Yet numerous other countries—including many that are not Muslim—also meet these criteria, but are not included in the ban.³⁸

The replacement Executive Order’s justifications also grossly and erroneously inflate the numbers of immigrants who have “prove[n] to be threats to our national security,” purportedly relying on reports regarding the criminal activities of immigrants and refugees provided to the President by Attorney General Sessions.³⁹ At least one of those reports refers to 580 individuals identified by the Department of Justice as being convicted of “terrorism or terrorism-related offenses between September 11, 2001, and December 31, 2014.”⁴⁰ According to a CATO Institute study, however, “only 40 of the 580 convictions (6.9 percent) were for foreigners planning a terrorist attack on U.S. soil.”⁴¹

Moreover, the replacement Executive Order does not detail the number of these cases that involved the six countries included in the travel ban. Instead, it gives only two examples of refugees who were purportedly threats to national security, and neither supports the replacement Executive Order. The first example is of two Iraqi nationals convicted of terrorism offenses.

³⁸ See U.S. DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM 2015, <https://tinyurl.com/jap2fpf> (classifying countries including Colombia and Venezuela as “Terrorist Safe Havens”); Weiner Decl. ¶ 36.

³⁹ Executive Order 13,780 § 1(e).

⁴⁰ Senator Jefferson Sessions and Senator Ted Cruz, Letter to President Obama (June 14, 2014), https://web.archive.org/web/20161109030307/http://www.sessions.senate.gov/public/_cache/file/s/f9d1d9f4-6ee8-42ff-a5f2-29a2518fe2f7/06.14.16-sens.-sessions-cruz-to-president-obama-on-terrorism-immigration.pdf; Weiner Decl. ¶ 37.

⁴¹ Alex Nowrasteh, *Little National Security Benefit to Trump’s Executive Order on Immigration*, Cato Institute (Jan. 25, 2017), <https://www.cato.org/blog/little-national-security-benefit-trumps-executive-order-immigration>; Weiner Decl. ¶ 38.

The travel ban, of course, no longer includes a categorical exclusion of Iraqis. The second example is a Somali national who entered the United States as a young child and was convicted of a terrorism offense many years later, as an adult.⁴² This single incident hardly qualifies as a basis to exclude *all* Somali visitors, immigrants, and refugees—to say nothing of individuals from Iran, Libya, Sudan, Syria, and Yemen as well. And the inclusion of this example in the replacement Executive Order demonstrates that the ban is not based on any identifiable security risks but instead simply discriminates on the basis of faith and nationality.

In summary, although the language of the first Executive Order has been revised, the replacement is, as promised by White House aide Stephen Miller, “technically” different from but fundamentally the same as the first version, and it reflects the same purpose: to discriminate against Muslims.

E. Effects of the Replacement Executive Order on Plaintiffs

1. UMAA

The Universal Muslim Association of America, Inc. (“UMAA”) is the largest organization of Shi’a Muslims in the United States. Over seventeen thousand people subscribe to UMAA’s weekly newsletters and its national convention draws more than three thousand attendees annually. UMAA maintains a national organization as well as local chapters across the country. UMAA also holds other events for the American Shi’a community throughout the year. Declaration of Azmat Husain (“Husain Decl.”), attached hereto as Exhibit B, ¶¶ 4-5.

⁴² Gordon R. Friedman, *Trump Used Failed Portland Car Bomb Plot as Justification for New Travel Ban*, OREGONIAN (Mar. 7, 2017), <http://bit.ly/2nt4aRV>; Weiner Decl. ¶ 39.

Shi'ism is the second largest denomination of Islam, comprising around ten to fifteen percent of the global and American Muslim populations.⁴³ Shi'a Muslims believe in a hierarchical structure of religious clergy, with the most learned given the highest spiritual authority.⁴⁴ While Shi'a adherents can be found in several nations, they form the majority in Iran, Iraq, Azerbaijan, and Bahrain and make up close to half of all Muslims in the Middle East.⁴⁵ Shi'a Islam is distinct from other major religions in that all its major centers of learning (*hawza 'ilmiyya*) are found in Iran, Iraq, and Syria. These three countries are also where some of the holiest sites of Shi'i Islam are located, drawing millions of Shia Muslims from across the world annually, including from the United States. In fact, the largest annual peaceful gathering on Earth occurs at Karbala, Iraq on the solemn Shia festival known as Arba'een; the event drew a reported 22 million pilgrims on a single day in 2013.⁴⁶

UMAA regularly arranges for renowned Shi'a scholars to visit the United States so that they may speak at its events, including at UMAA's national convention. Because the most renowned Shi'a scholars reside in Iran and Iraq, nearly all the scholars invited to UMAA's events are Iranian or Iraqi. Husain Decl. ¶¶ 7-8, 12.

⁴³ *Mapping the Global Muslim Population*, PEW RESEARCH CENTER 2, 10 (Oct. 7, 2009), <http://www.pewforum.org/2009/10/07/mapping-the-global-muslim-population/#footnotes>; Weiner Decl. ¶ 40; Husain Decl. ¶ 6.

⁴⁴ *See Sunni and Shi'a*, BBC (Aug. 19, 2008), http://www.bbc.co.uk/religion/religions/islam/subdivisions/sunnishia_1.shtml (explaining the clerical hierarchy in Shi'a Islam and how it differs from Sunni Islam, the other major Islamic denomination); Weiner Decl. ¶ 41; Husain Decl. ¶ 6.

⁴⁵ *Sunni and Shi'a*, *supra* n. 44.

⁴⁶ Fotini Christia, Elizabeth Dekeyser, & Dean Knox, *Shiites are participating in the world's largest pilgrimage today. Here's how they view the world*, Washington Post (Nov. 21, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/21/shiites-are-participating-in-the-worlds-largest-pilgrimage-today-heres-how-they-view-the-world/?utm_term=.f253d3a5e9d7 (explains significance and size of annual Arbaeen festival); Weiner Decl. ¶ 42; Husain Decl. ¶ 6.

The replacement Executive Order harms UMAA and its members because it effectively prevents UMAA from bringing Shi'a clergy to the United States to speak at its events and thereby restricts American Shi'a Muslims' access to many of the learned figures of their faith. For example, UMAA had arranged for a renowned Shia eulogy reciter, Basim Karbalaee, an Iranian national, to visit the United States in February 2017 for an event in Michigan to commemorate the birthday of the granddaughter of the Prophet Muhammad. UMAA had advertised for the event and sold some two thousand tickets. At that time, Mr. Karbalaee held a U.S. travel visa. After the first Executive Order, however, Mr. Karbalaee's visa was revoked and he was prohibited from traveling to the United States. UMAA was forced to cancel the event and issue refunds to people who had purchased tickets, at a cost of over \$15,000. Husain Decl. ¶¶ 14-19.

More generally, the replacement Executive Order prevents UMAA from inviting Mr. Karbalaee to the United States to speak at future events, as his travel visa has now expired, and the order bars issuance of new visas to Iranian nationals. After the Ninth Circuit rejected the government's motion to stay the TRO on the first Executive Order, UMAA planned to invite Mr. Karbalaee to its 2017 national convention from June 30 to July 3 in Bethesda, Maryland, for which Mr. Karbalaee would have sought a new travel visa. But because of the replacement Executive Order, Mr. Karbalaee is unable to secure a visa, and UMAA will again be unable to bring him to the United States to speak to its members. Husain Decl. ¶¶ 9-11, 25.

The replacement Executive Order leaves UMAA unable to invite scholars to its upcoming national convention and other events. This inability to secure scholars has harmed UMAA's ability to advertise and draw attendees to its events and hence has inhibited UMAA's and its members' ability to practice their faith. For example, in previous years, UMAA has

advertised its national convention by providing prospective attendees with an advance schedule that lists the participating foreign scholars. This year, UMAA has been unable to advertise its event to include Iranians and Iraqis. Because these foreign scholars are one of the primary attractions for the national convention, the replacement Executive Order significantly harms UMAA's ability to attract attendees. Moreover, the enforcement of the replacement Executive Order's travel restrictions harms UMAA's members because they now cannot receive the teachings of their religion's most important scholars. Husain Decl. ¶¶ 20-24.

The replacement Executive Order does include a discretionary "case-by-case" waiver provision, but this provision does not prevent harm to UMAA and its members. Because the replacement Executive Order applies to all Iranian nationals and because there is no guarantee that any particular applicant will be granted a waiver under the Order's stringent, largely undefined, and entirely discretionary standards, UMAA cannot determine which scholars to invite to its convention and other events because it does not know who might be granted a waiver. The additional scrutiny to which Iraqi visitors are subjected, *see* Executive Order 13,780 § 4, also leaves UMAA uncertain as to whether and when Iraqi scholars will be able to accept UMAA's invitation. Husain Decl. ¶¶ 20-24, 26-27.

Finally, the replacement Executive Order harms UMAA and its members by preventing UMAA's members who are U.S. citizens or lawful permanent residents from bringing their family to live in the United States with them. Many of UMAA's members are of Iranian or Iraqi descent and have pending petitions for their family members from those countries to obtain immigrant visas to come to the United States. Family members from the six countries will be unable to obtain these visas, and family members from Iraq will have increased difficulty in obtaining these visas. Husain Decl. ¶¶ 28-29.

2. The Doe Plaintiffs

Mr. and Mrs. Doe (the “Doe Plaintiffs”) are Muslim Yemeni citizens who have asylum status in the United States. Declaration of John Doe #1 (“John Doe Decl.”), attached hereto as Exhibit C, ¶¶ 2-3; Declaration of Jane Doe #1 (“Jane Doe Decl.”), attached hereto as Exhibit D, ¶¶ 2-3. The replacement Executive Order harms the Does because it prevents them from bringing their two young sons from Yemen to the United States.

In 2015, Yemen descended into civil war. The conflict, which is ongoing, has resulted in more than 10,000 civilian deaths and 40,000 civilian injuries.⁴⁷ This year, United Nations officials reported that nearly 19 million Yemeni civilians need urgent assistance to protect their safety, dignity, and basic human rights.⁴⁸

In early 2015, the Doe Plaintiffs came to the United States on visas with three of their children, but they could not afford to bring their other two children, ages 10 and 12, who therefore stayed behind in Yemen with their grandmother. John Doe Decl. ¶¶ 3-4; Jane Doe Decl. ¶¶ 3-4. While in the United States, Mr. Doe received word from Yemen that militants had threatened to kill him and his family if he returned. John Doe Decl. ¶ 5; Jane Doe Decl. ¶ 5.

With the help of an immigration attorney, Mr. Doe successfully applied for asylum in the United States. John Doe Decl. ¶ 6; Jane Doe Decl. ¶ 6. Mr. Doe then petitioned for his children in Yemen to obtain visas to come to the United States based on their status as minor children of

⁴⁷ Ahmed al-Haj, *Yemen civil war: 10,000 civilians killed and 40,000 injured in conflict, UN reveals*, The Independent (Jan. 17, 2017), <http://www.independent.co.uk/news/world/middle-east/yemen-civil-war-civilian-death-toll-10000-killed-40000-injured-conflict-un-reveals-a7530836.html>; Weiner Decl. ¶ 43.

⁴⁸ Kareem Shaheen, *Yemen death toll has reached 10,000, UN says*, The Guardian (Jan. 16, 2017), <https://www.theguardian.com/world/2017/jan/16/yemen-war-death-toll-has-reached-10000-un-says>; Weiner Decl. ¶ 44.

an asylee pursuant to Section 208(b)(3) of the INA. John Doe Decl. ¶¶ 8-9; Jane Doe Decl. ¶ 8. Mr. Doe's petition was approved in late 2016. John Doe Decl. ¶ 9.

In order to complete the visa application process, the Doe sons must be interviewed at a U.S. embassy or consulate abroad. Yemen does not have a U.S. consulate or embassy, however, requiring the children to travel to another country for their interviews. The Does arranged for the children to travel to Djibouti, where they both completed the medical examinations required for their visa interviews, but the State Department has yet to schedule those interviews. John Doe Decl. ¶ 10; Jane Doe Decl. ¶ 8. And though the replacement Executive Order provides for "case-by-case waivers" for individuals seeking admission to the United States if they can show, among other things, that their entry would be in the "national interest," Executive Order 13,780 § 3(c), the State Department has failed to respond to inquiries by the Does' immigration lawyer about the process of applying for a waiver. John Doe Decl. ¶ 13. Living expenses in Djibouti are very high, and if the sons are not granted visas soon, they will have to return to Yemen, where their lives are in danger. John Doe Decl. ¶ 12; Jane Doe Decl. ¶ 9.

III. ARGUMENT

To obtain a temporary restraining order or preliminary injunction, Plaintiffs must establish: (1) that they are likely to succeed on the merits of their claims; (2) that they are likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that injunctive relief is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016). Plaintiffs satisfy all four requirements.

A. Plaintiffs Are Likely to Succeed on the Merits of Their Claims

1. The Replacement Executive Order Continues to Violate the Establishment Clause.

The Establishment Clause of the First Amendment forbids discrimination on the basis of religion and “mandates governmental neutrality between religion and religion.” *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). Despite this explicit constitutional requirement, the Trump administration has singled out Muslims for discriminatory treatment. By instituting a Muslim travel ban, the government has run roughshod over the First Amendment.

At least three tests apply in determining whether the replacement Executive Order violates the Establishment Clause. First, when the government acts to disfavor a particular religion, its conduct is subject to strict scrutiny and presumptively cannot stand. *Larson v. Valente*, 456 U.S. 228, 246 (1982). Second, this Court must review the government’s action to determine whether it is endorsing religion or certain religious beliefs. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000). Third, the government’s action must be evaluated under *Lemon v. Kurtzman*, 403 U.S. 607 (1971), to determine, among other things, whether the government acted with a religious purpose and whether the effect of the government’s action is to disfavor religion or a particular faith. The replacement Executive Order fails all three tests.

a. The Replacement Executive Order Fails the Larson Test.

“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson*, 456 U.S. at 244; *see also McCreary Cty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 875 (2005) (“the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals”). When the government singles out one religion for unfavorable treatment, its action is subject to strict scrutiny.

In keeping with President Trump's campaign pledges, the replacement Executive Order singles out six countries that are overwhelmingly Muslim⁴⁹ and bans nationals from those countries—i.e., Muslims—from entering the United States. This straightforward religious favoritism warrants “strict scrutiny in adjudging its constitutionality,” requiring that the government show that its action is the least restrictive means to serve a compelling interest. *Larson*, 456 U.S. at 246.

The government has sought to justify its denominational preference by citing national-security concerns and a need to “to prevent infiltration by foreign terrorists.” Executive Order § 3(c). While national security and preventing terrorism are compelling interests (*see, e.g., Tabbaa v. Chertoff*, 509 F.3d 89, 103 (2d Cir. 2007)), the replacement Executive Order must be “closely fitted to further th[ose] interest[s]” (*Larson*, 456 U.S. at 248). Yet its fit with the government's asserted interests is wholly absent. In more than forty years of recorded and carefully-documented history, people from the six listed countries have not killed a single person in terrorist attacks in the United States.⁵⁰ The replacement Executive Order does not ban any of the top five countries of origin of foreigners who *have* committed terrorism in the United States; nor does it address the threat of homegrown terrorism perpetrated by non-Muslims living in the United States.⁵¹ *See id.* Further, the replacement Executive Order does not cover any of the non-majority-Muslim countries that the State Department has identified as “Terrorist Safe Havens.”⁵²

⁴⁹ The population of each of these countries is over 90% Muslim. *See CIA World Factbook*, <https://www.cia.gov/library/publications/the-world-factbook>; Weiner Decl. ¶ 45.

⁵⁰ *See* Alex Nowrasteh, Where Do Terrorists Come From? Not the Nations Named in Trump Ban, NEWSWEEK (Jan. 31, 2017), <http://www.newsweek.com/where-do-terrorists-come-not-seven-countries-named-550581>; Weiner Decl. ¶ 46.

⁵¹ *See id.*

⁵² *See supra* n 38.

Hence, as explained in Section II.D below, the replacement Executive Order is both overly broad and not broad enough to even potentially accomplish the goal of protecting the United States against terrorism, thus failing the narrow-tailoring requirement.

b. The Replacement Executive Order Fails the Endorsement Test.

“[T]he government may not favor one religion over another” by endorsing one religion or condemning another. *McCreary*, 545 U.S. at 875. Both “perceived and actual endorsement of religion” violate the Establishment Clause. *Santa Fe*, 530 U.S. at 305. The question for this Court, therefore, is “whether an objective observer . . . would perceive” the government to have endorsed or shown disapproval of a particular faith. *Id.* at 308 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring)).

The hypothetical objective observer is “presumed to be familiar with the history of the government’s actions and competent to learn what history has to show.” *McCreary*, 545 U.S. at 866. Even officially repudiated past actions are not “dead and buried” but remain in the objective observer’s memory, giving content to the latest governmental action. *Id.* at 870. As a matter of law, then, the public’s understanding of the replacement Executive Order and the history of its introduction (including the issuance and enjoining of its forbear) must be considered in determining whether it is an unconstitutional religious endorsement. *Id.* at 866.

Disapproval of Islam is apparent from the very text of the replacement Executive Order. Sections 1, 2, and 4 single out for unfavorable treatment individuals from seven nations with more than 90% Muslim populations. Section 4 requires additional screening procedures for people from Iraq, which is 99% Muslim. Section 6 temporarily suspends the entire U.S. refugee program, which disproportionately affects Muslims, who made up a plurality of all refugees

settled in the United States in 2016.⁵³ Employing terminology that plays to anti-Muslim stereotypes, Section 11 mandates that the Secretary of Homeland Security, in consultation with the Attorney General, collect and make publicly available information related to “foreign nationals in the United States who have been radicalized after entry into the United States” and “honor killings in the United States by foreign nationals.”⁵⁴ The intention to disfavor Islam and Muslims is clear.

The objective observer is also aware that both the original and the replacement Executive Orders are rooted in President Trump’s repeated promises of a Muslim ban, reiterated before and after his inauguration.⁵⁵ Further, actions taken by President Trump and members of his administration in issuing the replacement Executive Order serve only to reinforce the conclusion that the replacement Executive Order serves the same discriminatory purpose as the previous version did: First, President Trump initially announced that he would issue the replacement Executive Order as a supplement to the original while continuing to litigate the original’s legality.⁵⁶ Second, the replacement Executive Order on its face states that its purpose is to continue the work of its enjoined predecessor. *See* Executive Order § 1(i). Third, as noted

⁵³ Jens Manuel Krogstad & Jynnah Radford, *Key Facts About Refugees to the U.S.*, Pew Research Center (Jan. 30, 2017), <http://pewrsr.ch/2kk7r08>; Weiner Decl. ¶ 47.

⁵⁴ Farhana Khera & Johnathan Smith, *Don’t Be Fooled, Trump’s New Muslim Ban Is Still Illegal*, New York Times (Mar. 6, 2017), https://www.nytimes.com/2017/03/06/opinion/dont-be-fooled-trumps-new-muslim-ban-is-still-illegal.html?_r=0 (Weiner Decl. ¶ 48); Aziz Huq, *The “Travel Ban” Executive Order as Separation-of-Powers Test Case*, Just Security (Mar. 10, 2017), <https://www.justsecurity.org/38675/travel-ban-executive-order-separation-of-powers-test-case/> (Weiner Decl. ¶ 49).

⁵⁵ *See Hawaii v. Trump*, No. 1:17-cv-00050-DKW-KSC, slip op. at 33–36 (D. Haw. Mar. 15, 2017).

⁵⁶ Ronn Blitzer, *President Trump Signs New Travel Ban Executive Order*, Law Newz (Mar. 6, 2017), <http://lawnewz.com/high-profile/breaking-president-trump-signs-new-executive-order-on-immigration-ends-indefinite-ban-on-syrian-refugees/>; Weiner Decl. ¶ 50.

above, Stephen Miller, the President's Senior Policy Advisor, stated outright that the replacement Executive Order would have the "same basic policy outcome" as the earlier version.⁵⁷ And fourth, President Trump has made clear that the replacement Executive Order is just a "watered-down version of the first one," and that he would prefer "to go back to the first one."⁵⁸

The objective observer also knows from the government's own reports, widely disseminated statements by national security experts, both within and outside the government, and extensive media reportage that although the stated purpose of both Executive Orders is national security, the first Executive Order was drafted not by President Trump's national security advisors or other policy experts but instead by Trump's political advisors, who, as explained above, have publicly expressed hostility toward Islam.⁵⁹ And although the identities of the drafters of the replacement Executive Order are not publicly known, the Department of Homeland Security itself has determined that "citizenship is an 'unreliable' threat indicator and that people from the seven [now six] countries have rarely been implicated in U.S.-based terrorism,"⁶⁰ suggesting once again that those who are actually knowledgeable about national security had no role in the drafting – leaving no plausible justification for the measure.

In addition, the objective observer is aware that the timing of the replacement Executive Order conflicts with its stated purpose of increasing national security. When the federal court in the Western District of Washington issued a nationwide temporary restraining order on the first

⁵⁷ See *supra* n. 2.

⁵⁸ See *supra* n. 26.

⁵⁹ See *supra* ns. 14-18.

⁶⁰ Matt Zapotosky, *DHS Report Casts Doubt on Need for Trump Travel Ban*, WASH. POST (Feb. 24, 2017), <http://wapo.st/2lOkpKW>; Weiner Decl. ¶ 51.

travel ban on February 3, President Trump declared that the government needed to take immediate measures to prevent imminent threats of terrorist acts.⁶¹ The administration then promised several dates for the issuance of a replacement executive order—but missed all of them. Finally, an administration official announced that the President would issue his replacement Executive Order the day after his first address to a joint session of Congress.⁶² After favorable press response to his speech, however, President Trump delayed his plans yet again so that the replacement Executive Order could “have its own ‘moment’”⁶³—which really meant to allow the President to have *his* own moment, before having to face widespread condemnation of his renewed attempt at his Muslim ban.

Ultimately, the replacement Executive Order communicates to the world that Muslims are not welcome in the United States, sending the message that the federal government condemns Islam and that it perceives Muslims as “outsiders, not full members of the political community.” *Santa Fe*, 530 U.S. at 309-10. It also sends the message that all Muslims bear collective responsibility and are under collective suspicion for what others have done, purportedly in the name of Islam. Yet “to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights.” *Korematsu v.*

⁶¹ See, e.g., Darlene Superville, *Trump lashes Out at Federal Judge Over Ruling on Travel Ban*, St. Louis Post-Dispatch (Feb. 4, 2017), http://www.stltoday.com/news/national/govt-and-politics/trump-lashes-out-at-federal-judge-over-ruling-on-travel/article_40fcf6cf-8dd3-5ff1-a561-d0897195aec0.html; Weiner Decl. ¶ 52.

⁶² Phil McCausland & Hallie Jackson, *Donald Trump Expected to Sign New Immigration Order: A Timeline*, NBC News (Mar. 6, 2017), <http://www.nbcnews.com/news/us-news/donald-trump-expected-sign-new-immigration-order-timeline-n729186>; Weiner Decl. ¶ 53.

⁶³ Laura Jarrett *et al.*, *Trump Delays New Travel Ban After Well-Reviewed Speech*, CNN (Mar. 1, 2017), <http://www.cnn.com/2017/02/28/politics/trump-travel-ban-visa-holders/>; Weiner Decl. ¶ 54.

United States, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting). Collective maltreatment on the basis of faith sends the strongest possible message that a religion is disfavored—evoking some of the most sordid episodes in American history: “Jewish-Americans during the Red Scare, African-Americans during the Civil Rights Movement, and Japanese-Americans during World War II are examples that readily spring to mind.” *Hassan v. City of New York*, 804 F.3d 277, 309 (3d Cir. 2015). That message is not one that our government can or should convey.

c. The Replacement Executive Order Fails the Lemon Test.

The replacement Executive Order likewise violates the Establishment Clause under the test established in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), which requires that a governmental action must have both a preeminently secular purpose and a “principal or primary effect . . . that neither advances nor inhibits religion.” Failure to satisfy either requirement constitutes a violation of the Establishment Clause. *Id.* at 612-13.

1. Purpose

Again, the Trump administration contends that the purpose of the replacement Executive Order is to protect the United States “from terrorist attacks, including those committed by foreign nationals”⁶⁴—an ostensibly secular rationale. When the government asserts a secular purpose, however, the reviewing court must ensure that it is “genuine, not a sham, and not merely secondary to a religious objective.” *McCreary*, 545 U.S. at 864. The reviewing court must account for the origin and implementation of the policy, its evolution over time, and contemporaneous statements of relevant decision-makers. *Bonham v. D.C. Library Admin.*, 989 F.2d 1242, 1244-45 (D.C. Cir. 1993). The court must also scrutinize all “probative evidence,”

⁶⁴ *Executive Order Protecting The Nation From Foreign Terrorist Entry Into the United States* (Mar. 6, 2017), <https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states>; Weiner Decl. ¶ 55.

exercise “common sense,” and refuse “to turn a blind eye to the context in which the policy arose.” *McCreary*, at 866. In doing so, the court should look carefully at the “historical context” of the government’s action and “the specific sequence of events leading to [its] passage.” *Id.*

Here, the text, history, implementation, and express statements of purpose leave no room for doubt that the replacement Executive Order’s true aim is to discriminate against Muslims—in other words, to “endorse or disapprove of religion.” *Wallace v. Jaffrey*, 472 U.S. 38, 75-76 (1985).

The stated secular purpose for the replacement Executive Order is an after-the-fact rationalization that is not, and cannot be, substantiated. *Cf. Hawaii*, slip op. at 35–36.

The purported rationale of the protecting national security is belied by the process by which the Executive Orders were developed—by political advisers, without input from the Department of Homeland Security or other national-security experts, and without evidence that the targeted countries presented a threat warranting an absolute travel ban. *See Int’l Refugee Assistance Project*, slip op. at 35. The first Executive Order’s sweeping application to legal permanent residents, many of whom have been in the United States for years and know no other home, reveals a political intention to ban as many Muslims as possible—an impermissible purpose that taints the replacement Executive Order as well. The decision to ban first and gather evidence later—and then to ban once again before the evidence has come in—further demonstrates that the administration’s true objective is unrelated to any legitimate national-security considerations. *Cf. id.* at 36 (“[T]hat the national security rationale was offered only after courts issued injunctions against the First Executive Order suggests that the religious purpose has been, and remains, primary.”).

This Court need only review statements made by President Trump and his advisors to understand the replacement Executive Order's unstated premise: the false proposition, explicitly stated in the first Executive Order, that Muslims, because of their faith, are likely to "bear hostile attitudes toward [the United States] and its founding principles."⁶⁵ This baseless, irrational animus toward Muslims has been part of the fabric of the replacement Executive Order since its conception.

"Just as the Supreme Court has held that 'the world is not made brand new every morning[,] a person is not made brand new simply by taking the oath of office.'" *Aziz*, 2017 WL 580855, at *8 (quoting *McCreary*, 545 U.S. at 866) (alteration in original). A reasonable observer—indeed, anyone even vaguely aware of President Trump's campaign pledges and his statements and actions since taking office—would perceive the replacement Executive Order as disapproval of Islam. In short, "any reasonable, objective observer would conclude . . . that the stated secular purpose of the Executive Order is, at the very least, 'secondary to a religious objective' of temporarily suspending the entry of Muslims." *Hawaii*, slip op. at 36 (quoting *McCreary*, 545 U.S. at 864); *see also Int'l Refugee Assistance Project*, slip op. at 35 ("the record provides strong indications that the national security purpose is not the primary purpose for the travel ban"). The President's incantation of national security—absent any evidence that the travel ban is necessary for, or even beneficial to, national security—cannot be taken at face value.

2. Effect

The replacement Executive Order also violates *Lemon*'s secular-effect requirement by inhibiting Islam and advancing other faiths for the reasons explained above. *See* Section III.1.b.

⁶⁵ Executive Order 13,780 § 1.

The effect requirement is violated whenever governmental action “is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by nonadherents as disapproval, of their individual religious choices.” *Jewish War Veterans of the United States of America, Inc. v. Gates*, 506 F. Supp. 2d 30, 45 (D.D.C. 2007) (internal quotation marks omitted) (quoting *County of Allegheny v ACLU*, 492 U.S. 573, 597 (1989) (plurality opinion of Blackmun, J.)). “What counts is the . . . effect on a ‘reasonable observer’” . . . who is “‘deemed aware of the history and context of the community and forum.’” *Jewish War Veterans*, 506 F. Supp. 2d at 45 (quoting *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995)). Thus, just as the Executive Order violates the Endorsement Test because a reasonable observer familiar with its history would perceive it as a measure geared to disfavoring Islam rather than genuinely promoting national security, it likewise violates *Lemon*’s principal-effect requirement.

3. The Replacement Executive Order Continues to Violate Plaintiffs’ Equal Protection Rights Under the Fifth Amendment.

The Fifth Amendment’s Due Process Clause contains an equal protection component that prohibits the government from “invidiously discriminating between individuals or groups.” *Washington v. Davis*, 426 U.S. 229, 239 (1976). It applies equally to both citizens and noncitizens. *Plyler v. Doe*, 457 U.S. 202, 210 (1982). The replacement Executive Order violates the Due Process Clause by discriminating without adequate justification against the Does, UMAA, and UMAA’s members on the basis of religion and national origin.

a. *Religion*

To demonstrate a violation of the Fifth Amendment’s prohibition against unequal treatment of protected groups, Plaintiffs need not show that the intent to discriminate against Muslims “was the sole purpose of the challenged action, but only that it was a ‘motivating

factor.’” *Arce v. Douglas*, 793 F.3d 968, 978 (9th Cir. 2015) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). “When there is a proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified.” *Vill. of Arlington Heights*, 429 U.S. at 265-66.

The replacement Executive Order violates the Fifth Amendment’s equal protection component by discriminating against potential immigrants and visitors on the basis of religion without adequate justification. Classifications based on religion are inherently suspect and trigger strict scrutiny as a matter of equal protection just as denominational preferences do under the Establishment Clause. See *Hassan v. City of New York*, 804 F.3d 277, 299 (3d Cir. 2015) (religion is an inherently suspect distinction); *Steffan v. Perry*, 41 F.3d 677, 689 n.9 (D.C. Cir. 1994) (“Classifications based on race or religion, of course, would trigger strict scrutiny.”). While the replacement Executive Order does not explicitly discriminate against Muslims, it is clearly motivated by animus toward Muslims and disproportionately affects Muslims, including Muslims living in the United States who either wish to hear Muslim scholars or are applying for Muslim family members to join them in the United States.

The record unequivocally demonstrates that the purpose and effect of the replacement Executive Order are to ban Muslims from entering the country: The President’s advisors publicly stated that the first Executive Order was the culmination of the President’s campaign promise to institute a Muslim ban and that the geographic criteria were an attempt to mask (or simply relabel) the first Executive Order’s true purpose. Cf. *Vill. of Arlington Heights*, 429 U.S. at 267 (“The historical background of the decision is one evidentiary source [of purpose], particularly if it reveals a series of official actions taken for invidious purposes,” and “[t]he

specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes").

The replacement Executive Order was also the product of procedural and substantive departures from usual decision-making — further evidence of discriminatory purpose. *Id.* at 266 ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached."). The President's replacement Executive Order is parallel to the first, which was itself issued in a highly unusual manner, without consultation with the government officials responsible for the country's defense and border security. Moreover, the President delayed issuance of the replacement Executive Order so that he could ride a wave of positive press coverage for a speech, belying his claim that it is urgently needed for national-security reasons.⁶⁶ And the President's own Department of Homeland Security has determined that suspending nationals of the six countries will not promote national security.

Further, the replacement Executive Order disproportionately affects Muslims: more than 90% of the citizens of the listed countries are Muslim.⁶⁷ *Cf. Washington v. Davis*, 426 U.S. 229, 242 (1976) ("an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one [protected class] than another"). And the replacement Executive Order's impact on Shi'a Islam is especially pronounced. As so many prominent Shi'a scholars are based in Iran, the free flow of communication and ideas central to development of and instruction in the theology of Shi'a

⁶⁶ See *supra* n. 63.

⁶⁷ See *supra* n. 49.

Islam will be impaired by a ban on Iranian nationals entering the United States. Furthermore, the ban may cause Shi'a Muslims to avoid traveling to study with Shi'a scholars for fear of not being able to return home afterwards.

The disparate impact of, and the discriminatory intent behind, the replacement Executive Order both trigger strict scrutiny review. *Vill. of Arlington Heights*, 429 U.S. at 266-67. Under strict scrutiny, the Government must show that the law is narrowly tailored to serve a compelling government interest. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978). As already explained it cannot do so here.

Though the prevention of terrorism is a compelling interest, the replacement Executive Order is wildly over- and under-inclusive and, therefore fails strict scrutiny. *C.f. Sugarman v. Dougall*, 413 U.S. 634, 641 (1973) ("It is at once apparent, however, that appellants' asserted justification proves both too much and too little."). Not a single recent, fatal terrorist attack in the United States has been committed by nationals of any of the six listed nations. Conversely, countries not listed have produced multiple terrorists who have killed Americans on U.S. soil.⁶⁸ As already explained, the replacement Executive Order is both overly broad and not broad enough to even potentially accomplish the goal of protecting the United States against terrorism.

b. National Origin.

The replacement Executive Order also discriminates on the basis of national origin: it explicitly treats people differently based on national origin by limiting access to U.S. immigration benefits by nationals and citizens of one of six listed countries. By discriminating

⁶⁸ Alex Nowrasteh, *Guide to Trump's Executive Order to Limit Migration for "National Security" Reasons* (Jan. 26, 2017), <https://www.cato.org/blog/guide-trumps-executive-order-limit-migration-national-security-reasons> (Weiner Decl. ¶ 56); Miriam Valverde, *No terrorist attacks post 9/11 by people from countries in Trump's travel bans?*, Politifact (Jan. 29, 2017), <http://www.politifact.com/truth-o-meter/statements/2017/jan/29/jerrold-nadler/have-there-been-terrorist-attacks-post-911-countri/>; Weiner Decl. ¶ 57.

against people of certain nationalities who are seeking to enter the United States, the replacement Executive Order also discriminates against people (including U.S. citizens and lawful permanent residents) like the Does and UMAA members who are in the United States and are petitioning for their family members to join them. The family members in the United States are very likely to be of the same national origin as the people excluded by the replacement Executive Order for whom they are petitioning.

National origin is a suspect class, discrimination on the basis of which triggers strict scrutiny. *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (“Classifications based on alienage, *like those based on nationality* or race, are inherently suspect and subject to close judicial scrutiny” (emphasis added)); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (holding that national origin-based classifications trigger strict scrutiny because they are “deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others”). As demonstrated above, none of the Government’s proffered rationales is sufficient to withstand this review.

4. The Replacement Executive Order Violates Plaintiff UMAA’s and Its Members’ First Amendment Right to Receive Information and Ideas.

The replacement Executive Order also violates the First Amendment rights of UMAA and its members by restricting their ability to receive information and ideas from religious leaders and other speakers who would ordinarily travel from the six countries designated in the Executive Order to meet with and present to UMAA members. The Supreme Court has long held that “the Constitution protects the right to receive information and ideas. This freedom (of speech and press) . . . necessarily protects the right to receive” information. *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972) (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)). Thus the Court has held that the denial of a visa to a foreign scholar implicated the First

Amendment rights of the university professors who invited him to speak. *Id.* The Court emphasized the value of “sustained, face-to-face debate, discussion and questioning,” and rejected the government’s argument that the First Amendment was not implicated because the university professors had access to Mandel’s ideas through books, speeches, tapes and phone conversations. *Id.*; *see also Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009) (noting that “[t]he Supreme Court has recognized a First Amendment right to ‘hear, speak, and debate with’ a visa applicant”).

Likewise, the replacement Executive Order here infringes on the First Amendment right of UMAA and its members to receive information and ideas. The second Executive Order prevents UMAA from inviting Basim Karbalaei and others to the United States to speak at its events, including its national convention, because they are barred from obtaining visas. *See, e.g., Am. Acad. of Religion*, 573 F.3d at 115. The replacement Executive Order thus also prohibits UMAA’s members from hearing from their religion’s most renowned scholars.

The Supreme Court has held that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The court then must apply intermediate scrutiny, under which

a government regulation is constitutional if it is (1) it is within the constitutional power of the Government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest; and (5) the regulation leaves open ample alternative channels for communication. The failure to satisfy any prong of the test invalidates the regulation.

Edwards v. District of Columbia, 755 F.3d 996, 1002 (D.C. Cir. 2014) (internal quotation marks and citations omitted). The second and fourth parts of this test require that the government action be “narrowly tailored to further a substantial government interest.” *Id.* Narrow tailoring requires the Government to show that “the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Id.* Substantial overbreadth and underinclusiveness defeat intermediate scrutiny. *Id.* at 1008–9. In light of the facts outlined in Section II, the replacement Executive Order fails intermediate scrutiny because it is not narrowly tailored to further the President’s asserted interest in national security.

5. The Replacement Executive Order Violates the Immigration and Nationality Act

The replacement Executive Order also violates the Immigration and Nationality Act. The INA provides, “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.” 8 U.S.C. § 1152(a)(1)(A). The replacement Executive Order violates this clear prohibition by denying visas—including immigrant visas—to nationals of the six countries, Executive Order 13,780 § 2(c), and subjecting visa applicants from a seventh country, Iraq, to “additional scrutiny,” Executive Order §§ 1(g), 4. Although section 2(c) expressly suspends only “entry” of nationals from the six countries, it is clear from the text of the Order and its implementation that the President is also suspending the issuance of visas to nationals of these countries. Indeed, the government recently acknowledged to another court that “as a result of the Second Executive Order, any individual not deemed to fall within one of the exempt categories, or to be eligible for a waiver, will be denied a visa.” Memorandum Opinion, *Int’l Refugee Assistance Project*, slip op. at 21.⁶⁹

⁶⁹ The text of the replacement Executive Order confirms the government’s admission. The stated purpose of the suspension on entry is to allow the government to determine whether additional

UMAA has standing to challenge the Executive Order's violation of the INA because it has members who have pending petitions for their relatives to obtain immigrant visas to travel to the United States. Husain Decl. ¶ 28. *See Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 473 (D.C. Cir. 1995) (holding that U.S. resident sponsors had standing to assert that the State Department's failure to process visa applications of Vietnamese citizens violated 8 U.S.C. § 1152), *vacated on other grounds by U.S. Dept. of State, Bureau of Consular Affairs v. Legal Assistance for Vietnamese Asylum Seekers, Inc.*, 519 U.S. 1 (1996).

In the Executive Order, the President contends that 8 U.S.C. §§ 1182(f) and 1185(a) provide legal authority for excluding nationals from six nations. *See* Executive Order § 2(c). The government is incorrect. Section 1182(f) authorizes the president to suspend the entry of aliens under certain circumstances, while § 1185(a) makes it unlawful for aliens to "enter . . . the United States except under such reasonable rules, regulations, and orders . . . as the President may prescribe." Both provisions, enacted in 1952, are limited by the specific probation against discrimination in § 1152(a)(1)(A), enacted thirteen years later. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."); *Smith v. Robinson*, 468 U.S. 992, 1024 (1984) (recognizing that a later enacted, more specific statute amends an earlier, more general statute). As the D.C. Circuit observed, "Congress could hardly have chosen more explicit language" in crafting § 1152's anti-discrimination mandate. *Legal Assistance for Vietnamese Asylum Seekers*, 45 F.3d at 473

information is needed to adjudicate visa applications to ensure that the applicant is not a security threat, and to "temporarily reduce investigative burdens on the relevant agencies during the review period." *See* Executive Order No. 13,780 § 2, 2(c). That purpose would be ill-served by a rule that required government officials to continue adjudicating visa applications while denying entry at the border. The "waiver" provision further reflects that the suspension on entry is in fact a halt on the issuance of visas, as it allows government officials to "decide on a case-by-case basis to *authorize the issuance of a visa to . . . a foreign national for whom entry is otherwise suspended.*" Executive Order No. 13,780 § 3(c) (emphasis added).

(holding that the State Department's interpretation and application of its regulation to discriminate against Vietnamese on the basis of their nationality violated § 1152). The legislative history of the 1965 INA, including § 1152, confirms its broad anti-discriminatory purpose. The INA was "passed alongside the Civil Rights Act of 1964 and the Voting Rights Act of 1965" and its legislative history "is replete with the bold anti-discriminatory principles of the Civil Rights Era." *Olsen v. Albright*, 990 F. Supp. 31, 37 (D.D.C. 1997). Sections 2(c) and 4 of the replacement Executive Order therefore violate the INA's prohibition against discrimination against national origin in the issuance of immigrant visas. *See Int'l Refugee Assistance Project*, slip op. at 24 (holding that plaintiffs showed a likelihood of success on the merits of their claim that the second Executive Order violates § 1152(a) as to the issuance of immigrant visas).

6. The Limited Review Applied in *Kleindienst v. Mandel* Does Not Apply to Plaintiffs' Constitutional Claims.

In defending the first Executive Order, the President argued that the justification for the Order need only be "facially legitimate and bona fide" within the language of *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972), to survive a constitutional challenge. But as the Ninth Circuit held in rejecting that argument, the more limited standard of review does not apply to the "President's promulgation of sweeping immigration policy." *Washington v. Trump*, 847 F.3d 1151, 1162 (9th Cir. 2017). Rather, limited review was warranted in *Mandel* only because the lawsuit challenged "an executive branch official's decision to issue or deny an individual visa based on the application of a congressionally enumerated standard to the particular facts presented by that visa application." *Id.* (emphasis added). In *Mandel*, the Court emphasized that deference was appropriate because the Attorney General, in denying a single visa, had "exercised the plenary power that Congress delegated to the Executive." 408 U.S. at 769. In contrast, the

replacement Executive Order is not a valid exercise of plenary power over particular visas delegated by Congress; rather, the Order is a violation of an express statutory prohibition.

The replacement Executive Order purports to borrow the list of countries from a list already compiled by Congress and the Secretaries of State and Homeland Security pursuant to statutory authorization. *See* Executive Order 13,780 § 1(b)(i). This justification ignores the purpose of the existing list, which was simply to exclude the six countries (and Iraq) from the streamlined entry procedures of the Visa Waiver Program,⁷⁰ not to block the entry of people from these countries altogether. There is no congressional authorization flatly to ban nationals of the six countries from the United States or subject nationals of a seventh to extreme vetting. Because the replacement Executive Order is not applying a congressional delegation of power—and in fact violates the INA—the limited review applied in *Mandel* does not apply here.

Even if the court were to apply *Mandel*'s limited review, however, the replacement Executive Order would still fail the test. Government action is not “bona fide,” within the language of *Mandel*, if it is taken in bad faith. *See Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J. concurring) (courts may “look behind” the government’s stated purpose if there is an affirmative showing of bad faith on the part of the executive official whose actions are being challenged); *Cardenas v. United States*, 826 F.3d 1164, 1172 (9th Cir. 2016) (noting that a plaintiff may demonstrate that the reason given for a government action was not “bona fide” by making “an affirmative showing of bad faith”); *Bertrand v. Sava*, 684 F.2d 204, 212 (2d Cir. 1982) (noting that discrimination “against a particular race or group” would not be “legitimate and bona fide within the meaning of *Kleindienst v. Mandel*”).

⁷⁰ The Visa Waiver Program (“VWP”) permits nationals of certain countries to enter the United States without a visa on the condition that they agree to waive their rights to contest their removal on any ground except asylum. 8 U.S.C. § 1187(b)(2).

Plaintiffs have amply demonstrated bad faith. The text of the replacement Executive Order and its predecessor, the Order's timing, and the President's statements over the course of the past year and a half demonstrate that the replacement Executive Order is motivated by animus against Muslims, not by reasoned national security concerns. Indeed, the replacement Executive Order continues to target seven majority Muslim countries even in the face of the government's own determination showing that national origin is not a predictor of terrorist intent, and despite expert opinions that the replacement Executive Order will sow further mistrust and hostility in the international community and make us less safe. The replacement Executive Order therefore fails even the limited level of review applied in *Mandel*. See *Aziz v. Trump*, No. 1:17-cv-00116-LMB-TC, ECF 11 at 16 (holding that *Mandel*'s standard did not apply to the first Executive Order issued on Jan. 27, but that even if it did, the "proffered reason for the EO [was not] the real reason").

B. Plaintiffs Will Suffer Immediate, Irreparable Harm Absent Preliminary Injunctive Relief

Without preliminary relief from this Court, Plaintiffs are at serious risk of immediate and irreparable harm. As an initial matter, irreparable harm is presumed because Plaintiffs have demonstrated a likelihood of success on their Establishment Clause claim. See, e.g., *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) ("loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury'"), quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006) ("[W]here a movant alleges a violation of the Establishment Clause, this is sufficient, without more, to satisfy the irreparable harm prong for purposes of the preliminary injunction determination.").

Although the constitutional violations suffice to demonstrate irreparable harm, Plaintiffs will suffer additional harms if the replacement Executive Order is not enjoined. For example, without an injunction, the Doe Plaintiffs' sons will be unable to travel to the United States, forcing them to return to extremely dangerous conditions in Yemen, and the Doe Plaintiffs will continue to suffer the pain of an already traumatic family separation. UMAA will continue to be unable to recruit prominent scholars and speakers for its events, including its upcoming national convention, which is the organization's largest annual fundraiser. UMAA's members will be unable to access scholars whose teachings are important to the practice of these members' faith. UMAA's members will also continue to be separated from their families, who will be unable to obtain immigrant visas to come to the United States. *See Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017), *reconsideration en banc denied*, No. 17-35105, 2017 WL 992527 (9th Cir. Mar. 15, 2017) (noting that the separation of families is an irreparable harm).

The possibility of a waiver is no answer because simply being forced to apply for a waiver—on an illegitimate and discriminatory basis through a special, more onerous procedure—is itself a cognizable harm imposed by the replacement Executive Order. The replacement Executive Order creates greater procedural hurdles for the Does and UMAA while simultaneously conveying a message of disfavor on the basis of religion and nationality. *See Int'l Refugee Assistance Project*, slip op. at 16.

C. The Balance of the Equities and the Public Interest Support Preliminary Relief

The balance of equities and the public interest, which “merge when the Government is the opposing party,” *see Nken v. Holder*, 556 U.S. 418, 435 (2009), also support preliminary injunctive relief. The government has no legitimate interest in the enforcement of unconstitutional laws or actions by the President. *United States v. U.S. Coin & Currency*, 401

U.S. 715, 726 (1971). Rather, “enforcement of an unconstitutional law is always contrary to the public interest.” *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013).

Any alleged national security justification for enforcement of the replacement Executive Order is mere pretext for invidious religious discrimination. As noted, the Department of Homeland Security’s findings support that conclusion, and the Trump administration has provided not a shred of credible evidence to the contrary.

Simply put, the replacement Executive Order cannot be squared with long-standing U.S. immigration policy and, as recognized by Republican Senators John McCain and Lindsey Graham in analyzing the first Executive Order, it is likely to “do more to help terrorist recruitment than improve our security.”⁷¹ The United States has fought for decades to promote religious freedom and to condemn terrorism, including by governments of some of the countries identified in the replacement Executive Order. But banning nationals of those countries from traveling to the United States, regardless of where they are actually residing or what the circumstances of their requests for entry might be, does nothing to protect the safety of Americans.⁷²

Ultimately, the replacement Executive Order treats all the nationals of all six countries as proponents of “radical Islam” who intend to carry out terrorist acts against the United States. This invidious stereotyping is offensive to those who trace their roots to these countries and to the Muslim community at large. Nothing about the replacement Executive Order is in the interest of the American public. Plaintiffs therefore have a strong and overriding interest in

⁷¹ David Caplan and Benjamin Siegel, *Trump Spars With Sens. McCain and Graham After They Criticize Travel Ban* (Jan. 29, 2017), <http://abcnews.go.com/Politics/handful-gop-senators-representatives-criticize-trump-travel-ban/story?id=45121595>; Weiner Decl. ¶ 58.

⁷² See, e.g., Hadi Ghaemi, Opinion, *Trump’s Travel Ban Is a Gift to Iran’s Rulers*, WASH. POST (Jan. 29, 2017), <http://wapo.st/2kDw1NR>; Weiner Decl. ¶ 59.

obtaining preliminary relief and in enjoining the enforcement of a policy that infringes on their basic constitutional rights. The public shares that interest: “It is always in the public interest to prevent the violation of a party’s constitutional rights.” *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 105 (D.D.C. 2012) (internal quotation marks omitted). No other remedy exists that will adequately protect the individuals harmed by the replacement Executive Order.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs’ motion for a temporary restraining order and preliminary injunction should be granted.

Dated: March 23, 2017



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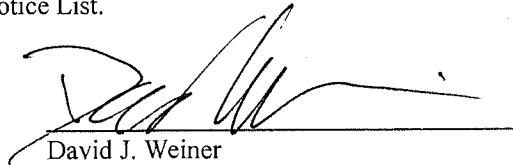
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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 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 the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

A handwritten signature in black ink, appearing to read 'David J. Weiner', is written over a horizontal line.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNIVERSAL MUSLIM ASSOCIATION)
OF AMERICA and JOHN and JANE DOE,)

Plaintiffs,)

v.)

DONALD J. TRUMP, in his official capacity)
as President of the United States; U.S.)
DEPARTMENT OF HOMELAND)
SECURITY; U.S. CUSTOMS AND)
BORDER PROTECTION; U.S.)
DEPARTMENT OF STATE; U.S.)
DEPARTMENT OF JUSTICE; JOHN)
KELLY, in his official capacity as Secretary)
of the Department of Homeland Security;)
KEVIN K. MCALEENAN, in his official)
capacity as Acting Commissioner of U.S.)
Customs and Border Protection; REX W.)
TILLERSON, in his official capacity as)
Secretary of State; and JEFFERSON)
BEAUREGARD SESSIONS III, in his)
official capacity as Attorney General of the)
United States,)

Defendants.)

Civil Action No.: _____

**PROPOSED ORDER GRANTING PLAINTIFFS' MOTION
FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

The Court, having considered Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction ("Motion") and any opposition thereto, and find that good cause appears, orders as follows:

1. Sections 2 and 4 of Executive Order No. 13, 780 violate the Constitution and laws of the United States.
2. Defendants are hereby temporarily restrained and preliminarily enjoined, across the Nation, from:

- a. Enforcing Sections 2 and 4 of Executive Order No. 13,780, including at any United States embassy, consulate, border, or point of entry;
 - b. Applying Sections 2 or 4 of Executive Order No. 13,780 to deny, revoke, restrict, cancel, or delay issuance of any immigrant or nonimmigrant visa;
 - c. Applying Sections 2 or 4 of Executive Order No. 13,780 to deny or suspend entry or admission to the United States to any person;
 - d. Applying Sections 2 or 4 of Executive Order No. 13,780 to prohibit any person from applying for any benefit under the Immigration and Nationality Act of 1965;
 - e. Denying any person subject to the Executive Order access to legal counsel of his or her choice;
 - f. Applying Sections 2 or 4 of Executive Order No. 13,780 to instruct any airline or other common carrier to deny passage to any person; and
 - g. Imposing or threatening to impose any financial penalty on any airline or other common carrier for allowing passage to any person covered by Executive Order No. 13,780.
3. Defendants will promptly reissue any and all visas physically cancelled pursuant to Executive Order No. 13,780.
 4. Defendants will instruct the consular officials handling the visa applications of the Doe children to schedule their visa interviews within 10 calendar days of the entry of this Order and to adjudicate those visa applications within 7 calendar days of their interviews.

5. Defendants will process without undue delay visa applications submitted by nationals of Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.
6. Defendants will promptly provide written guidance to employees, contractors, and agents of the Department of Homeland Security, the Department of State, U.S. Customs and Border Protection, and all other necessary U.S. government officials and entities to ensure full and timely compliance with this Order. Defendants will promptly post such written guidance on federal government websites, including but not limited to www.whitehouse.gov, www.dhs.gov, www.state.gov, www.doj.gov, and www.cpb.gov.
7. Defendants will promptly rescind any guidance, directive, memorandum or statement interpreting or applying Executive Order 13,780 that conflicts with any term of this Order. Defendants will promptly post such rescission on federal government websites, including but not limited to www.whitehouse.gov, www.dhs.gov, www.state.gov, www.doj.gov, and www.cpb.gov.
8. Defendants will promptly update all relevant public guidance, documentation, and FAQs to reflect the terms of this Order and post such updates on federal government websites, on federal government websites, including but not limited to www.whitehouse.gov, www.dhs.gov, www.state.gov, www.doj.gov, and www.cpb.gov.
9. Defendants will file with this Court, on the tenth day of each month following the entry of this Order, a signed and verified declaration stating:

- a. The number of United States visas granted during the previous month to nationals of each of the following countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen;
- b. The number of United States visa applications denied during the previous month to nationals of each of the following countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen;
- c. For each denied visa application as referenced in subparagraph (b), the identifying information or visa application number for the Court's reference; and
- d. For each denied visa application as referenced in subparagraph (b), a detailed explanation of the reason(s) the application was denied, including facts, legal authority, and reasons for denial.

10. Defendants will pay the Plaintiffs' attorneys' fees and costs.

IT IS SO ORDERED.

Dated: March __, 2017

U.S. DISTRICT JUDGE