UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

EBLAL ZAKZOK, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*,

Defendants.

Case No. 17-cv-02969-TDC

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

In four days, the Plaintiffs in this case will be indefinitely separated from their loved ones abroad—a father-in-law who suffers from cancer, a daughter at risk of return to a regime that tortured her father, and a mother separated from a critically ill child—by virtue of a Proclamation that follows on the heels of the President's repeated calls to ban Muslims from the United States. The Proclamation, like the two predecessor orders that were enjoined by courts across the country, seeks to effectuate the President's threat.

The government argues the Proclamation is different. It points to a purported "worldwide review" of countries' information-sharing and identity-management practices against "baseline criteria." On this basis, the government asserts that the Proclamation should not be reviewed by this Court. But history and precedent compel searching judicial review. The Proclamation is undeniably the product of the executive orders that came before it: it indefinitely suspends most travel from six Muslim-majority countries—five of which were subject to the prior orders. Although this new ban applies to North Korea and Venezuela, in view of the President's two prior failed efforts to discriminate against Muslims, it is plain that North Korea and Venezuela are mere window dressing. Only a handful of North Koreans apply for U.S. visas and the ban only applies to a select list of Venezuelan government officials; their inclusion is just a cynical attempt to distinguish the Proclamation from its predecessors.

As the Fourth Circuit recognized in its review of EO-2, where plaintiffs have plausibly alleged that the stated rationale for government action is merely a bad faith attempt to mask a religious purpose, the court should look behind the stated purpose to assess its *bona fides*. Similarly, as the Ninth Circuit recognized in reviewing EO-2, Constitutional precedent requires that the Proclamation be reviewed because it effectively supplants the detailed statutory scheme

of the Immigration and Nationality Act and is thus incompatible with the expressed will of Congress. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

In addition to the tactical and pointless inclusion of North Korea and Venezuela, the Proclamation's facially irrational application betrays the religious animus from which it originated: it bans countries that met its criteria and spares many that did not; it applies ill-defined "mitigating" factors to exempt certain countries even when banned countries are similarly situated; and it affords exceptions that cannot be reconciled with its stated aims. Moreover, out of purported concern that the banned countries do not provide sufficient information for the United States to assess the risk that their nationals pose, the Proclamation imposes an indiscriminate and senseless ban that includes individuals who have no meaningful ties to those countries. The Proclamation would exclude, for example (among many others), the sister of Plaintiff Hamadmad—an academic who has never set foot in Syria—simply because she was born to Syrian parents.[1]

ARGUMENT

Contrary to the government's position, the "national-security and foreign-policy determinations" on the face of the Proclamation do not foreclose this Court's Establishment Clause inquiry. (Opp. at 35.) Indeed, to accept the government's argument would require this Court to conclude that two Courts of Appeals—including the Fourth Circuit sitting *en banc*—erred in finding, on similar facts, that the government was not entitled to such deference. *See Int'l Refugee Assistance Project* v. *Trump*, 857 F.3d 554, 591 (4th Cir. 2017), *vacated as moot and remanded*, 2017 WL 4518553 (U.S. Oct. 10, 2017) ("*IRAP*"); *Washington* v. *Trump*, 847

[1] Plaintiffs adopt and incorporate by reference the reply memoranda in support of the motions for a preliminary injunction filed in *Int'l Refugee Assistance Project* v. *Trump*, No. 8:17-cv-00361 ("*IRAP*"), and *Iranian Alliances Across Borders, et al.* v. *Donald J. Trump, et al.*, No. 8:17-cv-2921 ("*IAAB*").

F.3d 1151, 1162 (9th Cir. 2017).[2] Instead, as the Fourth Circuit has held, the Court must look behind the "stated reason for the challenged action" where, as here, plaintiffs have "seriously called into question whether the stated reason for the challenged action was provided in good faith." *See IRAP*, 857 F.3d at 591 (citing *Kerry* v. *Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring in the judgment)).

Plaintiffs have alleged facts which are equally compelling as those that the Fourth Circuit previously concluded were sufficient to give rise to an inference of bad faith.[3] Specifically, the litany of historical evidence presented by the plaintiffs demonstrating religious animus (as discussed by the *IRAP* plaintiffs), balanced against the "weak evidence" proffered by the government that the Proclamation is "meant to address national security interests," *id.* at 592 (as discussed below), compels the conclusion that the government's justification for the Proclamation was not offered in good faith, but instead as a mere pretext to effectuate the President's promise to ban Muslims from the United States.

The Court therefore must examine "evidence of purpose beyond the face of the challenged law," including "the historical background of the decision and statements by decisionmakers," in order to determine whether the Proclamation is in fact the product of its stated aims, or whether it instead is motivated by an impermissible purpose. *Washington*, 847

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[2] The case relied upon by the government to urge this Court to depart from this precedent, *Sessions* v. *Morales-Santana*, is inapposite. (*See* Opp. at 36.) *Morales-Santana* did not concern the Establishment Clause, let alone analyze its application to a sweeping change in immigration policy effected following myriad statements by the President touting his goal to bar Muslims. *See* 137 S. Ct. 1678 (2017). In relying on *Morales-Santana*, the government is merely recycling arguments it previously made—and lost—before the Fourth Circuit.

[3] As in cases challenging the President's prior executive orders, Plaintiffs allege that Proclamation is the product of the President's numerous "statements expressing animus towards the Islamic faith" *IRAP*, 857 F.3d at 591, and ongoing efforts "to find a way to ban Muslims in a legal way," *id.* (*See, e.g.*, Compl. ¶¶ 2–3, 6–7, 22–32, 36, 40–41, 55–59.)

F.3d at 1167–68; *see IRAP*, 857 F. 3d at 593. An assessment of the process, reasoning, and evidence that purportedly gave rise to the challenged government action is commonplace when courts evaluate constitutionality. *See, e.g.*, *McCreary Cty., Ky.* v. *Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005) ("[S]crutinizing purpose does make practical sense, as in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact . . . ."); *City of Los Angeles* v. *Alameda Books, Inc.*, 535 U.S. 425, 438–39 (2002) (stating that the evidence must "fairly support" the government's rationale for a challenged ordinance).

I. The Stated Rationale Is Not A Good Faith Justification For The Proclamation.

On its face, the "review" on which the Proclamation purportedly is based is a tactic, not substance; it is a pretext, not policymaking. While the so-called "baseline criteria" and "mitigation factors" sound like the analytic tools of legitimate Executive action, their nonsensical application and irrational outcomes demonstrate that, like the President's prior efforts, the Proclamation's purported justifications are just an effort to disguise an improper religious-based motive. The only coherent and consistent explanation for the Proclamation, given the government's incoherent and inconsistent justification for it, is that it aims to achieve the same improper purpose as the prior executive orders. The Proclamation cannot be "divorced from the cohesive narrative linking it to the animus that inspired it." *IRAP*, 857 F.3d at 601. As demonstrated below, the Proclamation's purported national security justification, like that of EO-2, is "secondary to its primary religious purpose and [is] offered as more of a 'litigating position' than as the actual purpose." *Id.* at 596.

The baseline criteria were not actually applied. The Proclamation itself concedes that its "baseline criteria" were, in fact, ignored in banning immigrants from countries that met the criteria, and in sparing immigrants from countries that did not. Somalia (a majority-Muslim

country) was banned, even though it satisfied the criteria. (Proclamation § 2(h).) Iraq was not banned, even though it failed to meet the criteria. (*Id.* § 1(g).)

The Proclamation ignores numerous countries that failed the baseline criteria. The government chose to permit immigration from scores of countries that do not satisfy the baseline criteria and, in particular, do not supply the "***information needed*** from foreign governments to enable the United States to assess its ability to make informed decisions about foreign nationals applying for visas." (Opp. at 6 (emphasis added).) For example:

- The "national security and public-safety" risk assessment purportedly considered whether the country "regularly fails to receive its nationals subject to final orders of removal from the United States." (Proclamation § 1(c)(iii).) Immigration and Customs Enforcement found 12 countries failed this requirement—four of which were actually sanctioned as a result: Eritrea, Cambodia, Guinea, and Sierra Leone. (Ex. 1.) None of these sanctioned countries is subject to the ban. (Ex. 2.) And of the countries that are banned, only one (Iran) failed to satisfy this supposed "national security" test.

- Ten countries identified by the State Department as terrorist safe havens are not subject to the ban. (Ex. 3.) However, Chad is banned even though it is not a terrorist safe haven according to the State Department, and actively partners with the United States against terrorism. (*Id.*)

- More than 80 countries fail to "issue electronic passports embedded with data to enable confirmation of identity." (Proclamation § 1(c)(i); *See* Ex. 4.) Yet four countries that *do* satisfy this "baseline" requirement—Iran, Libya, Somalia, and Venezuela—are banned. (*Id.*; *see also* Ex. 3.)

- At least 17 countries do not share information on "lost and stolen passports to appropriate entities." (Proclamation § 1(c)(i); Ex. 5.) Yet at least the majority of these countries are not banned.

The Proclamation's mitigating factors were haphazardly applied. The Proclamation spares certain countries, such as Iraq, from the ban based on "certain mitigating factors," (Proclamation § 1(h)(iii)), but applies them in no logical or coherent fashion, other than to impose a ban on Muslim-majority countries. Chad meets every one of the mitigating factors—more than even Iraq (which met only four of five). (Ex. 3; *see also* Ex. 6.) Three other countries

subject to the Proclamation meet four of the five mitigating factors—the same number as Iraq. (Ex. 3.)

The Proclamation purports to solve a non-existent problem. Taken at face value, the alleged purpose of the Proclamation—controlling immigration from countries with deficient information-sharing practices—is already addressed by the current immigration system. "As the law stands, a visa applicant bears the burden of showing that the applicant is eligible to receive a visa," and "[t]he Government already can exclude individuals who do not meet that burden." *Hawaii* v. *Trump*, 859 F.3d 741, 773 (9th Cir. 2017) (citing 8 U.S.C. § 1361). The Proclamation, like EO-2, offers no "reason explaining how this individualized adjudication process is flawed." *Id.* If the information necessary to determine whether a particular visa applicant is a terrorist or criminal is unavailable due to deficiencies in information gathering or sharing, then he or she can be denied entry by immigration officers. The Proclamation itself offers no evidence that consular officers have inappropriately approved visas for nationals from banned countries without sufficient information to assess the risks they may pose.[4] To the contrary, the evidence shows that four out of ten visa applications from those countries already are denied. (Ex. 7 at 9–10.)

In any event, a categorical ban based on nationality would not accomplish the Proclamation's supposed goal of addressing "terrorism-related" risks. The Department of Homeland Security itself has determined that "country of citizenship is unlikely to be a reliable

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[4] Moreover, the law contains robust mechanisms for identifying and excluding aliens who may sympathize with terrorist groups. In particular, the PATRIOT Act provides that those who "endorse[] or espouse[] terrorist activity or persuade[] others to endorse or espouse terrorist activity or support a terrorist organization" can be barred from the country. 8 U.S.C. § 1182(a)(3)(B)(i)(VII); *see* Ex. 8 at 26–27. As part of the visa process, would-be visitors are asked a number of questions aimed at surfacing links to violent behavior or terrorism. (*See, e.g.*, Ex. 9; Ex. 10.)

indicator of potential terrorist activity." (Ex. 11 at 1.) The few foreigners who do commit terrorist acts in the United States do so years after coming to the country, so basing decisions to exclude on nationality is unlikely to identify threats. (Ex. 12 at 2.) Not a single American has died in a terrorist attack in the U.S. at the hand of citizens of Iran, Libya, Syria, Yemen, or Somalia in the past 40 years. (Ex. 13 at 1.)

The Proclamation's aims are contradicted by its own exceptions. The government's assertion that "it would be detrimental to the Nation's interests to allow certain foreign nationals of those countries to enter the United States" because it "lacks sufficient information to assess the risks they pose," (Opp. at 2), cannot be squared with the fact that the Proclamation *permits* foreign nationals from nearly every banned country to enter on a wide variety of nonimmigrant visas—documents for which applicants receive *less* vetting than immigrant visas. (*See* Proclamation § 2(a)–(c), (g)–(h).) There is no good faith explanation for why it would be detrimental to the national interest to admit aliens as business travelers or tourists but not as students, crewmembers, or exchange visitors. Rather, the facially inconsistent and contradictory terms of the Proclamation reveal that its true purpose, like the earlier versions from which it came to be, is to ban Muslims based on their religious faith.

II. The Harm Suffered By Plaintiffs Cannot Be Squared With The Proclamation's Alleged Rationale.

The real and immediate harms that will be suffered by Plaintiffs in this case alone—not to mention countless others who face similar circumstances—demonstrate that the Proclamation's consequences are wholly unconnected from its supposed aims. The Proclamation is substantially overbroad with respect to its asserted rationale. The United States does not need information from a foreign government in order to confirm that an individual who never set foot in that country is not a terrorist, that a six-year old child presents no risk of criminal activity, or

that a refugee fleeing torture or war should be permitted entry. Nor is it plausible that the banned countries would even have meaningful information about aliens "who left as children" or "whose nationality is based on parentage alone." *Hawaii*, 859 F.3d at 773. The Proclamation's focus on nationality yields "the paradoxical effect of barring entry by a Syrian national who has lived in Switzerland for decades, but not a Swiss national who has immigrated to Syria during its civil war." *Id*.

It is precisely that injustice—and others—that the Proclamation will work in this specific case. Plaintiff Sumaya Hamadmad's sister, Dima, an academic who has been invited to collaborate on her research by Yale University and the University of Florida, will be stranded in Jordan by the Proclamation. (Hamadmad Decl. ¶¶ 3–7.) Dima will be barred from the United States solely because she was born to Syrian parents; she has lived in Jordan her entire life and has never visited Syria. (*Id*. ¶¶ 3, 8.) While the Proclamation cites the conditions in Syria as the exclusive rationale for banning travel by Syrian nationals, it ensnares Dima—and others like her—simply because of her heritage. The government attempts to justify this outcome by asserting that the risks purportedly addressed by the Proclamation—information-sharing and identity-management-protocols—"apply regardless of the degree of a foreign national's connection to his or her country of citizenship." (Opp. at 25.) But there is no information about Dima in Syria to manage, since she has lived her entire life in Jordan. Dima is not required by current immigration law to supply *any* information from the Syrian government in order to visit the United States. (*See* 8 U.S.C. § 1361; Ex. 14.) The Proclamation would permit Dima to enter the United States if her countries of ancestry and residence were reversed: a *Jordanian* citizen who immigrated to Syria during the civil war would not be denied entry into the United States by the Proclamation.

The Proclamation also would indefinitely separate Plaintiff Jane Doe #3 from her fiancé, who has not been to Somalia in nearly a decade. (Jane Doe #3 Decl. ¶¶ 3, 6.) Jane Doe #3's fiancé has lived in Malaysia for the past nine years, where he is studying to obtain his Master's degree in finance. (*Id.* ¶ 3.) The Proclamation justifies this outcome by contending that there is a "persistent terrorist threat . . . emanat[ing] from Somalia's territory," and that Somalia does not sufficiently prevent "terrorist groups [from] plan[ning] and mount[ing] attacks from its territory." (Proclamation § 2(h)(i).) The Proclamation is silent, because there is nothing to say, as to why its effect should be to exclude a graduate student in Malaysia.

Plaintiff Eblal Zakzok similarly suffers the Proclamation's arbitrary consequences. After the Syrian regime subjected Dr. Zakzok to detention and torture, he fled to Turkey and subsequently sought and was granted asylum in the United States. (Zakzok Decl. ¶¶ 6, 9–11.) Only his eldest daughter—who happened to be older than 21 when Dr. Zakzok sought asylum—was not eligible for the derivative asylum benefits that his wife and four other children obtained. (*Id.* ¶¶ 12–14.) Her immigration application remains pending. (*Id.* ¶ 14.) Although she has not been to Syria in over three years and fled Syria on account of the regime's threat to her family, the Proclamation will ban Dr. Zakzok's daughter from the United States indefinitely, apparently on the basis of the same connection to Syria shared by the rest of her family—each of whom the United States already saw fit to approve for permanent legal residency in the United States.

CONCLUSION

For the foregoing reasons and those stated in the plaintiffs' opening briefs, Plaintiffs' motion for a preliminary injunction should be granted.

Dated: October 14, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 14, 2017, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will serve all counsel of record.

Dated: October 14, 2017

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