IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

P.K., *et al.*, on behalf of themselves and all others similarly situated,	)	No. 1:17-cv-01533-TSC
Plaintiffs/Petitioners,	)	
v.	)	
REX W. TILLERSON, *et al.*,	)	
Defendants/Respondents.	)	

PLAINTIFFS' STATUS UPDATE

Plaintiffs respectfully submit the following Status Update. On December 22, 2017, the United States Court of Appeals for the Ninth Circuit issued its decision in *Hawaii v. Trump*, No. 17-17168, 2017 WL 6554184 (9th Cir. Dec. 22, 2017). This decision affirmed a district court decision enjoining the enforcement of the current and third version of the entry restriction, Proclamation 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) ("EO-3"). That injunction is currently stayed. As the Court is aware, the instant litigation does not involve EO-3 and instead relates to an earlier Executive Order, Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017 ("EO-2"). However, the reasoning of the Court of Appeals invalidating EO-3 supports denying Defendants' motion to dismiss.

First, the Ninth Circuit held that consular nonreviewability did not bar judicial review. Because the plaintiffs there challenged a policy determination by the Executive Branch, judicial review was available. "[C]ourts do not hesitate to reach challenges to the substance and implementation of immigration policy." *Hawaii*, 2017 WL 6554184, at *6 (internal quotation

marks omitted). This Court previously came to the same conclusion on similar reasoning in its decision granting a preliminary injunction in part. *See* ECF No. 49 at 15. The Court should adhere to its prior decision, as supported by the decision of the Ninth Circuit in *Hawaii*, and deny the motion to dismiss on the grounds of consular nonreviewability.

Second, the Ninth Circuit concluded that EO-3 violated the Immigration and Nationality Act. Most significantly for purposes of this case, the Court held that the prohibition on national origin discrimination in immigrant visa issuance, 8 U.S.C. § 1152(a)(1)(A), "cabin[ed]" the authority to deny entry under 8 U.S.C. § 1182(f). *Hawaii*, 2017 WL 6554184, at *20. Because EO-3 expressly discriminated on the basis of national origin, the Court of Appeals found that it was invalid. *Id.* at *20-21. The Ninth Circuit was not persuaded by the government's reliance on two prior Executive Orders issued by President Carter and Reagan, noting that "those restrictions were never challenged in court and . . . [m]oreover, both orders are outliers among the forty-plus presidential executive orders restricting entry, and therefore cannot support a showing of congressional acquiescence." *Id.* at 21.

In its motion to dismiss, Defendants have presented virtually identical arguments to those rejected by the Court of Appeals and have relied on the same two prior outlier Executive Orders. ECF No. 53-1 at 26-28. This Court should reach the same conclusion here and deny the motion to dismiss.

January 5, 2018

Respectfully submitted,

/s/ Matthew E. Price

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CERTIFICATE OF SERVICE

I certify that, on January 5, 2018, I served the foregoing Plaintiffs' Status Update on all counsel of record by filing it via this Court's CM/ECF system.

/s/ Matthew E. Price