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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

STATE OF HAWAI'I and ISMAIL ELSHIKH,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA,

Defendants.

No. 1:17-cv-00050-DKW-KSC

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO CONVERT TRO TO PI

Judge: Hon. Derrick K. Watson

Hearing: Wednesday, March 29, 2017, 9:30 a.m.

Related Documents: Dkt. No. 238

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INTRODUCTION

Seeking to bar the provisions of Executive Order No. 13,780[1] from taking effect, Plaintiffs sought a Temporary Restraining Order from this Court "[a]s an immediate remedy."[2] This Court in turn granted Plaintiffs that immediate, temporary relief.[3]

Plaintiffs now seek to convert that temporary relief, awarded after extremely expedited briefing and argument, into a preliminary injunction of far longer duration. Yet Plaintiffs effectively treat this significant procedural and substantive step as a mere formality.[4] They fail to offer additional, relevant evidence to support their request, despite carrying the burden to demonstrate that a preliminary injunction is necessary, irrespective of the issuance of the prior TRO. And their legal arguments

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1 82 Fed. Reg. 13,209 (Mar. 6, 2017).

2 Plaintiffs' Motion for Temporary Restraining Order at 4 (ECF No. 65).

3 *See* Order Granting Motion for Temporary Restraining Order (ECF No. 219) ("TRO").

4 *See generally* Mem. in Supp. of Motion to Convert Temporary Restraining Order to a Preliminary Injunction (ECF No. 238-1) ("Pl. Mem.").

are equally light, even in the face of Defendants' filing of their Motion for Clarification,[5] which emphasized that the relief granted by the Court was still broader in scope than anything justified by Plaintiffs' arguments and evidence (even if one were to accept those arguments in full).

The Court should not sidestep its duty to weigh the arguments and evidence at this critical phase. Now that the Court has an opportunity to more carefully evaluate Plaintiffs' claims, Defendants believe they should be rejected in full for the reasons set forth in Defendants' Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order.[6] But at the very least, the Court should limit any preliminary injunction to the arguments and injuries Plaintiffs have alleged.

In particular, this Court should limit any preliminary injunction to Section 2(c) of the Executive Order, which is what the Maryland district court did in *International Refugee Assistance Project v. Trump*.[7] Section 2(c) contains the 90-day suspension-of-entry provision that was (and remains) the focus of Plaintiffs' briefing, and is the only section of the Executive Order on which Plaintiffs have submitted any evidence of alleged injury. Because their alleged injury is limited to Section 2(c), Plaintiffs

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5 ECF No. 227.

6 ECF No. 145 ("Def. TRO Mem.").

7 Civil Action No. TDC-17-0361, 2017 WL 1018235 (D. Md. Mar. 16, 2017), *appeal docketed*, No. 17-1351 (4th Cir. Mar. 17, 2017) (hereinafter, "*IRAP*").

lack standing to seek preliminary relief regarding: (a) Section 6(a)'s 120-day suspension of certain aspects of the U.S. Refugee Admissions Program ("USRAP"); or (b) Section 6(b)'s 50,000-refugee cap (which, it bears emphasis, is not mentioned *anywhere* in Plaintiffs' Second Amended Complaint or TRO papers). Nor are Plaintiffs likely to succeed on the merits of their challenges to these provisions, which are not limited to the six countries and draw no distinction on the basis of religion. Accordingly, any preliminary injunction should be limited to Section 2(c) of the Executive Order.

At an absolute minimum, however, this Court should reject Plaintiffs' request to grant a preliminary injunction as to the provisions of Sections 2 and 6 that provide for inter-governmental reporting and consultation within the Executive Branch and that also may require requesting information from foreign governments. Plaintiffs cannot possibly explain how they face immediate and irreparable injury from the implementation of these provisions. They do not apply to Plaintiffs at all, but instead simply facilitate the Government's ability to identify and fix potential gaps in the Nation's vetting procedures. Plaintiffs therefore lack standing to challenge these provisions, any such challenge is not ripe, and these provisions do not even arguably violate the Establishment Clause.

BACKGROUND

Defendants refer to their Memorandum in Opposition to Plaintiffs' Motion for a Temporary Restraining Order for the procedural background of this case. *See* Def. TRO Mem. Plaintiffs' motion to convert, however, raises particular issues regarding the application of the provisions contained in Sections 2 and 6 of the Executive Order, which are described below. Defendants also provide a brief response to Plaintiffs' characterizations regarding certain aspects of the procedural history of this case.

A. Section 2 of the Executive Order

Section 2 of the Executive Order concerns vetting procedures for immigration benefits. It contains two basic sets of provisions.

First, Section 2(c) suspends entry into the United States of certain nationals from six countries, subject to exceptions and waivers. *See* Exec. Order No. 13,780 § 2(c). Section 2(c) was the near-exclusive focus of Plaintiffs' TRO briefing.

Second, the remainder of Section 2 contains inward-facing provisions aimed at allowing the Government to identify potential cracks in the Nation's vetting procedures. These provisions set forth a process by which the President may make future determinations about whether any restrictions on entry are necessary for certain foreign nationals or categories of foreign nationals. To begin that process, Section 2(a) requires the Secretary of Homeland Security, in consultation with the

Secretary of State and the Director of National Intelligence, to conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country so that in adjudicating an application by a national of that country for a visa, admission, or other benefit, it can be determined that the individual is not a security or public safety threat. Section 2(b) requires the preparation and submission to the President of a report based upon that review. *See id.* § 2(a), (b). Section 2(d) provides that, following the submission of the report referenced in subsection (b), the Secretary of State shall request that foreign governments begin to supply additional, needed information. *Id.* § 2(d). Sections 2(e) and 2(f) contain various procedures to assist the President in making any subsequent determinations about whether restrictions on entry are warranted for "appropriate categories of foreign nationals of countries that have not provided the information requested[.]" *Id.* § 2(e), (f). Finally, Section 2(g) provides that the Secretaries of State and Homeland Security shall submit to the President various joint reports on their progress in implementing the provisions of the Order. *Id.* § 2(g).

Neither Plaintiffs' TRO briefing, nor this Court's TRO opinion, addresses these provisions in any meaningful way (to the extent they even address them at all). And for good reason: None of these provisions targets specific countries or regions at all, much less a specific religion. Instead, they call on cabinet agencies to conduct

a "worldwide" review to determine whether and how the Nation's defenses can be strengthened.

B. Section 6 of the Executive Order

Section 6 of the Executive Order concerns certain aspects of the USRAP. It contains three basic sets of provisions.

First, Section 6(a) suspends travel under USRAP and decisions on refugee applications for a period of 120 days after the effective date of the Executive Order, subject to waivers provided for in Section 6(c). *See* Exec. Order No. 13,780 § 6(a), (c). Section 6(a) also provides that, during the suspension period, the Government shall conduct an internal review of USRAP application and adjudication processes and implement additional procedures identified by the review. *Id.* § 6(a). The Secretary of State shall resume allowing travel of refugees into the United States under USRAP 120 days after the effective date of the Order, and the Secretary of Homeland Security shall resume making decisions on applications for refugee status for stateless persons and nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that adequate additional procedures to protect the security and welfare of the Nation are in place. *Id.*

Second, Section 6(b) provides "that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States" and, on

that basis, "suspend[s] any entries in excess of that number until such time as [the President] determine[s] that additional entries would be in the national interest." *Id.* § 6(b). Plaintiffs' Second Amended Complaint and TRO papers do not address this provision. Nor is it addressed in the Court's TRO opinion, which again makes sense, since Section 6(b) applies worldwide and without regard to religion.

Finally, Section 6(d) sets forth a policy of coordinating refugee placement and settlement with state and local jurisdictions. *See id.* § 6(d). The provision is intended to allow those jurisdictions to "have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions." *Id.* Once again, this provision is not referenced in Plaintiffs' Second Amended Complaint and TRO papers, or in this Court's TRO opinion.

C. Plaintiffs' Characterizations of This Case's Procedural History

Plaintiffs assert that Defendants, in opposing Plaintiffs' TRO motion, failed to argue the appropriate scope of any TRO that the Court might issue. *See* Pl. Mem. at 15. That characterization is incorrect. Defendants' opposition to Plaintiffs' TRO motion addressed Hawaii's (unsupported) claims regarding the suspension of aspects of the USRAP. *See* Def. TRO Mem. at 19, 48. Defendants also argued that "any emergency relief could extend only to addressing the plaintiffs' asserted violations, not the sweeping relief plaintiffs request." *Id.* at 52; *see also id.* at 53 (asserting that any TRO should be narrow in scope). As described herein, Plaintiffs

requested sweeping relief but failed to provide supporting facts or arguments to justify the scope of that relief. Defendants' response matched, if not exceeded, the level of detail in Plaintiffs' briefs.

Plaintiffs also inexplicably accuse Defendants of litigating at a "plodding pace." Pl. Mem. at 13. That is simply not true. The same day that Executive Order No. 13,780 was signed by the President, the parties conferred regarding a briefing schedule for Plaintiffs' TRO motion and agreed to such a schedule in short order. That schedule allowed this Court to issue a decision before the provisions of Executive Order No. 13,780 were to take effect. A mere two days after the Court issued its TRO, Defendants filed their motion to clarify. This Court denied that motion on Sunday, March 19. The very next day, the parties submitted an agreed-upon joint schedule for Plaintiffs' conversion motion, which is also being briefed on an expedited basis. *See* ECF No. 235. The fact that Defendants did not, as Plaintiffs put it, "rush[ ] to the Ninth Circuit," but instead sought to provide this Court with an opportunity to refine the scope of its preliminary relief, does not mean that Defendants "resisted at every turn Plaintiffs' efforts to expedite these proceedings." Pl. Mem. at 13. It means that Defendants respect this Court's role in issuing findings with respect to the parties' dispute.

ARGUMENT

I. Plaintiffs Do Not Even Attempt to Carry Their Burden on Seeking to Convert the Court's TRO to a Preliminary Injunction

Plaintiffs have already received from this Court the precise form of relief that they sought—a temporary restraining order. Having obtained that emergency relief, Plaintiffs now treat the proposed conversion of the TRO into a preliminary injunction as a mere formality. Rule 65 dictates otherwise.

Even though this Court issued a TRO, Plaintiffs retain the burden of proof in seeking a preliminary injunction. Rule 65 specifically contemplates proceedings during which "the party who obtained the [temporary restraining] order must proceed with the motion [for preliminary injunction]; if the party does not, the court must dissolve the order." Fed. R. Civ. P. 65(b)(3); *cf.* 11A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2953 (3d ed.) ("If the hearing is converted into one under Rule 65(a) [for a preliminary injunction], the burden of persuasion remains on the party who requested the temporary restraining order[.]"); *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 441 (1974) ("At such hearing, as in any other hearing in which a preliminary injunction is sought, the party seeking the injunction would bear the burden of demonstrating the various factors justifying preliminary injunctive relief[.]").

Accordingly, this Court's TRO anticipated that there would be further proceedings before a preliminary injunction could be issued. Among other things, the Court specifically noted that "[t]he underlying purpose of a TRO is to preserve the status quo and prevent irreparable harm *before a preliminary injunction hearing is held*." TRO at 27 (emphasis added) (citing *Granny Goose Foods*, 415 U.S. at 439; *Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1130-31 (9th Cir. 2006)). To that end, the Court indicated that it "intends to set an expedited hearing to determine whether [the TRO] should be extended" and directed the parties to "submit a stipulated briefing and hearing schedule" on that issue. *Id.* at 43.

One of the purposes of holding further proceedings is to revisit and, if appropriate, narrow the scope of emergency relief granted in a TRO. As this Court is aware, "[i]njunctive relief is an 'extraordinary remedy' [which] 'must be tailored to remedy the specific harm alleged.'" *McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9th Cir. 2012) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008); *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1160 (9th Cir. 2011)). In reviewing Plaintiffs' request for a preliminary injunction, the Court should therefore narrow the scope of its relief to ensure it is "no more burdensome to the defendant[s] than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004) (noting that an injunction should

"remedy only the specific harms shown by the plaintiffs, rather than 'to enjoin all possible breaches of the law'" (quoting *Zepeda v. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983))).

Courts thus routinely narrow the scope of relief previously granted in a TRO when entering preliminary injunctions that will last for the course of the litigation. *See, e.g.*, *Luxottica Group S.p.A. v. Light in the Box Ltd.*, No. 16-cv-05314, 2016 WL 6092636, at *4, *9 (N.D. Ill. Oct. 19, 2016) ("[T]he court will narrow the TRO it previously granted so that the preliminary injunction covers eyewear only" where plaintiffs failed to present evidence that defendants "sold any products other than eyewear or eyewear accessories that infringe on its protected trademarks."); *Serv. Emps. Int'l Union v. Roselli*, No. C 09-00404 WHA, 2009 WL 2246198, at *2 (N.D. Cal. July 27, 2009) (district court issued preliminary injunction that was "more narrowly tailored than the TRO"); *In re Adelphia Commc'ns Corp.*, No. 02-41729 (REG), 2006 WL 1529357, at *1 (Bankr. S.D.N.Y. June 5, 2006) ("I am granting the TRO in the form in which it was requested, though at the time of the hearing on the preliminary injunction, I will [consider] . . . whether I can address the very substantial needs and concerns of the Debtors and their creditors by a somewhat narrower injunction[.]").

In *IRAP v. Trump*, decided the same day this Court issued its TRO, the plaintiffs sought to preliminarily enjoin Executive Order No. 13,780 in its entirety,

including both Sections 2 and 6. *See IRAP*, 2017 WL 1018235. That court, however, declined plaintiffs' invitation, finding instead that "[p]laintiffs' Establishment Clause and INA arguments focused primarily on the travel ban for citizens of the six Designated Countries in Section 2(c)." *Id.* at *17. The court therefore "enjoin[ed] that provision only." *Id.* As set forth below, the same is true here: Hawaii and Dr. Elshikh focus their challenges "primarily on" Section 2(c) of the Executive Order. Plaintiffs rely upon *IRAP* for the proposition that this Court should convert its "TRO into a preliminary injunction granting the same scope of relief" as in its TRO, Pl. Mem. at 14, but do not mention that the preliminary injunction entered in *IRAP* was limited to Section 2(c).

Plaintiffs misapprehend the nature of their own motion when they argue that Defendants must point to "changed circumstances," or that the Court has already "rejected" Defendants' arguments regarding the scope of the TRO. Pl. Mem. at 2, 15. Plaintiffs' points might be relevant if Defendants were moving to dissolve the TRO or a subsequent preliminary injunction, but that is not the procedural posture here. Instead, Plaintiffs continue to bear the burden of proof in seeking a preliminary injunction.[8] As described in more detail below, Plaintiffs fail to carry that burden,

[8] It is questionable whether Plaintiffs can even properly rely on the Court's legal conclusions in the TRO decision. *See Consol. Salmonid Cases*, 713 F. Supp. 2d 1116, 1122 n.1 (E.D. Cal. 2010) ("The denial of a TRO motion is not dispositive of

particularly to the extent that they are seeking a preliminary injunction against any sections of the Executive Order other than Section 2(c).

II. If This Court Enters a Preliminary Injunction, It Should Not Apply to Section 6 of the Executive Order

Defendants disagree with the Court's TRO ruling. For the reasons set forth in Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Temporary Restraining Order (ECF No. 145) and as explained at the TRO hearing, Defendants do not believe that Plaintiffs are entitled to any form of preliminary relief. Defendants incorporate by reference and reiterate those arguments here. But accepting this Court's reasoning, its ruling does not justify a preliminary injunction with respect to any provision of the Executive Order other than Section 2(c). Plaintiffs are simply incorrect that the Court's TRO ruling can justify a preliminary injunction with respect to Section 6(a), Section 6(b), or the remaining, inward-facing provisions of Sections 2 and 6.

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the merits of a related motion for preliminary injunction." (citing *Office of Personnel Mgmt. v. Am. Fed'n of Gov't Emps.*, 473 U.S. 1301, 1305 (1985)).

A. Plaintiffs Lack Standing to Challenge Sections 6(a) and 6(b) Because They Have Failed to Identify Any Particularized and Judicially Cognizable Injury to Themselves That Arises from Enforcement of Those Sections

To have standing, Plaintiffs must demonstrate a "concrete and particularized" injury that is "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (citation omitted). However, "standing is not dispensed in gross." *Lewis v.* Casey, 518 U.S. 343, 358 n.6 (1996). Instead, "a plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *see Washington Envtl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013) ("A plaintiff must demonstrate standing for each claim he or she seeks to press and for each form of relief sought." (citation omitted)). Here, Plaintiffs lack standing to challenge either Section 6(a) or Section 6(b) of the Executive Order.

1. Section 6(a)

In order to obtain a preliminary injunction regarding Section 6(a), Plaintiffs must demonstrate that they have standing to challenge the provisions of that Section. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 233-35 (1990) (refusing to assess constitutionality of certain provisions of ordinance that no plaintiff had standing to challenge); *Covenant Media of SC, LLC v. City of N. Charleston*, 493 F.3d 421, 430 (4th Cir. 2007) ("[A] plaintiff must establish that he has standing to challenge each

provision of an ordinance by showing that he was injured by application of those provisions." (citing *FW/PBS*, 493 U.S. at 230)); *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 350 (6th Cir. 2007) (A plaintiff's standing with respect to one provision of an ordinance "does not magically carry over to allow it to litigate other independent provisions of the ordinance without a separate showing of an actual injury under those provisions."); *HonoluluTraffic.com v. FTA*, Civ. No. 11-00307, 2012 WL 1805484, at *2-*4 (May 17, 2012) (plaintiffs challenging Honolulu rail project for failure to consider site impacts were required to show standing with regard to each challenged site separately).

Plaintiffs lack standing to challenge Section 6(a) because they have failed to demonstrate any concrete and particularized injury to judicially cognizable interests of theirs that arise from the enforcement of the Executive Order's 120-day suspension of certain aspects of USRAP. To the contrary, Plaintiffs' briefing for both the TRO and their conversion motion focuses on the 90-day suspension-of-entry provision contained in Section 2(c) of the Executive Order and the alleged impact that the application of that provision would have on them.

For example, in its TRO papers Hawaii claimed that its university system would be harmed by the Executive Order because it would not be able to recruit and retain foreign students and faculty from the six countries subject to the suspension of entry provision. *See* Mem. in Supp. of Plaintiffs' Mot. for a Temporary

Restraining Order at 14-15 (ECF No. 65-1) ("Pl. TRO Mem."). Hawaii also claimed that the Executive Order would harm the State's economy and, in particular, would have a negative impact on tourism. *See id.* at 17-18.[9] The State's TRO briefing barely discussed the refugee provisions at all, relegating them to occasional references in passing, *see, e.g.*, *id.* at 12 (noting that Section 6(a) "suspends [USRAP] for a period of 120 days"), or vague predictions that the State's "small" program "to resettle and assist refugees" would be hindered, *id.* at 16; *see id.* at 48 (conclusory assertion that Hawaii would be forced to "abandon" its refugee program). Nor did the State submit any declarations identifying any injuries deriving specifically from or relating to any of the refugee provisions of the Executive Order. *See* ECF No. 66 (declarations in support of TRO motion).

Based on the claims Plaintiffs presented, this Court concluded that Hawaii has Article III standing "[f]or purposes of" the TRO because "(1) its universities will suffer monetary damages and intangible harms; (2) the State's economy is likely to

[9] Defendants reiterate that Plaintiffs' standing showing is conspicuously weak even with regard to these claims. *See* Def. TRO Mem. at 15-18. For example, Hawaii's declarations do not identify any particular persons whom it seeks to recruit or who have concrete plans to relocate to Hawaii, but are precluded from doing so within the next 90 days by the provisions of Section 2(c). *See id.* at 15-16. Nor do its declarations regarding the impacts on tourism provide evidence of a concrete and particularized injury. *See id.* at 17-18. These claims of possible future injury are insufficient to confer standing. *See Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1147 (2013).

suffer a loss of revenue due to a decline in tourism; (3) such harms can be sufficiently linked to the Executive Order; and (4) the State would not suffer the harms to its proprietary interests in the absence of implementation of the Executive Order." TRO at 21. Notably, none of these harms relied upon by the Court has any relation to the Executive Order's refugee provisions in Section 6 (let alone provisions regarding internal review of the Nation's screening and vetting procedures as discussed in Part III, *infra*).

For the reasons given in our brief opposing Plaintiffs' TRO motion, it is Defendants' position that Plaintiffs' submissions do not warrant relief even as to Section 2(c). But Plaintiffs have now moved to convert the TRO to a preliminary injunction, and have done nothing to address these deficiencies or otherwise supplement the record regarding their supposed injuries. Like their TRO briefs, Plaintiffs' conversion brief contains references to the 120-day suspension of certain aspects of USRAP, *see*, *e.g.*, Pl. Mem. at 4, 18-20, but otherwise offers no factual evidence, or even unsupported argument, about how that suspension will cause concrete and cognizable harm to the State. Instead, Hawaii merely reiterates its prior arguments that the Executive Order will impact tourism and the University of Hawaii

system, *see id.* at 12, even though neither of these impacts has anything at all to do with refugees.[10]

As for Dr. Elshikh's injury, Plaintiffs rely entirely on this Court's TRO to assert that he "can still easily make a showing 'of direct, concrete injuries to the exercise of his Establishment Clause rights.'" Pl. Mem. at 12 (quoting TRO at 40). Even if that were true, his showing has nothing at all to do with the Executive Order's refugee provisions, and Plaintiffs' reliance on this Court's prior ruling does not demonstrate otherwise. This Court's TRO focused on Dr. Elshikh's Declaration,[11] which in turn discussed the impacts of the suspension-of-entry provision.[12] That is

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[10] The only new "evidence" that Plaintiffs offer regarding harm comes in the form of a *New York Times* article about the impact of the Executive Orders on foreign student enrollment at American universities. *See* Pl. Mem. at 12 (citing Stephanie Saul, *Amid 'Trump Effect' Fear, 40% of Colleges See Dip in Foreign Applicants*, N.Y. Times, Mar. 16, 2017, Katyal Decl. Ex. C). That article, which does not even mention the University of Hawaii system other than a reference to this Court's TRO, says nothing about the impact of Executive Order No. 13,780's refugee provisions.

[11] The Court's TRO also cited Plaintiffs' Second Amended Complaint, but the referenced paragraphs—which are allegations only at this early stage of the proceedings—discussed the Executive Order in general terms. *See* TRO at 26 (citing SAC ¶¶ 88-90).

[12] *See* Elshikh Decl. ¶ 1 (ECF No. 66-1) (describing how Elshikh is "deeply saddened by the passage of the Executive Order *barring nationals from now-six Muslim majority countries from entering the United States*" (emphasis added)); *id.* ¶ 3 (describing Elshikh's claim that the Executive Order "prevent[s] people from *certain Muslim countries* from entering the United States" (emphasis added)); *id.* ¶ 4 (claiming the "revised travel ban will have a direct personal effect on me, my wife, and my children because it creates an obstacle to the ability of my mother-in-law"

not surprising, as Dr. Elshikh's mother-in-law is not a refugee, and the refugee provisions contained in Section 6 apply on a global basis without regard to religion or nationality. Dr. Elshikh has therefore failed to identify any concrete and particularized injury arising directly from the refugee provisions contained in Section 6.

Because neither Hawaii nor Dr. Elshikh has identified any injury that arises specifically from the refugee provisions contained in Section 6(a) of the Executive Order, neither has standing to challenge that Section. This Court therefore lacks jurisdiction over Plaintiffs' claims regarding Section 6(a) and, accordingly, should not issue a preliminary injunction that enjoins enforcement or implementation of that Section.

2. Section 6(b)

As set forth above, Plaintiffs do not provide any factual support to show that they have standing to challenge the 120-day suspension of certain aspects of USRAP. That is equally, if not even more, true with regard to the 50,000-refugee

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to visit); *id.* ¶ 6 ("President Trump's issuance of the *new Executive Order banning Syrian nationals* from entering the United States has directly impacted my family" (emphasis added)); *id.* ¶ 7 (claiming that "the travel ban targets Muslim citizens" and referring to Mosque members who "have family and friends *still living in the countries affected by* the revised travel plan" (emphasis added)); *id.* ¶ 8 (personal knowledge of community and Mosque members "who have immediate relatives in the *six designated countries*" (emphasis added)).

cap contained in Section 6(b). That provision is cited nowhere in Plaintiffs' Second Amended Complaint, TRO papers, or conversion brief, save for a cryptic reference to provisions that "limit and control the admission of refugees going forward," Pl. Mem. at 4 (citing Exec. Order No. 13,780 § 6(b)-(d)), and a note that "all of the provisions of Section 6 are components of an integrated process for 'suspend[ing]' and 'review[ing]' refugee admission rules," *see id.* at 18 (quoting Mem. in Supp. of Motion for Clarification at 4, ECF No. 227-1). Plaintiffs' complete silence on this point makes it impossible to understand how the operation of that provision could have injured them. Plaintiffs have therefore failed to carry their burden of identifying, for standing purposes, a "concrete [action] that threatens imminent harm to [their] interests" arising from Section 6(b) of the Executive Order. *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009).

B. Even if This Court Finds That Plaintiffs Have Standing to Challenge Section 6, They Are Unlikely to Succeed on the Merits of Their Claims Regarding Sections 6(a) or 6(b)

On the merits, Plaintiffs rely primarily on a bootstrapping argument that, because the Court has already issued a TRO as to Sections 2 and 6 based on Plaintiffs' prior briefing about Section 2, it should now grant a preliminary injunction regarding both Sections. But the mere fact that the Court has already entered a TRO does not perforce entitle Plaintiffs to a preliminary injunction—in particular as to both Sections 6(a) and 6(b).

1. Section 6(a)

As noted above, the 120-day suspension of refugee admissions contained in Section 6(a) operates on a global basis without regard to religion or nationality. Plaintiffs, however, fail to address this point, other than referring to provisions contained in the prior Executive Order, as well as "the factual record [that they] have developed in this case," to argue generally that Section 6 "was motivated by discriminatory animus toward Muslims." Pl. Mem. at 18; *see id.* at 18-20. But on review, their "factual record" fails to support this conclusion.

For their "record," Plaintiffs argue that the changes made to the new Executive Order were merely a superficial attempt to "sanitize" or "water[ ]-down" the prior Order. *See id.* at 18-20. The various public statements on which Plaintiffs rely do not constitute a record that is even relevant to Section 6, much less facts on which this Court should rely. To the contrary, a substantive comparison of Executive Order No. 13,769 to Executive Order No. 13,780—including, in particular, a comparison of the refugee provisions—reveals that the Executive Branch revised the new Executive Order to avoid any Establishment Clause concerns. At a general level, Executive Order No. 13,780 involved a detailed review of the national security risks

that pose the greatest threats to the nation, and it then provided targeted measures to address those security risks in a religiously neutral manner.[13]

Indeed, the New Executive Order *eliminated* preferences for religious minorities and the indefinite suspension that applied to Syrian refugees. *See Sarsour v. Trump*, No. 17-cv-00120-AJT-IDD, slip op. at 18 (E.D. Va. Mar. 24, 2017) ("The text of [Executive Order No. 13,780], unlike that of [Executive Order No. 13,769], makes no mention of religion as a criterion for benefits or burdens") (attached hereto). As two district courts have now concluded, these changes are substantial and reflect the Executive's "response to judicial decisions that identified problematic aspects of [Executive Order No. 13,769] and invited revisions." *Sarsour*, slip op. at 23; *see Wash. v. Trump*, Case No. C17-0141JLR, 2017 WL 1045950, at *3 (W.D. Wash. Mar. 16, 2017) ("The Court agrees with Defendants that the Ninth Circuit implicitly invited Defendants to attempt to 'rewrite' [Executive Order 13,769] 'to make appropriate distinctions' and 'eliminate constitutional defects.'" (quoting

[13] The entire Executive Order, including Section 2, is neutral with respect to religion. Section 1 of the Executive Order lays out detailed findings of fact with respect to the six countries covered by the temporary travel suspension, and critically, Section 1(g) of the Order excludes Iraq, a Muslim-majority country covered by Executive Order No. 13,769, from the scope of this Order because, "since Executive Order 13769 was issued, the Iraqi government has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal." Exec. Order No. 13,780 § 1(g).

Wash. v. Trump, 847 F.3d 1151, 1167 (9th Cir. 2017)). Based on "the real substantive differences between the two orders," *Sarsour*, slip op. at 27, there is no basis to enjoin enforcement of Section 6(a).[14]

For this reason, Plaintiffs' citation to *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), is inapposite. *See* Pl. Mem. at 16-17. In that case, there was no evidence that the challenged ordinance was enacted for any reason other than for religious purposes, notwithstanding the ordinance's non-religious applications. 508 U.S. at 539-40. Here, by contrast, the Executive Order's refugee provisions were substantially modified in order to address constitutional concerns.[15] As a result, this Court is not at all "faced with a facially discriminatory order" and these changes satisfy the Supreme court's instruction for "[d]istrict courts [to]

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[14] Defendants also wish to make the Court aware of a recent development in the appeal of *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017). In that case, Judges Bybee, Kozinski, Callahan, Bea, and Ikuta issued three separate opinions dissenting from the denial of reconsideration *en banc* of a panel decision affirming the denial of the Government's motion to stay the preliminary injunction issued by the Washington district court against the prior Executive Order. *See id.* (panel decision). A copy of the slip opinion containing the dissents from the denial of reconsideration *en banc* is attached hereto.

[15] Even if *Lukumi* were applicable, it does not address the requirement that this Court limit its injunctive relief to those portions of the Executive Order that Plaintiffs can show would cause them a concrete and particularized injury. *See Lewis*, 518 U.S. at 358 n.6; *DaimlerChrysler*, 547 U.S. at 352; *Washington Envtl. Council*, 732 F.3d at 1139; Part II.A, *supra*.

adjust[ ] preliminary relief to take account of genuine changes in constitutionally significant conditions." *Sarsour*, slip op. at 23 (denying a motion to enjoin the enforcement of Executive Order No. 13,780 as violating Establishment Clause) (quoting *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 848 (2005)); *Wash. v. Trump*, 2017 WL 1045950, at *3 (denying Washington's motion to enforce TRO of prior Executive Order against Executive Order No. 13,780 because of "substantial distinctions" in implementation and rationale between the Orders).

2. Section 6(b)

Plaintiffs present no argument on the merits *at all* regarding the implementation of the 50,000-person refugee cap contained in Section 6(b). Although Plaintiffs cite various statements regarding refugees, describe the provisions of Section 6 as being "components of an integrated process," and argue that the Executive Order was motivated by animus, *see* Pl. Mem. at 18-20, they make no effort whatsoever to tie any of their Establishment Clause claims to the specific provisions of Section 6(b). It is therefore impossible to ascertain what argument they are presenting on this point, to the extent they are even challenging this provision at all. No other court addressing either Executive Order No. 13,780 or the revoked Order has enjoined Section 6(b) (or the refugee cap contained in the prior

Order). This Court should likewise decline to enjoin implementation of that provision.

III. At a Minimum, This Court Should Not Enjoin Those Portions of Sections 2 and 6 That Relate to Governmental Operations

At the very least, this Court should not enjoin the remaining, internal-facing provisions of Sections 2 and 6 of Executive Order No. 13,780, including the following:

- Section 2(a) (requiring the Secretary of Homeland Security to conduct a worldwide review to ensure that foreign governments are providing whatever information may be necessary to ensure that individuals seeking visas or other immigration benefits are not a security or public safety threat);
- Section 2(b) (requiring the preparation and submission to the President of a report based upon the review described in Section 2(a));
- Section 2(d) (providing that the Secretary of State shall request that foreign governments begin to supply additional, needed information about their nationals);
- Section 2(e) (instructing the Secretary of Homeland Security to submit to the President, after the period in Section 2(d) expires, recommendations regarding future restrictions on entry of appropriate

categories of foreign nationals of countries that have not provided the requested information);

- Section 2(f) (authorizing the Secretary of Homeland Security to make additional recommendations to the President following the initial recommendations);
- Section 2(g) (providing that the Secretaries of State and Homeland Security shall submit various joint reports on their progress in implementing the provisions of the Order);
- Portions of Section 6(a) to the extent those portions call for review of the USRAP application and adjudication process, including the implementation of additional procedures; and
- Section 6(d) (encouraging the coordination of refugee placement with state and local jurisdictions).

These provisions involve only internal governmental activities (such as conducting reviews and updating policies) or inter-governmental diplomatic activities. They cannot have any immediate impact on Plaintiffs.

Plaintiffs clearly lack standing to challenge these provisions of the Executive Order because they have failed to identify any injury that they have suffered or would suffer that arises from the implementation of these specific provisions.

Instead, all they offer is a bare-bones assertion that "the remainder of Section 2 is designed to help the President extend his discriminatory ban on entry to additional countries and for additional periods of time." Pl. Mem. at 18. Even if there were factual support for this assertion—Plaintiffs offer none—the President has not yet taken any action to extend the provisions of the Executive Order. And any extension could undermine this Court's rationale for issuing a TRO, especially if applied to countries that do not have a majority-Muslim population. Plaintiffs' claims, if any, are therefore speculative and hypothetical, *Lujan*, 504 U.S. at 560-61; and they certainly are not ripe, *see Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (quotation omitted)).[16]

Plaintiffs also claim that it would be "particularly illogical to enjoin only parts of the ban" because these provisions are, in Plaintiffs' view, "inextricably linked" to the suspension of entry provision in Section 2(c). Pl. Mem. at 17. That argument, of course, ignores that Plaintiffs themselves seek to "enjoin only parts of" the

[16] Even if Plaintiffs somehow had standing, they have made no attempt to demonstrate that they will be irreparably harmed by the implementation of these specific provisions. That, too, is fatal to their attempt to enjoin the implementation of these provisions. *See Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988) (to secure an injunction, plaintiffs "must do more than merely allege imminent harm sufficient to establish standing"; they "must *demonstrate* immediate threatened injury" that only "preliminary injunctive relief" can prevent).

Executive Order. Moreover, as a matter of both law and logic, the provisions are severable. As to the former, the Executive Order contains an express severability provision. *See* Exec. Order No. 13,780 § 15.[17] As to the latter, an internal review of procedures obviously can take place independently of the 90-day suspension-of-entry provision (though doing so would place additional burdens on the Executive Branch, which is one of the several reasons for the 90-day suspension). *See* Exec. Order No. 13,780 § 2(c).

Further, limiting the scope of any injunction at this stage to permit these operational activities of the Government to proceed would be consistent with the goals expressed in this Court's previous Order. As the Court explained, it did not intend the TRO to suggest that it "forever" barred "any effort by [the Executive Branch] to address the security concerns of the nation." TRO at 38. Yet precluding the Secretary of Homeland Security or the Secretary of State from engaging in these activities limits the ability of those officers to fulfill their duty to assess future security concerns and identify the means to address such concerns consistent with the Court's recognition that "context may change during the course of litigation." *Id.* at 39.

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[17] That provision provides, in relevant part, that "[i]f any provision of this order . . . is held to be invalid, the remainder of this order . . . shall not be affected thereby." Exec. Order No. 13,780 § 15(a).

Plaintiffs characterize Defendants' concern about the application of an injunction to these provisions as "meritless." Pl. Mem. at 20. Instead, Plaintiffs put their own gloss on the current TRO (and the preliminary injunction that they are seeking), asserting that the TRO "merely prevents Executive [B]ranch action under the auspices of an illegal Executive Order" and noting that "[t]he Government could engage in appropriate consultations and an appropriate review of the immigration system as a whole independent of this Order." Pl. Mem. at 21. Defendants, however, do not have the luxury of defining for themselves the scope of this Court's orders; as it stands now, the Court's TRO does not contain a carve-out for "appropriate consultations," as Plaintiffs put it. Plaintiffs' concession acknowledges the basic inappropriateness of an injunction against internal governmental communications and activities, most if not all of which could take place in the absence of the Executive Order but the status of which is now, at the very least, unclear in view of the current TRO.

CONCLUSION

For the reasons stated herein, in Defendants' opposition to Plaintiffs' TRO motion, and by Defendants at the TRO hearing, the Court should not enter a preliminary injunction. To the extent that the Court issues a preliminary injunction, it should limit the scope of that preliminary injunction to particular identifiable aliens affected by the Executive Order to the extent that they have ripe claims and the

application of the Order causes irreparable injury to judicially cognizable rights of the Plaintiffs. In the alternative, the Court should limit the scope of a preliminary injunction to Section 2(c) of the Executive Order. At the very least, the Court should not enjoin the inward-facing provisions of Sections 2 and 6.

Dated: March 24, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of March, 2017, by the methods of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

LINDA SARSOUR, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Civil Action No. 1:17cv00120 (AJT/IDD)
DONALD J. TRUMP, *et al.*,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

Presently pending before the Court is Plaintiffs' "Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction" [Doc. No. 13] (the "Motion"). The Court held a hearing on the Motion on March 21, 2017, following which it took the Motion under advisement. Upon consideration of the Motion, the memoranda in support thereof and in opposition thereto, the arguments of counsel at the hearing held on March 21, 2017, and for the reasons set forth below, the Motion is DENIED.[1]

I. BACKGROUND

The Plaintiffs seek an emergency order enjoining the enforcement of Executive Order 13,780 ("EO-2" or the "Order"), issued by President Donald J. Trump ("President Trump" or the "President") on March 6, 2017 and scheduled to go into effect on March 16, 2017. Subject to a number of enumerated limitations, exemptions, and waivers, the Order suspends entry into the United States by nationals of six countries for 90 days and by all refugees for 120 days. EO-2

[1] Both parties have urged the Court to decide the Motion on the merits. In particular, the Plaintiffs claim that given the nature of their Establishment Clause injuries, the harm inflicted by EO-2 is not confined to any particular provision and persists so long as any of its provisions continue to operate. Given the nature of Plaintiffs' claims, the temporary and limited nature of the injunctions already issued, and the facts that appear to be particular to these Plaintiffs, the Court concludes that there remains a justiciable controversy ripe for adjudication and will therefore decide the Motion on its merits.

explicitly rescinds Executive Order 13,769 ("EO-1"), which similarly temporarily barred nationals from certain countries from obtaining visas or entering the United States but did not contain the exemptions and waivers now in EO-2 and also included certain religious preferences no longer in EO-2.

The ultimate issue in this action is whether the President exceeded his authority, either as delegated to him by Congress or as provided by the Constitution. But because Plaintiffs seek at the beginning of this case the relief they would ultimately obtain at the end of the case should they prove successful, Plaintiffs must show not only that (1) they are likely to succeed on the merits of their claim that EO-2 exceeded the President's authority, but also that (2) without immediate injunctive relief, Plaintiffs face imminent irreparable harm; (3) the balance of equities, including the balance of hardships, weigh in their favor; and (4) issuance of the requested injunction on an emergency basis is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

A. Factual History

1. Executive Order No. 1

On January 27, 2017, President Trump issued Executive Order 13,769, titled "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 8977 (Jan. 27, 2017). EO-1 immediately suspended immigrant and nonimmigrant entry into the United States for 90 days to aliens from Iraq, Iran, Libya, Sudan, Somalia, Syria, and Yemen. EO-1 also suspended the U.S. Refugee Admissions Program ("USRAP") for 120 days, *id.* § 5(a), and suspended the entry of all refugees from Syria indefinitely, *id.* § 5(c). Furthermore, in screening refugees, government bodies were directed "to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority

religion in the individual's country of nationality." *Id.* § 5(b). The order provided for "case-by-case" exceptions to the 120-day refugee suspension. *Id.* § 5(f).

A group of plaintiffs including the State of Washington and the State of Minnesota challenged EO-1 on both constitutional and statutory grounds in the United States District Court for the Western District of Washington. *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). On February 3, 2017, the district court issued a nationwide injunction halting enforcement of the operative portions of that order, although it did not provide a specific basis for finding that the plaintiffs were likely to succeed on the merits. *Id.* On February 9, 2017, the United States Court of Appeals for the Ninth Circuit denied the defendants' emergency appeal to stay the district court's order, which it construed as a preliminary injunction. *Washington v. Trump*, 847 F.3d 1151, 1165-66 (9th Cir. 2017). The Ninth Circuit found that the defendants had not demonstrated a likelihood of success on the merits as to the plaintiffs' procedural due process claim, but it reserved judgment on the plaintiffs' Establishment Clause and Equal Protection Clause claims, noting that they "raise[d] serious allegations and present[ed] significant constitutional questions." *Id.* at 1168.

Separately, on February 13, 2017, this Court enjoined the enforcement of section 3(c) only as to Virginia residents and students enrolled in state educational institutions located in the State of Virginia. *Aziz v. Trump*, No. 1:17-cv-116, --- F. Supp. 3d ---, 2017 WL 580855 (E.D. Va. Feb. 13, 2017) (Brinkema, J.). This Court ruled that the plaintiffs had clearly demonstrated a likelihood of success on the merits of their Establishment Clause claim, but it did not address their other claims. That injunction has not been appealed.

2. Executive Order No. 2

Responding to the successful legal challenges to EO-1, on March 6, 2017, President Trump issued EO-2. EO-2 explicitly rescinds EO-1 and was scheduled to go into effect on March 16, 2017 at 12:01 a.m. EDT. EO-2 has the same title as EO-1 and has many of the same stated policies and purposes. It also has substantial differences, as discussed in detail below. Briefly summarized, EO-2 removes Iraq from the list of designated countries whose nationals are covered by the Order, eliminates the indefinite suspension of all refugees from Syria, exempts otherwise covered persons who are located in the United States or who had appropriate travel documents as of the date on which EO-1 was issued, provides a list of categories where otherwise covered persons qualify for consideration of a waiver, and removes any religious-based preferences for waivers. The Order also contains substantially more justification for its national security concerns and the need for the Order, including why each particular designated country poses specific dangers.

Before the Order's effective date, the State of Hawaii and a United States citizen challenged the Order in the United States District Court for the District of Hawaii. On March 15, 2017, the Hawaii court issued a nationwide temporary restraining order ("TRO") enjoining the enforcement of sections 2 and 6 of EO-2. *Hawai'i v. Trump*, No. 1:17-cv-00050, 2017 WL 1011673 (D. Haw. Mar. 15, 2017). At the hearing in this action before this Court on March 21, 2017, Defendants represented that they expected the District of Hawaii court to extend the TRO, with their consent, until that court decides the pending motion for a preliminary injunction, a hearing on which has been scheduled for March 29, 2017.[2] The TRO has not been appealed.

[2] The TRO did not have an expiration date, but it will expire on March 29, 2017, unless extended. *See* Fed. R. Civ. P. 65(b)(2) ("The order expires at the time after entry—not to exceed 14 days—that the court sets . . . ."). Where the court has not set a specific time of expiration, the order simply expires fourteen days after entry.

A separate group of six individuals and three organizations challenged EO-2 in the United States District Court for the District of Maryland, alleging that it inflicted stigmatizing injuries as well as various other more particularized forms of harm. In an order signed on March 15, 2017 but entered on March 16, 2017, the Maryland court issued a nationwide preliminary injunction enjoining the enforcement of section 2(c) of EO-2. *Int'l Refugee Assist. Proj. v. Trump*, No. 8:17-cv-00361-TDC, --- F. Supp. 3d ---, 2017 WL 1018235 (D. Md. Mar. 16, 2017).

Litigation in the Western District of Washington also continues. In that case, Plaintiffs filed an emergency motion to enforce the court's February 3, 2017 preliminary injunction of EO-1. The district court rejected that motion, finding that EO-2 did not violate the court's prior preliminary injunction because EO-2 is substantively different from EO-1. Order Denying Washington's Emergency Motion to Enforce the Preliminary Injunction, *Washington v. Trump*, No. C17-0141JLR (W.D. Wash. Mar. 16, 2017), ECF No. 163.

By way of summary, at this point, the District of Hawaii court's TRO remains in effect as to sections 2 and 6 of the Order until March 29, 2017, and the District of Maryland court's preliminary injunction remains in effect as to section 2(c) of the Order. All other sections of EO-2 are in force at this time. Plaintiffs in this litigation ask this Court to enjoin the enforcement of EO-2 in its entirety.

B. Plaintiffs Who Move for Emergency Relief

All Plaintiffs are Muslims who are presently residing in various locations across the country and claim that they have been harmed by the issuance of EO-2 in a variety of ways. Among the injuries they allege is the harm created by a stigma against Muslims living in the United States. Specifically, they claim that as a result of Defendants' conduct, beginning with the initial announcement of the "Muslim Ban," Defendants have promoted views that (1)

disfavor and condemn their religion of Islam; (2) marginalize and exclude Muslims, including themselves, based on the claim that Muslims are disposed to commit acts of terrorism; (3) endorse other religions and nonreligion over Islam; (4) Muslims are outsiders, dangerous, and not full members of the political community; and (5) all non-adherents of Islam are insiders and therefore favored. Amended Complaint [Doc. No. 11] ("AC") ¶¶ 20-38. In addition, Plaintiffs allege a range of other injuries based on each's particular status in the United States and each's relationships with persons outside of the United States. The following eight Plaintiffs have joined in the Motion.[3]

Plaintiffs Basim Elkarra, Hussam Ayloush, and Adam Soltani are United States citizens who allegedly "are no longer able to bring their family members from Syria and Iran to visit them in the United States as a direct result of the Revised Muslim Ban [EO-2] as they otherwise would." Plaintiffs' Motion ("Pls.' Mot.") 6. They further allege that, as "prominent civil rights and grassroots activists," they "have had to change their conduct adversely in that they have been required to assist and advocate on behalf of Muslims targeted or stigmatized by the First Muslim Ban [EO-1], push back against the anti-Muslim sentiment fomented and legitimized by Defendants, and defend their religion as a religion of peace on national media outlets and through grassroots efforts." *Id.*

Plaintiff John Doe No. 6 is also a United States citizen. He recently filed a marriage petition for his Sudanese wife currently residing outside of the United States, which he claimed would be "subjected to a more onerous application process that will require her to make heightened showings to obtain a waiver from the Revised Muslim Ban [EO-2], pursuant to Sec. 3(c)(iv) of the Revised Muslim ban, based solely on her Sudanese national origin." *Id.* 6-7. That

[3] Plaintiffs John Doe No. 5 is a Sudanese national and lawful permanent resident of the United States who initially joined in the presently pending Motion; however, on March 21, 2017, he withdrew his Motion. [Doc. No. 31.]

petition was approved while this Motion was pending, however, [*see* Doc. No. 31], and her visa application is now pending.

Plaintiffs John Doe Nos. 7 and 8 are lawful permanent residents of the United States. John Doe No. 7 is a Syrian national, and John Doe No. 8 is a Sudanese national. John Doe No. 7 filed a marriage petition for his wife, which is currently pending. John Doe No. 8 also filed a marriage petition for his wife, which was approved, but her visa application remains pending. These three Plaintiffs allege that under EO-2, "their wives' visa applications will be subject to a more onerous application process that will require [them] to make heightened showings to obtain a waiver from the Revised Muslim Ban." *Id.* 7.

Plaintiffs John Doe Nos. 2 and 3 are students of Somali and Yemeni national origin who were issued single-entry F-1 student visas which expire upon completion of their studies. They allege that they intended to travel outside of the United States but that, if they do so now, they "will be subjected to a more onerous application process that will require them to make heightened showings to obtain a waiver." *Id.* They claim that this inability to travel imposes a hardship because they are additionally deprived of the opportunity to see their families, and they may not be able to stay in student housing during school breaks. *Id.* 7-8.

C. Procedural History

President Trump issued EO-1 on January 27, 2017. Three days later, on January 30, 2017, Plaintiffs filed their Complaint for Injunctive and Declaratory Relief [Doc. No.1] against President Trump, Secretary of the Department of Homeland Security John F. Kelly, the U.S. Department of State, and the Director of National Intelligence.[4] Then, on March 13, 2017,[5] after

[4] On February 3, 2017 and February 27, 2017, three separate motions to intervene were filed by *pro se* movants Janice Wolk Grenadier [Doc. No. 2], Raquel Okyay [Doc. No. 4], and Vincent A. Molino [Doc. No. 8]. The Court denied each of these motions. [Doc. Nos. 5, 10.]

President Trump's March 6, 2017 issuance of EO-2, which explicitly rescinded EO-1, Plaintiffs filed their Amended Complaint for Injunctive and Declaratory Relief [Doc. No. 11] as well as their presently pending "Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction" [Doc. No. 13].

II. LEGAL STANDARD

Federal Rule of Civil Procedure 65 authorizes federal courts to issue temporary restraining orders and preliminary injunctions. "The standard for granting either a TRO or a preliminary injunction is the same." *Moore v. Kempthorne*, 464 F. Supp. 2d 519, 525 (E.D. Va. 2006) (citation omitted) (internal quotation marks omitted). Both are "extraordinary remedies involving the exercise of a very far-reaching power to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola*, 245 F.3d 335, 339 (4th Cir. 2001). The movants bear the burden to establish that (1) they are likely to succeed on the merits of their case; (2) they are likely to suffer irreparable harm in the absence of injunctive relief; (3) the balance of the equities tips in their favor; and (4) an injunction would be in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *Manning v. Hunt*, 119 F.3d 254, 263 (4th Cir. 1997); *see also Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013).

III. ANALYSIS

A. Standing

In order to obtain the requested injunction, Plaintiffs must first demonstrate that they have standing to challenge EO-2. Defendants dispute that any of the Plaintiffs have standing. "Standing doctrine functions to ensure, among other things, that the scarce resources of the

[5] In their Motion, Plaintiffs incorrectly claim that they filed their Amended Complaint on March 10, 2017. *See* Def.'s Mot. 8. The Amended Complaint is dated "March 13, 2017," *see* AC 53, and the Court's CM/ECF electronic case filing system also indicates that the document was electronically filed on March 13, 2017.

federal courts are devoted to those disputes in which the parties have a concrete stake." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191. To establish standing, a plaintiff must set forth specific facts to demonstrate that (1) he has "suffered an 'injury in fact' . . . which is (a) concrete and particularized . . . and (b) 'actual or imminent, not conjectural or hypothetical"; (2) there exists "a causal connection between the injury and the conduct complained of"; and (3) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). Plaintiffs must demonstrate standing for every claim, but a claim is justiciable if even only one Plaintiff has standing to raise it. *Bostic v. Schaefer*, 760 F.3d 352, 370-71 (4th Cir. 2014).

Because of the nature of Plaintiffs' statutory and constitutional claims, their showing of standing may be based on subjective, non-economic, or intangible injuries. *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997) ("[R]ules of standing recognize that noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable."); *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 605 (4th Cir. 2012) ("[P]laintiffs have been found to possess standing when they are 'spiritual[ly] affront[ed]' as a result of 'direct' and 'unwelcome' contact with an alleged religious establishment within their community." (quoting *Suhre*, 131 F.3d at 1086-87)); *Bostic*, 760 F.3d at 372 (Equal Protection Clause challenges, like Establishment Clause challenges, can be premised on "stigmatic injury stemming from discriminatory treatment."). However, the allegation of injury in the form of a stigma alone is insufficient to support standing; there must also be a "cognizable injury caused by personal contact [with the offensive conduct]." *Suhre*, 131 F.3d at 1090; *see also Moss*, 683 F.3d at 607 (finding standing where plaintiffs alleged "outsider" status after having received a letter from

their school district promoting a "course of religious education [with] Christian content" and "prayers and other Christian references [at] school events").

In this case, all Plaintiffs claim that in addition to the stigma that the Order has imposed on them as Muslims, they have suffered "cognizable injury caused by personal contact" because EO-2 prevents or impermissibly burdens their ability to (1) reunite with their foreign national spouses or other relatives; (2) travel internationally without fear of forfeiting their own visas; (3) renew their visas without being subjected to a heightened standard of review; and (4) attend other life activities without the need to combat the pernicious effects of EO-2 through religious advocacy and outreach. Based on these alleged injuries and the facts that have been presented, the Court finds for the purposes of the Motion that Plaintiffs have made a sufficient showing that they have standing to challenge EO-2.

B. Plaintiffs' Likelihood of Success on the Merits

Section 2(c) of EO-2 suspends the entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen for 90 days, subject to the limitations, exemptions, and waivers in sections 3 and 12. Section 6 of EO-2 suspends decisions on applications for refugee status worldwide for 120 days, subject to waivers issued under section 6(c). Plaintiffs seek to enjoin EO-2 in its entirety on the grounds that all or parts of the Order exceed the President's statutory or constitutional authority and that, in any event, the Order, as a whole, has the unconstitutional effect of imposing upon them a stigma based on their status as Muslims.

"[A] party seeking a preliminary injunction . . . must clearly show that it is likely to succeed on the merits."[6] *Dewhurst v. Century Alum. Co.*, 649 F.3d 287, 290 (4th Cir. 2011).

[6] Plaintiffs claim that "a showing of likelihood of success on the merits is required 'only if there is no imbalance of hardships in favor of the plaintiff.'" Pls.' Mot. 12 (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 808 (4th Cir. 1991)). After the Supreme Court's decision in *Winter* in 2008, the Fourth Circuit concluded that "[o]ur . . . standard in several respects [as stated in *Direx Israel, Ltd.*] now stands in fatal tension with the Supreme

The "requirement . . . is far stricter than . . . [a] requirement that the plaintiff demonstrate only a grave or serious *question* for litigation." *Real Truth About Obama, Inc. v. F.E.C.*, 575 F.3d 342, 346-47 (4th Cir. 2009), *judgment vacated on other grounds*, 559 U.S. 1089 (2010), and *adhered to in relevant part*, 607 F.3d 355 (4th Cir. 2010).[7] In determining whether the Plaintiffs have made the required showing, the issue is not whether EO-2 is wise, necessary, under- or over-inclusive, or even fair. It is not whether EO-2 could have been more usefully directed to populations living in particular geographical areas presenting even greater threats to national security or even whether it is politically motivated. Rather, the core substantive issue of law, as to which Plaintiffs must establish a clear likelihood of success, is whether EO-2 falls within the bounds of the President's statutory authority or whether the President has exercised that authority in violation of constitutional restraints.

1. Plaintiffs' Claim that EO-2 Violates the Immigration and Nationality Act (Count IV[8])

Plaintiffs claim that section 2(c) of EO-2 bars entry into the United States based on nationality and therefore violates the Immigration and Nationality Act of 1952 ("INA"), Pub. L. No. 82-414, 66 Stat. 163, 8 U.S.C. §§ 1101-1537 (2012). Plaintiffs argue that 8 U.S.C. § 1152(a)(1)(A) ("Section 1152") bars EO-2. Defendants claim that the President's broad

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Court's 2008 decision in *Winter*. . . . [T]he . . . balance-of-hardship test may no longer be applied in granting or denying preliminary injunctions in the Fourth Circuit." *Real Truth About Obama, Inc. v. F.E.C.*, 575 F.3d 342, 346-47 (4th Cir. 2009), *judgment vacated on other grounds*, 559 U.S. 1089 (2010).

[7] The Supreme Court vacated the Fourth Circuit's opinion in *Real Truth About Obama, Inc.* following its opinion in *Citizens United v. F.E.C.*, 558 U.S. 310 (2010), and remanded to the Fourth Circuit "for 'further consideration in light of *Citizens United* and the Solicitor General's suggestion of mootness.'" *Real Truth About Obama, Inc. v. F.E.C.*, 607 F.3d 355 (4th Cir. 2010) (quoting *Real Truth About Obama, Inc. v. F.E.C.*, 559 U.S. 1089 (2010)). In a published order issued per curiam, the Fourth Circuit reissued Parts I and II of its earlier opinion, "stating the facts and articulating the standard for the issuance of preliminary injunctions," and remanded the case to the district court for further consideration in accordance with the Supreme Court's directive.

[8] Plaintiffs' labelling of this claim as "Count V" in their Amended Complaint appears to be a typo, as there is no Count IV. *See* AC 50.

authority under 8 U.S.C. § 1182(f) ("Section 1182(f)") to bar entry of "any aliens or class of aliens" is not restricted by Section 1152.[9]

Congress has the exclusive constitutional authority to create immigration policies. *See Galvan v. Press*, 347 U.S. 522, 531 (1954).[10] In exercising that authority, Congress has enacted (and repealed) a wide variety of immigration statutes over the years, with a wide variety of restrictions and authorizations. As a result, the current version of the INA, a comprehensive statute governing immigration and the treatment of aliens originally passed in 1952, is a legislative rabbit warren that is not easily navigated.

Section 1182(a)(3)(B) identifies those aliens seeking to enter the United States who are "inadmissible" because of certain identified activities related to terrorism. These aliens include, with certain exceptions, aliens who have engaged in "terrorist activities," are reasonably believed to be engaged or "likely to engage after entry in any terrorist activities," are representatives of a terrorist organization, endorse or espouses terrorist activities or persuade others to do so, have received military-type training from a terrorist organization, or are the spouses or children of an alien who is inadmissible. 8 U.S.C. § 1182(a)(3)(B)(i). "Terrorist activity" is defined broadly. *See id.* § 1182(a)(3)(B)(iii).

In addition to the specific criteria for inadmissibility set forth in Section 1182(a)(3)(B), Section 1182(f), which was also passed in 1952, delegates broad authority to the President to bar entry into the United States of "any aliens or class of aliens." More specifically, Section 1182(f) provides that:

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[9] The Court will first assess Plaintiffs' statutory claims pursuant to its obligation to avoid constitutional rulings whenever possible. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

[10] Defendants contend that the President has Article II authority, as well as statutory authority, to issue EO-2. Given the Court's ruling, there is no need to consider the merits of Defendants' Article II contentions.

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

Id. § 1182(f). 8 U.S.C. § 1185(a) ("Section 1185(a)"), passed in 1978, further delegates authority to the President:

> Unless otherwise ordered by the President, it shall be unlawful for an alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.

Id. § 1185(a)(1). President Trump relies explicitly on his authority under Section 1182(f) and Section 1185(a) to suspend the entry of all nationals from the six designated countries for 90 days as well as to suspend the entry of all refugees under the United States Refugee Admissions Program for 120 days. EO-2 §§ 2(c), 6.

In 1965, Congress amended the INA to prohibit certain types of discrimination in connection with the issuance of immigrant visas. Section 1152 provides:

> No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence.

8 U.S.C. § 1152(a)(1)(A). Plaintiffs rely centrally on this provision to argue that the President's exercise of his authority under Sections 1182(f) and 1185(a) is limited and restricted by the non-discrimination provision in Section 1152.

8 U.S.C. § 1201(h) ("Section 1201(h)") is also relevant. In pertinent part, it provides:

> Nothing in [the INA] shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted the United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this chapter, or any other provision of law.

Id. § 1201(h). So as to leave no doubt as to the scope of entitlement granted by the issuance of an immigrant visa, Congress mandated that the text of this provision "appear upon every visa application." *Id.*

Plaintiffs urge this Court to conclude that section 2(c) of EO-2 discriminates on the basis of nationality and is therefore prohibited by Section 1152. Plaintiffs argue in this regard that because this non-discrimination section was added after Section 1182(f), Congress intended that it supersede Section 1182(f) to the extent the two sections conflict. Plaintiffs argue in support of this position that, historically, presidents have used Section 1182(f) only to prohibit the issuance of visas to classes of applicants that are not subject to Section 1152. *See* Pls.' Mot. 27-28. Plaintiffs also contend that because, when applicable, Section 1152(a) applies to any assessment of the terrorism related grounds for inadmissibility under Section 1182(a)(3)(B), Section 1152(a)'s non-discrimination restrictions must also be read to apply to the President's exercise of authority under Section 1182(f) and 1185(a), at least in so far as that authority is exercised to bar entry based on terrorism concerns. For all these reasons, Plaintiffs claim that Congress foreclosed the President's ability to make national security determinations on the basis of criteria prohibited under Section 1152.

In response to Plaintiffs' position, Defendants see presidential authority and authorizations in Sections 1182(f) and 1185(a) unaffected by Section 1152 and contend that the President's authority under those sections "comfortably encompass the Order's temporary suspension of entry of aliens from six countries." Defendant's Memorandum in Opposition to Plaintiffs' Motion [Doc. No. 22] ("Defs.' Mem. Opp'n") 17. They contend, in this regard, that Section 1185(a) was enacted after Section 1152 and that, in any event, Section 1152 prohibits discrimination only in the issuance of an *immigration* – not a *non*-immigration – visa "in the

ordinary process of visas and admissions." *Id.* 18. Section 1152 "does not purport to, and has never been interpreted to restrict, the President's longstanding authority [under Sections 1182(f) or 1185(a)]." *Id.* Defendants further contend that since most of the aliens that Plaintiffs claim will be affected by EO-2 – students, employees, tourists, refugees, and family – would seek to obtain *non*-immigrant visas, any limitations imposed by Section 1152 would not extend to the President's authority to bar entry of that class of aliens seeking non-immigration visas.

In construing the proper scope of the President's statutory authority, the Court has reviewed the text and structure of the INA as a whole and, specifically, the practical, operational relationship each of the above referenced provisions has with the others. Based on that analysis, the Court concludes, at a minimum, that Section 1152's non-discrimination restrictions, which apply in connection with the issuance of immigrant visas, do not apply to the issuance or denial of non-immigrant visas or entry under Section 1182(f).[12]

The Court also has substantial doubts that Section 1152 can be reasonably read to impose any restrictions on the President's exercise of his authority under Sections 1182(f) or 1185(a). Under those sections, the President has unqualified authority to bar physical entry to the United States at the border. Sections 1182(f) and 1152(a) deal with different aspects of the immigration process, and Section 1201(h) makes clear that while clearly related, the process of issuing a visa, and the rules and regulations related thereto, involves an aspect of the immigration process that is separate and distinct from the process of actually permitting entry into the country. There is nothing in the legislative scheme to suggest that Congress intended Section 1152 to restrict the exercise of the President's unqualified authority under Section 1182(f) with respect to a

[12] The District of Maryland court attempted to reconcile these seemingly contradictory provisions of the INA in *International Refugee Assistance Project*. There, the court concluded that Section 1152 bars the President from discriminating on the basis of nationality in the issuance of immigrant visas only. *Int'l Refugee Assist. Proj.*, 2017 WL 1018235, at *10.

completely distinct aspect of the immigration process. To do so would appear to make Section 1201(h) all but meaningless. Likewise, the Court sees little merit to Plaintiffs' argument that because there are specific grounds for inadmissibility in Section 1182(a)(3)(B) based on terrorist activities, the President is foreclosed from barring entry of "aliens or classes of aliens" under Section 1182(f) based on national security concerns related to terrorism. Nothing in the text of Section 1182(a)(3)(B) or any other provision of the INA suggests that an alien may be barred from entering the United States on terrorism grounds only through the regular visa application process. This provision simply provides grounds that establish *per se* ineligibility to receive a visa or to be admitted into the country. It also shows that Congress knows how to make a provision applicable to both the visa decision and the entry decision when it so intends and that the two aspects of immigration are distinct. *See* 8 U.S.C. § 1182(a) ("Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States . . . .").

For the above reasons, the Court cannot say at this point in the litigation that Plaintiffs have clearly shown that the President's authority under Section 1182(f) and 1185(a) is limited by Section 1152 with respect to either immigrant or non-immigrant visas. Plaintiffs have therefore not demonstrated that they are likely to succeed on the merits of their INA statutory claim even if EO-2 discriminates on the basis of nationality (Count IV).

2. Plaintiffs' Claim that EO-2 Constitutes Unlawful Agency Action Under the Administrative Procedures Act (Count III)

Plaintiffs claim that the issuance of EO-2 violates the Administrative Procedures Act ("APA"), 5. U.S.C. §§ 701-706 (2012). Although the APA defines an "agency" broadly to include "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," 5 U.S.C. § 701, this definition is not broad enough to

include the Office of the President. The Supreme Court has explicitly found that "the President's actions [a]re not reviewable under the APA, because the President is not an 'agency' within the meaning of the APA." *Dalton v. Specter*, 511 U.S. 462, 469 (1994); *see also Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) ("Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA."). Accordingly, because President Trump's issuance of EO-2 is not reviewable under the APA, Plaintiffs have not demonstrated that they are likely to succeed on the merits as to their unlawful agency action claim (Count III).

3. Plaintiffs' Claim that EO-2 Violates the Establishment Clause (Count I)

Plaintiffs also allege that EO-2 violates the Establishment Clause because it disfavors the religion of Islam.[13] The First Amendment prohibits any "law respecting an establishment of religion," U.S. Const. amend. I, and "mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). If an act is discriminatory on its face, than it will be subject to strict scrutiny. *Larson v. Valente*, 456 U.S. 228, 246, 255 (1982). If it is not discriminatory on its face, then courts typically apply a three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) to determine whether the act violates the Establishment Clause.[14]

[13] As a threshold matter, there remain open issues concerning to what extent recognized Establishment Clause principles and prohibitions developed over time with respect to domestic government conduct transfer seamlessly in application to restrict government conduct touching upon national security matters, including immigration and the treatment of aliens with no claim to citizenship or other immigration benefits. Nevertheless, for the purpose of this Motion, and because the Plaintiffs invoke the Establishment Clause based on their personal status as U.S. citizens or as lawful residents of the United States, the Court assumes, without deciding, that the President's exercise of his authority to issue EO-2 is circumscribed by settled Establishment Clause principles.

[14] There is one additional test to find a violation of the Establishment Clause, which has only once been invoked and is not relevant to this litigation. Regardless of whether a government action is facially neutral, that action will be found constitutional where there is "unambiguous and unbroken history" that unequivocally demonstrates the Framers' intent that the Establishment Clause not prohibit the government action. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (finding the opening of congressional session with a prayer constitutional).

The text of EO-2, unlike that of EO-1, makes no mention of religion as a criterion for benefits or burdens. Nevertheless, Plaintiffs maintained at the hearing that EO-2, section 1(f), which articulates President Trump's rationale behind the Order, is nevertheless discriminatory on its face because the national security risk referenced to justify EO-2 in that section is demonstrably false and EO-2's plain language therefore betrays the Order's discriminatory intent.

As an initial matter, and as Plaintiffs concede in their brief, the language of EO-2 is facially neutral. *See* Pls' Mot. 5 ("[EO-2] creates a framework that although neutral on its face, carries through the same invidious intent insofar it essentially seeks to preserve a portion of the First Muslim Ban [EO-1]."). To be facially neutral simply means that there is no discrimination in "that which is shown by the mere language employed, without any explanation, modification, or addition from extrinsic facts or evidence." *Face, Black's Law Dictionary* (10th ed. 2014). Discrimination based on religion cannot be inferred from the language EO-2 employs. EO-2 draws no "explicit and deliberate distinctions" based on religion. *See Larson v. Valente*, 456 U.S. 228, 262 (1982). Moreover, the Court sees no basis for the claim that EO-2's stated and referenced justifications are "demonstrably false," and no inference of religious discrimination can be reasonably inferred from those justifications. EO-2 is therefore "facially neutral," and the Court applies the *Lemon* test to assess its constitutional validity under the Establishment Clause of the First Amendment.

Under the *Lemon* test, to withstand an Establishment Clause challenge, the government action (1) "must have a secular legislative purpose," (2) "its principal or primary effect must be one that neither advances nor inhibits religion," and (3) "the statute must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-13 (quoting *Walz v. Tax*

Comm'n of City of N.Y., 397 U.S. 664, 668 (1970) (internal citation omitted). Plaintiffs do not contend that EO-2 fails to satisfy the second or third prongs of the *Lemon* test, and the Court only needs to consider whether EO-2 has a secular purpose.

EO-2 clearly has a stated secular purpose: the "protect[ion of United States] citizens from terrorist attacks, including those committed by foreign nationals." EO-2 § 1(a). It also details the overall policy and purpose for the Order. *See id*. ("The screening and vetting protocols and procedures associated with the visa-issuance process and the United States Refugee Admissions Program (USRAP) play a crucial role in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States. It is therefore the policy of the United States to improve the screening and vetting protocols and procedures associated the visa-issuance process and the USRAP."); *id.* § 2(c) (explaining that the suspensions are needed "[t]o temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order"). The Court must therefore first determine to what extent and on what basis it will look behind the Order's stated secular purpose and justification to determine whether EO-2 constitutes a subterfuge or pretext for a true purpose of religious discrimination. The Plaintiffs contend in that regard that the Court must consider what they claim is a long and unbroken stream of anti-Muslim statements made by both candidate Trump and President Trump, as well as his close advisors, which, taken together, makes clear that EO-1 and EO-2 are nothing more than subterfuges for religious discrimination against Muslims. Defendants contend that given the

clearly articulated secular purpose and national security related justifications in EO-2, the Court should not consider any such statements and end its inquiry at the text of EO-2.

In determining how to proceed, the Court is cast upon cross jurisprudential currents. On the one hand, this prong of the *Lemon* analysis "contemplates an inquiry into the subjective intentions of the government." *Mellen v. Bunting*, 327 F.3d 355, 372 (4th Cir. 2003). On the other hand, the Supreme Court has repeatedly cautioned that in the immigration context, a court should not "look behind the exercise of [Executive Branch] discretion" when exercised "on the basis of a facially legitimate and bona fide reason." *Kliendienst v. Mandel*, 408 U.S. 753, 770 (1972). In *Mandel*, the Supreme Court recognized that First Amendment rights were implicated in the government's denial of a visa to an invited foreign lecturer. Nevertheless, and even though the government did not attempt to justify that denial on national security grounds, the Supreme Court concluded that where the government has provided a facially legitimate and bona fide reason, "the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who [claim they are injured by the visa denial]." *Id.*; *see also Fiallo v. Bell*, 430 U.S. 787, 795 (1977) (confirming that a broad "policy choice" is to be reviewed under the same "standard . . . applied in[]*Mandel*"). As reflected in these rulings, a court must extend substantial deference to the government's facially legitimate and non-discriminatory stated purposes. *See, e.g., Appiah v. U.S. I.N.S.*, 202 F.3d 704, 710 (4th Cir. 2000) ("The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the president in the area of immigration and naturalization." (quoting *Matthews v. Diaz*, 426 U.S. 67, 81-82 (1976)).

Since *Mandel* and *Fiallo*, the Supreme Court has counseled that the focus of a district court's inquiry should be on whether the stated purpose "was an apparent sham, or the secular purpose secondary." *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 865 (2005) (While courts "often . . . accept governmental statements of purpose, in keeping with the respect owed in the first instance to such official claims, . . . in those unusual cases where the claim was an apparent sham, or the secular purpose secondary, the unsurprising results have been findings of no adequate secular object."). It also directs that a court must develop an "an understanding of official objective . . . from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." *Id.* at 862. Based on these principles, the Court rejects the Defendants' position that since President Trump has offered a legitimate, rational, and non-discriminatory purpose stated in EO-2, this Court must confine its analysis of the constitutional validity of EO-2 to the four corners of the Order. The Court has therefore carefully assessed President Trump's facially legitimate national security basis for EO-2 against the backdrop of all of the statements the President and his closest advisors have made.[15]

When this Court reviewed and enjoined EO-1, "the question [wa]s whether the [order] was animated by national security concerns at all." *Aziz*, 2017 WL 580855, at *10 (Brinkema, J.). President Trump and his advisors made statements that allowed the inference that the President's purpose in exercising his authority under Section 1182(f) to issue EO-1 was to impose burdens wholesale on people who subscribe to the Islamic faith, *viz.*, a "Muslim Ban." That possible purpose was also reflected in the text and structure of EO-1, which contained language that, when considered in connection with public statements, suggested that Christians

[15] These statements are recounted in detail in Plaintiffs' briefs and the opinions of those courts that have enjoined the enforcement of EO-1 and EO-2. *See Hawai'i v. Trump*, No. 1:17-cv-00050, 2017 WL 1011673, at *13-15 (D. Haw. Mar. 15, 2017); *Int'l Refugee Assist. Proj. v. Trump*, No. 8:17-cv-00361-TDC, --- F. Supp. 3d ---, 2017 WL 1018235, at *3-4 (D. Md. Mar. 16, 2017); *Aziz v. Trump*, --- F. Supp. 3d ---, No. 1:17-cv-116, 2017 WL 580855, at *3-5 (E.D. Va. Feb. 13, 2017).

would be given a benefit not available to Muslims. EO-2 is materially different in structure, text, and effect from EO-1 and has addressed the concerns raised not only by this Court but also by other courts that reviewed and enjoined EO-1. EO-2 was not rushed into immediate effect but, rather, was issued ten days before its effective date, permitting government bodies to better prepare for its effective implementation. It does not indefinitely suspend the entry of refugees from Syria, and it applies to all refugees, no matter where they are located. It does not direct that preference be given to any particular religion or group of religion over any other.

EO-2 also effectively excludes large categories of otherwise covered nationals from the relatively short suspension of any right to enter the United States. For example, section 3(a) limits the scope of section 2(c) to aliens who were not in the United States on the Order's effective date and who did not have a valid visa on that date or on the effective date of EO-1.[16] Under section 3(b), all of the Plaintiffs involved in this litigation are exempted from the reach of the Order. Similarly, under section 12(c) and (d), all immigrant and non-immigrant visas issued before the issuance of EO-2, including those marked revoked or cancelled pursuant to EO-1, are valid and reinstated. EO-2 also contains multiple circumstances and categories under which consular officials are permitted to grant case-specific waivers to coverage under section 2(c) or section 6(a).[17] EO-2 §§ 3(c), 6(c). Iraq is eliminated from the list of suspended countries because "the Iraqi government has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to finals orders of removal" since

[16] Other groups of aliens whose inclusion in the scope of EO-1 concerned the Ninth Circuit are similarly excluded from the scope of EO-2, including legal permanent residence, foreign nationals admitted to or paroled into the United States, foreign nationals granted asylum, refugees already admitted to the United States, and people granted particular forms of protection from removal. EO-2 § 3(b).

[17] This list includes, *inter alia*, foreign nationals previously "admitted to the United States for a continuous period of work, study, or other long-term activity" but who currently reside outside of the United States and seek to re-enter; those who seek entry for "significant business or professional obligations and the denial of entry would impair those obligations"; and those who seek entry "to visit or reside with a close family member (e.g., a spouse, child, or parent) who is a [U.S.] citizen, legal permanent resident, or alien lawfully admitted on a valid nonimmigrant visa." EO-2 § 3(c).

President Trump issued EO-1. *Id.* § 4. Finally, a "Policy and Purpose" section has been added which provides an extensive justification for the Order on the basis of national security, including information specific to each of the six countries referenced in EO-2.[18] *Id.* § 1. And as stated above, EO-2 was also explicitly revised in response to judicial decisions that identified problematic aspects of EO-1 and invited revisions.[19]

Given the revisions in EO-2, the question is now whether the President's past statements continue to fatally infect what is facially a lawful exercise of presidential authority. In that regard, the Supreme Court has held that "past actions [do not] forever taint any effort on [the government's] part to deal with the subject matter. . . . District courts are fully capable of adjusting preliminary relief to take account of genuine changes in constitutionally significant conditions." *McCreary*, 545 U.S. at 848. This Court is no longer faced with a facially discriminatory order coupled with contemporaneous statements suggesting discriminatory intent. And while the President and his advisors have continued to make statements following the issuance of EO-1 that have characterized or anticipated the nature of EO-2,[20] the Court cannot conclude for the purposes of the Motion that these statements, together with the President's past statements, have effectively disqualified him from exercising his lawful presidential authority

[18] When it issued its stay of the district court's TRO of EO-1, the Ninth Circuit indicated it had invited President Trump to make the sorts of changes that he has now made in his reissuance of the Order. *See Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) ("Despite the district court's and our own repeated invitations to explain the urgent need for the Executive Order to be placed immediately into effect, the Government submitted no evidence . . . .").

[19] As President Trump states in the Order, "I am revoking Executive Order 13769 and replacing it with this order, which expressly excludes from the suspensions categories of aliens that have prompted judicial concerns and which clarifies or refines the approach to certain other issues or categories of affected aliens." EO-2 § 1(i); *cf.* Order Denying Washington's Emergency Motion to Enforce the Preliminary Injunction, *Washington v. Trump*, No. C17-0141JLR, at 5-6 (W.D. Wash. Mar. 16, 2017), ECF No. 163. (noting significant differences between EO-1 and EO-2 in denying the plaintiffs' emergency motion to enforce the court's preliminary injunction of EO-1 against EO-2 on the grounds that EO-2 constituted the same conduct previously enjoined).

[20] Among these are the President's reference to EO-2 as a "watered-down version" of EO-1, [*see* Doc. No. 28]; and Presidential Advisor Stephen Miller's statement that a revised executive order was "going to have the same basic policy outcome for the country" and that it would be issued "with mostly minor technical differences." Pls' Mot., Ex. Y.

under Section 1182(f). In other words, the substantive revisions reflected in EO-2 have reduced the probative value of the President's statements to the point that it is no longer likely that Plaintiffs can succeed on their claim that the predominate purpose of EO-2 is to discriminate against Muslims based on their religion and that EO-2 is a pretext or a sham for that purpose. To proceed otherwise would thrust this Court into the realm of "'look[ing] behind' the president's national security judgments . . . result[ing] in a trial *de novo* of the president's national security determinations," *Aziz*, 2017 WL 580855, at *8, and would require "a psychoanalysis of a drafter's heart of hearts," all within the context of extending Establishment Clause jurisprudence to national security judgments in an unprecedented way.

For the above reasons, Plaintiffs have not made a clear showing that they are likely to succeed on the merits as to their Establishment Clause claim (Count I).

4. Plaintiffs' Claim that EO-2 Violates the Equal Protection Clause (Count II)

Plaintiffs also contend that EO-2 violates the Equal Protection Clause of the First Amendment by targeting Muslims for distinctive treatment. The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.[21] It is undisputed that EO-2 has a differential impact on Muslims. According to Plaintiffs, "there are approximately 166 million people in these six countries, all of whom will be affected by the [Order], and 97 percent of whom are Muslim." Pls.' Mot. 23. Defendants do not dispute that the countries affected are overwhelmingly Muslim.

"[A] law, neutral on its face and serving ends otherwise within the power of government to pursue, is not invalid under the Equal Protection Clause simply because it may affect a greater

[21] Although the Clause only applies to state and local governments according to its text, the Supreme Court has held that it also applies to the federal government through the Due Process Clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

proportion of one race than of another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). This precept is particularly applicable in the area of immigration measures related to national security concerns. Relying on Supreme Court precedent, the Fourth Circuit has emphasized that where a particular immigration measure is facially neutral and has a rational national security basis that is "facially legitimate and bona fide," such a measure will survive an Equal Protection Clause challenge. *Rajah v. Mukasy*, 544 F.3d 427, 438 (4th Cir. 2008) (quoting *Romero v. INS*, 399 F.3d 109, 111 (2d Cir. 2005)). "Distinctions on the basis of nationality may be drawn in the immigration field by Congress or the Executive . . . [and must be upheld] [s]o long as [they] are not wholly irrational . . . ." *Id.* (quoting *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979)).

In *Rajah*, the Fourth Circuit rejected an Equal Protection Clause challenge to a program that required all non-permanent resident males over the age of sixteen from a group of countries that were, except for North Korea, predominantly Muslim to appear personally at government facilities for registration and fingerprinting and to present immigration related documents ("the Program"). Individuals who did not appear risked potential arrest. *Id*. at 433. The Fourth Circuit concluded that there was a rational national security basis for the special registration requirements because (1) the terrorist attacks of September 11, 2001 "were facilitated by the lax enforcement of immigration laws"; (2) "[t]he Program was designed to monitor more closely aliens from certain countries selected on the basis of national security criteria"; and (3) the "Program was a plainly rational attempt to enhance national security." *Id*. at 438-39. Rejecting the plaintiffs' Equal Protection Clause challenge, the Fourth Circuit observed:

> To be sure, the Program did select countries that were, with the exception of North Korea, predominantly Muslim. Petitioners argue, without evidence other than that fact, that the Program was motivated by an improper animus toward Muslims. However, one major threat of terrorist attacks comes from radical Islamic groups. The Program was clearly tailored to those facts. It excluded males under 16 and females on the grounds that military age men are a greater

> security risk. Muslims from non-specified countries were not subject to registration. Aliens from the designated countries who were qualified to be permanent residents in the United States were exempted whether or not they were Muslims. The Program did not target only Muslims: non-Muslims from the designated countries were subject to registration. There is therefore no basis for petitioner's claim.

Id. at 439. Plaintiffs argue that EO-2 is suspect because it does not extend to other countries that pose greater terrorist threats, considering that there is no evidence that individuals who committed acts of terrorism in the United States have actually come from the designated countries. But the Fourth Circuit dispatched those sorts of arguments as well:

> Petitioners also challenge the Program based on their perception of its effectiveness and wisdom. They argue, among other things, that it has not succeeded in catching a terrorist. However, we have no way of knowing whether the Program's enhanced monitoring of aliens has disrupted or deterred attacks. In any event, such a consideration is irrelevant because an *ex ante* rather than an *ex post* assessment of the Program is required under the rational basis test.

Id. at 439.

EO-2 identified a broad range of conditions, circumstances, and conditions that raise "facially legitimate and bona fide" national security bases for the Order, including that each of the designated countries (1) has conditions that present "heightened risks"; (2) is a state sponsor of terrorism; (3) has been actively compromised by terrorist organizations; or (4) contains active combat zones. EO-2 § 2(d). The President sees in these circumstances conditions that "diminish[] the foreign government's willingness or ability to share or validate important information about individuals seeking travel to the United States," and "the significant presence in each of these countries of terrorist organizations, members, and others exposed to these organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States." *Id.* § 1(d). Moreover, "once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delayed issuing, or refuse to issue, travel documents."

Id. EO-2 also identifies specific conditions in each designated country "that demonstrate why their nationals continue to present heightened risks to the security of the United States." *Id.* § 1(e). The President has concluded that "[i]n light of the conditions in these six countries, until the assessment of current screening and vetting procedures required by section 2 of this order is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harming national security of the United States is unacceptably high." *Id.* § 1(f). These are judgments committed to the political branches – not to the courts.

Moreover, as with the Program at issue in *Rajah*, EO-2 is similarly tailored to limit the scope of the temporary suspension. EO-2 contains limitations, exemptions, and waivers that undercut any inference that the purpose of the Order was to discriminate against Muslims because of their religion or nationality rather than national security concerns. Also as in *Rajah*, while the Order pertains to predominantly Muslin countries, it applies to any particular person equally, whether Muslim or non-Muslim. Overall, EO-2 identifies a rational security basis for its issuance at least as strong and explicit as that found sufficient in *Rajah*. Plaintiffs again argue that the stated justifications and revisions reflected in EO-2 cannot overcome the President's statements, including that EO-2 is a "watered-down" version of EO-1. But those statements do not eliminate the real substantive differences between the two orders, and for the reasons previously discussed within the context of Plaintiffs' Establishment Clause challenge, those statements are insufficient for the Court to conclude that the Plaintiffs have clearly shown that they will likely succeed on their Equal Protection Clause challenge in Count III.

C. Irreparable Harm in the Absence of Preliminary Relief

The Fourth Circuit has held that, as a matter of law, "loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 520-21 (4th Cir. 2002) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Aziz v. Trump*, No. 1:17-cv-116 (LMB/TCB), 2017 WL 580855, at *10 (E.D. Va. Feb. 13, 2017). These Plaintiffs allege violations of the Establishment Clause of the First Amendment of the United States Constitution in Count I, *see* AC ¶¶ 87-97, as well as various other forms of irreparable harm including (1) inability to arrange visits from foreign relatives, (2) more stringent review of spousal marriage petitions, and (3) more stringent review of a visa application. Without ruling specifically on these claims of irreparable harm, the Court finds it sufficient that Plaintiffs' First Amendment rights are implicated in EO-2; and Plaintiffs should therefore not be denied injunctive relief based on the lack of irreparable harm.

D. Balance of Equities

In order to obtain the requested injunction, plaintiffs must establish, separately from any showing of irreparable harm, that the "balance of equities" weighs in their favor. In determining whether plaintiffs have made that showing, "[i]n each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Winter*, 555 U.S. at 24 (quoting *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 542 (1987)).

Plaintiffs argue that EO-2 has inflicted five different categories of harm on them: it (1) may prevent them from reuniting with their foreign national spouses due to EO-2's heightened standard of review of marriage applications and visas; (2) may prevent them from renewing their own visas because those visas will be subject to a heightened standard of review; (3) may

prevent them from traveling internationally out of their fear that they may somehow forfeit their own visas by doing so; (4) has imposed a stigma on the American Muslim community of which they are a part; and (5) has required them to devote their time and attention to publicly advocating on behalf of the American Muslim community.

All of these alleged harms are either speculative or were already experienced before or independently of EO-1 or EO-2. For example, with respect to the harms alleged in category 1, Plaintiffs claim that their marriage petitions filed on behalf of their spouses or their relatives' visas will either be delayed in processing or subject to new, never before imposed, heightened standards of scrutiny. In support of that claim, they point to section 3(c) of EO-2, which provides consular officials with the discretion to issue individual waivers "if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest," as well as section 4, which subjects nationals of Iraq to "thorough review," and section 5, which directs various agencies within the executive branch to implement a uniform screening and vetting procedure for screening all individuals who seek to enter the United States. Yet, as reflected in a State Department Alert issued on March 6, 2017, visa application appointments continue to be held. *See* Defs.' Mem. Opp'n 12. Defendants have further represented that currently, while the enforcement of EO-2 has been enjoined by other Courts, applications are being reviewed in substantially the same way as before the issuance of either EO-1 or EO-2. In fact, on March 21, 2017, Plaintiff John Doe No. 6 "advise[d] the Court that his marriage petition that he filed for his wife was approved, and her visa application is currently pending." [Doc. No. 31.] In short, there is no evidence that relevant visa applications

have been processed, delayed, or denied in any meaningfully different way than before the issuance of EO-1 and EO-2.

Similarly speculative are the harms claimed in categories 2 and 3, based on certain of the Plaintiffs' currently held visas and their immigration status. For example, Plaintiffs John Doe Nos. 2 and 3, who have valid F-1 student visas, allege that EO-2's interferes with their ability to travel. But these Plaintiffs are in a category expressly exempted from the temporary ban of the Order. In that regard, section 3(a) provides that "the suspension of entry . . . shall apply only to foreign nationals of the designated countries who: (i) are outside the United States on the effective date of this order; (ii) did not have a valid visa at 5:00 p.m., eastern standard time on January 27, 2017; and (iii) do not have a valid visa on the effective date of this order." EO-2 § 3(a). Plaintiffs John Doe Nos. 2 and 3 were inside the United States on the effective date of the Order and had valid F-1 visas both as of January 27, 2017 and as of March 16, 2017, the effective date of the Order. They are therefore exempt from EO-2's temporary suspension of entry, and it is completely speculative whether these Plaintiffs would experience any harm as a result of EO-2 were they to travel within the United States or internationally.

Finally, with respect to the harms included in categories 4 and 5, certain Plaintiffs claim that they are being harmed by EO-2 because they are "prominent civil rights activists . . . [who have been forced] to spend a significant amount of their time . . . assisting and advocating on behalf of Muslims targeted by th[e] order and pushing back against the anti-Muslim sentiment that Defendants have fomented and legitimized through their actions."[22] These individuals have engaged in these activities in connection with their chosen calling and careers and were engaged in similar civil rights activities before and independently of the issuance of EO-2. Likewise, the stigma Plaintiffs have felt, judging by their description, emanated before either executive order

[22] Def.'s Mot. 15.

issued; and while those feelings of stigma are undoubtedly legally cognizable injuries and may have been deepened with the issuance of the executive orders, they were primarily experienced separate and apart from the issuance of the orders and will not be cured if the Court were to grant the Motion. Therefore, any stigma that was in fact caused by the orders cannot be materially undone or redressed at this point beyond what has already been effected through the injunctions already issued by other district courts.

In contrast to the speculative and abstract hardships that Plaintiffs may experience in the absence of immediate relief, "the Government's interest in combating terrorism is an urgent objective of the highest order." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). In EO-1, the President did "little more than reiterate that fact" and "submitted no evidence" to demonstrate the need for immediate action. *Washington v. Trump*, 847 F.3d 1151, 1165-66 (9th Cir. 2017). However, in EO-2, the President has provided a detailed justification for the Order based on national security needs, and enjoining the operation of EO-2 would interfere with the President's unique constitutional responsibilities to conduct international relations, provide for the national defense, and secure the nation. On balance, Plaintiffs have not established that the equities tip in their favor.

E. Public Interest

Plaintiffs must also establish that the issuance of an injunction is in the public interest. "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)) (internal quotation marks omitted). Based on the record now before the Court, the parties' respective interests described above, the subject matter of EO-2, and the protections to the public that EO-2 is intended to

provide, Plaintiffs have not established that the public interest favors issuance of immediate relief in this action.

V. CONCLUSION

For the above reasons, Plaintiffs have not established that (1) they are likely to succeed on the merits of their case, (2) the balance of hardships tips in their favor, or (3) immediate relief would be in the public interest. Accordingly, they have not established that they are entitled to obtain the extraordinary remedy of an injunction enjoining the enforcement of EO-2. Plaintiffs' Motion is therefore denied.

The Court will issue an appropriate order.

/s/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
March 24, 2017

FOR PUBLICATION

FILED

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF WASHINGTON and STATE OF MINNESOTA, Plaintiffs-Appellees, v. DONALD J. TRUMP, President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; REX W. TILLERSON, Secretary of State; JOHN F. KELLY, Secretary of the Department of Homeland Security; UNITED STATES OF AMERICA, Defendants-Appellants.	No. 17-35105 D.C. No. 2:17-cv-00141 Western District of Washington, Seattle AMENDED ORDER

Before: CANBY, CLIFTON, and FRIEDLAND, Circuit Judges.

This court in a published order previously denied a motion of the government for a stay of a restraining order pending appeal. 847 F.3d 1151 (9th Cir. 2017). That order became moot when this court granted the government's unopposed motion to dismiss its underlying appeal. Order, Mar. 8, 2017. No party has moved to vacate the published order. A judge of this court called for a vote to determine whether the court should grant en banc reconsideration in order to vacate the published order denying the stay. The matter failed to receive a majority of the votes of the active judges in favor of en banc reconsideration.

Vacatur of the stay order is denied. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994) (holding that the "extraordinary remedy of vacatur" is ordinarily unjustified when post-decision mootness is caused by voluntary action of the losing party).

This order is being filed along with a concurrence from Judge Reinhardt, a concurrence from Judge Berzon, a dissent from Judge Kozinski, a dissent from Judge Bybee, and a dissent from Judge Bea. No further opinions will be filed.

Washington v. Trump, No. 17-35105

REINHARDT, J., concurring in the denial of en banc rehearing:

I concur in our court's decision regarding President Trump's first Executive Order – the ban on immigrants and visitors from seven Muslim countries. I also concur in our court's determination to stand by that decision, despite the effort of a small number of our members to overturn or vacate it. Finally, I am proud to be a part of this court and a judicial system that is independent and courageous, and that vigorously protects the constitutional rights of all, regardless of the source of any efforts to weaken or diminish them.

Judge Kozinski's diatribe, filed today, confirms that a small group of judges, having failed in their effort to undo this court's decision with respect to President Trump's first Executive Order, now seek on their own, under the guise of a dissent from the denial of en banc rehearing of an order of voluntary dismissal, to decide the constitutionality of a second Executive Order that is not before this court. That is hardly the way the judiciary functions. Peculiar indeed!

BERZON, J., concurring in the denial of reconsideration en banc.

I concur in the court's denial of rehearing en banc regarding vacatur. I have full confidence in the panel's decision. I write to emphasize that, although one would think otherwise from the three dissents from denial of rehearing en banc, judges are empowered to decide issues properly before them, not to express their personal views on legal questions no one has asked them. There is no appeal currently before us, and so no stay motion pending that appeal currently before us either. In other words, all the merits commentary in the dissents filed by a small minority of the judges of this court is entirely out of place.

Here is the background: A three-judge panel of this court decided that the Government was not entitled to a stay pending appeal of the district court's Temporary Restraining Order enjoining enforcement of the President's January 27, 2017 Executive Order. *Washington v. Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017). The Government chose not to challenge the panel's order further but instead to draft a revised Executive Order, revoking the one that was before this court's panel. Exec. Order 13780 of March 6, 2017 §§ 1(i), 13, 82 Fed. Reg. 13209 (published Mar. 9, 2017). That Order was expressly premised on the panel opinion. *Id.* § 1(c), (i). The Government has since elected to dismiss this appeal,

and with it its stay request; it filed an unopposed motion to dismiss, which we granted, and did *not* in that motion ask that the panel, or an en banc court, vacate the panel's opinion.[1]

So there is now *no* live controversy before our court regarding either the merits of the underlying case or the propriety of the original restraining order. "In our system of government, courts have no business deciding legal disputes or expounding on law in the absence of . . . a case or controversy." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) (internal quotation marks omitted) (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006)).

One judge of the court nonetheless called for a vote of the active judges as to whether to convene an en banc court for the sole purpose of vacating the panel's opinion. As the panel's March 15, 2017 order, denying rehearing en banc, notes, vacating an opinion where the losing party's voluntary actions have mooted the appeal is ordinarily improper. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25–27 (1994); *United States v. Payton*, 593 F.3d 881, 883–86 (9th Cir. 2010). And as Judge Bybee's dissent reflects, the only justification

[1] On the contrary, both parties have since relied on the opinion in staking out their positions. *See* Exec. Order 13780 § 1(c), (i); Resp. to Defs.' Notice of Filing of Exec. Order at 2-11, *Washington v. Trump*, No. 2:17-cv-00141-JLR (W.D. Wash. Mar. 9, 2017).

offered for vacating the opinion was a disagreement on the merits.

It is simply not an "exceptional circumstance[]" justifying the "extraordinary remedy of vacatur" that members of our court disagree with a panel opinion. *See Bonner Mall*, 513 U.S. at 26, 29. I am aware of *no* instance in which we have convened an en banc panel to vacate a precedential opinion on the basis of its merits, where no party seeks further appellate review or vacatur. *Compare Animal Legal Def. Fund v. Veneman*, 490 F.3d 725, 725–27 (9th Cir. 2007) (en banc) (Bybee, J., concurring) (vacating a panel opinion in light of a settlement agreement dependent on vacatur reached *after* a majority of the court already had voted to take the case en banc and designated the panel's opinion non-precedential). Rather, it is "inappropriate . . . to vacate mooted cases, in which we have no constitutional power to decide the merits, on the basis of assumptions about the merits." *Bonner Mall*, 513 U.S. at 27.

We as a court make the vast majority of our decisions through three-judge panels, and we abide by the decisions of those panels absent a decision by a majority of the active judges that there is good reason to reconsider the case with a larger, eleven-judge panel, determined by lot. *See* Fed. R. App. P. 35; Ninth Cir. R. 35-3; Ninth Cir. Gen. Order 5.1–5.5. Reconsidering a case before an en banc panel after full argument and coming to a new, reasoned decision—which might

reach the same result as the earlier panel decision or might conclude otherwise—is an entirely different matter from what was sought here: wiping out the panel's decision and leaving a vacuum. The en banc court would have no authority whatever to opine on the merits of the case or the propriety of the district court's stay, as there is simply no live appeal before us.

Article III of the United States Constitution precludes us from revisiting the issues addressed in the panel opinion at this point, as any decision rendered by the en banc court necessarily would be advisory. *See Already LLC*, 133 S. Ct. at 726. A few dissenting colleagues have nonetheless used the decision by the active judges of the court to decline to rewrite history as the occasion to attack the panel opinion on myriad grounds. As there is nothing pending before us, it would be entirely inappropriate to respond in detail—which, I presume, is precisely why the panel did not do so.

In some ways that is too bad. There is much to discuss, and such discussion would show that the panel's opinion was quite correct.

To take but one example: The cases Judge Bybee cites regarding the applicability of *Kleindienst v. Mandel*, 408 U.S. 753 (1972), do not govern the case as it came to the panel. None addresses whether the "facially legitimate and bona fide reason" standard articulated in *Mandel* applies to executive action that

categorically revokes permission to enter or reenter the country *already granted* by the Executive Branch. *See Kerry v. Din*, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring in the judgment); *Fiallo v. Bell*, 430 U.S. 787, 792–95 (1977); *Cardenas v. United States*, 826 F.3d 1164, 1171–72 (9th Cir. 2016); *An Na Peng v. Holder*, 673 F.3d 1248, 1258 (9th Cir. 2012); *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008); *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 978–79 (9th Cir. 2006); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1082 (9th Cir. 2006); *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1065–66 (9th Cir. 2003); *Noh v. INS*, 248 F.3d 938, 942 (9th Cir. 2001). That the Second Circuit applied *Mandel*'s test to a program requiring certain non-immigrants to provide information to authorities (and to face removal only *after* undergoing "generally applicable legal [removal] proceedings to enforce pre-existing immigration laws"), *see Rajah v. Mukasey*, 544 F.3d 427, 439 (2d Cir. 2008), in no way portends that application of *Mandel* was appropriate here. The question before our panel, unlike the one in *Rajah*, concerned a sweeping Executive Order that *barred* from entry whole groups of legal permanent residents and visa holders, among many others, *without* any individualized determination regarding the revocation. Presumably recognizing the weight of these individuals' constitutional interests, the President excepted them from the revised Executive Order. *See* Exec. Order 13780 § 3.

Judges Kozinski and Bea likewise used the filing of the order denying rehearing en banc as to the question of vacating the panel opinion as a platform for providing their personal views as to the merits of that opinion. Both concern themselves with issues the panel expressly did not finally resolve. *See* Bea, J., dissenting from denial of rehearing en banc, at 3–6 (discussing *parens patriae* standing); Kozinski, J., dissenting from denial of rehearing en banc, at 3–7 (discussing the Establishment Clause); *Washington*, 847 F.3d at 1161 n.5, 1168 (explicitly declining to reach the questions of *parens patriae* standing and, after outlining the parameters of the appropriate Establishment Clause analysis, not coming to rest on the likelihood of success with respect to that issue). Further, Judge Kozinski expresses at some length his unhappiness with the invocation of the panel's Establishment Clause analysis in a recent district court order, once again venturing an opinion on an appeal not before us—in this instance, not because the appeal was withdrawn but because none has yet been filed.[2]

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[2]Judge Kozinski also contests the scope of the Temporary Restraining Order the panel declined to stay, observing that relatively few of the affected individuals have lawful status. Again, this was not the occasion to opine on the contours of a now-moot injunction. And, contrary to Judge Kozinski's representation, the number of individuals covered directly by the panel's due process analysis was substantial—there were tens-of-thousands of individuals whose already approved visas were revoked. *See* Mica Rosenberg & Lesley Wroughton, *Trump's Travel Ban Has Revoked 60,000 Visas for Now*, Reuters, Feb. 3, 2017,

(continued...)

There will be ample opportunity, and probably soon, *see* Order Granting Motion for Temporary Restraining Order, *Hawaii v. Trump*, No. 1:17-cv-00050 DKW-KSC (D. Haw. Mar. 15, 2017), for further review of the important issues raised by the President's Executive Orders. And it is apparent from the Government's delay in promulgating a new Executive Order, and in the ten-day delay in implementation within the revised Order, *see* Exec. Order 13780 § 14, that no overwhelming exigency counsels in favor of abandoning the ordinary process of adversarial appellate review.

I well understand the importance of the cases concerning these Executive Orders. They raise critical questions concerning the reach of executive and judicial authority, and they could profoundly affect the lives of our citizens, our communities, and our position in the world. It is their very seriousness that, in my view, commands that we as judges speak about them when we have authority to do so, which is when we are asked by litigants to settle a dispute. The court at large has not been asked. So my dissenting colleagues should not be engaging in a one-sided attack on a decision by a duly constituted panel of this court.

We will have this discussion, or one like it. But not now.

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[2](...continued)
http://www.reuters.com/article/us-usa-immigration-visas-idUSKBN15I2EW (citing figures provided by the Government).

Washington v. Trump, No. 17-35105

KOZINSKI, Circuit Judge, with whom Circuit Judges **BYBEE**, **CALLAHAN, BEA** and **IKUTA** join, dissenting from the denial of reconsideration en banc.

I write separately to highlight two peculiar features of the panel's opinion. First, the panel's reasoning rests solely on Due Process. But the vast majority of foreigners covered by the executive order have no Due Process rights. Nevertheless, the district court enjoined the order's travel provisions in their entirety, even as applied to the millions of aliens who have no constitutional rights whatsoever because they have never set foot on American soil. See Zadvydas v. Davis, 533 U.S. 678, 693 (2001); United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990). In short, the panel approves the district court's nationwide injunction using a rationale that applies to a small percentage of those covered by the President's order.

The panel itself seems to acknowledge this strange state of affairs when it notes that there "might be persons covered" by the district court's restraining order who have no Due Process claims. Panel Order at 23. "Might" indeed! The overwhelming majority of the hundreds of millions of people covered by the order lack Due Process claims; only a tiny proportion have been accorded lawful status. Yet the panel offers no explanation for allowing the district court's extraordinarily broad restraining order to stand in full. This St. Bernard is being wagged by a flea

on its tail.

Because we have an obligation to maintain as much of the order as is legal, we normally ask: Can we keep it operational in a way that avoids constitutional conflict? The law of our circuit is that we consider the severability of an executive order just as we would consider the severability of a statute. See Matter of Reyes, 910 F.2d 611, 613 (9th Cir. 1990); see also Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 191 (1999) (assuming without deciding that the same severability analysis applies to executive orders as to statutes).[1] If we applied this framework to the executive order, we would "refrain from invalidating more of the [order] than is necessary" and "maintain the [order] in so far as it is valid." Regan v. Time, Inc., 468 U.S. 641, 652 (1984). This would have been easy: We could have approved the injunction as to the relatively few who have lawful status in the United States and allowed the executive order to cover everyone else. This workable solution would have respected the President's prerogative to regulate immigration as delegated to him by 8 U.S.C. § 1182(f), a provision about which the panel says nothing.

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[1] Indeed, we know that this executive order can be severed because the district court did precisely that: It enjoined the five subsections of the executive order relating to travel and left the other eleven intact. Washington v. Trump, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017) (order granting temporary restraining order).

Which brings me to the second peculiar feature of the opinion, a topic about which the panel says all too much: the Establishment Clause. While its opinion does not come to rest on this issue, the panel still sows chaos by holding "that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims." Panel Order at 25. This matters because one Establishment Clause test requires a showing of secular purpose,[2] and the panel gives its imprimatur to considering the "numerous statements by the President" about Muslims, most of them made before he was elected or took office. Id. This holding has continued vitality: It was relied on only days ago by a district judge in Hawaii who, in the ongoing contretemps between our circuit and the executive, enjoined the President's new executive order nationwide. See Hawaii v. Trump, No. 17-00050 DKW-KSC (D. Haw. Mar. 15, 2017) (order granting temporary restraining order). Indeed, this holding is spreading like kudzu through the federal courts. See Int'l Refugee Assistance

[2] I don't endorse Lemon v. Kurtzman, 403 U.S. 602 (1971), as the appropriate test in this context. Like Judge Bybee, I am puzzled why Lemon should be plucked from domestic contexts and applied to laws affecting immigration. See Bybee Dissental at 8 n.6. If we apply this test so casually to immigration policy, I see no reason it should not apply to every foreign policy decision made by the political branches, including our dealings with various theocracies across the globe. I see many reasons to resist this gross intrusion of the judicial power into foreign affairs.

Project v. Trump, No. 17-00361-TDC, at 5, 29 (D. Md. Mar. 16, 2017).

Taking a cue from the panel's opinion and citing a trove of informal and unofficial statements from the President and his advisers, see Hawaii at 33–37, the district judge found that plaintiffs had shown "a strong likelihood of succeeding on their claim" that the new order violates the Establishment Clause, id. at 41. And why shouldn't he? After all, the panel made this evidentiary snark hunt the law of the Ninth Circuit; the district judge was (in his own word) "commanded" to follow it. Id. at 32.

This is folly. Candidates say many things on the campaign trail; they are often contradictory or inflammatory.[3] No shortage of dark purpose can be found by sifting through the daily promises of a drowning candidate, when in truth the poor shlub's only intention is to get elected. No Supreme Court case—indeed no case anywhere that I am aware of—sweeps so widely in probing politicians for

[3] There is an anecdote, doubtless apocryphal, about Franklin Roosevelt during a whistlestop tour. He had two speeches that took opposite positions on a hot-button issue of the day. When the train stopped at a town that favored the issue, he would give his "pro" speech. And in towns that opposed the issue he'd give his "con" speech. One day he approached a town that his advisors told him was divided evenly between the pros and cons. FDR's advisers worried about how he'd handle the situation, but FDR was undaunted. He gave a speech and when he was done the pros in the audience believed he was in their corner and the cons were convinced he agreed with them. And that, friends, is the nature of electoral politics.

unconstitutional motives.[4] And why stop with the campaign? Personal histories, public and private, can become a scavenger hunt for statements that a clever lawyer can characterize as proof of a -phobia or an -ism, with the prefix depending on the constitutional challenge of the day.

This path is strewn with danger. It will chill campaign speech, despite the fact that our most basic free speech principles have their "fullest and most urgent application precisely to the conduct of campaigns for political office." McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1441 (2014) (citation and internal quotation marks omitted). And it will mire us in a swamp of unworkable litigation. Eager research assistants can discover much in the archives, and those findings will be dumped on us with no sense of how to weigh them. Does a Meet the Press interview cancel out an appearance on Face the Nation? Does a year-old presidential proclamation equal three recent statements from the cabinet? What is the appropriate place of an overzealous senior thesis or a poorly selected yearbook quote?

Weighing these imponderables is precisely the kind of "judicial

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[4] Respect for a coordinate branch should also counsel against focusing on campaign statements. Candidate Trump, unlike President Trump, had not taken an oath to "preserve, protect and defend the Constitution," U.S. Const. art. II, § 1, cl. 8, and was not bound to "take Care that the Laws be faithfully executed," id. art. II, § 3.

psychoanalysis" that the Supreme Court has told us to avoid. McCreary County v. ACLU of Ky., 545 U.S. 844, 862 (2005). The hopelessness of this weighing exercise is why the Supreme Court has never "deferred to comments made by [government] officials to the media." Hamdan v. Rumsfeld, 548 U.S. 557, 623–24 n.52 (2006). And it's why the panel's case citations for the supposedly "well established" proposition that the President's informal statements are admissible, upon closer inspection, turn out to refer to a much more limited universe: the text of city council resolutions, early drafts of legislation, transcripts of legislative discussions and contemporaneous statements by legislative members. See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534–35 (1993); Larson v. Valente, 456 U.S. 228, 254 (1982); Vill. of Arlington Heights v. Metro Housing Dev. Corp., 429 U.S. 252, 268 (1977). Limiting the evidentiary universe to activities undertaken while crafting an official policy makes for a manageable, sensible inquiry. But the panel has approved open season on anything a politician or his staff may have said, so long as a lawyer can argue with a straight face that it signals an unsavory motive.

Even if a politician's past statements were utterly clear and consistent, using them to yield a specific constitutional violation would suggest an absurd result—namely, that the policies of an elected official can be forever held hostage

by the unguarded declarations of a candidate. If a court were to find that campaign skeletons prevented an official from pursuing otherwise constitutional policies, what could he do to cure the defect? Could he stand up and recant it all ("just kidding!") and try again? Or would we also need a court to police the sincerity of that mea culpa—piercing into the public official's "heart of hearts" to divine whether he really changed his mind, just as the Supreme Court has warned us not to? See McCreary, 545 U.S. at 862.

This is yet another reason my colleagues err by failing to vacate this hasty opinion. The panel's unnecessary statements on this subject will shape litigation near and far.[5] We'll quest aimlessly for true intentions across a sea of insults and hyperbole. It will be (as it were) a huge, total disaster.

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[5] Contrary to the claims of Judges Reinhardt and Berzon, the substance of the panel's opinion continues to be highly relevant. Because the panel has refused to vacate it, the opinion continues to be the law of the circuit and is being followed by courts in the circuit and elsewhere. My criticism bears directly on the mistake our court has made in failing to vacate the opinion, and will hopefully warn other courts away from similar errors. My colleagues' effort to muzzle criticism of an egregiously wrong panel opinion betrays their insecurity about the opinion's legal analysis.

Washington v. Trump, No. 17-35105

BYBEE, Circuit Judge, with whom KOZINSKI, CALLAHAN, BEA, and IKUTA, Circuit Judges, join, dissenting from the denial of reconsideration *en banc*.

I regret that we did not decide to reconsider this case *en banc* for the purpose of vacating the panel's opinion. We have an obligation to correct our own errors, particularly when those errors so confound Supreme Court and Ninth Circuit precedent that neither we nor our district courts will know what law to apply in the future.

The Executive Order of January 27, 2017, suspending the entry of certain aliens, was authorized by statute, and presidents have frequently exercised that authority through executive orders and presidential proclamations. Whatever we, as individuals, may feel about the President or the Executive Order,[1] the President's decision was well within the powers of the presidency, and "[t]he wisdom of the policy choices made by [the President] is not a matter for our consideration." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 165 (1993).

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[1] Our personal views are of no consequence. I note this only to emphasize that I have written this dissent to defend an important constitutional principle—that the political branches, informed by foreign affairs and national security considerations, control immigration subject to limited judicial review—and not to defend the administration's policy.

This is not to say that presidential immigration policy concerning the entry of aliens at the border is immune from judicial review, only that our review is limited by *Kleindienst v. Mandel*, 408 U.S. 753 (1972)—and the panel held that limitation inapplicable. I dissent from our failure to correct the panel's manifest error.

I

In this section I provide background on the source of Congress's and the President's authority to exclude aliens, the Executive Order at issue here, and the proceedings in this case. The informed reader may proceed directly to Part II.

A

"The exclusion of aliens is a fundamental act of sovereignty." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *see also Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Congress has the principal power to control the nation's borders, a power that follows naturally from its power "[t]o establish an uniform rule of Naturalization," U.S. Const. art. I, § 8, cl. 4, and from its authority to "regulate Commerce with foreign Nations," *id.* art. I, § 8, cl. 3, and to "declare War," *id.* art. I, § 8, cl. 11. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power . . . ."). The

President likewise has some constitutional claim to regulate the entry of aliens into the United States. "Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *Garamendi*, 539 U.S. at 414 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)). The foreign policy powers of the presidency derive from the President's role as "Commander in Chief," U.S. Const. art. II, § 2, cl. 1, his right to "receive Ambassadors and other public Ministers," *id.* art. II, § 3, and his general duty to "take Care that the Laws be faithfully executed," *id.* *See Garamendi*, 539 U.S. at 414. The "power of exclusion of aliens is also inherent in the executive." *Knauff*, 338 U.S. at 543.

In the Immigration and Nationality Act of 1952, Congress exercised its authority to prescribe the terms on which aliens may be admitted to the United States, the conditions on which they may remain within our borders, and the requirements for becoming naturalized U.S. citizens. 8 U.S.C. § 1101 *et seq.* Congress also delegated authority to the President to suspend the entry of "any class of aliens" as he deems appropriate:

Whenever the President finds that the entry of any aliens or of any

> class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

Id. § 1182(f). Many presidents have invoked the authority of § 1182(f) to bar the entry of broad classes of aliens from identified countries.[2]

In Executive Order No. 13769, the President exercised the authority granted in § 1182(f). Exec. Order No. 13769 § 3(c) (Jan. 27, 2017), *revoked by* Exec. Order No. 13780 § 1(i) (Mar. 6, 2017). The Executive Order covered a number of subjects. Three provisions were particularly relevant to this litigation. First, the Executive Order found that "the immigrant and nonimmigrant entry into the United States of aliens from [seven] countries . . . would be detrimental to the interests of the United States" and ordered the suspension of entry for nationals (with certain exceptions) from those countries for 90 days. *Id.* The seven countries were Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. Second, it directed the Secretary of State to suspend the U.S. Refugee Admissions Program (USRAP) for 120 days.

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[2] *See*, *e.g.*, Exec. Order No. 12324 (Sept. 29, 1981) (Reagan and Haiti); Proclamation No. 5517 (Aug. 22, 1986) (Reagan and Cuba); Exec. Order No. 12807 (May 24, 1992) (George H.W. Bush and Haiti); Proclamation No. 6958 (Nov. 22, 1996) (Clinton and Sudan); Proclamation No. 7359 (Oct. 10, 2000) (Clinton and Sierra Leone); Exec. Order No. 13276 (Nov. 15, 2002) (George W. Bush and Haiti); Exec. Order No. 13692 (Mar. 8, 2015) (Obama and Venezuela); Exec. Order No. 13726 (Apr. 19, 2016) (Obama and Libya).

However, exceptions could be made "on a case-by-case basis" in the discretion of the Secretaries of State and Homeland Security. Once USRAP resumed, the Secretary of State was "to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual [was] a minority religion in the individual's country of nationality." *Id.* § 5(a), (b), (e). Third, it suspended indefinitely the entry of Syrian refugees. *Id.* § 5(c).

B

Three days after the President signed the Executive Order, the States of Washington and Minnesota brought suit in the Western District of Washington seeking declaratory and injunctive relief on behalf of their universities, businesses, citizens, and residents that were affected by the Executive Order in various ways. The States also sought a temporary restraining order (TRO). On February 3, 2017, following a hearing, the district court, without making findings of fact or conclusions of law with respect to the merits of the suit, issued a nationwide TRO against the enforcement of §§ 3(c), 5(a)–(c), (e). The district court proposed further briefing by the parties and a hearing on the States' request for a preliminary injunction.[3]

[3] That same day, the district court for the District of Massachusetts denied a preliminary injunction to petitioners challenging the Executive Order on equal protection, Establishment Clause, due process, and APA grounds. *Louhghalam v.*

The United States sought a stay of the district court's order pending an appeal. A motions panel of our court, on an expedited basis (including oral argument by phone involving four time zones), denied the stay. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

Among other things, the panel drew three critical conclusions. First, the panel held that, although we owe deference to the political branches, we can review the Executive Order for constitutionality under the same standards as we would review challenges to domestic policies. *See id.* at 1161–64. Second, the panel found that the States were likely to succeed on their due process arguments because "the Executive Order [does not] provide[] what due process requires, such as notice and a hearing prior to restricting an individual's ability to travel." *Id.* at 1164. Third, the panel found that there were at least "significant constitutional questions" under the Establishment Clause raised by the fact that the seven countries identified in the Executive Order are principally Muslim countries and the President, before and after his election, made reference to "a Muslim ban." *Id.* at 1168.

Trump, No. 17-10154-NMG, 2017 WL 479779 (D. Mass. Feb. 3, 2017). The following week, the district court for the Eastern District of Virginia granted a preliminary injunction against enforcement of the Executive Order in Virginia. The court's sole grounds were based on the Establishment Clause. *Aziz v. Trump*, No. 1:17-cv-116 (LMB/TCB), 2017 WL 580855 (E.D. Va. Feb. 13, 2017).

In response to the panel's decision not to stay the district court's TRO pending appeal, a judge of our court asked for *en banc* review. The court invited the parties to comment on whether the entire court should review the judgment. The U.S. Department of Justice asked that the panel hold the appeal while the administration considered the appropriate next steps and vacate the opinion upon the issuance of any new executive order. A majority of the court agreed to stay the *en banc* process. In the end, the President issued a new Executive Order on March 6, 2017, that referred to the panel's decision and addressed some of the panel's concerns. In light of the new Executive Order, the Department of Justice moved to dismiss the appeal in this case. The panel granted the motion to dismiss but did not vacate its precedential opinion.[4]

Ordinarily, when an appeal is dismissed because it has become moot, any opinions previously issued in the case remain on the books. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) ("Judicial precedents are presumptively correct and valuable to the legal community as a whole. They . . . should stand unless a court concludes that the public interest would be served by a

[4] Proceedings in the original suit filed by Washington and Minnesota are still pending in the Western District of Washington. The State of Hawaii also filed suit in the District of Hawaii and has asked for a TRO enjoining the second Executive Order. *See* Plaintiffs' Motion for Temporary Restraining Order, *Hawai'i v. Trump*, No. 1:17-cv-00050-DKW-KSC (D. Haw. Mar. 8, 2017), ECF No. 65.

vacatur." (citation omitted)). The court, however, has discretion to vacate its opinion to "clear[] the path for future relitigation of the issues between the parties," *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950), or where "exceptional circumstances . . . counsel in favor of such a course," *U.S. Bancorp Mortg.*, 513 U.S. at 29. We should have exercised that discretion in this case because the panel made a fundamental error.[5] It neglected or overlooked critical cases by the Supreme Court and by our court making clear that when we are reviewing decisions about who may be admitted into the United States, we must defer to the judgment of the political branches.[6] That does not mean that we have no power of judicial review at all, but it does mean that our authority to second guess or to probe the decisions of those branches is carefully circumscribed. The panel's analysis conflicts irreconcilably with our prior cases. We had an obligation to

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[5] We have previously said that it is procedurally proper for a judge "to seek an en banc rehearing for the purpose of vacating [a panel's] decision." *United States v. Payton*, 593 F.3d 881, 886 (9th Cir. 2010).

[6] To be clear, the panel made several other legal errors. Its holding that the States were likely to succeed on the merits of their procedural due process claims confounds century-old precedent. And its unreasoned assumption that courts should simply plop Establishment Clause cases from the domestic context over to the foreign affairs context ignores the realities of our world. But these errors are not what justified vacatur. Instead, it is the panel's treatment of *Kleindienst v. Mandel*, 408 U.S. 753 (1972), that called for an extraordinary exercise of our discretion to vacate the panel's opinion.

vacate the panel's opinion in order to resolve that conflict and to provide consistent guidance to district courts and future panels of this court.

II

The panel began its analysis from two important premises: first, that it is an "uncontroversial principle" that we "owe substantial deference to the immigration and national security policy determinations of the political branches," *Washington*, 847 F.3d at 1161; second, that courts can review constitutional challenges to executive actions, *see id.* at 1164. I agree with both of these propositions. Unfortunately, that was both the beginning and the end of the deference the panel gave the President.

How do we reconcile these two titan principles of constitutional law? It is indeed an "uncontroversial principle" that courts must defer to the political judgment of the President and Congress in matters of immigration policy. The Supreme Court has said so, plainly and often. *See*, *e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) ("[T]he responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government."); *Harisiades*, 342 U.S. at 590 ("[N]othing in the structure of our Government or the text of our Constitution would warrant judicial review by standards which would require us to equate our political judgment with

that of Congress."); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); *Henderson v. Mayor of N.Y.*, 92 U.S. (2 Otto) 259, 270–71 (1876). On the other hand, it seems equally fundamental that the judicial branch is a critical backstop to defend the rights of individuals against the excesses of the political branches. *See INS v. Chadha*, 462 U.S. 919, 941 (1983) (reviewing Congress's use of power over aliens to ensure that "the exercise of that authority does not offend some other constitutional restriction" (quoting *Buckley v. Valeo*, 424 U.S. 1, 132 (1976))).

The Supreme Court has given us a way to analyze these knotty questions, but it depends on our ability to distinguish between two groups of aliens: those who are present within our borders and those who are seeking admission. As the Court explained in *Leng May Ma v. Barber*,

> It is important to note at the outset that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, . . . and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely "on the threshold of initial entry."

357 U.S. 185, 187 (1958) (quoting *Mezei*, 345 U.S. at 212). The panel did not

recognize that critical distinction and it led to manifest error. The panel's decision is not only inconsistent with clear Supreme Court authority, but the panel missed a whole bunch of our own decisions as well.

A

The appropriate test for judging executive and congressional action affecting aliens who are outside our borders and seeking admission is set forth in *Kleindienst v. Mandel*, 408 U.S. 753 (1972). In *Mandel*, the government had denied a visa to a Marxist journalist who had been invited to address conferences at Columbia, Princeton, and Stanford, among other groups. Mandel and American university professors brought facial and as-applied challenges under the First and Fifth Amendments. The Court first made clear that Mandel himself, "as an unadmitted and nonresident alien, had no constitutional right of entry." *Id.* at 762. Then it addressed the First Amendment claims of the professors who had invited him. Recognizing that "First Amendment rights [were] implicated" in the case, the Court declined to revisit the principle that the political branches may decide whom to admit and whom to exclude. *Id.* at 765. It concluded that when the executive has exercised its authority to exclude aliens "on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment

interests of those who seek personal communication with the applicant." *Id.* at 770.

In this case, the government argued that *Mandel* provided the proper framework for analyzing the States' claims. The panel, however, tossed *Mandel* aside because it involved only a decision by a consular officer, not the President. *See Washington*, 847 F.3d at 1162 ("The present case, by contrast, is not about the application of a specifically enumerated congressional policy to the particular facts presented in an individual visa application. Rather the States are challenging the President's *promulgation* of sweeping immigration policy."). Two responses. First, the panel's declaration that we cannot look behind the decision of a consular officer, but can examine the decision of the President stands the separation of powers on its head. We give deference to a consular officer making an individual determination, but not the President when making a broad, national security-based decision? With a moment's thought, that principle cannot withstand the gentlest inquiry, and we have said so. *See Bustamante v. Mukasey*, 531 F.3d 1059, 1062 n.1 (9th Cir. 2008) ("We are unable to distinguish *Mandel* on the grounds that the exclusionary decision challenged in that case was not a consular visa denial, but rather the Attorney General's refusal to waive Mandel's inadmissibility. The holding is plainly stated in terms of the power delegated by Congress to 'the

Executive.' The Supreme Court said nothing to suggest that the reasoning or outcome would vary according to which executive officer is exercising the Congressionally-delegated power to exclude."). Second, the promulgation of broad policy is precisely what we expect the political branches to do; Presidents rarely, if ever, trouble themselves with decisions to admit or exclude individual visa-seekers. *See Knauff*, 338 U.S. at 543 ("[B]ecause the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power . . . for the best interests of the country during a time of national emergency."). If the panel is correct, it just wiped out any principle of deference to the executive.

Worse, the panel's decision missed entirely *Fiallo v. Bell*, 430 U.S. 787 (1977), and *Fiallo* answers the panel's reasons for brushing off *Mandel*. In *Fiallo*, the plaintiff brought a facial due process challenge to immigration laws giving preferential treatment to natural mothers of illegitimate children. As in *Mandel*, the constitutional challenge in *Fiallo* was "based on [the] constitutional rights of citizens." *Id.* at 795. The Court acknowledged that the challenge invoked "'double-barreled' discrimination based on sex and illegitimacy." *Id.* at 794. Either ground, if brought in a suit in a domestic context, would have invoked some kind of heightened scrutiny. *See Craig v. Boren*, 429 U.S. 190, 197 (1976) (sex

discrimination); *Trimble v. Gordon*, 430 U.S. 762, 769 (1977) (illegitimacy). Rejecting the claim that "the Government's power in this area is never subject to judicial review," *Fiallo*, 430 U.S. at 795–96, 795 n.6, the Court held that *Mandel*'s "facially legitimate and bona fide reason" test was the proper standard: "We can see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*, a First Amendment case." *Id.* at 795; *see also id.* at 794 (rejecting "the suggestion that more searching judicial scrutiny is required"). Importantly, the Court reached that conclusion despite the fact the immigration laws at issue promulgated "sweeping immigration policy," *Washington*, 847 F.3d at 1162, just as the Executive Order did.

The panel's holding that "exercises of policymaking authority at the highest levels of the political branches are plainly not subject to the *Mandel* standard," *id.*, is simply irreconcilable with the Supreme Court's holding that it could "see no reason to review the broad congressional policy choice at issue [there] under a more exacting standard than was applied in *Kleindienst v. Mandel*," *Fiallo*, 430 U.S. at 795.

Fiallo wasn't the only Supreme Court case applying *Mandel* that the panel missed. In *Kerry v. Din*, 135 S. Ct. 2128 (2015), the Court confronted a case in

which Din (a U.S. citizen) claimed that the government's refusal to grant her Afghani husband a visa violated her own constitutional right to live with her husband. A plurality held that Din had no such constitutional right. *Id.* at 2131 (plurality opinion). Justice Kennedy, joined by Justice Alito, concurred in the judgment, and we have held that his opinion is controlling. *Cardenas v. United States*, 826 F.3d 1164, 1171 (9th Cir. 2016). For purposes of the case, Justice Kennedy assumed that Din had a protected liberty interest, but he rejected her claim to additional procedural due process. "The conclusion that Din received all the process to which she was entitled finds its most substantial instruction in the Court's decision in *Kleindienst v. Mandel*." *Din*, 135 S. Ct. at 2139 (Kennedy, J., concurring in the judgment) (citation omitted). After reciting *Mandel*'s facts and holding, Justice Kennedy concluded that "[t]he reasoning and the holding in *Mandel* control here. That decision was based upon due consideration of the congressional power to make rules for the exclusion of aliens, and the ensuing power to delegate authority to the Attorney General to exercise substantial discretion in that field." *Id.* at 2140. Once the executive makes a decision "on the basis of a facially legitimate and bona fide reason," the courts may "'neither look behind the exercise of that discretion, nor test it by balancing its justification against' the constitutional interests of citizens the visa denial might implicate." *Id.*

(quoting *Mandel*, 408 U.S. at 770). Applying *Mandel*, Justice Kennedy concluded that "the Government satisfied any obligation it might have had to provide Din with a facially legitimate and bona fide reason for its action when it provided notice that her husband was denied admission to the country under [8 U.S.C.] § 1182(a)(3)(B)." *Id.* at 2141. No more was required, and "[b]y requiring the Government to provide more, the [Ninth Circuit] erred in adjudicating Din's constitutional claims." *Id.*

The importance and continuing applicability of the framework set out in *Mandel* and applied in *Fiallo* and *Din* has been recognized in circumstances remarkably similar to the Executive Order. After the attacks of September 11, 2001, the Attorney General instituted the National Security Entry-Exit Registration System. That program required non-immigrant alien males (residing in the United States) over the age of sixteen from twenty-five countries—twenty-four Muslim-majority countries plus North Korea—to appear for registration and fingerprinting. One court referred to the program as "enhanced monitoring." *See Rajah v. Mukasey*, 544 F.3d 427, 433–34, 439 (2d Cir. 2008) (describing the program).[7] The aliens subject to the program filed a series of suits in federal courts across the

[7] The aliens subject to the program were designated by country in a series of notices. The first notice covered five countries: Iran, Iraq, Libya, Sudan, and Syria. *See Rajah*, 544 F.3d at 433 n.3.

United States. They contended that the program unconstitutionally discriminated against them on the basis of "their religion, ethnicity, gender, and race." *Id.* at 438. Similar to the claims here, the petitioners argued that the program "was motivated by an improper animus toward Muslims." *Id.* at 439.

Citing *Fiallo* and applying the *Mandel* test, the Second Circuit held that "[t]he most exacting level of scrutiny that we will impose on immigration legislation is rational basis review." *Id.* at 438 (alteration in original) (citation omitted). The court then found "a facially legitimate and bona fide reason for" the registration requirements because the countries were "selected on the basis of national security criteria." *Id.* at 438–39. The court rejected as having "no basis" the petitioners' claim of religious animus. *Id.* at 439. The court observed that "one major threat of terrorist attacks comes from radical Islamic groups." *Id.* It added:

> Muslims from non-specified countries were not subject to registration. Aliens from the designated countries who were qualified to be permanent residents in the United States were exempted whether or not they were Muslims. The program did not target only Muslims: non-Muslims from the designated countries were subject to registration.

Id. Finally, the court refused to review the program for "its effectiveness and wisdom" because the court "ha[d] no way of knowing whether the Program's enhanced monitoring of aliens ha[d] disrupted or deterred attacks. In any event,

such a consideration [was] irrelevant because an *ex ante* rather than *ex post* assessment of the Program [was] required under the rational basis test." *Id.* The Second Circuit thus unanimously rejected the petitioners' constitutional challenges and "join[ed] every circuit that ha[d] considered the issue in concluding that the Program [did] not violate Equal Protection guarantees." *Id.*; *see Malik v. Gonzales*, 213 F. App'x 173, 174–75 (4th Cir. 2007); *Kandamar v. Gonzales*, 464 F.3d 65, 72–74 (1st Cir. 2006); *Zafar v. U.S. Attorney Gen.*, 461 F.3d 1357, 1367 (11th Cir. 2006); *Hadayat v. Gonzales*, 458 F.3d 659, 664–65 (7th Cir. 2006); *Shaybob v. Attorney Gen.*, 189 F. App'x 127, 130 (3d Cir. 2006); *Ahmed v. Gonzales*, 447 F.3d 433, 439 (5th Cir. 2006); *see also Adenwala v. Holder*, 341 F. App'x 307, 309 (9th Cir. 2009); *Roudnahal v. Ridge*, 310 F. Supp. 2d 884, 892 (N.D. Ohio 2003). The panel was oblivious to this important history.

The combination of *Mandel*, *Fiallo*, and *Din*, and the history of their application to the post-9/11 registration program, is devastating to the panel's conclusion that we can simply apply ordinary constitutional standards to immigration policy. Compounding its omission, the panel missed all of our own cases applying *Mandel* to constitutional challenges to immigration decisions. *See*, *e.g.*, *Cardenas*, 826 F.3d at 1171 (discussing *Mandel* and *Din* extensively as the "standard of judicial review applicable to the visa denial" where petitioner alleged

due process and equal protection violations); *An Na Peng v. Holder*, 673 F.3d 1248, 1258 (9th Cir. 2012) (applying the *Mandel* standard to reject a lawful permanent resident's equal protection challenge against a broad policy); *Bustamante*, 531 F.3d at 1060 (applying *Mandel* to a due process claim and describing *Mandel* as "a highly constrained review"); *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 978–79 (9th Cir. 2006) (applying *Mandel* to a due process challenge to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1082 (9th Cir. 2006) (using the *Mandel* standard to address an alien's challenge to the executive's denial of parole to temporarily enter the United States, and finding the executive's reasons "were not facially legitimate and bona fide"); *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1065 (9th Cir. 2003) (applying *Fiallo* to a facial equal protection challenge based on "former marital status"); *Noh v. INS*, 248 F.3d 938, 942 (9th Cir. 2001) (applying *Mandel* when an alien challenged the revocation of his visa); *see also Andrade-Garcia v. Lynch*, 828 F.3d 829, 834–35 (9th Cir. 2016) (discussing review under *Mandel*). Like the Second Circuit in *Rajah*, we too have repeatedly "equated [the *Mandel*] standard of review with rational basis review." *Barthelemy*, 329 F.3d at 1065; *see An Na Peng*, 673 F.3d at 1258; *Ablang v. Reno*, 52 F.3d 801, 805 (9th Cir. 1995). It is equally clear from our cases that we apply *Mandel* whether we are

dealing with an individual determination by the Attorney General or a consular officer, as in *Mandel* and *Din*, or with broad policy determinations, as in *Fiallo*. The panel's clear misstatement of law justifies vacating the opinion.

B

Applying *Mandel* here, the panel's error becomes obvious: the Executive Order was easily "facially legitimate" and supported by a "bona fide reason." As I have quoted above, § 1182(f) authorizes the President to suspend the entry of "any class of aliens" as he deems appropriate:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f).[8] Invoking this authority and making the requisite findings, the President "proclaim[ed] that the immigrant and nonimmigrant entry into the United States of aliens from [seven] countries . . . would be detrimental to the interests of

[8] Regrettably, the panel never once mentioned § 1182(f), nor did it acknowledge that when acting pursuant it to it, the government's "authority is at its maximum, for it includes all that [the President] possesses in his own right plus all the Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring); *see Knauff*, 338 U.S. at 542 ("When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.").

the United States," and he suspended their entry for 90 days. Exec. Order No. 13769 § 3(c). As the Executive Order further noted, the seven countries—Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen—had all been previously identified by either Congress, the Secretary of State, or the Secretary of Homeland Security (all in prior administrations) as "countries or areas of concern" because of terrorist activity.[9] The President noted that we "must be vigilant" in light of "deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest." *Id.* § 1. The President's actions might have been more aggressive than those of his predecessors, but that was his prerogative. Thus, the President's actions were supported by a "facially legitimate and bona fide" reason.

Justice Kennedy indicated in *Din* that it might have been appropriate to "look behind" the government's exclusion of Din's husband if there were "an affirmative showing of bad faith on the part of the consular officer who denied [the

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[9] *Iraq and Syria*: Congress has disqualified nationals or persons who have been present in Iraq and Syria from eligibility for the Visas Waiver Program. 8 U.S.C. § 1187(a)(12)(A)(i)(I), (ii)(I).

Iran, Sudan, and Syria: Under § 1187(a)(12)(A)(i)(II), (ii)(II), the Secretary of State has designated Iran, Sudan, and Syria as state sponsors of terrorism because the "government . . . repeatedly provided support of acts of international terrorism."

Libya, Somalia, and Yemen: Similarly, under § 1187(a)(12)(A)(i)(III), (ii)(III), the Secretary of Homeland Security has designated Libya, Somalia, and Yemen as countries where a foreign terrorist organization has a significant presence in the country or where the country is a safe haven for terrorists.

husband's] visa." *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). Because the panel never discussed *Din*, let alone claimed that Justice Kennedy's comment might allow us to peek behind the facial legitimacy of the Executive Order, I need not address the argument in detail. Suffice it to say, it would be a huge leap to suggest that *Din*'s "bad faith" exception also applies to the motives of broad-policy makers as opposed to those of consular officers.

Even if we have questions about the basis for the President's ultimate findings—whether it was a "Muslim ban" or something else—we do not get to peek behind the curtain. So long as there is *one* "facially legitimate and bona fide" reason for the President's actions, our inquiry is at an end. As the Court explained in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999):

> The Executive should not have to disclose its "real" reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on that country's nationals—and even it if did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.

Id. at 491; *see Mezei*, 345 U.S. at 210–12; *Knauff*, 338 U.S. at 543.

The panel faulted the government for not coming forward in support of the Executive Order with evidence—including "classified information." *Washington*, 847 F.3d at 1168 & nn.7–8. First, that is precisely what the Court has told us we

should not do. Once the facial legitimacy is established, we may not "look behind the exercise of that discretion." *Fiallo*, 430 U.S. at 795–96 (quoting *Mandel*, 408 U.S. at 770). The government may provide more details "when it sees fit" or if Congress "requir[es] it to do so," but we may not require it. *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). Second, that we have the capacity to hold the confidences of the executive's secrets does not give us the right to examine them, even under the most careful conditions. As Justice Kennedy wrote in *Din*, "in light of the national security concerns the terrorism bar addresses[,] . . . even if . . . sensitive facts could be reviewed by courts *in camera*, the dangers and difficulties of handling such delicate security material further counsel against requiring disclosure." *Id.*; *see Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences."). When we apply the correct standard of review, the President does not have to come forward with supporting documentation to explain the basis for the Executive Order.

The panel's errors are many and obvious. Had it applied the proper standard, the panel should have stopped here and issued the stay of the district

court's TRO. Instead, the panel opinion stands contrary to well-established separation-of-powers principles. We have honored those principles in our prior decisions; the panel failed to observe them here. If for no other reason, we should have gone *en banc* to vacate the panel's opinion in order to keep our own decisions straight.

III

We are all acutely aware of the enormous controversy and chaos that attended the issuance of the Executive Order. People contested the extent of the national security interests at stake, and they debated the value that the Executive Order added to our security against the real suffering of potential emigres. As tempting as it is to use the judicial power to balance those competing interests as we see fit, we cannot let our personal inclinations get ahead of important, overarching principles about who gets to make decisions in our democracy. For better or worse, every four years we hold a contested presidential election. We have all found ourselves disappointed with the election results in one election cycle or another. But it is the best of American traditions that we also understand and respect the consequences of our elections. Even when we disagree with the judgment of the political branches—and perhaps *especially* when we disagree—we have to trust that the wisdom of the nation as a whole will prevail in the end.

Above all, in a democracy, we have the duty to preserve the liberty of the people by keeping the enormous powers of the national government separated. We are judges, not Platonic Guardians. It is our duty to say what the law is, and the meta-source of our law, the U.S. Constitution, commits the power to make foreign policy, including the decisions to permit or forbid entry into the United States, to the President and Congress. We will yet regret not having taken this case *en banc* to keep those lines of authority straight.

Finally, I wish to comment on the public discourse that has surrounded these proceedings. The panel addressed the government's request for a stay under the worst conditions imaginable, including extraordinarily compressed briefing and argument schedules and the most intense public scrutiny of our court that I can remember. Even as I dissent from our decision not to vacate the panel's flawed opinion, I have the greatest respect for my colleagues. The personal attacks on the distinguished district judge and our colleagues were out of all bounds of civic and persuasive discourse—particularly when they came from the parties. It does no credit to the arguments of the parties to impugn the motives or the competence of the members of this court; *ad hominem* attacks are not a substitute for effective advocacy. Such personal attacks treat the court as though it were merely a political forum in which bargaining, compromise, and even intimidation are acceptable

principles. The courts of law must be more than that, or we are not governed by law at all.

I dissent, respectfully.

Washington v. Trump, No. 17-35105

BEA, Circuit Judge, with whom KOZINSKI, CALLAHAN, and IKUTA, Circuit Judges, join, dissenting from the denial of rehearing en banc:

I join Judge Bybee's excellent dissent from the denial of rehearing en banc. I write separately to emphasize a serious error in the panel's conclusion that the due process claims advanced by Washington and Minnesota (collectively, "the States") were likely to succeed on the merits. States may not sue the federal government to assert due process rights for themselves, nor for their residents—much less non-resident aliens—under the Fifth Amendment, because the States are not proper party plaintiffs.[1] We should have taken this case en banc to correct this error in the panel's due process holding and the several errors identified by Judge Bybee in his dissent.

The States are not proper party plaintiffs to make claims under the Due Process Clause, because they are simply not "persons" protected by the Fifth Amendment.[2] *See South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966)

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[1] The panel denied the government's motion for a stay solely on due process grounds. *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017). It specifically avoided deciding the First Amendment claim based on religious discrimination.

[2] I agree with the panel that the States have alleged proprietary harms to their public universities sufficient to establish Article III standing. The universities have spent money for procurement of visas for scholars, faculty, and students, which expenditures will be wasted if the visa holders are prevented from attendance at the state schools. What the States have not done, however, is establish that they have rights under the Due Process Clause of the Fifth Amendment to vindicate those proprietary harms.

("The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court.");[3] *United States v. Thoms*, 684 F.3d 893, 899 n.4 (9th Cir. 2012) (quoting *Katzenbach*, 383 U.S. at 323); *Premo v. Martin*, 119 F.3d 764, 771 (9th Cir. 1997) ("Because the State is not a 'person' for the purposes of the Fifth Amendment, the State's reliance on the Due Process Clause was misplaced." (citing *Katzenbach*, 383 U.S. at 323–24)).

Perhaps to avoid this pitfall, the panel goes one step further. It holds that, "[u]nder the 'third party standing' doctrine, [the] injuries to the state universities give the States standing to assert the rights of the students, scholars, and faculty affected by the Executive Order." *Washington*, 847 F.3d at 1160. In taking this step, the panel ignores direct, on-point Supreme Court precedent to the contrary.

[3] In *Katzenbach*, South Carolina sought "a declaration that selected provisions of the Voting Rights Act of 1965 violate the Federal Constitution," and "an injunction against enforcement of [those] provisions by the Attorney General." *Katzenbach*, 383 U.S. at 307. South Carolina filed its case directly in the Supreme Court, which had original jurisdiction to hear the case. *Id.* The Court denied South Carolina's request to enjoin the enforcement of the Voting Rights Act. In its response to South Carolina's claim that the Voting Rights Act denied South Carolina due process, the Court held that states may not bring due process claims under the Fifth Amendment because states are not persons protected by the Fifth Amendment. *Id.* at 323–24.

The States may not sue the federal government as *parens patriae* to protect their citizens from constitutional violations alleged to have been committed by the federal government. *See Katzenbach*, 383 U.S. at 324 ("Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen."); *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923) ("While the state, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the federal government. In that field it is the United States, and not the state, which represents them as parens patriae, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status." (citing *Missouri v. Illinois*, 180 U.S. 208, 241 (1901))); *see also* Erwin Chemerinsky, *Federal Jurisdiction* 123 (7th ed. 2016) ("One important limit on parens patriae standing of state and local governments is that they may not sue the federal government in this capacity, though they may sue the federal government to protect their own sovereign or proprietary interests.").

The panel avoids this precedent, and holds that the States may sue the federal government on behalf of their residents' (and potential future residents')[4] constitutional interests under the Fifth Amendment because the States have third-party standing to do so.[5] None of the precedent cited by the panel supports its

[4] The panel holds that the States may assert "potential claims regarding possible due process rights of other persons," including "[visa] applicants who have a relationship with a U.S. resident or an institution that might have rights of its own to assert." *Washington*, 847 F.3d at 1166. The Supreme Court has already explained that the States have no rights of their own to assert under the Fifth Amendment, and have no basis for asserting the Fifth Amendment due process rights of their residents. In light of that precedent, I see no reason why the States would be permitted to assert due process claims on behalf of foreign individuals who have not yet received a visa, and who do not yet reside in the States that wish to assert claims on the individuals' behalves. The panel also does not explain what procedures as to notice (reason for denial) or due process hearing (proof of reasons) the federal government would need to provide non-resident visa applicants to satisfy due process upon the denial or suspension of entry pursuant to 8 U.S.C. § 1182(f). Suppose, for example, an Iranian national applies for a non-immigrant tourist visa on April 1, and hostilities break out between the United States and Iran on April 10, one day before the Iranian national expected to receive a visa. Is the Iranian national entitled to notice that his visa will not be issued because of the outbreak of hostilities and to a hearing to justify that the government's denial does not violate the Iranian national's due process rights? Before whom would that hearing be held, where would it take place, and what would be the required proof? Could the Iranian national file suit in a federal district court to assert his "possible" due process rights? The panel invites litigation by visa applicants and other non-resident foreign nationals to assert "potential claims regarding possible due process rights." *Id.* But, as Judge Bybee shows with precision, no alien has a right to enter the United States; it is a privilege which can be withheld. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.").

[5] The States did not raise third-party standing as a basis to assert the due process rights of their residents. Instead, the States argued that, as *parens patriae*, they may bring due process claims on behalf of their residents (and potential future

assertion—which, by the way, was never advanced by the States in their complaint, their response to the federal government's emergency motion, or during oral argument—that a state can evade the strictures of *Katzenbach* and *Mellon* through

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residents), citing *Mellon*, 262 U.S. at 481–82, 485 (1923), *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 609 (1982), and *Massachusetts v. EPA*, 549 U.S. 497, 516–21, 520 n.17 (2007). Not so. Although *Mellon* cites *Missouri v. Holland*, 252 U.S. 416 (1920), for the proposition that a state may sue the federal government to protect *its own* quasi-sovereign interests, such as the right of a state to regulate the taking of wild game within its borders, *Mellon*, 262 U.S. at 482, *Mellon* also made clear that "it is no part of [a state's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government." *Id.* at 485–86. In *Snapp*, Puerto Rico sued private individuals and companies engaged in the apple industry in Virginia, alleging that those individuals and companies violated federal statutes when they allegedly discriminated against qualified Puerto Rican farmworkers. The Fourth Circuit held that Puerto Rico, as *parens patriae*, could maintain its suit against the private defendants. The Supreme Court affirmed, and held that Puerto Rico could sue "to secure the federally created interests of its residents *against private defendants*," but also noted that states lack "standing as *parens patriae* to bring an action against the Federal Government." *Snapp*, 458 U.S. 592, 610 n.16 (emphasis added). Finally, in *Massachusetts v. EPA*, the Supreme Court held that Massachusetts alleged facts sufficient to establish standing—not to assert constitutional rights on behalf of its residents, but to assert a statutory right on behalf of the state's own quasi-sovereign interests—to sue the Environmental Protection Agency (EPA). *Massachusetts*, 549 U.S. at 517–21. The Court held that the state was entitled to "special solicitude" in the standing analysis because Congress accorded the states a procedural right to challenge agency action unlawfully withheld, and because the state owned much of the territory alleged to be affected by the EPA's withholding of agency action. *Id.* at 520. Here, neither the States nor the panel cite any congressional authorization for the States to bring their claims. None of the cases cited by the States or the panel supports a theory that a state, as *parens patriae*, may sue the federal government to assert the due process rights of its residents. The panel's uninvited leap to third-party standing completely avoids the precedents actually cited by the States, which more directly address the question whether states can sue the federal government to assert constitutional claims on behalf of their residents. The answer to that question is "No."

third-party standing doctrine. A closer look at third-party standing doctrine reveals just the opposite. *See Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004) ("[T]here may be circumstances where it is necessary to grant a third party standing to assert the rights of another. But we have limited this exception by requiring a party seeking third-party standing make two additional showings. First, we have asked whether the party asserting the right has a 'close' relationship with the person who possesses the right. Second, we have considered whether there is a 'hindrance' to the possessor's ability to protect his own interests." (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). Even if we assume a close relationship between the States' universities and their students, faculty, and scholars, the panel—and more importantly, the States—have not identified any hindrance to first parties' "ability to protect [their] own interests" here. *Id.*; *see also Louhghalam v. Trump*, ___ F. Supp. 3d ___, 2017 WL 479779 (D. Mass. Feb. 3, 2017) (reviewing constitutional claims arising from Executive Order 13769 brought by Iranian nationals who are employed as Associate Professors at the University of Massachusetts–Dartmouth). The panel's conclusion that the States may assert the due process rights of their residents (or potential future residents) under third-party standing doctrine renders *Katzenbach* and *Mellon* meaningless.

To the lay person, our discussion of third-party standing doctrine may seem pedantic and without recognition of the harm that could have resulted from the

grant of the federal government's motion to stay the temporary restraining order pending appeal. The important point is this: The States may not sue the federal government, either on their own behalf or on behalf of their citizens, to protect their residents' due process rights under the Fifth Amendment. Much less do the States have third-party standing as to non-resident aliens seeking entry into the country. Therefore, the panel erred when it concluded that the federal government did not establish a likelihood of success on the merits of the States' due process claims—the only claims fully addressed by the panel.

As the district court stated, but unfortunately failed adequately to apply in his temporary restraining order, "The work of the court is not to create policy or judge the wisdom of any particular policy promoted by the other two branches. That is the work of the legislative and executive branches and of the citizens of this country who ultimately exercise democratic control over those branches. The work of the Judiciary, and this court, is limited to ensuring that the actions taken by the other two branches comport with our country's laws, and more importantly, our Constitution." *Washington v. Trump*, No. C17-0141-JLR, 2017 WL 462040, at *3 (W.D. Wash. Feb. 3, 2017). At a minimum, the federal government established a likelihood of success on the merits that Executive Order 13769 comports with our country's laws and our Constitution. The government's motion for a stay of the temporary restraining order should have been granted. Our court should have

avoided the inclination to rule based on the political headwinds of a particular moment in history and taken this case en banc to correct the panel's significant errors.