DOUGLAS S. CHIN (Bar No. 6465)
Attorney General of the State of Hawai‘i
DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI‘I
425 Queen Street
Honolulu, HI 96813
Telephone: (808) 586-1500
Fax: (808) 586-1239
Attorneys for Plaintiff, State of Hawai‘i

NEAL K. KATYAL*
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: (202) 637-5600
Fax: (202) 637-5910
**Admitted Pro Hac Vice*

Attorneys for Plaintiffs, State of Hawai‘i and Ismail Elshikh

(See Next Page For Additional Counsel)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I

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.

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

REPLY IN SUPPORT OF MOTION TO CONVERT TEMPORARY RESTRAINING ORDER TO A PRELIMINARY INJUNCTION; CERTIFICATE OF WORD COUNT; CERTIFICATE OF SERVICE

ADDITIONAL COUNSEL

CLYDE J. WADSWORTH (Bar No. 8495)
Solicitor General of the State of Hawai‘i
DEIRDRE MARIE-IHA (Bar No. 7923)
DONNA H. KALAMA (Bar No. 6051)
KIMBERLY T. GUIDRY (Bar No. 7813)
ROBERT T. NAKATSUJI (Bar No. 6743)
Deputy Attorneys General
DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI‘I
425 Queen Street
Honolulu, HI 96813
Telephone: (808) 586-1500
Fax: (808) 586-1239
Email: deirdre.marie-iha@hawaii.gov

Attorneys for Plaintiff, State of Hawai‘i

COLLEEN ROH SINZDAK*
MITCHELL P. REICH*
ELIZABETH HAGERTY*
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: (202) 637-5600
Fax: (202) 637-5910
Email: neal.katyal@hoganlovells.com

THOMAS P. SCHMIDT*
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
Telephone: (212) 918-3000
Fax: (212) 918-3100

SARA SOLOW*
ALEXANDER B. BOWERMAN*
HOGAN LOVELLS US LLP
1835 Market St., 29th Floor
Philadelphia, PA 19103
Telephone: (267) 675-4600
Fax: (267) 675-4601

**Admitted Pro Hac Vice*

Attorneys for Plaintiffs, State of Hawai‘i and Ismail Elshikh

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

INTRODUCTION

Ten days ago, the Court issued an order enjoining the President's second attempt, in a span of two months, to "suspend[] the entry of Muslims" to the United States. Op. 36. Defendants' primary tactic in opposing the present motion is to create the illusion that the Court's TRO should not be converted to a preliminary injunction because there is a "significant procedural and substantive" difference between a TRO and a preliminary injunction, and Plaintiffs are obliged "to offer additional, relevant evidence to support their request." Opp. 1.

Defendants are wrong; their brief distorts both Rule 65 and precedent. There is no significant procedural or substantive difference between a TRO and a preliminary injunction in a case like this one, where Plaintiffs submitted extensive facts and declarations (specifically, a 38-page complaint, 14 exhibits, and eight declarations); both parties submitted oversized briefs fleshing out their legal theories; and a lengthy hearing occurred before the TRO was issued. Nor have Defendants offered any new evidence or changed circumstances to undermine the integrity of the lengthy opinion finding the facts and making the legal conclusions necessary to issue emergency injunctive relief. They do not, for example, even begin to dispute the accuracy of the factual premise of this Court's opinion: the numerous statements by the President and his aides reflecting discriminatory intent. Nor can they deny that the Order bans refugees at a time when the major

refugee crisis involves Muslim-majority countries. All Defendants have done here—as in their prior "clarification" motion—is present the same arguments that this Court already rejected.

For these reasons, Plaintiffs respectfully request that the Court issue a preliminary injunction without further proceedings. *See* Local Rule 7.2(d) (permitting court to decide any motion without a hearing). That would enable the parties to move toward the swift resolution of this dispute that all parties profess to seek. And after the repeated stops and starts of the last two months, it would ensure that the constitutional rights of the Plaintiffs, and of Muslim citizens throughout the United States, could be finally and fully vindicated.

ARGUMENT

I. This Court Has Already Made The Findings Necessary For A Preliminary Injunction.

This Court's detailed TRO opinion—issued after extensive merits briefing and an adversarial hearing lasting approximately 90 minutes—already made all of the findings necessary to grant a preliminary injunction. Mem. 9-14. Defendants do not attempt to argue otherwise or offer a single reason why any of those well-supported findings was incorrect. They simply "incorporate by reference" the arguments they made in opposition to the TRO motion. Opp. 13. But the Court did not find those arguments persuasive last week, and they have not grown more so in the intervening days. Because the standards for issuing a TRO and a

preliminary injunction are "substantially identical," Op. 27 (citing *Stuhlbarg Int'l Sales Co.* v. *John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001)), a preliminary injunction restraining Sections 2 and 6 is appropriate.

Defendants nonetheless suggest that Plaintiffs bear some *additional* "burden of proof," or must present "additional * * * evidence," to support issuance of a preliminary injunction. Opp. 1, 9. That is just not true. Where the record has not changed in the interim, courts regularly convert TROs to preliminary injunctions without any additional showing by the plaintiff. *See, e.g.*, *LFP IP LLC* v. *Midway Venture LLC*, 2010 WL 4395401, at *2 (C.D. Cal. Oct. 29, 2010) (converting TRO to preliminary injunction because "the Court has no reason to doubt its previous findings"); *Productive People, LLC* v. *Ives Design*, 2009 WL 1749751, at *3 (D. Ariz. June 18, 2009) ("Because Defendants have given the Court no reason to alter the conclusions provided in its [Temporary Restraining] Order * * * the Court will enter a preliminary injunction."); *Fla. Democratic Party* v. *Scott*, 2016 WL 6080225, at *1 (N.D. Fla. Oct. 12, 2016) ("Nothing has changed since * * * this Court issued the Temporary Restraining Order * * * [a]nd for those same reasons, a preliminary injunction * * * is appropriate."). There is certainly no requirement that Plaintiffs present new evidence at the preliminary injunction stage—although Plaintiffs have in fact done so, adding to the record (among other things) President Trump's admission that the revised Executive Order was merely "a watered-down

version of the first" (Dkt. 239-1, at 7), an extraordinarily telling statement Defendants inexplicably wave away as a "fact[] on which th[e] Court should [not] rely," Opp. 21.

Courts routinely issue preliminary injunctions on the kinds of evidence Plaintiffs have submitted: publicly available documents, *see, e.g.*, *Ticketmaster L.L.C.* v. *RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1114–15 (C.D. Cal. 2007), and the "well-pleaded allegations of [Plaintiffs'] complaint and uncontroverted affidavits," *G.G. ex rel. Grimm* v. *Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 725–26 (4th Cir.), *remanded on other grounds*, No. 16-273, 2017 WL 855755 (U.S. Mar. 6, 2017). This is especially true where, as here, the defendants "have not provided any facts contradicting" the plaintiff's evidence. *Arch Ins. Co.* v. *Sierra Equip. Rental, Inc.*, No. CIV S-12-0617 KJM, 2012 WL 5897327, at *5 (E.D. Cal. Nov. 13, 2012). Indeed, the Ninth Circuit relied on substantially the same evidence in upholding the injunction in *Washington* v. *Trump*, 847 F.3d 1151 (9th Cir. 2017), which it treated as a preliminary injunction. *Id.* at 1559.

Defendants claim (Opp. 9) that Rule 65(b) "contemplates" some additional proceedings between the TRO stage and the preliminary injunction. Remarkably, Defendants neglect to inform the Court that Rule 65(b) by its plain text—which Defendants excise from their quotation—*refers only to circumstances in which a TRO is issued "without written or oral notice to the adverse party*." Fed. R. Civ.

P. 65(b)(1); *accord id.* 65(b)(2) & (b)(3) (referring to an "order issued without notice"); *see also* 11A Charles Alan Wright et al., Fed. Practice & Proc. § 2953 (3d ed.) (describing procedures required by Rule 65(b)(2) when a TRO is "issued without notice"); *Granny Goose Foods, Inc.* v. *Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 442–443 (1974) (describing requirements where "a temporary restraining order is granted without notice" (quoting Fed. R. Civ. P. 65(b))).

When a defendant has "actually received notice of the application for a restraining order," and "there has been [a] hearing," the law makes clear that a TRO can simply "be treated as a preliminary injunction." Wright et al., *supra*, § 2951. That is why the Ninth Circuit, as well as Judge Brinkema and Judge Chuang, deemed it appropriate to issue or affirm a preliminary injunction immediately after adversarial briefing and a hearing. *See Washington* v. *Trump*, 847 F.3d 1151, 1158 (9th Cir. 2017) (deeming TRO a preliminary injunction in part because "[t]he parties vigorously contested the legal bases for the TRO in written briefs and oral arguments before the district court."); *International Refugee Assistance Project* v. *Trump*, -- F. Supp. 3d --, 2017 WL 1018235, at *1 (D. Md. Mar. 16, 2017); *Aziz* v. *Trump*, -- F. Supp. 3d --, 2017 WL 580855, at *1 (Feb. 13, 2017).

Defendants are also wrong to claim (Opp. 11) that courts "routinely" narrow the scope of relief between a TRO and a preliminary injunction. In each case Defendants cite, relief was narrowed because there was some *changed circumstance* between the first injunction and the second. In *Service Employees International Union* v. *Roselli*, 2009 WL 2246198 (N.D. Cal. July 27, 2009), the court noted that it had "the benefit of a record of three months of discovery." *Id.* at *2. In *Luxottica Grp. S.p.A.* v. *Light in the Box Ltd.*, 2016 WL 6092636 (N.D. Ill. Oct. 19, 2016), the parties conducted "discovery," put on "witness testimony," and entered "stipulations" that showed the plaintiff lacked evidence to support the allegations on which the TRO rested. *Id.* at *2, *9. And in *In re Adelphia Commc'ns Corp.*, 2006 WL 1529357 (Bankr. S.D.N.Y. June 5, 2006), the TRO had been entered ex parte. *See id.* at *1. It is telling that despite scouring district courts across the country, Defendants are unable to find a *single case* in which a court narrowed the scope of preliminary relief merely because the defendant wished to make new arguments it neglected to include in its TRO briefing.

Finally, Defendants protest that Plaintiffs mischaracterize their briefs by saying that Defendants "failed to argue the appropriate scope of any TRO that the Court might issue." Opp. 7 (citing Mem. 15). But it is Defendants who are doing the mischaracterizing here. Plaintiffs accurately pointed out (on that very page) that while Defendants proposed other means of narrowing the injunction in their

initial TRO briefing, they did not suggest this one. Rather, Defendants now "ask the Court to make a distinction"—limiting the injunction to section 2(c)—"that the Federal Defendants' previous briefs and arguments never did." (Dkt. 229).

And in the end, that is all Defendants' Opposition is about. Having failed to convince the Court to "clarify" the TRO to say something it obviously did not (Dkt. 227), Defendants now try to get to the same end by asking the Court to "revisit" questions it already decided, Opp. 10. However styled, this effort supposes that the Court somehow erred in enjoining Sections 2 and 6 of the President's unconstitutional order. It did not. The Court closely considered every argument Defendants raised and rightly rejected them all. Because nothing has changed since the Court's TRO decision that would warrant revisiting those conclusions, the Court's findings should be reaffirmed, and its temporary order converted into a preliminary injunction.

II. The Scope Of The Injunction Should Not Be Narrowed.

Even if the Court accepted Defendants' invitation to reexamine the scope of the injunction, their arguments are meritless. Defendants ask the Court to deny Plaintiffs standing by ignoring its prior opinions, the Ninth Circuit's opinion in *Washington*, and the plain words of Plaintiffs' declarations. And they invite the Court to flout precedent by limiting the applicability of this Court's well-grounded Establishment Clause holding. Both lines of argument are wrong.

A. Plaintiffs Have Standing To Challenge Sections 2 And 6 In Their Entirety.

Ruling on Defendants' standing arguments is simple; the Court has already done it twice. Just ten days ago, the Court held, without qualification, that "Plaintiffs meet the threshold Article III standing requirements" to challenge both Section 2 and Section 6. Op. 16. It noted that Dr. Elshikh "declares that the effects of the Executive Order"—the whole Order—"are 'devastating to me, my wife and children" because it "sends a message to [Muslims] that they are outsiders" and "targets Muslim citizens because of their religious views." *Id.* at 24-25. And it observed that "a decision enjoining *portions* of the Executive Order"—plural—"would redress that injury." *Id.* at 25 (emphasis added). It then exercised jurisdiction to enjoin "Sections 2 and 6" together. *Id.* at 42. Defendants then spent much of their improper motion to "clarify" the injunction rehashing its standing arguments, to no better effect.

Now Defendants urge for the third time (Opp. 19) that Dr. Elshikh's standing is entirely derivative of the harms to his "mother-in-law." For the third time, Defendants must be told that "is not true." Op. 26; Dkt. 228, at 6. "Dr. Elshikh alleges direct, concrete injuries to both himself and his immediate family that are independent of his mother-in-law's visa status." Op. 26. And contrary to Defendants' representation (Opp. 18), those alleged harms are not limited to "the suspension-of-entry provision" in Section 2. Dr. Elshikh's declaration discusses at

length the harms inflicted by "the Executive Order" as a whole and "the message" in "convey[s]" to him, his family, and his mosque. Op. 24; *see, e.g.*, Dkt. 66-1 ¶ 4 (describing "knowledge" that the government would "discriminate" based on "religious beliefs"); *id.* ¶ 7 (referring to the impression that the Order "targets Muslim citizens because of their religious views"). The complaint, moreover, states that "Sections 2 and 6 of President Trump's March 6, 2017 Executive Order are intended to disfavor Islam." SAC ¶ 107; *see also id.* ¶ 90.

Defendants assert that they cannot see how the Order's various refugee provisions and its "internal-facing" requirements "could have injured" Dr. Elshikh. Opp. 20, 25-26. But Dr. Elshikh's claim is that *all* of these provisions are part of the President's policy of discrimination, and *all* of them convey the message that Muslims are outsiders and threats to national security. That is unquestionably sufficient to establish an Establishment Clause injury. *See Catholic League for Religious & Civil Rights* v. *City & Cnty. of San Francisco*, 624 F.3d 1043, 1048 (9th Cir. 2010) (en banc) (holding that "adherents to a religion have standing to challenge an official condemnation by their government of their religious views"). Defendants may attempt to refute Plaintiffs' claims about purpose and the message conveyed, but that is their defense on the merits, not a basis for denying Dr. Elshikh standing to raise the claim.

Defendants are also wrong in claiming that Hawai‘i lacks standing to challenge Sections 2 and 6 in their entirety, although the Court need not decide that question to convert the TRO. *See Preminger* v. *Peake*, 552 F.3d 757, 764 (9th Cir. 2008) (“‘[O]nce the court determines that one of the plaintiffs has standing, it need not decide the standing of the others.’”). Defendants assert (Opp. 15-16) that the State’s only proffered basis for standing is the effect of Section 2(c) on its universities and tourism industry. Not so. The State, like Dr. Elshikh, alleges that Section 2 and Section 6 are part of an unconstitutional establishment of religion, SAC ¶¶ 106-110—a claim that the State has standing to raise both in its own right, *see Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring in the judgment), and on behalf of its University’s students and professors, *see Washington*, 847 F.3d at 1160 n.4 (holding that States had standing to bring an Establishment Clause challenge to original Order’s refugee provisions because the “the States [were] asserting the [Establishment Clause] rights of their students and professors”). Nor should the harm to the University be easily dismissed, particularly because it is currently admissions season.

The State has also asserted a quasi-sovereign interest in protecting residents who have a relationship with refugees abroad (Dkt. 65-1, at 39-40, 49), a basis for standing expressly endorsed by the Ninth Circuit, *see Washington*, 847 F.3d at

1165 (finding that States had standing to challenge the prior Order's deprivation of "procedures [otherwise] provided by federal statute for refugees seeking asylum").

Moreover, Hawai'i has alleged harms to its proprietary interests that flow from provisions of the Order *other* than Section 2(c). The State has described the chilling effect the Order as a whole will inflict to its tourism economy—especially the provisions in Section 2 that contemplate the addition of more countries. *See* SAC ¶¶ 100-10; Dkt. 66-6 ¶¶ 6-10. This Court relied on that evidence to support its finding about the State's standing. Op. 20-21. Such pocketbook harms are sufficient to confer standing; as the Supreme Court reaffirmed earlier this week, "[f]or standing purposes, a loss of even a small amount of money is ordinarily an 'injury,' " particularly in "the Establishment Clause" context. *Czwewski* v. *Jevic Holding Corp.*, -- S. Ct. --, 2017 WL 1066259, at *9 (Mar. 22, 2017). In any event, courts have consistently held that the sort of Establishment Clause injury inflicted by the Order *irreparably* harms plaintiffs. Op. 40 (collecting cases).

B. The Merits Dictate That The Injunction Should Cover Sections 2 and 6.

Defendants dedicate the bulk of their "merits" argument to the contention that the injunction should be narrowed because Plaintiffs are not likely to succeed on their Establishment Clause challenge. As a preliminary matter, that completely ignores the fact that Sections 2 and 6 could also be enjoined based on additional

statutory and constitutional grounds this Court has not yet reached. But it need not reach them now either. Defendants' argument veers off course at every turn.

1. The Establishment Clause violation requires enjoining Section 6.

Defendants begin by asserting (Opp. 21) that the factual record "fails to support" the conclusion that Section 6 "was motivated by discriminatory animus toward Muslims." This Court has already flatly rejected that contention, holding that the record "includes significant and unrebutted evidence of religious animus driving the promulgation of the Executive Order and its related predecessor." Op. 33. That animus is readily apparent with respect to Section 6. *See* Mem. 17-20. For example, on the day the first Order was announced, the President stated that it was designed to favor Christian refugees over Muslims, a statement made all the more salient by the President's recent declaration that the new Order is a "watered-down version" of the first.

Defendants contend (Opp. 21) that public statements like these are not "even relevant to Section 6" and that the Court should instead look to the text. That is factually and legally incorrect. The President's statements about his "watered-down" Order were not limited in applicability; he made them in response to this Court's TRO, which expressly applied to both Sections 2 and 6. And the statements are legally relevant. This Court, the Ninth Circuit, and the Supreme Court, have all confirmed that in the Establishment Clause context, "evidence of

purpose beyond the face of the challenged law may be considered." Op. 32 (quoting *Washington*, 847 F.3d at 1167 (citing *Church of Lukumi* v. *City of Hialeah*, 508 U.S. 520, 534 (1993))); *see also e.g.*, *Hernandez* v. *CIR*, 490 U.S. 680, 696 (1989) (facially neutral policy "born of animus" to one faith cannot withstand scrutiny); *Town of Greece, N.Y.* v. *Galloway*, 134 S. Ct. 1811, 1824 (2014) (considering whether policy was prompted by "aversion or bias" in Establishment Clause context); *id.* at 1831 (Alito, J., concurring) (an otherwise constitutional policy would likely be unconstitutional if it were done with a "discriminatory intent"); *cf. Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981) (holding that even in the national security context "deference does not mean abdication" and affirming constitutionality of selective service statute only after examining its legislative history).

Defendants next attempt to distinguish *Lukumi*'s express holding that even a facially neutral provision of a policy motivated by religious animus must be invalidated. They contend (Opp. 23) that *Lukumi* held that the ordinances were not severable because "there was no evidence" that they were passed for a nondiscriminatory reason. But *Lukumi* itself says only that a nondiscriminatory purpose was "implausible," and the same can be (and has been) easily said of the new Executive Order, including Section 6. 508 U.S. at 540; *see Church of Scientology* v. *City of Clearwater*, 2 F.3d 1514, 1551 (11th Cir. 1993) (holding that

a "predominantly * * * sectarian motive" requires that a court "permanently enjoin[ ]" an ordinance as a whole; severance is possible only in the absence of such motive). Defendants assert that this Order is distinguishable from the ordinances in *Lukumi* either because the "entire Order" is "neutral with respect to religion" (Opp. 22 n.13) or because *Lukumi* did not consider how to tailor an injunction to the particular harms of the plaintiffs (Opp. 23 n.15). These arguments appear in footnotes for a reason: This Court's opinion thoroughly explained why the Order is *not* neutral with respect to religion, and even if Defendants simply mean that there is no overt sign of discrimination on the face of the Order, that is wrong. Plaintiffs have repeatedly explained that the Order's improper purpose is apparent even without looking at extrinsic evidence: The Order singles out Muslim-majority nations for targeting, it bans refugees at a time when the publicized refugee crisis is focused on Muslim-majority nations, it uses words such as "honor killings" that are associated with the Muslim faith, and the fit between its stated secular purpose and its policy is both over- and under-inclusive.

As to tailoring, Plaintiffs have it backwards. Tailoring does not require a court to leave new and unconstitutional policies in place; the purpose of a preliminary injunction is to maintain the "status quo," Op. 27—that is, the rights in existence *before* the unconstitutional order was signed. And Plaintiffs are harmed so long as any of the stigmatizing Order is in place. That conclusion is not altered

by Plaintiffs' choice to challenge only Sections 2 and 6. Plaintiffs have never conceded that the remainder of the Order is constitutional or is motivated by something other than animus. Rather, Plaintiffs elected to focus their resources on the most harmful and clearly discriminatory provisions in the Order. It would turn the law's preference for tailored relief on its head to require parties to request injunctive relief with respect to *all* of their harms in order to get relief for *any* of them.

Defendants' arguments with respect to Section 6(b) fare no better. Defendants claim (Opp. 24) that Plaintiffs have not explained why the refugee cap should be enjoined, and that Plaintiffs have merely observed that Section 6 as a whole is an "integrated" unit that is part of an Executive Order "motivated by animus." But that *is* the explanation of why Section 6(b) must be enjoined: It is part and parcel of a provision designed to exclude refugees as a means of implementing a broader policy of religious discrimination. Mem. 16. And, again, it strains credulity to contend that the Establishment Clause permits Defendants to keep in place a provision designed to cap refugees that is part of a "watered-down" version of a policy that—in its first incarnation—explicitly discriminated against refugees based on faith.

2. Recent case law does not suggest otherwise.

Defendants point to three recent judicial opinions in an attempt to prop up their arguments, to no avail. *First*, Defendants assert that the recent District Court decision in *Washington* v. *Trump*, 2017 WL 1045950 (W.D. Wash. Mar. 16, 2017), suggests that the new Executive Order is fundamentally different from the first. But the Order they cite explicitly states that it "makes no ruling as to whether Defendants accomplished" the goal of "eliminat[ing] [the] constitutional defects" that plagued the first Order. *Id.* at *3. *Second*, they cite *Sarsour* v. *Trump*, No. 17-cv-00120-AJT-IDD (ED. Va. Mar. 24, 2017). Of course, an out-of-circuit decision from a different district court is not precedential. And even *Sarsour* does not deny that there was sufficient evidence to enjoin the *first* Executive Order under the Establishment Clause. (Dkt. 251-1, at 3, 21-22.) This Court and a Maryland District Court recently held that the Second Order suffers the same defect, and for good reason.[1] As the President himself confirmed, the new Order is motivated by precisely the same policy as the old. "Watering down" its provisions cannot cleanse its discriminatory purpose.

[1] To be sure, the Maryland court enjoined only Section 2(c), but not because it doubted that the remainder of that Section and Section 6 could be enjoined. The Court held only that, on the record in that case, those plaintiffs had not "sufficiently develop[ed]" their arguments to apply to Sections 2 and 6 as a whole. 2017 WL 1018235, at *17. That determination has no significance for this Court.

Third, Defendants point (Opp. 23 n.14) to a set of dissents from denial of rehearing en banc in *Washington* v. *Trump*. This is a curious citation given that—as another Ninth Circuit judge explained—these dissents reflect the views of a "small group of judges, having failed in their effort to undo." (Dkt. 251-2, at 1 (Reinhardt, J., concurring).) They have no binding effect on anyone.

Nor does disagreeing with the *Sarsour* Court and *en banc* dissenters suggest that the President is forever unable to make effective immigration policy. As this Court correctly recognized, the Establishment Clause taint may be lifted by "*genuine* changes in constitutionally significant conditions." Op. 38. But Defendants have done nothing to demonstrate a "genuine" change of purpose here. They have not, for example, asked Congress—the body with constitutional responsibility for immigration—to enact statutes or otherwise become involved in its sweeping immigration reform. Instead, the Executive has overridden Congress's express judgment that conditions in the six designated countries are best handled by exempting those countries from the visa waiver program. (*See* Dkt. 145, at 41 (acknowledging that the President had a different view of how to deal with the same circumstances).)

Similarly, after the first Order was invalidated, the Administration did not announce an effort to study and explore how to sculpt its policy to address national security concerns within constitutional boundaries. Instead, it announced a plan to

make only "technical" changes to the Order designed to get around a "bad decision," and it *ignored* two memos from the DHS suggesting that the policy embodied in the Executive Order did not effectively combat terrorism. Op. 13. Further, any claims that the Administration's hands are tied are belied by the recent enactment of the laptop ban for passengers on airlines departing from certain Muslim-majority countries. *See* Suppl. Katyal Decl. Exs. D, E. Plaintiffs readily acknowledge that policies like that one, justified with respect to a particular (even if unspecified) new threat, implemented without accompanying statements of animus towards Islam, and in harmony with Congressional policies and the policies of our allies, raise no constitutional concerns. The same is true of the vast majority of policies that lack one or more of these features. This Order lacks *all of them*. It is, as the Court aptly stated, "unique."

3. This Court should not parse Sections 2 and 6.

Finally, Defendants contend (Opp. 25-29) that, at a minimum, the provisions of Sections 2 and 6 that do not ban or cap admission should be excluded from the injunction. That again ignores the fact that allowing implementation of *any* provision of those sections permits Defendants to inflict a policy born of animus on its citizens. Defendants' arguments on this point also misunderstand the law with respect to injunctions. Defendants claim that enjoining the consultation and reporting provisions of Sections 2 and 6 will altogether prevent the Executive from

undertaking a necessary review of its vetting procedures. But, as Plaintiffs explained in their motion, enjoining Section 2 and 6 does not prevent Defendants from undertaking a review of their immigrations vetting systems, it merely prevents them from doing so under the auspices of a discriminatory policy. A court order barring the implementation of conduct motivated by religious animus does not also bar conduct undertaken as part of a separate, neutral policy. These distinctions are elementary. Notably, they are also ones that Defendants themselves have made explicitly with respect to the injunction in *Washington* (*see* Opp. 5-6; *Washington* v. *Trump*, No. 17-cv-141 (W.D. Wash. Mar. 14, 2017), ECF No. 146), and implicitly by implementing increased vetting procedures worldwide while the current injunctions of the Order are in place. *See* Suppl. Katyal Decl. Ex. F.

CONCLUSION

For the foregoing reasons, the Court should convert the TRO into a preliminary injunction prohibiting Defendants from enforcing or implementing Sections 2 and 6 of the Executive Order across the Nation.

DATED: Washington, D.C., March 25, 2017.

Respectfully submitted,

/s/ Neal K. Katyal

DOUGLAS S. CHIN (Bar No. 6465)
Attorney General of the State of Hawai‘i
CLYDE J. WADSWORTH (Bar No. 8495)
Solicitor General of the State of Hawai‘i
DEIRDRE MARIE-IHA (Bar No. 7923)
DONNA H. KALAMA (Bar No. 6051)
KIMBERLY T. GUIDRY (Bar No. 7813)
ROBERT T. NAKATSUJI (Bar No. 6743)
Deputy Attorneys General
DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI‘I

Attorneys for Plaintiff, State of Hawai‘i

NEAL K. KATYAL*
COLLEEN ROH SINZDAK*
MITCHELL P. REICH*
ELIZABETH HAGERTY*
THOMAS P. SCHMIDT*
SARA SOLOW*
ALEXANDER B. BOWERMAN*
HOGAN LOVELLS US LLP

**Admitted Pro Hac Vice*

Attorneys for Plaintiffs, State of Hawai‘i and Ismail Elshikh