No. 17-15589

IN THE

United States Court of Appeals for the Ninth Circuit

STATE OF HAWAII, *et al.*,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawaii, No. 1:17-cv-00050-DKW-KSC
District Judge Derrick K. Watson

OPPOSITION TO MOTION OF DEFENDANTS-APPELLANTS FOR A STAY PENDING EXPEDITED APPEAL

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INTRODUCTION

The Government is right about one thing: This case is "extraordinary." Mot. 1. One week after taking office, President Trump issued an Executive Order that was a bald attempt to fulfill an equally bald campaign promise to discriminate against members of the Muslim faith. After this Court held that Order unconstitutional, President Trump revoked it and issued a new Executive Order that he himself described as a "watered down version" of the first one. Dist. Ct. Dkt. 239-1, at 7. According to a close advisor, the "basic policy" of the new Executive Order is the same as the old, TRO Opinion ("TRO") at 35 (Dist. Ct. Dkt. 219); the Administration just made a few " 'technical' revisions," *id.*, to "avoid * * * litigation," Order § 1(i). Examining these facts—and refusing to "crawl into a corner, pull the shutters closed, and pretend it has not seen what it has"—the District Court preliminarily enjoined Defendants from implementing Sections 2 and 6 of the revised Order. Preliminary Injunction Opinion ("PI") at 17 (Dist. Ct. Dkt. 270)

The Government now asks for a stay of that injunction. None "of the traditional factors favor[s] a stay of that injunction pending expedited appeal." Mot. 2. The Government will not suffer any irreparable injury from the absence of a stay; the injunction simply preserves the longstanding status quo. And the Government's actions over the past two months further underscore that there is no

genuine urgency behind the Order's implementation. In any event, the Government completely ignores that a court in the Fourth Circuit has *also* enjoined the enforcement of Section 2(c) nationwide, meaning a stay from this Court would not even be sufficient to permit the Government to enforce its discriminatory travel ban.

The Government also has not come close to "ma[king] 'a strong showing that [it] is likely to' prevail against" Plaintiffs' constitutional and statutory claims. *Washington* v. *Trump*, 847 F.3d 1151, 1165 (9th Cir. 2017) (per curiam) (citation omitted). Its stay papers and brief on the merits fail to demonstrate that the Order is anything other than an enactment of religious animus. Rather, as to the Establishment Clause challenge, the Government asks this Court to do things it already rejected—to ignore "extrinsic material" bearing on the Order's intent (Mot. 17), *but see Washington*, 847 F.3d at 1167 ("evidence of purpose beyond the face of the challenged law may be considered"), and to discount Plaintiffs' Establishment Clause injuries as not "meaningful" (Mot. 10-12, 14), *but see Washington*, 847 F.3d at 1167 (recognizing the injury caused by policies that "send[] * * * the message" of being outsiders). These tactics fail (again). And the Government has not even addressed the alternative statutory and constitutional grounds upon which the injunction can be affirmed.

Most striking of all, the Government claims (Mot. 15-16) that this Court is powerless to review the constitutionality of the Executive Order. This argument is both frivolous and inconsistent with our Nation's most basic values: "There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy." *Washington*, 847 F.3d at 1161.

The other stay factors also counsel against the issuance of such extraordinary relief here. The State of Hawaii and Dr. Elshikh will suffer multiple irreparable harms if the Order is allowed to take effect. They will be forced to tolerate their national government's putting a stamp of disapproval on the Muslim religion; Dr. Elshikh will be subjected to an additional barrier to reuniting with his mother-in-law; and the State will endure "certainly impending" injuries to its proprietary and sovereign interests, including harms to its University. *See Clapper* v. *Amnesty Int'l*, 133 S. Ct. 1138, 1143 (2013). These injuries flow from the Order as a whole. *See* E.R. 94-96 (Elshikh Decl. ¶¶ 4, 7); E.R. 162, 167 (Compl. ¶¶ 90, 107). There is no basis for this Court to stay or narrow the injunction during its review.

The motion for a stay should be denied.

ARGUMENT

The Government must carry a heavy burden to obtain a stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). First, it must show that it will suffer

irreparable harm if the injunction is not stayed, meaning that something concrete and injurious will happen if the Order is not put into effect during this Court's review. Next, it must make "a strong showing that [it] is likely to succeed on the merits" of its appeal, meaning it must demonstrate a strong likelihood that this Court will find the District Court abused its discretion in issuing the preliminary injunction. *Nken* v. *Holder*, 556 U.S. 418, 434 (2009) (citation omitted). The standards for each showing are high. *See id.* ("simply showing some 'possibility of irreparable injury'" is not sufficient (citation omitted)); *Washington*, 847 F.3d at 1168 (the Government must "submit[] * * * evidence" proving the "urgent need for the Executive Order to be placed immediately into effect"); *Sw. Voter Registration Educ. Project* v. *Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (abuse of discretion review for preliminary injunction is "deferential"). In addition to these two "most critical" factors in the stay analysis, *Nken*, 556 U.S. at 434, the Government must also demonstrate that a stay will not "substantially injure the other parties interested in the proceeding," and that the public interest favors such relief. *Hilton*, 481 U.S. at 776. The Government fails on all counts.

I. The Government Will Not Suffer Irreparable Harm In The Absence Of A Stay.

This Court should deny the Government's request for a stay because it has not shown that it will suffer irreparable harm—or indeed, any harm—as a result of

a district court "order [that] merely return[s] the nation temporarily to the position it has occupied for many previous years." *Washington*, 847 F.3d at 1168.

First and foremost, to obtain a stay the Government must demonstrate not only that it will be harmed if the Order is not ultimately enforced, but also that the harm will occur if the Order is not enforced *immediately*. *See, e.g.*, *Boardman* v. *Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016). The Government's own conduct over the past two months makes that showing impossible. The Government waited a month to issue the revised Order after this Court left in place the injunction of the prior one. E.R. 156. The Government then delayed the release date of the new Order so as not to undercut favorable media coverage of the President's address to Congress. E.R. 156-157.

The Government's litigation tactics further demonstrate the lack of any urgent need to restore the Order. After the District Court issued its temporary restraining order ("TRO") on March 15, the Government could have moved swiftly to demonstrate a basis for its position that the TRO threatened national security objectives, and in turn moved to dissolve the TRO. Or, the Government could have stipulated to the conversion of the TRO to a preliminary injunction to accelerate review in this Court. The Government did neither. Instead, the Government filed a "Motion for Clarification"—even though there was "nothing unclear about the scope of the [TRO]," Dist. Ct. Dkt. 229—and then opposed

Plaintiffs' motion to convert the TRO to a preliminary injunction without adding any support for its national-security-based hardship arguments to the record.

Further, while the Government now pleads for a stay of the District Court's ruling *before* this Court reaches a decision on the Government's appeal, the Government *agreed* to brief its stay motion on the same schedule as its appeal. If the Government's need for a stay were in fact immediate, the Government should have presented its request for a stay immediately. *Compare* Order, *Washington* v. *Trump*, No. 17-35105 (9th Cir. Feb. 4, 2017) (in light of Government's request for speed, setting extremely truncated briefing schedule regarding stay, with response brief due February 5, reply brief due February 6, and oral argument on February 7) *with Int'l Refugee Assistance Project* ("*IRAP*") v. *Trump*, No. 17-1351 (4th Cir. Mar. 23, 2017) (stay motion filed March 24, stay briefing complete on April 5, oral argument on May 8).

In any event, the Government has altogether failed to demonstrate that the Order serves a genuine national security objective. The District Court found the Government's showing lacking, and it is not alone in reaching that conclusion. *See* TRO 42 (noting the "questionable evidence supporting the Government's national security motivations"); *Aziz* v. *Trump*, 2017 WL 580855, at *9 (E.D. Va. Feb. 13, 2017) (noting "the dearth of evidence indicating a national security purpose" for the Order); *Int'l Refugee Assistance Project* v. *Trump*, -- F. Supp. 3d --, 2017 WL

1018235, at *17 (D. Md. Mar. 16, 2017) ("Defendants * * * have not shown * * * that national security cannot be maintained without an unprecedented six-country travel ban"); *see also* Former Nat'l Security Officials Amicus Br. 4-9, Dkt. 108. The Government has said nothing new before this Court that counsels a different result.

Notably, the Government has come up with no response to this Court's simple conclusion that enjoining the Order cannot irreparably harm the national security during appellate consideration since it merely preserves the status quo that has existed for decades. *See Washington*, 847 F.3d at 1168; *cf. Feldman* v. *Arizona Sec'y of State's Office*, 843 F.3d 366, 369 (9th Cir. 2016) (en banc) (granting injunction pending appeal to "restore[] the *status quo ante*" of "Arizona's long standing election procedures"). The Government has identified no recent event—except for the President's inauguration—that compels an overhaul of the immigration system during the brief period of this Court's expedited review.

Moreover, the Government has precious little to support its claim that the persons covered by Section 2 are more likely to commit terrorism in the imminent future than anyone else. Most of the examples cited in the Order are decades old, and some involve nationals of countries the Order does not cover. Nationality-based generalizations do not equate to the individualized risk assessments the law requires. *See* Former Federal Immigration & Homeland Security Officials Amicus

Br. 20-25, Dkt. 176 ("the Order weakens vetting * * * by using national-origin discrimination as a substitute for individualized threat assessments"); Former Nat'l Security Officials Amicus Br. 8-9 (same). On that very point, a draft report from the Department of Homeland Security ("DHS") released on February 24, 2017, concluded that: (1) a person's country of origin is an "*unlikely* indicator" of terrorism threats in the United States; (2) of the 82 persons who attempted to commit such crimes since 2011, half were U.S. citizens born in the United States; and (3) of those offenders who were foreign-born, very few hailed from the six countries included in the Order. *See* E.R. 151-152. Indeed, since 1975, not a *single* American has been killed as a result of terrorist attacks on U.S. soil carried out by individuals born in the six countries targeted in the Order. *Id.* at 148.

As for Section 6, the Government says that immediate implementation is needed—*i.e.*, all refugee admissions must be halted instantly—because since 2001, "'[h]undreds of persons born abroad have been convicted of terrorism-related crimes in the United States [including] individuals who first entered the country as refugees.'" Mot. 7 (quoting Order § 1(h)). This vague statement provides no indication of an imminent risk that would arise in the next 120 days without a refugee ban. For example, the Government fails to say how many of those "hundreds of persons" were *in fact* refugees (the available evidence suggests the number is vanishingly small). *See, e.g.*, Former Nat'l Security Officials Amicus

Br. 13-14. The one example the Order gives is telling: It cites "a native of Somalia who had been brought to the United States as a child refugee" and later attempted to detonate a bomb. Order § 1(h). But elsewhere the Order creates a specific waiver provision for children. *Id.* §3(c)(v). If the Government wishes to convince the Court of the dubious proposition that children are the real threat, then at a minimum it should not have created an exemption explicitly for them. *But see* Am. Prof. Soc'y on the Abuse of Children Amicus Br. 22-30, Dkt. 107 (describing the extraordinarily vulnerable status of refugee children).

Perhaps recognizing that the Order's entry bans cannot be justified by an immediate risk to national security, the Government next defends them by pointing to the forthcoming "review[s]" of our "Nation's screening and vetting procedures." Mot. 4. The Motion repeatedly declares that Sections 2 and 6 are necessary to enable those reviews and must therefore be put into effect right away. *See id*. ("[t]o facilitate that important review [of our vetting procedures], the President ordered a temporary pause on entry of nationals from six countries"); *id.* at 6 ("in order to allow the Secretary of State to review application and adjudication processes," the "President also directed" the 120-day refugee suspension). The Order speaks in similar terms. *E.g.*, Order § 2(c) ("To temporarily reduce investigative burdens on relevant agencies during the review period * * * I hereby" restrict the entry of nationals from six countries).

The problem is that the Government gives no logical explanation for why Sections 2 and 6 will "facilitate" these reviews at all. Nothing in the record indicates why the Departments of State and Homeland Security, each filled with thousands of employees, need 90-day and 120-day entry bans to be able to assess their internal vetting systems. If anything, Sections 2 and 6 appear to *increase* the burdens on the relevant agencies as they are doing their reviews—by introducing sweeping changes to the immigration system, imposing a disruptive halt on the U.S. Refugee Admissions Program, and requiring consular and refugee officers to create and implement new "waiver" systems. *See* Order §§ 3(c), 6(c).

Moreover, it is Section 5 of the Order—which has not been enjoined—that directs the Secretary of State, Attorney General, and Secretary of Homeland Security to revise their vetting procedures. And the Department of State has proceeded with implementing such new procedures for visa applicants during the time Sections 2 and 6 of the Order have been enjoined. *See* Dist. Ct. Dkt. 253-3; *see also* T.A. Amicus Br. 11-12 & Addendum, Dkt. 114, 116 (detailing and attaching the State Department's March 17 cable with instructions for "heightened screening and vetting of visa applications" by consular officers). DHS has also introduced a "laptop ban" for flights from certain Muslim-majority countries. *See* Dist. Ct. Dkt. 253-1, 253-2. Thus, the Government's claim that Sections 2 and 6

are necessary for the relevant agencies to find ways to tighten vetting not only defies logic—it defies fact.

At the end of the day, the Government relies not on any actual and imminent threat, but on the purported harm inflicted by the judicial "overrid[e]" of the President's will. Mot. 9 (claiming that the injunction threatens irreparable harm "by invalidating an action taken at the height of the President's authority"); *see id.* ("[T]he district court's injunction overriding the President's national-security judgment imposes irreparable harm on the government"); *id.* at 10 ("*A fortiori*, the injunction against the Order here imposes irreparable injury on the President"). This argument has already been rejected: The *Washington* Court explained that there is *no* basis for the President's claim of unreviewable power, and any "institutional harm" imposed by the alleged "erosion of the separation of powers" would be a question for the merits, not for the irreparable harm analysis. *Washington*, 847 F.3d at 1168; *accord Texas* v. *United States*, 787 F.3d 733, 767-768 (5th Cir. 2015) ("[I]t is the resolution of the case on the merits, not whether the injunction is stayed pending appeal, that will affect those [separation of powers] principles.").

II. Plaintiffs Will Suffer Irreparable Harm If A Stay Is Entered.

This Court, however, need not peer too deeply into the Government's flawed rationales for its stay request in order to conclude that it should be denied. The

irreparable harm the Order will inflict on both Dr. Elshikh and the State of Hawaii is reason enough to deny the stay.

First, as the District Court found, Dr. Elshikh has demonstrated "direct, concrete injuries to the exercise of his Establishment Clause rights" and "is likely to suffer irreparable injury in the absence of a TRO." TRO 40; *see also* PI 11, 18-19. Dr. Elshikh's declaration and complaint state that:

- The effects of the Executive Order—the whole Order—are "devastating to me, my wife and children," E.R. 96 (Elshikh Decl. ¶ 6);
- He is "deeply saddened by the message that [both Orders] convey—that a broad travel-ban is 'needed' to prevent people from certain Muslim countries from entering the United States," *id.* ¶ 1;
- His children are "deeply affected by the knowledge that the United States * * * would discriminate against individuals" with their religious beliefs, *id.* ¶ 3;
- Members of his Mosque "feel that the travel ban targets Muslim citizens because of their religious views and national origin," *id.* ¶ 7;
- "Dr. Elshikh feels that, as a result of the new Executive Over, there is now a favored and disfavored religion" in America, E.R. 162 (Compl. ¶ 90); and

- Dr. Elshikh's children have asked "Dad, how come we can't have our grandmother like our friends; is it because we are Muslims?" E.R. 96 (Elshikh Decl. ¶ 3).

This testimony leaves no doubt—as the District Court found—that Dr. Elshikh's Establishment Clause "injuries are neither contingent nor speculative." PI 11.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Klein* v. *City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (quoting *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976)). This is especially true in the Establishment Clause context, "because an erosion of religious liberties cannot be deterred by awarding damages to the victims of such erosion." *ACLU of Ill.* v. *City of St. Charles*, 794 F.2d 265, 275 (7th Cir. 1986); *see also Chaplaincy of Full Gospel Churches* v. *England*, 454 F.3d 290, 303 (D.C. Cir. 2006) (Establishment Clause injury causes irreparable harm); *ACLU of Ky.* v. *McCreary Cnty*, 354 F.3d 438, 445 (6th Cir. 2003) (same); *Ingebretsen ex rel. Ingebretsen* v. *Jackson Pub. Sch. Dist.,* 88 F.3d 274, 280 (5th Cir. 1996) (same); *Parents' Ass'n of P.S. 16* v. *Quinones,* 803 F.2d 1235, 1242 (2d Cir. 1986) (same). Thus, a stay will immediately visit this irreparable harm on Dr. Elshikh.

The Government counters that Dr. Elshikh's Establishment Clause injury is "manufacture[d]" because all he has alleged is an "abstract stigmatic injury"

resulting from "a governmental *message* concerning religion.'" Mot. 11 (brackets and quotation marks omitted). That type of harm, the Government says, is neither cognizable under Article III nor "meaningful and irreparable" under the stay analysis. *Id.* at 11-12.

The Government misses the point. The spiritual and psychological harm Dr. Elshikh and his children experience from the Order is not the product of his "observation of conduct with which [he] disagrees," Mot. 11—it is the direct and personal result of a government policy that sends a discriminatory message about *his* religion. *See* E.R. 96 (Elshikh Decl. ¶ 7); *accord* Decl. of *Amicus Curiae* Khizr Khan ¶ 25, Dkt. 88. ("[T]he message I perceive in President Trump's Executive Order * * * is that Muslims—even those, like my son, who have died for this country—are stigmatized by the Trump administration as outsiders."). The very purpose of the Establishment Clause is to bar official action that "sends a message to nonadherents [of the favored denomination] that they are outsiders." *Lynch* v. *Donnelly,* 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). There is ample precedent for the bedrock principle that "spiritual or psychological" harm—inflicted on a person by "the government's condemnation of *one's own* religion"—is at the heart of the Establishment Clause. *Catholic League for Religious and Civil Rights* v. *City and Cnty. of San Francisco*, 624 F.3d 1043, 1050, 1052 (9th Cir. 2010) (en banc) (emphasis added); *accord Santa Fe Indep. Sch. Dist.* v. *Doe*,

530 U.S. 290, 308-310 (2000); *Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1251 (9th Cir. 2007).

Second, Dr. Elshikh will suffer irreparable harm if the injunction is stayed because he will be forced to overcome an additional obstacle to reunification with his mother-in-law. *See Kerry* v. *Din*, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring in the judgment) (recognizing potential constitutional harm inflicted when a loved one is prohibited from entering the country); *id.* at 2142-43 (Breyer, J., dissenting) (same); *Leiva-Perez* v. *Holder*, 640 F.3d 962, 969-970 (9th Cir. 2011) (per curiam) ("[I]mportant [irreparable harm] factors include separation from family members."). Even the Government acknowledged in the prior round of litigation before this Court that "a U.S. citizen with a connection to someone seeking entry" would have "a route to make a constitutional challenge." Oral Arg. 24:28-24:47, *Washington*, No. 17-35105 (9th Cir. Feb. 7, 2017); *see also* Gov't Reply Br. 4, *Washington*, No. 17-35105 (9th Cir. Feb. 6, 2017) (Dkt. 70).

That describes Dr. Elshikh exactly. His mother-in-law is a Syrian national, living in Syria, and in September 2015, Dr. Elshikh's wife filed an I-130 immigrant visa petition on her behalf. On April 14, 2017, as this appeal was pending, Dr. Elshikh and his family were notified by the National Visa Center that his mother-in-law's visa interview had been scheduled for May 24, 2017, at the U.S. embassy in Lebanon. A stay would mean that at her interview, she would

now be deemed ineligible for a visa and blocked from entering the country unless she could demonstrate that she qualifies for a "national interest" waiver. Order § 3(c).

The "imposition of [that additional] barrier" to Dr. Elshikh's reunification with his family member *itself* constitutes an injury, even if it does not result in "ultimate inability to obtain the benefit." *Gratz* v. *Bollinger*, 539 U.S. 244, 262 (2003); *see also Oklevueha Native Am. Church of Hawaii, Inc.* v. *Holder*, 676 F.3d 829, 838 (9th Cir. 2012) (rejecting argument that plaintiffs' request for prospective relief was unripe because "Plaintiffs did not request an exception"); *Neal* v. *Shimoda*, 131 F.3d 818, 825 n.4 (9th Cir. 1997) (similar). Moreover, the waiver provision is intended to be a narrow escape hatch; if family members like Dr. Elshikh's mother-in-law were supposed to routinely get it, they would have been exempt from Section 2(c) in the first place. That is why this Court rejected the argument that the prior Order's waiver provided "a sufficient safety valve" to the potential denial of constitutional rights such that there was no threatened irreparable harm. *Washington*, 847 F.3d at 1169.

Third, the State of Hawaii will suffer several irreparable harms if a stay is granted. It will suffer injuries under the Establishment Clause—both in its own right, *see Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring), and on behalf of its University's students and professors,

see Washington, 847 F.3d at 1160 n.4 (States of Washington and Minnesota had standing to "assert[] the [Establishment Clause] rights of their students and professors"). It will suffer proprietary harms at its University, both because the University will be unable to recruit, enroll and hire the most qualified persons for open spots while the Order is in effect, and because potential students and faculty members from the designated countries will be chilled from even applying. *See* E.R. 120-122 (Dickson Suppl. Dec. ¶¶ 7, 8). These harms will be particularly acute because it is admissions season *right now*. Dist. Ct. Dkt. 238-1, at 12; *accord* Illinois et al. Amicus Br. 7-15, Dkt. 125; Colleges & Universities Amicus Br. 22-25, Dkt. 97. The University recently announced that eleven graduate students from the designated countries have been admitted for the 2017-2018 academic year and the University is considering applications from another 21 students in the affected countries.[1] If imposed, the Order's entry ban would prevent those students from matriculating or even visiting the University. This Court found that virtually identical harms threatened to Washington and Minnesota's universities by the prior Order were "substantial * * * and even irreparable." *Washington*, 847 F.3d at 1169.

That is not all. A stay would lead to an imminent drop in tourism, which is Hawaii's leading economic driver. E.R. 141. As the District Court found, data

[1] *UH a popular destination for international students*, UH NEWS (Apr. 20, 2017), https://goo.gl/RJ0tnk.

from the Hawaii Tourism Authority "suggests that during the interval of time that the first Executive Order was in place, the number of visitors to Hawai'i from the Middle East dropped[.]" TRO 20; *see also* E.R. 164-165 (Compl. ¶ 100). New numbers released on the Hawaii Tourism Authority's website after the preliminary injunction was issued show that visits from the Middle East in February 2017 were down over *sixty percent* compared to one year ago. *See Visitor Arrivals from Middle East & Africa*, HAWAII TOURISM AUTHORITY, https://goo.gl/PK3M5B.[2] And even beyond the designated countries, the Order will chill tourism to Hawaii and harm its international brand as a place of welcome. *See* TRO 20-21; Abha Bhattarai, *Even Canadians are skipping trips to the U.S. after Trump travel ban*, Wash. Post, Apr. 14, 2017, https://goo.gl/lVFyju (finding that "[w]ithin days" of the first Order, thousands of Europeans "pulled their plans"); *cf. Wells Fargo & Co.* v. *ABD Ins. & Fin. Servs., Inc.*, 758 F.3d 1069, 1073 (9th Cir. 2014) (the "loss of control over business reputation and damage to goodwill" constituted irreparable harm).

Finally, the Order will restrain Hawaii from applying its own laws that ensure religious liberty and foster diversity, *see* Haw. Const. art. I, § 4; Haw. Rev.

[2] Monthly visitor data, including information on country and region of origin, is released by the Hawaii Tourism Authority on a rolling basis. *See* http://www.hawaiitourismauthority.org/research/research/visitor-highlights/ (last visited Apr. 21, 2017) (click on "arrivals from Middle East and Africa MMA" to see the data referenced above).

Stat. Ann. §§ 381-1, 489-3, 515-3, and from "securing [its] residents from the harmful effects of discrimination." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 609 (1982). These offenses to Hawaii's sovereign and quasi-sovereign interests are significant and irreparable; they too counsel against a stay. *See Maryland* v. *King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers) ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (brackets and quotation marks omitted)); *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) (States are "not lightly to be required to give up quasi-sovereign rights"); *see also* Illinois et al. Amicus Br. 22-25.

III. Plaintiffs Are Likely To Succeed On the Merits.

Even if the Government could make the showing required to satisfy the other stay factors, the Government's request is fatally undermined by the weakness of its merits arguments. As Plaintiffs have described at length in their Appellee's Brief, and as court after court has found, the Executive Order is unlawful and unconstitutional several times over. At bottom, the President has claimed an unreviewable immigration power, despite the fact that the Constitution grants the authority to make immigration laws to *Congress*, and despite the fact that even Congress may not assert an unlimited power to violate the Constitution's core guarantee of religious freedom. Moreover, the President defends his claim by

distorting the immigration statutes and the promises of the First Amendment itself, all while denying Due Process rights to the very individuals this Court held protected. Permitting the Government to succeed on these arguments, or even suggesting that there is any likelihood that they will succeed, would undermine the individual liberties the Constitution protects and the core separation of powers principles designed to preserve them.

IV. There Are No Grounds To Stay Individual Portions Of The Injunction Pending Appeal.

Finally, the Court should reject the Government's request to stay parts of the preliminary injunction while deciding this appeal. Every argument the Government submits to justify such parsing lacks merit.

First, the Government contends that facial relief is inappropriate because the Order could have some lawful applications. It offers the lone example of "foreign nationals with no close relatives in the country and no other sufficient connection to it." Mot. 19. But there is no application of the Order that would be lawful, given the anti-Muslim animus behind it. The "mere passage * * * of a policy that has the purpose and perception of government establishment of religion" warrants facial relief. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 14.

Second, the Government contends that the preliminary injunction is broader than necessary to "provide complete relief" to Plaintiffs here. Mot. 20-23. It says any injunction should be narrowed to "Dr. Elshikh's mother-in-law and any

particular individuals Hawaii could identify whose coverage under a specific provision of the Order cognizably injures Hawaii." *Id.* at 23. That would hardly provide Plaintiffs complete relief. Allowing the Government to exclude anyone else on the basis of their Muslim faith would continue to "send [the] message * * * that [Muslims] are outsiders, not full members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

Likewise, the Government's contention that nothing beyond Section 2(c) has any effect on Plaintiffs is flat-out wrong. Plaintiffs' declarations and Complaint make clear that it is the Order *as a whole* that sends the offensive message. *See* PI 20-21; E.R. 162, 167 (Compl. ¶¶ 90, 108-109); E.R. 94-96 (Elshikh Decl. ¶¶ 4, 7); *see also* Ismail Elshikh Amicus Br. 4-6, 11, *IRAP*, No. 17-1351 (4th Cir. Apr. 19, 2017) (Dkt. 146-1). In particular, Plaintiffs provide extensive detail about the anti-Muslim animus underlying the refugee ban. *See* E.R. 144, 146, 150 (Compl. ¶¶ 36-38, 43 & n.19, 58). Indeed, the first Order contained an explicit carve-out for refugees who were religious minorities in their home countries; the President acknowledged this was to aid Christians because of his misguided belief that, to date, it had been easy for Muslim refugees to enter the country. E.R. 10 (Compl. ¶ 58). Section 6 is a "watered down" version of this explicit religious discrimination, which continues to bar refugees at the height of a refugee crisis involving Muslim-majority countries.

The Government also ignores Hawaii's showing that Section 2—not just 2(c)—chilled tourism to the State. *See* TRO 20-21; E.R. 164-165 (Compl. ¶ 100); E.R. 109-110 (Salaveria Suppl. Decl. ¶¶ 8-10). And it ignores the District Court's determination that, despite the Government's repeated requests for a narrowed injunction, the Government had given *no* clear indication of how the injunction could be effectively narrowed while still serving its purpose. PI 22. In any event, Hawaii's sovereign and quasi-sovereign interests in enforcing its laws against religious discrimination and in protecting its residents from the "universal sting" of discrimination, *Alfred L. Snapp*, 458 U.S. at 609, cannot be protected in piecemeal fashion as the Government suggests.

Finally, the importance of uniformity—and predictability—in immigration law further counsels against staying some portion of the District Court's ruling during this Court's review. Ushering in a fragmented system of individualized exceptions to the Order before this Court rules on this appeal would work harms to the public interest in itself. *See Washington*, 847 F.3d at 1166-67 (citing *Texas* v. *United States*, 809 F.3d 134, 187-188 (5th Cir. 2015)).[3]

[3] These considerations distinguish the authorities upon which the Government relies, as none of them involved an Establishment Clause injury or a State plaintiff. *See Lewis* v. *Casey*, 518 U.S. 343, 360 (1996) (narrowing injunction to inmates whose access to courts was prejudiced in the absence of "systemwide" violations); *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 775 (1994) (narrowing injunction that burdened more speech by protestors at clinic than necessary to protect patients); *McCormack* v. *Hiedeman*, 694 F.3d 1004, 1019-20 (9th Cir.

CONCLUSION

For the foregoing reasons, the Government's motion for a stay should be denied.

Respectfully submitted,

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2012) (narrowing injunction barring enforcement of anti-abortion law to plaintiff); *Stormans, Inc.* v. *Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (narrowing injunction to only plaintiffs who challenged requirement that pharmacists dispense Plan B absent evidence that other pharmacists objected to dispensing Plan B); *Meinhold* v. *U.S. Dep't of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994) (narrowing injunction to Navy serviceman who was improperly discharged under DOD regulations); *see also Lamb-Weston, Inc.* v. *McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991) (*upholding* worldwide injunction in trade secret dispute).

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitations of Circuit Rules 27-1(1)(d) and 32-3(2) because it contains 5,397 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 27(a)(2)(B) and 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 21, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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