UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ARAB AMERICAN CIVIL RIGHTS LEAGUE, *et al.*,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, *et al.*,

Defendants.
_____/

Case No. 17-10310

Hon. Victoria A. Roberts

DEFENDANTS' RESPONSE AND OBJECTIONS TO PLAINTIFFS' FIRST SET OF DOCUMENT REQUESTS, REQUEST NO. 1

Pursuant to Federal Rule of Civil Procedure 34 and this Court's Order dated May 11, 2017 (ECF No. 89) ("May 11 Order"), Defendants hereby submit their objections and response to Document Request No. 1 ("Request No. 1" or "Request") of Plaintiffs' First Set of Document Requests (the "Requests"). Defendants' Objections are based on the information known to Defendants at this time, and are made without prejudice to assertion of additional objections should Defendants identify additional grounds for objection. Defendants reserve the right to assert additional objections with respect to Plaintiffs' remaining document requests and interrogatories. Defendants intend to move the court for a protective order relating to this Request and additional discovery requests.

Document Request No. 1 seeks discovery of a document allegedly created during the presidential campaign by a private individual to provide advice to candidate Donald J. Trump in his personal capacity, some five months before he was elected President. Plaintiffs seek that document on the theory that it is relevant to the underlying motive behind an official government policy (Executive Order 13,780, the "Executive Order") signed by the President many months later in his official capacity, after he took the oath of office and formed his Administration, and that such motive is relevant to the Executive Order's legality. That theory cannot support a finding even of relevance, much less one of proportionality to the needs of the case, as required by Federal Rule of Civil Procedure 26.

Importantly, Defendants reiterate that the discovery requests in this case, if found to be relevant, could raise substantial and complex issues relating to privilege, legal authority over campaign materials, and third-party interests related to those materials, that call for careful consideration. Requiring a response addressing those interests in one week is not reasonable, particularly in light of the fact that two nationwide injunctions remain in effect, and appellate courts are currently considering the overarching legal issues that apply here and that are inextricably intertwined with the scope of permissible discovery in this matter.[1]

[1] Both the Fourth and the Ninth Circuits have heard oral arguments on those matters and are likely to issue legal opinions bearing directly on these issues. *See*

Indeed, in one of the other cases challenging the same Executive Order, the district court concluded that a stay of all district court proceedings (including discovery) was warranted, pending resolution of the Ninth Circuit appeal, in part because the Ninth Circuit's decision is likely to resolve legal issues that bear on the appropriate scope of discovery and "potentially complex privilege" issues, and because of the "'high respect' owed to the Executive" in protecting him against the burden of discovery. *See Washington v. Trump*, No. 2:17-cv-00141, ECF No. 189 at pp. 9, 11, 2017 WL 2172020 (W.D. Wash., May 17, 2017) (attached hereto as Exhibit 1). Accordingly, in addition to the specific objections set forth below, Defendants object to the truncated process ordered here that is inconsistent with the federal rules governing discovery, with the practical needs presented in this case, and with the significant issues presented.

generally Int'l Refugee Assistance Proj. v. Trump, No. 17-1351 (4th Cir.); *Hawai'i v. Trump*, No. 17-15589 (9th Cir.).

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS:

1. Defendants object to the definition of "Proposed Muslim Ban / Extreme Vetting / Travel Ban" because it purports to encompass any and all proposals by or on behalf of Donald Trump, regardless of whether these proposals were advanced during his candidacy, while he was a private citizen, or during his presidency; Defendants further object to this definition as vague and overbroad in that it does not define what is meant by "countries to be identified." Defendants also object to the definition to the extent it improperly characterizes the policy or policies reflected in Executive Order 13769 or Executive Order 13780 and to the extent it suggests that Executive Order 13769 is relevant to the Court's evaluation of Executive Order 13780.

2. Defendants object to the definition of "Communication" on the grounds that it is overly broad and unduly burdensome, because it is defined so broadly as to include verbal or non-written communications, which is beyond the scope of Rule 34. *See* Fed. R. Civ. P. 34 (allowing requests to inspect or produce documents, electronically stored information, or tangible items).

3. Defendants object to the definition of "Meeting" on the grounds that it overlaps with the definition of "Communication" and is therefore vague and confusing. Defendants further object to the definition of "Meeting" on the grounds that it is overly broad and unduly burdensome because it is defined so broadly as to

include verbal or non-written communications, which is beyond the scope of Rule 34. *See* Fed. R. Civ. P. 34 (allowing requests to inspect or produce documents, electronically stored information, or tangible items).

4. Defendants object to the definition of "Document" on the grounds that it is overly broad and unduly burdensome. Furthermore, Defendants are not required to produce publicly available materials as there is a less burdensome manner for Plaintiffs to obtain these materials. Fed. R. Civ. P. 26(b)(2)(C)(i).

5. Defendants object to the definition of the terms "you" and "your" on the grounds that they are overly broad and unduly burdensome. Subject to specific objections enumerated below and in subsequent objections, Defendants will construe "you" and "your" to refer to the departments and agencies that are named Defendants in this case.

6. Defendants object to the definition of "Trump Campaign" as overbroad and unduly burdensome because it includes not only the official campaign entity, but unofficial entities and all affiliates, "related entities," and "any other person(s) acting under their control or on their behalf." Defendants will construe the "Trump Campaign" to mean the official campaign entity "Donald J. Trump for President, Inc."

7. Defendants object to Plaintiff's Instruction No. 1, in that it includes in the definition a statement, "or otherwise available to your employees, agents,

consultants, attorneys, and accountants, whether past or present," which is contrary to the Sixth Circuit standard for possession, custody, or control. Under that standard, parties are obligated to produce only those documents within their actual possession or those documents for which the party has a "the legal right to obtain [] on demand." *In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995); *see also Frye v. CSX Transp., Inc.*, 2016 WL 2758268, at * 4 (E.D. Mich. May 12, 2016) ("The Sixth Circuit and other courts have consistently held that 'documents are deemed to be within the 'possession, custody or control' for purposes of Rule 34 if the party has actual possession, custody or control, *or has the legal right to obtain the documents on demand*.") (emphasis in original). Defendants are only under the obligation to produce relevant, non-privileged information, to the extent that it exists, if individuals, operating in their official governmental capacity, have responsive, non-privileged information that is under the possession, custody or control of the named Defendants or that they have the legal right to obtain on demand.

8. Defendants object to the format of production proposed in Instruction No. 2. To the extent that responsive, non-privileged materials exist, Defendants will produce them in PDF format. Fed. R. Civ. P. 34 (b)(2)(D) ("The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form

was specified in the request—the party must state the form or forms it intends to use.").

9. Defendants object to Instruction No. 3 of Plaintiffs' Requests, in that it calls for material that may be privileged as detailed further below.

10. Defendants object to Instruction No. 4(c) of Plaintiffs' Requests as an unduly burdensome requirement and outside of the scope of the obligations for privilege logs as required under Federal Rule of Civil Procedure 26(b)(5). Defendants reserve the right to create a categorical privilege log.

DOCUMENT REQUEST NO. 1

A copy of the "memorandum" (or "white paper") that Rudolph Giuliani and others provided to Donald J. Trump or others working for or on behalf of the Trump Campaign in approximately May to July 2016, which was discussed extensively by Mr. Giuliani during public appearances on or about July 8, 2016, November 13, 2016 and January 28, 2017, by Rep. Michael McCaul in public appearances in late January and early February 2017, and by Susan Phelan, Spokeswoman for the House Committee on Homeland Security, on or about January 30, 2017.[2]

Objections to Document Request No. 1:

Discovery is Premature.

1. Given that the Court has not yet determined whether it has Article III jurisdiction over Plaintiffs' complaint, or any or all of the claims asserted therein, it is inappropriate to proceed with discovery as to the merits. Defendants have moved to dismiss in part for lack of subject-matter jurisdiction because Plaintiffs have failed to meet their burden to establish standing. *See* Defendants' Motion to Dismiss (ECF No. 76), at pp. 9-14. As the Court recognized, it has not yet decided that issue. May 11 Order (ECF No. 89), at p. 4 (Court is "not one-hundred percent certain" that plaintiffs have standing). The Court, therefore, has no jurisdiction to

[2]http://www.nj.com/politics/index.ssf/2016/07/exclusive_giuliani_source_of_trump_shift_on_muslim.html; www.cnn.com/TRANSCRIPTS/1611/13/sotu.01.html); https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-bangiuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.75466c390ef0; http://www.mcclatchydc.com/news/politics-government/white-house/article129703344.html; https://www.texastribune.org/2017/02/07/michael-mccaul-calls-trumps-travel-ban-rolloutproblematic/.

proceed to the merits of the case, which includes discovery on the merits. *See Steel Co v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1988) ("Without jurisdiction the court cannot proceed at all in any cause."); *cf. Dynamic Image Techs., Inc. v. United States*, 221 F.3d 34, 38 (1st Cir. 2000) ("[C]ompelling public policy reasons support stringent limitations on discovery [in cases against the federal government] pending the resolution of threshold jurisdictional questions."); *Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) ("Federal Rule of Civil Procedure 45 grants a district court power to issue subpoenas as to witnesses and documents, but the subpoena power of a court cannot be more extensive than its jurisdiction. It follows that if a district court does not have subject-matter jurisdiction over the underlying action, and the process was not issued in aid of determining that jurisdiction, then the process is void[.]"); *U.S. v. Morton Salt Co.*, 338 U.S. 632, 641-42 (1950) ("Federal judicial power itself extends only to adjudication of cases and controversies and it is natural that its investigative powers should be jealously confined to these ends.").

Although the Court suggested (May 11 Order, at p. 4) that *Steel Co.* does not preclude discovery as to "standing and/or ripeness," those are jurisdictional matters, and discovery as to those issues, to allow a court to make a determination as to jurisdiction provides no support for the Court's conclusion that it can order discovery on the merits when it has not yet determined its own jurisdiction. And

Plaintiffs have not asserted that discovery is necessary to support their arguments as to standing. Accordingly, it is improper for the Court to proceed with discovery before it resolves whether it has Article III jurisdiction, particularly where that discovery is directed at the President.

2. Request No. 1 is likewise premature because the Court has not yet ruled on Defendants' Motion to Dismiss the Second Amended Complaint (ECF No. 76). As Defendants have explained, Defendants believe that their Motion to Dismiss will likely dispose of all or some of the claims in this action, rendering discovery ultimately unnecessary or, at the very least, narrowing the scope of the Complaint and thus the scope of relevant discovery. Although Defendants acknowledge that the Court "is not convinced that [Defendants' Motion to Dismiss] will be fully dispositive," May 11 Order at p. 4, the Court unduly discounted Defendants' argument that resolving the Motion to Dismiss would, at a minimum, dispose of or narrow some claims, and would likely resolve some of the substantive legal disputes which will, in turn, shape the appropriate discovery inquiry. Moreover, two nationwide injunctions of the Executive Order remain in effect, and appellate courts are currently considering the overarching legal issues that apply here and that are inextricably intertwined with the scope of permissible discovery in this matter.

In light of that, proceeding with discovery before the Court has resolved the necessary legal standards and issues that will bear upon the appropriate scope of discovery is inappropriate. *See* Ex. 1, *Washington v. Trump*, No. 2:17-cv-00141, ECF No. 189, at pp. 5-6 (explaining that a stay pending the Ninth Circuit appeal is warranted because the appeal "is likely to decide legal issues that will impact the court's resolution of the parties' discovery disputes [] by clarifying 'the applicable law or relevant landscape of facts that need to be developed.'"); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1368 (11th Cir. 1997) ("If the district court dismisses a nonmeritorious claim before discovery has begun, unnecessary costs to the litigants and to the court system can be avoided. Conversely, delaying ruling on a motion to dismiss such a claim until after the parties complete discovery encourages abusive discovery and, if the court ultimately dismisses the claim, imposes unnecessary costs."). Until the Court resolves those issues and the other legal arguments in favor of dismissal, the materials sought by Plaintiffs "are not useable for any substantive purpose," and the requested discovery thus should be denied. *See Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 982 (6th Cir. 2003).

Moreover, the Court's conclusion (May 11 Order, at p. 6) that, because discovery here will implicate complex privilege issues, "there is no point in delaying discovery," is backwards. If there is a possibility that the legal issues

could be resolved such that Plaintiffs' proposed discovery exceeds the bounds of permissible discovery, then this Court could avoid altogether the potentially thorny privilege issues that might otherwise arise as well as avoid the potential intrusion on the Executive by permitting discovery directed at the President. *See* Ex. 1, *Washington v. Trump*, ECF No. 189, at pp. 5-6, 9, 11.

3. Request No. 1 is premature under Federal Rule of Civil Procedure 26(d) because the parties have not conferred under Federal Rule of Civil Procedure 26(f). Fed. R. Civ. P. 26(d)(1), (d)(2)(B); *Rumburg v. McHugh*, No. 10-CV-11670-DT, 2010 U.S. Dist. LEXIS 76840, at *2 (E.D. Mich. July 29, 2010) ("The federal rules provide that discovery may not be sought from any source before the parties have conferred under Federal Rule of Civil Procedure 26(f)."). Plaintiffs served the instant Requests on Defendants on April 6, 2017. These discovery requests are considered "early Rule 34 requests" under Federal Rule of Civil Procedure 26(d)(2) because they were served prior to a Rule 26(f) conference; early Rule 34 requests are not considered served until the first Rule 26(f) conference, with responses due 30 days thereafter. Fed. R. Civ. P. 34(b)(2)(A). Although the parties have disputed whether a Rule 26(f) Conference did in fact occur on April 6, 2017, (*see* Tr., Apr. 13, 2017, Status Conference, at pp. 7-9 (attached hereto as Exhibit 2)), the Court has made no determination that a 26(f) Conference occurred. In fact, at an April 13, 2017, Status Conference, the Court indicated that a proper

Rule 26(f) Conference had not occurred. Ex. 2, at p. 16 (stating that the Court may later order the parties to conduct a Rule 26(f) Conference that "comports with the court rules"). The May 11 Order (ECF No. 89) also does not address whether a Rule 26(f) Conference occurred. Defendants continue to maintain that such a conference has not occurred as there are a variety of Rule 26(f) conference topics, such as production format, that have not been addressed by the parties and must be discussed pursuant to Rule 26(f).

A Rule 26(f) conference must occur, pursuant to Rule 26(d)(2), before early discovery requests are considered served. The 30 days to respond to early discovery requests only begins to run once the Rule 26(f) conference occurs. A Rule 26(f) Conference has not occurred in this case and thus Request No. 1 has not yet been served on Defendants. Although Fed. R. Civ. P. 26(d)(1) allows a court to permit discovery prior to a Rule 26(f) conference, Rule 26(d)(2), which applies to early discovery requests, does not contain this clause. The Court should not modify the period to respond to early discovery requests served under Rule 26(d)(2) as it runs contrary to the language of the rule and the purpose of early discovery requests.[3] Therefore, Defendants should have thirty days to respond

[3] "Rule 26(d)(2) is added to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. *Delivery does not count as service; the requests*

from the first Rule 26(f) conference. It is prejudicial to require Defendants to respond in one-quarter of the time normally allotted by Fed. R. Civ. P. 34(b)(2) and Rule 26(d)(2).

Moreover, the Request is premature because the Court's May 11 Order regarding discovery was purportedly issued under Federal Rule of Civil Procedure 16(b) (*see* May 11 Order, at p. 7), yet the Order was issued before a Court conference with the parties and without the benefit of a Rule 26(f) Report from the parties, either of which is a prerequisite to an order under Rule 16(b). *See* Fed. R. Civ. P. 16(b)(1). The Court did not hold a Rule 16 Scheduling conference, but instead re-characterized an April 13, 2017, Status Conference as a Rule 16(b)(1)(B) Scheduling Conference, after that status conference had already occurred. *See* May 11 Order (ECF No. 89), at p. 2 (determining, after the fact, that a previous status conference constituted a conference of the parties sufficient to satisfy Rule 16(b)(1)(B)). The April 13, 2017, Status Conference was not described by the Court as a "Scheduling Conference" before, during, or directly after that conference; rather, it was repeatedly styled by the Court as a "Telephonic

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are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond." 2015 Advisory Committee Note to Fed. R. Civ. P. 26 (emphasis added).

Status Conference."[4] Indeed, the Court noted at the Status Conference that it would later hold a "[scheduling] conference with the parties." Ex. 2, at p. 16. The Advisory Committee Notes recognize the importance of advance notice of the Rule 16(b)(1)(B) conference so that the parties have notice in advance that a "Scheduling Conference" is upcoming and can conduct their Joint 26(f) conference. *See, e.g.,* Fed. R. Civ. P. 16(b) Advisory Committee Note to 1993 amendment ("[W]hen setting a scheduling conference, the court should take into account the effect this setting will have in establishing deadlines for the party to meet under revised Rule 26(f)"). That notice requirement was not satisfied here.

The Request is Beyond the Scope of Proper Discovery Under Rule 26(b)(1) Because it Seeks an Alleged Campaign Document from the Government Entities.

Request No. 1 seeks a memorandum, if it exists, that Plaintiffs allege "Rudolph Giuliani . . . provided to Donald J. Trump or others working for or on behalf of the Trump Campaign in approximately May to July 2016." *See* Requests at p. 8. Defendants object to Request No. 1 as overbroad and outside the scope of discovery, unduly burdensome, and harassing because, "considering . . . the parties' relative access to relevant information," Plaintiffs have supplied no reason

[4]Docket Entry of April 5, 2017 ("Set Deadlines/Hearings: TELEPHONIC Status Conference set for 4/13/2017 at 2:30 PM before District Judge Victoria A. Roberts."; Minute Entry of April 13, 2017 ("Minute Entry for proceedings before District Judge Victoria A. Roberts: Telephonic Status Conference held on 4/13/2017 (Court Reporter: Janice Coleman) (CPin) (Entered: 04/13/2017).").

to believe that campaign materials would be contained in official files of any of the government defendants. Fed. R. Civ. P. 26(b)(1). Plaintiffs' request for a campaign document is more properly directed at the Trump campaign or Mr. Giuliani—or Rep. McCaul, or Ms. Phelan (the two other individuals Plaintiffs allege to have publicly discussed the purported document). This is so for several reasons.

First, because the request seeks what they allege to be a campaign document, Plaintiffs are seeking discovery from the wrong entity. Plaintiffs have not brought suit against Donald J. Trump for President, Inc., the official Presidential campaign committee. *See* Requests at p. 1 (defining "Trump Campaign"). Rather, they have sued Defendants, in their official government capacities, who do not in that capacity have authority over Donald J. Trump for President, Inc. or its files. The official Trump campaign committee is an incorporated entity that exists wholly apart from the Trump Administration. That private entity continues to exist, and Plaintiffs could seek campaign materials from it, but they apparently have not done so. Plaintiffs appear to believe that because some of the Defendants—such as the President—were involved in the campaign in their personal capacities, the campaign files are therefore available for discovery in this action. *See* Requests at p. 8 (seeking papers that were "provided to Donald J. Trump or others working for . . . the Trump Campaign"). That is not correct. The files of Donald J. Trump for

President, Inc. are owned by that legal entity. The campaign files did not become part of the government's official files simply because Mr. Trump won the election and is now the President. Thus, any campaign files should be sought from the campaign itself.[5]

Second, Donald J. Trump for President, Inc. and/or Mr. Trump in his capacity as a former candidate may seek to assert discovery privileges of their own. Because the campaign is not a party to this proceeding, those discovery privileges might not be heard or considered without their participation in the litigation. *Cf. United States v. American Tel. & Tel.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980) ("Without the right to intervene in discovery proceedings, a third party with a claim of privilege in otherwise discoverable materials could suffer "the obvious injustice of having his claim erased or impaired by the court's adjudication without ever being heard."). Importantly, the campaign could seek to assert interests that protect its internal deliberative materials from disclosure in a law suit challenging official government action. *See, e.g., Perry v. Schwarzenegger*, 591 F.3d 1147, 1161-62 (9th Cir. 2010) (recognizing a First Amendment interest in protecting the internal deliberative materials of a political campaign as against discovery in civil litigation). In a case like this one, where that discovery is not

[5] As discussed below, however, even if responsive documents are properly sought from a third party, Defendants may nonetheless assert any applicable privileges protecting against the release or disclosure of such document.

being sought from the entity most likely to possess it, and the correct entity may want to assert privilege claims available to it, the proper course is to require Plaintiffs to seek discovery directly from the third party.

Third, requiring a burdensome search for campaign materials in official government files, and particularly in the Executive Office of the President, would be disproportionate to the needs of the case—particularly since the President is not subject to suit for injunctive relief with respect to performance of his official duties, *see* pp. 23-24, *infra*. The anticipated benefit of such a search is exceedingly slight as compared to the burden of conducting the search and the intrusion on the Executive.

Plaintiffs have identified no reason as to why Defendants would possess a document allegedly created for use by Donald J. Trump for President, Inc. The government agency Defendants were of course not part of the official Trump campaign committee and, during the time period relevant to the request, were under a different Presidential administration. Moreover, the defendant agencies employ thousands of individuals. Requiring a search for even one document, particularly where that document is not of the type maintained in the ordinary course of business, is unreasonable. "Even very slight inconvenience may be unreasonable if there is no occasion for the inquiry and it cannot benefit the party making it." *Serrano v. Cintas Corp.*, 699 F.3d 884, 901 (6th Cir. 2012). Of

course, Plaintiffs' discovery requests go far beyond the single document identified in Document Request No. 1, and the burden of searching for all the campaign materials encompassed by Requests Nos. 1-3, when Plaintiffs have not identified why they are likely to be located in official government files, does not justify the requested discovery.

And to the extent any of the individual Defendants participated in the Trump campaign in their personal capacities, the documents generated in connection with that work would be campaign documents, and Plaintiffs have not explained why those documents would exist in government files.

The President, of course, who is sued in his official capacity, was not President until long after these campaign materials were allegedly created. [6] Without a further showing as to why Plaintiffs cannot seek that document directly from the official Trump campaign entity and why a campaign document belonging to Donald J. Trump for President, Inc., might be within the President's official government files many months later. Plaintiffs have not demonstrated that Request No. 1 is proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1).

[6] Plaintiffs have not alleged that the purported Giuliani memo was received by Donald Trump, personally, either as a candidate or as President. *See* Request No. 1 (requesting memo that "Giuliani and others provided to Donald J. Trump *or others* working for or on behalf of the Trump Campaign).

The Request to Search for the Documents At Issue Must Be Rejected Under *Cheney*.

Defendants further object because asking the President or his close advisers and cabinet secretaries to search for the materials sought in Request No. 1, and the other related Requests, is not proportional to the needs of this case. As we have explained, Plaintiffs have not provided any reason to think that a document that is allegedly a campaign document would be located in the official government files. But even if this Court does not accept that flaw in the discovery request, requiring a search for the document on the theory that it formed the basis for an Executive Order issued by the President in his official capacity is not permitted under *Cheney* without a heightened showing that has not been made here and could not be made given the ready availability of the document, if it exists, from the campaign.

Under *Cheney*, Plaintiffs must make a heightened showing of need before they can require a search for, and force the government to determine whether to formally assert privileges with respect to, discovery sought from the President or his close advisers. *See Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367 (2004) (reversing Court of Appeals decision that the Vice President and other executive officials must first formally assert privilege before the Court may address their separation-of-powers objections to discovery requests). *Cheney* acknowledged the special burden presented when "discovery requests are directed to the Vice President and other senior Government officials who served on the

NEPDG to give advice and make recommendations to the President." *Id.* at 385. If the Court credits Plaintiffs' erroneous claim that campaign materials are relevant to the validity of the Executive Order, the discovery at issue here is nevertheless improper because of the concerns expressed in *Cheney*. Indeed, discovery here is even less proportional to the needs of the case here than in *Cheney*, because Plaintiffs' discovery is directly targeted at the President.

The Supreme Court in *Cheney* directed that courts must take special care to ensure that civil discovery requests do not intrude on the "public interest" in (1) "afford[ing] Presidential confidentiality the greatest protection consistent with the fair administration of justice"; and (2) "protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." *Cheney*, 542 U.S. at 382. There must be a heightened showing of need made before allowing this kind of burdensome discovery. *Id.*[7]

Courts have thus applied *Cheney* to require a heightened showing of need before imposing the burden of responding to discovery, as the consideration and assertion of applicable privileges in these circumstances must be a "last resort."

[7] Although only the production of a single document (or objections thereto) is initially at issue here, the relevant inquiry is the scope of the discovery sought as a whole, and in this respect, the discovery being sought is similarly broad in scope to that sought in *Cheney*. But whether Plaintiffs seek one document or many, *Cheney* requires a heightened showing of need before permitting any discovery against the President or his close advisers.

United States v. McGraw-Hill Companies, Inc., 2014 WL 8662657, at *8 (C.D. Cal. Sept. 25, 2014); *see also Dairyland Power Co-op v. U.S.*, 79 Fed. Cl. 659, 662 (2007) ("The Court agrees with the Government that, in the case of a discovery request aimed at the President and his close advisors, the White House need not formally invoke the presidential communications privilege until the party making the discovery request has shown a heightened need for the information sought."). A showing of heightened need is necessary, as the Supreme Court has recognized that the separation of powers under our Constitution is directly implicated by subjecting the President to judicial process in matters arising out of the performance of his official duties. *Nixon v. Fitzgerald*, 457 U.S. 731, 748-55 (1982); *cf. Mississippi v. Johnson*, 71 U.S. 475, 501 (1866). This is motivated not solely by the concern for maintaining Presidential confidentiality and preventing the need to address difficult separation of powers issues, but also with the distractions created by the burden of responding to discovery requests, and evaluating documents for the assertion of privilege, in light of the President's weighty official duties. *See Cheney*, 542 U.S. at 382, 385, 389-90. The *Cheney* principle also properly avoids embroiling courts in difficult and potentially unnecessary privilege issues implicating the separation of powers. *Id*.

Here, Plaintiffs have not demonstrated the required need for the document at issue. Most importantly, because Defendants' Motion to Dismiss remains pending,

there cannot be a showing at this time of relevance. Further, they have not shown that the document is not available from other sources—such as from the campaign, which is the actual identified owner of the document being sought. *See* Request No. 1 (seeking document allegedly drafted "on behalf of the Trump Campaign" before the election); *see also* Request No. 2 (seeking pre-election documents relating to an alleged campaign "'commission' or 'group'"); Request No. 3 (seeking documents created by various individuals in connection with the campaign). They cannot obtain these documents, if they even exist, because Plaintiffs have failed to show—and could not show given that these are campaign documents—that they are "not available with due diligence elsewhere." *Dairyland Power*, U.S. Fed. Cl. at 668.

A related principle further precludes discovery from the President in these circumstances. A federal court cannot "enjoin the President in the performance of his official duties." *see Mississippi*, 71 U.S. at 501; *see also County of Santa Clara v. Trump*, 17-cv-00574, --- F. Supp. 3d ---, 2017 WL 1459081, at *29 (N.D. Cal. April 25, 2017) ("extraordinary remedy of enjoining the President himself is not appropriate"). *A fortiori*, a federal court likewise could not compel the President to comply with a civil discovery request. *Cf. Fitzgerald*, 457 U.S. at 748-55 (holding that the President has absolute immunity for civil liability for acts within his official responsibilities). That conclusion is grounded on the President's "unique

constitutional position" and "respect for separation of powers." *See Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992). Although the Supreme Court has recognized limited exceptions permitting judicial process against the President, *Clinton v. Jones*, 520 U.S. 681, 703, 704 n.39 (1997) (civil discovery permitted where private, rather than official, act was involved); *United States v. Nixon*, 418 U.S. 683, 710-13 (1974) (permitting subpoena directed at President for use in criminal prosecution), neither of those exceptions is relevant here. Pursuant to these principles, because the President is immune from this kind of civil injunctive action challenging his official conduct, he cannot properly be the subject of discovery in this civil litigation. The conclusion that civil discovery under Rule 26 is not available against the President here is likewise compelled by the fact that the President is not a properly named defendant to this civil injunctive action.

The Requested Document, if it Exists, Would Be Irrelevant, and Even If Relevant, An Opportunity to Consider Privilege Assertions Would Be Necessary.

Defendants object to Request No. 1 as overbroad and outside the scope of discovery under Federal Rule of Civil Procedure 26(b)(1) because it seeks a document that is neither relevant to the claims and defenses in this case nor "proportional to the needs of the case." And under *Cheney*, imposing a discovery burden on the President and his close advisers is improper, without first making the heightened showing discussed above, and further having established relevancy by,

among other things, considering the legal rules that are applicable to this case and the arguments made in the government's pending Motion to Dismiss. And even if this Court determined that the document were relevant and required a search for it, there would need to be an opportunity for the Defendants to consider and assert applicable privileges after obtaining and reviewing the document.

1. If the "memorandum" or "white paper" sought in this Request exists, it is not relevant to the legal issues presented in this case for several reasons.[8] Defendants have explained in the pending Motion to Dismiss that, because the Executive Order involves the ability of the political branches to exclude aliens who have no constitutional or statutory right to enter the United States, evaluating the constitutionality of the Executive Order does not require the Court to assess the subjective intent of the President. Under well-established law, the validity of the Executive Order turns on whether it is "facially legitimate and bona fide." *See, e.g.*, *Kleindeinst v. Mandel*, 408 U.S. 753, 770 (1972); *Fiallo v. Bell*, 430 U.S. 787,

[8] Other than stating generally that Plaintiffs "seek only limited discovery that will be relevant to any claim" (May 11 Order, at p. 4 (ECF No. 89), the Court did not specifically resolve whether this requested document is relevant when it required Defendants to respond to the Document Requests and denied Defendants' request to postpone issuance of a scheduling order. *See id.* at p. 7. As the Court acknowledged, Defendants have not yet raised any specific objections to the discovery requests and the discovery topics, nor has the Court ruled on the relevance of these topics or the other burdens presented by the Requests. *See id.* at 8 ("Of course, Defendants may object to requests as allowed by the Federal Rules of Civil Procedure.").

796 (1977); *Almario v. Att'y Gen.*, 872 F.2d 147, 151 (6th Cir. 1989). The Sixth Circuit has explained that the "facially legitimate and bona fide reason" standard "may be even lower," that is, less stringent, "than rational basis review." *Bangura v. Hansen*, 434 F.3d 487, 495 (6th Cir. 2006). Rational basis review requires a court to uphold government action if there is any rational justification for the policy, and even rational basis review does not allow an inquiry into the subjective intent of decisionmakers, which courts are ill-equipped to review. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993) (classification "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"). Moreover, the presumption of regularity here further supports the actions of the President. *See United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926) (explaining the presumption of regularity that attaches to federal officials' actions).

Under the *Mandel* standard, Plaintiffs' discovery demand is irrelevant. But even if some evaluation beyond *Mandel* were appropriate, any such inquiry should be limited to official government actions and thus should not include unofficial statements or events that took place before the President's inauguration, which would involve a "judicial psychoanalysis of a drafter's heart of hearts." *See McCreary Cnty. v. ACLU of Kentucky*, 545 U.S. 844, 862 (2005) (it is only an "official objective" of favoring or disfavoring religion gleaned from "readily

discoverable fact" that implicates the Establishment Clause). Plaintiffs' discovery request, which focuses on a campaign document from a private political campaign, is irrelevant to that analysis of official government action or the message presented by official government action. Further, as Plaintiffs' emphasis on *public* statements implicitly concedes, only such objective manifestations of purpose are even arguably relevant to whether the Executive Order amounts to an establishment of religion or represents religious animus. *See id*. Relying on internal campaign materials would not only implicate the campaign's constitutional rights, as discussed above, it would "chill political debate during campaigns," *Phelps v. Hamilton*, 59 F.3d 1058, 1068 (10th Cir. 1995). At a minimum, the "evidentiary universe" should be "limit[ed] . . . to activities undertaken while crafting an official policy." *Washington v. Trump*, No. 17-35105, Am. Order (Dkt Entry No. 191), p. 6 (9th Cir. Mar. 17, 2017) (Kozinski, J., dissenting from denial of rehearing en banc) (attached hereto as Exhibit 3).

Moreover, Plaintiffs' discovery request seeks evidence of religious animus to support their claim that the Executive Order violates the Establishment Clause. But violation of the Establishment Clause turns on whether the government officially and publicly communicates a message favoring or disfavoring religion. *See Board of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994) (plurality op.); *McCreary*, 545 U.S. at 863 (explaining that, absent a "divisive

announcement" apparent to an outside observer, governmental action cannot not facially impermissibly advance religion). The Executive Order conveys no religious message and operates without regard to religion, and it was revised to eliminate any misperception of religious purpose. Thus, Request No. 1 is not relevant to the Establishment Clause analysis.

In addition, because Plaintiffs' discovery request seeks evidence only to support their Establishment Clause claim, it is not relevant or proportional to the needs of the case, as required by Rule 26(b)(1). As noted above, any evidence of religious animus is not relevant to an Establishment Clause claim where the official government action does not convey a religious message. This Court was mistaken when it stated that the "limited discovery" Plaintiffs seek "will be relevant to any claim." May 11 Order, at p. 4. All of Plaintiffs' discovery requests are aimed at seeking evidence of religious animus. It is inappropriate to allow discovery on those issues, especially before deciding threshold legal issues as to that claim, which would determine the appropriate scope of discovery (if any) on that claim.

Even if the requested campaign document could be relevant to a challenge against the initial executive order, that order has been revoked and replaced with a substantially revised second order, after consultation with and advice from cabinet members. Such actions show that the Executive Order at issue before this Court

does not have a religious purpose or message, as one court has concluded. *Sarsour v. Trump*, No. 17-cv-120, --- F. Supp. 3d ---, 2017 WL 1113305, at *12 (E.D. Va. Mar. 24, 2017) ("the substantive revisions reflected in [the Order] have reduced the probative value of the President's [past] statements" and undercut any claim that "the predomina[nt] purpose of [the Order] is to discriminate against Muslims based on their religion."); *see also Washington v. Trump*, No. 17-cv-00141, 2017 WL 1050354, at *5 (W.D. Wash. Mar. 17, 2017) (finding significant differences between the provisions, scope, and articulated purposes of the two executive orders).[9] Therefore, the document sought is outside the scope of discovery under Federal Rule of Civil Procedure 26(b)(1) because it is not relevant to the claims and defenses in this case or proportional to the needs of the case. *Omokehinde v. Detroit Bd. of Educ.*, 251 F.R.D. 261 (E.D. Mich. 2007) (denying discovery in part because documents sought could have no bearing on the elements of Plaintiff's claim). Requiring this discovery would be particularly inappropriate here, where the requested discovery would burden the President and senior advisers. *See Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367, 386 (2004) (recognizing the importance of "filter[ing] out insubstantial legal claims" before imposing discovery on the President or his advisers).

[9] *But see Hawai'i v. Trump*, --- F. Supp. 3d ---, 2017 WL 1011673 (D. Haw. Mar. 15, 2017); *Int'l Refugee Assist. Proj. v. Trump*, --- F. Supp. 3d ---, 2017 WL 1018235 (D. Md. Mar. 16, 2017).

2. Even if the Court were to reject our objections that (1) discovery at this point is improper as there is no showing of need given the fact that two nationwide injunctions are in force and two appellate courts are considering the legal standards that govern identical challenges; (2) Request No. 1 is premature, in part because standing has not been established and no discovery conference has been held; (3) the Request was served on the wrong entity, since it seeks a campaign document rather than a government document; (4) requiring the President and his close advisers to search for the document sought is unwarranted under Supreme Court law absent a special showing of need that has not been made; and (5) the document is not relevant to the legal claims being brought by Plaintiffs, and if in the unlikely event the document were located in the official files of the Defendants, then there would need to be an opportunity for the Defendants to review the document and consider any privileges that may be applicable to it. Of course, no claim of privilege could be properly evaluated or asserted until the document, if it exists, has been obtained from the proper source and reviewed. And this Court may need to give other non-parties an opportunity to assert potential privileges, as well. *See supra* pp. 17-18.

Plaintiffs' assertion that campaign and transition materials cannot be privileged is too simplistic, particularly since their own legal arguments depend on an assertion that the document at issue is relevant to determining the purpose of the

President's official action. Although the Government maintains that campaign statements are not relevant here, and has moved to dismiss in part on this basis, if this Court concludes otherwise, production would not be warranted until there is an opportunity to fully consider any privileges that may apply to the materials—potential privileges that may be asserted either by the Defendants or third parties who are not parties to the litigation. Accordingly, even if the Court rejects the objections identified above, that opportunity to consider the document and applicable privileges by interested parties would be necessary.

Ultimately, in addition to the irrelevance of these materials, the harm of potential loss of a privilege justifies limits on discovery at this time in this case. *See In re Ohio Execution Protocol Litig.*, 845 F.3d 231, 236 (6th Cir. 2016) ("Good cause [to limit discovery] exists if specific prejudice or harm will result from the absence of a protective order." (citations and internal quotations omitted)); *In re Cty. of Erie*, 473 F.3d 413, 416 (2d Cir. 2007) (recognizing harm of potential invasion of privilege and allowing a writ of mandamus to review discovery orders that potentially invade a privilege where the issue is one of first impression and the privilege may be lost); *Perry*, 591 F.3d at 1158-59 (same).

The Document Sought Can Be Obtained from Another, Less Burdensome Source.

Relatedly, Request No. 1 is improper and unduly burdensome because it seeks information that could be more easily obtained from third parties. The Court

must limit discovery when "the discovery sought … can be obtained from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. P. 26(b)(2)(C); *Metavante Corp. v. Emigrant Sav. Bank*, No. 05-CV-1221, 2008 WL 4722336, at *7 (E.D. Wis. Oct. 24, 2008) (noting prior holding denying motion to compel where the documents were available from a "more convenient" third-party source). The claimed author of the document sought, or other individuals alleged to have knowledge of the document, are undeniably better sources from which to obtain this document in light of the burdens imposed on the government in searching for this document.

The Request is Vague.

Defendants object to the Request as vague because, while it asks for just a single potentially identifiable memo created by Mr. Giuliani, it is not clear that there is a simple way to identify the specific, final memorandum being referenced without additional information that is in the hands of third parties (*i.e.*, Mr. Giuliani), not the government. Without the participation of Mr. Giuliani (or perhaps the Trump campaign), Defendants ultimately must speculate regarding the specific document being sought. That speculation would be based on figuring out exactly what document was being referred to by third parties in news reports. That is, it asks Defendants to guess what document was referred to by third parties (Mr.

Giuliani, Rep. McCaul, and Ms. Phelan) in conversations with other third parties (members of the press).

The Request Seeks Potentially Privileged Information.

Defendants object on the basis that the Request seeks potentially privileged information. As set forth above, Defendants maintain that any documents relating to the Trump Campaign are irrelevant; however, if the Plaintiffs were to establish that such documents are legally relevant, the document sought would then be potentially subject to a variety of privilege claims. Further, Defendants lack sufficient information to determine if the document is covered by any privileges that may be asserted by third parties who are not parties to this litigation.

Response to Document Request No. 1:

Based on the foregoing objections, Defendants are not producing any documents in response to this Request because, among other things, the Request is premature, a search would place a burden on the President and senior level cabinet members under *Cheney* that is not justified because Plaintiffs have not made the required showing under *Cheney*, Plaintiffs are seeking a campaign document from official entities, the document is not relevant, and even if the document were relevant (and if it exists), there must be an adequate opportunity for the assertion of any potentially applicable governmental or campaign privileges.

Dated: May 19, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2017, I served the foregoing document, DEFENDANTS' RESPONSE AND OBJECTIONS TO PLAINTIFFS' FIRST SET OF DOCUMENT REQUESTS, REQUEST NO. 1, via email to all counsel of record for the Plaintiffs per counsel's written consent to receive service electronically:

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EXHIBIT 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	CASE NO. C17-0141JLR ORDER GRANTING MOTION FOR STAY

I. INTRODUCTION

Before the court is Defendants' motion to stay these proceedings pending resolution of the appeal of the preliminary injunction in *Hawaii v. Trump*, No. CV 17-00050 (D. Haw.). (Mot. (Dkt. # 175)); *see also Hawaii v. Trump*, No. 17-15589 (9th Cir.). The court has considered Defendants' motion, Plaintiffs' opposition to the motion (Resp. (Dkt. # 180)), Defendants' reply (Reply (Dkt. # 184)), the relevant portions of the

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record, and the applicable law. Being fulling advised,[1] the court GRANTS Defendants' motion.

II. BACKGROUND

This lawsuit arises out of President Donald J. Trump's recent issuance of two Executive Orders on immigration: Executive Order No. 13,769 ("EO1") and Executive Order No. 13,780 ("EO2").[2] This lawsuit began as a challenge to EO1. (*See* Compl. (Dkt. # 1).) On February 3, 2017, this court issued a nationwide temporary restraining order ("TRO") enjoining enforcement of sections 3(c), 5(a), 5(b), 5(c), and 5(e) of EO1. (TRO (Dkt. # 52).) On appeal, the Ninth Circuit construed this court's TRO as a preliminary injunction and declined to stay the preliminary injunction pending Defendants' appeal of the preliminary injunction in the Ninth Circuit. *See Washington v. Trump*, 847 F.3d 1151, 1158 (9th Cir. 2017). On March 6, 2017, President Trump issued EO2, which expressly revokes EO1. *See* EO2 ¶ 13. In addition, Defendants withdrew their appeal of this court's injunction with respect to EO1. (9th Cir. Order (Dkt. # 111) (granting unopposed motion for voluntary dismissal of appeal).)

Following the President's issuance of EO2, Plaintiffs filed a second amended complaint incorporating new allegations and claims with respect to EO2. (SAC (Dkt. # 152).) On March 15, 2017, Plaintiffs filed a motion seeking a TRO against enforcement of Sections 2(c) and 6(a) of EO2. (TRO Mot. (Dkt. # 148).) Later that same

[1] No party has requested oral argument, and the court determines that oral argument is not necessary for its disposition of this motion. *See* Local Rules W.D. Wash. LCR 7(b)(4).

[2] EO2 expressly revoked EO1 effective March 16, 2017. *See* EO2 § 13.

day, in a separate suit, the federal district court in Hawaii enjoined the enforcement of Sections 2 and 6 of EO2. *See Hawaii v. Trump*, No. CV 17-00050 (D. Haw.), Dkt. ## 219-20. On March 17, 2017, the court entered a stay of Plaintiffs' motion for a TRO in part because the federal district court in Hawaii entered a nationwide injunction that provided Plaintiffs with the relief they sought. (3/17/17 Order (Dkt. # 164) at 8-9.) The court also noted that "the Ninth Circuit's rulings on EO2 in *Hawaii v. Trump* will likely have significant relevance to—and potentially control—the court's subsequent ruling here." (*Id.* at 10.) Accordingly, the court concluded that "granting the stay of Plaintiffs' TRO motion while the nationwide injunction remains in place . . . pending the outcome of appellate proceedings in [the Hawaii] case would facilitate the orderly course of justice." (*Id.*)

Defendants now seek a stay not just of Plaintiffs' motion for a TRO, but of the entire case pending resolution of the appeal in *Hawaii v. Trump*. (*See* Mot.) Plaintiffs oppose a stay. (*See* Resp.) The court now considers Defendants' motion.

III. ANALYSIS

The court "has broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *see also Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). This power applies "especially in cases of extraordinary public moment" when "a plaintiff may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Clinton*, 520 U.S. at 707. In determining whether to grant a motion to stay, "the competing interests which will be affected by the

granting or refusal to grant a stay must be weighed." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (citing *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). Those interests include: (1) "the possible damage which may result from the granting of a stay," (2) "the hardship or inequity which a party may suffer in being required to go forward," and (3) "the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Id.* Here, the court finds that these factors weigh in favor of granting Defendants' motion pending resolution of the appeal of the preliminary injunction in *Hawaii v. Trump*.

A. The Orderly Course of Justice

The court begins with the last factor—the orderly course of justice and judicial economy. District courts often stay proceedings where resolution of an appeal in another matter is likely to provide guidance to the court in deciding issues before it. *See Landis*, 299 U.S. at 254. Where a stay is considered pending the resolution of another action, the court need not find that the two cases involve identical issues; a finding that the issues are substantially similar is sufficient to support a stay. *See Landis*, 299 U.S. at 254; *see also Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979) (stating that the court's authority to stay one proceeding pending the outcome in another "does not require that the issues in such proceedings are necessarily controlling of the action before the court"). Here, the appeal in *Hawaii v. Trump* involves many issues that overlap with the present litigation. Indeed, both cases involve challenges to sections 2 and 6 of EO2. (*See* SAC ¶¶ 196, 203, 209, 218, 224, 235, 240); *Hawaii v. Trump*, No.

CV 17-00050 DKW-KSC, 2017 WL 1011673, at *17 (D. Haw. Mar. 15, 2017) (issuing nationwide TRO regarding sections 2 and 6 of EO2).

Defendants argue that waiting for the Ninth Circuit's decision in the *Hawaii* case will likely provide guidance to the court in resolving discovery disputes relevant to Plaintiffs' claims. (Mot. at 6-8.) First, Defendants argue that Plaintiffs are seeking internal government records that Defendants believe are irrelevant because under *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), Defendants need only demonstrate a "facially legitimate and bona fide reason" for the Executive's exclusion of aliens. (Mot. at 6.) Plaintiffs contend that "the Ninth Circuit has already resolved . . . against Defendants" the issue of whether internal government documents are relevant to Plaintiffs' claims when it rejected application of the *Mandel* standard in *Washington*, 847 F.3d at 1162. (Resp. at 7-8.) However, in the *Hawaii* appeal, Defendants argue that the federal district court in *Hawaii* misread [the Ninth Circuit's] stay ruling in *Washington*. (*See* Mot. at 1 (citing appellants' brief).) Plaintiffs obviously disagree with this position, but the salient point for purposes of Defendants' stay motion is that resolution of the *Hawaii* appeal is likely to provide guidance to this court on that issue and by extension on the appropriate scope of discovery.

Further, even if the Ninth Circuit were to determine in *Hawaii* that *Mandel* does not provide the applicable standard and that courts may look beyond the four corners of EO2, the Ninth Circuit's decision is likely to provide guidance on the scope of that review. Although the Ninth Circuit is not considering discovery issues on appeal, it is likely to decide legal issues that will impact the court's resolution of the parties'

discovery disputes here by clarifying "the applicable law or relevant landscape of facts that need to be developed." *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 1050354, at *5 (W.D. Wash. Mar. 17, 2017) (quoting *Hawaii v. Trump*, No. CV 17-00050 DKW-KJM, 2017 WL 536826, at *5 (D. Haw. Feb. 9, 2017)).

In addition, Defendants are likely to move for dismissal under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Mot. at 8.) Defendants are likely to raise the same arguments that they would have raised in opposition to Plaintiffs' TRO motion had the court not stayed consideration of that motion. (*Id.*) For the same reasons that the court determined that the Ninth Circuit's decision in *Hawaii* would be helpful in resolving Plaintiffs' TRO motion, *see Washington*, 2017 WL 1050354, at *6, the Ninth Circuit's decision will also likely help the court in resolving Defendants' motion to dismiss.

Plaintiffs argue that the issues in the two cases are not perfectly matched and that the Ninth Circuit's resolution of the appeal in *Hawaii* will leave various issues unresolved before this court. (*See* Resp. at 8-10.) Resolution of the *Hawaii* appeal, however, need not "settle every question of . . . law" to justify a stay. *Landis*, 299 U.S. at 256. It is sufficient that the *Hawaii* appeal will likely "settle many" issues and "simplify" others, *id.*, such that a stay will facilitate the orderly course of justice and conserve resources for both the court and the parties. *See Fairview Hosp. v. Leavitt*, No. 05-1065RWR, 2007 WL 1521233, at *3 n.7 (D.D.C. May 22, 2007) (granting a stay pending the resolution of another matter that would likely settle or simplify issues even though resolution of the other matter "would not foreclose the necessity of litigation in

[the stayed] case"); *In re Literary Works in Elec. Databases Copyright Litig.*, No. 00 CIV 6049, 2001 WL 204212, at *3 (S.D.N.Y. Mar. 1, 2001) (same). Accordingly, the court finds that this factor weighs in favor of granting Defendants' motion for a stay.

B. Possible Harm to Plaintiffs if a Stay is Imposed

Plaintiffs assert that there is a significant possibility that a stay will harm their ability to obtain complete and accurate discovery. (Resp. at 3-6.) In particular, Plaintiffs raise the specter that third parties may be free to destroy evidence during the stay. (*Id.* at 4-5.) They also assert that Defendants have disclaimed any obligation to locate or preserve evidence that predates President Trump's inauguration on January 20, 2017. (*Id.*)

The court first addresses Defendants' obligation to preserve evidence. Defendants acknowledge that they "are aware of their obligation to preserve information in their possession, custody, or control that *may* be relevant to the claims and defenses in this case." (JSR (Dkt. # 177) at 9 (italics added).) To date, the court has not ruled that evidence that predates January 20, 2017, is irrelevant to this case. Indeed, Plaintiffs' second amended complaint expressly raises factual allegations concerning pre-inauguration events.[3] (*See, e.g.*, SAC (Dkt. # 152) ¶ 141 ("Prior to his election, Donald Trump campaigned on the promise that he would ban Muslims from entering the United

[3] "The 'obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation—most commonly when suit has already been filed, providing the party responsible for the destruction with express notice, but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation.'" *Ruiz v. XPO Last Mile, Inc.*, No. 05CV2125 JLS (KSC), 2016 WL 7365769, at *3 (S.D. Cal. Dec. 19, 2016) (quoting *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)).

States.").) Indeed, the relevancy of this time period is one of the issues that Defendants assert the *Hawaii* appeal may resolve and that supports imposing a stay. (*See* Mot. at 7 ("[T]he Ninth Circuit's decision is likely to provide assistance in resolving disputes about the appropriate time frame for any discovery.").) Thus, until that issue is resolved, the court expects all parties to abide by their obligation to preserve information in their possession, custody, or control that may be relevant to Plaintiffs' claims and Defendants' defenses—including evidence that predates January 20, 2017. The entry of a stay in these proceedings does not obviate either parties' obligation to ensure the preservation such evidence, and the court expects all parties to fulfill their obligations in this regard.[4] *See supra* n.3.

Plaintiffs also raise legitimate concerns about their need to obtain information and preserve evidence from third parties. (*See* Resp. at 5.) To alleviate this potential harm, Defendants suggest that Plaintiffs send preservation letters to the third parties at issue "to notify them of the litigation and request that they preserve any potentially relevant evidence." (Reply at 5.) If Plaintiffs do not believe that sending such letters will resolve the issue of third-party evidentiary preservation, the court permits Plaintiffs to seek a limited modification of the stay order to allow Plaintiffs to issue subpoenas to the third parties. The issuance of subpoenas to third parties would provide the force of a court

[4] Without citation to evidence, Plaintiffs assert that Defendants believe they "may discard probative evidence if it was created prior to Inauguration Day." (Resp. at 5.) As noted above, such a belief would be contrary to Defendants' obligations to preserve evidence that may be relevant to either Plaintiffs' claims or Defendants' defenses. If there is evidence that a party to this litigation has discarded probative evidence, the court expects such evidence to be brought before it forthwith.

order with respect to the preservation of this evidence and should assuage Plaintiffs' fears that potentially relevant evidence might be destroyed. The court would then stay any required production under or response to the subpoenas until such time as the stay is lifted, which will prevent Defendants from becoming embroiled in potentially complex privilege and relevancy issues without the benefit of the Ninth Circuit's ruling in the *Hawaii* case.[5] (*See* Reply at 6.)

Plaintiffs are also concerned about the potential length of a stay. The court is sensitive to this concern, but notes that the Ninth Circuit ordered expedited briefing in the *Hawaii* appeal and conducted oral argument on May 15, 2017. *See Hawaii v. Trump*, No. 17-15589 (9th Cir.), Dkt. ## 14, 18. Plaintiffs also raise the concern that the stay may continue through an appeal to the United States Supreme Court. (Resp. at 6-7.) Although that may be true, the court also recognizes that litigation is inherently uncertain and this litigation or the *Hawaii* litigation could end prior to reaching the United States Supreme Court. Further, the court will require the parties to submit a joint status report within ten days of the Ninth Circuit's ruling in the *Hawaii* appeal so that the court can reassess the continued appropriateness of the stay at that time. Due to the short duration of the stay Defendants seek and the safeguards that the court has implemented to mitigate any harm to Plaintiffs—particularly with regard to the preservation of evidence—the

[5] In addition, requiring Plaintiffs to bring a motion prior to issuing any third-party subpoenas during the course of the stay will permit Defendants an opportunity to respond before any modification of the stay order.

court finds that the potential harm to Plaintiffs is insufficient to warrant denying Defendants' motion.

C. Possible Hardship or Inequity to Defendants if a Stay is Not Imposed

Defendants assert that, in the absence of a stay pending further guidance from the Ninth Circuit, they will endure hardship due to "[t]he sheer volume of discovery" that Plaintiffs anticipate serving on "the highest levels of government." (Mot. at 9, 10.) In addition to written discovery and document requests, Plaintiffs anticipate up to 30 depositions of government officials, including White House staff and Cabinet-level officers. (*Id.* at 10; *see also* Resp. at 11; Reply at 5 n.3 (stating that Plaintiffs indicated in their initial disclosures that they believe the following officials have discoverable information: President Donald Trump, Secretary of Homeland Security John Kelly, Secretary of State Rex Tillerson, Attorney General Jefferson Sessions, former National Security Advisor Michael Flynn, White House Counsel Donald McGahn, Presidential Advisors Stephen Miller and Stephen Bannon, and White House Press Secretary Sean Spicer); JSR at 8, 9 (stating that Plaintiffs propose that the parties be permitted to take up to thirty (30) depositions per side).) Plaintiffs respond that "being required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity.'" (Resp. at 11 (quoting *Lockyer*, 398 F.3d at 1112 and *Landis*, 299 U.S. at 255).)

However, neither this lawsuit, nor the discovery Plaintiffs seek is typical. The Supreme Court has declared that "the high respect that is owed to the office of the Chief Executive . . . is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery, . . . and the Executive's constitutional

responsibilities and status are factors counseling judicial deference and restraint in the conduct of litigation against it." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 385 (2004) (alterations and internal citations omitted). Plaintiffs' anticipated discovery will likely lead to multiple discovery disputes. (*See* JSR at 5-7 (relevance objections), 7-8 (privilege issues), and 11-12 (objections to taking depositions of high-ranking and White House officials).) In the context of this case, the "high respect" owed to the Executive warrants a stay to protect Defendants from the burden of resource intensive discovery while the Ninth Circuit addresses issues that may inform the appropriateness, scope, and necessity of that discovery. *See id.*; *see also Clinton*, 520 U.S. at 707 (stating that the power to stay proceedings applies "especially in cases of extraordinary public moment"). Thus, the court concludes that this factor weighs heavily in favor of granting Defendants' motion for a stay pending the outcome of the appeal in *Hawaii v. Trump.*

D. Summary of the Factors

The court concludes that the relevant factors weighs in favor of staying these proceedings pending the resolution of the appeal in *Hawaii v. Trump*. Awaiting the Ninth Circuit's opinion in that case will promote the orderly course of justice and judicial economy. In addition, Defendants have demonstrated they face hardship or inequity in the absence of a stay in light of Plaintiffs' anticipated sweeping discovery and the unique nature of this case involving the Chief Executive. *See Cheney*, 542 U.S. at 385; *Clinton*, 520 U.S. at 707. To the extent that Plaintiffs fear that a stay will harm their ability to preserve evidence, the court has implemented measures described above to mitigate any such possible effects. *See supra* § III.B. In addition, the Ninth Circuit has placed the

appeal on a fast track and oral argument has already occurred, so the stay will likely be of short duration. Finally, the court orders the parties to file a joint status report within ten days of the Ninth Circuit's ruling so that the court may evaluate the continued appropriateness of any stay at that time.

IV. CONCLUSION

Based on the foregoing analysis, the court GRANTS Defendants' motion (Dkt. # 175) for a stay in these proceedings pending the Ninth Circuit's resolution of the appeal in *Hawaii v. Trump.* Should circumstances change such that lifting the stay is warranted, any party may move to lift the stay.

Dated this 17th day of May, 2017.

JAMES L. ROBART
United States District Judge

EXHIBIT 2

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Arab American Civil Rights League, Hend Alshawaish, Sofana Bella, American Civil Liberties Union of Michigan, et al,

Plaintiffs,

Case No. 17-10310

-vs-

Detroit, Michigan

Donald Trump, Department of Homeland Security, U.S. Customs and Border Protection, John Kelly and Kevin McAlleenan,

April 13, 2017

Defendants.

_____/

TRANSCRIPT OF TELEPHONE CONFERENCE

BEFORE THE HONORABLE VICTORIA A. ROBERTS

UNITED STATES DISTRICT COURT JUDGE

Appearances:

For the Plaintiffs: Miriam J. Aukerman
Michael J. Steinberg
Rula Aoun
Nishchay Maskay

For the Defendants: Gisela Westwater
Joshua Press
Briana Yuh
Katherine Shinners

Proceedings taken by mechanical stenography, transcript produced by computer-aided transcription

Detroit, Michigan

Thursday, April 13, 2017

(At about 2:39 p.m.)

- - - -

(Call to Order of the Court)

THE COURT: Hello. This is Judge Roberts and I understand Linda has already done a roll call. We are now on the record, so I will need you attorneys to give your names again because -- can everyone hear me?

UNIDENTIFED ATTORNEY: Yes, Your Honor.

THE COURT: So we're calling the case of Arab American Civil Rights League, et al versus Donald Trump, et al., civil case number 17-10310. So for the Plaintiffs please, appearances?

MS. AUKERMAN: Miriam Aukerman, ACLU of Michigan, Arab American Studies Association and individual Plaintiffs Adeeb Saleh, Sofana Bella, Hilal Alkatteeb and SA.

THE COURT: All right. Thank you.

MS. AOUN: And Rula, R-u-l-a A-o-u-n on behalf of the ACRL, The American Arab Chamber of Commerce, Plaintiff Hend Alshawaish, Salim Alshawish, Yousef Abdullah, Fahmi Jahaf and Mohamed Alshega.

THE COURT: Ok, for the Plaintiffs Linda took a roll call earlier. Is Michael Steinberg on line?

MR. STEINBERG: Yes, Your Honor.

THE COURT: And another -- Nishchay -- can you help me with that name?

MR. MASKAY: Yes, Nishchay Maskay, Your Honor.

THE COURT: Thank you very much. Anyone else for Plaintiffs? And representing the Defendants?

MS. WESTWATER: Yes, Your Honor. Hello. This is Gisela Westwater here representing the Defendants.

MS. YUH: Your Honor, this is Briana Yuh representing Defendants.

MR. PRESS: Josh Press representing the Defendants.

MS. SHINNERS: And Katherine Shinners representing the Defendants.

THE COURT: Thank you, everyone. So I wanted to have this conference call just to get a better handle on exactly what is going on. There have been cases with similar allegations in other parts of the country and we have -- everyone has been paying very close attention to the developments in those cases. The developments in this case have not been as robust and I do know that the Plaintiffs here filed an Amended Complaint on March 16th. There hasn't been responsive pleading filed to that yet, and I want to talk about what that pleading is going to look like.

Then just a day or so ago there was a Motion filed for leave to file excess pages in that Motion to Dismiss. I think I just signed the Order today granting that extension and then noticed from the docket that that was withdrawn. So can you, Counsel for Defendants, just give me an update on what it is that you're going to be doing? And also Counsel before any of you speaks please give us your name so the record is clear.

MS. WESTWATER: Yes, Your Honor. This is Gisela Westwater. We still intend to be -- the problem with the first filing was that some signature blocks were missing from the Stipulated Order -- or from the Motion and therefore we are simply

re-filing, Your Honor. So it is our -- both of the parties' intent that you would grant the renewed Motion, however, with all the signature blocks, Your Honor.

THE COURT: All right. So when is that coming?

MS. WESTWATER: Your Honor, at present our answer deadline is Monday. We hope to have it filed tomorrow, but we have sort of been going off of our original answer deadline until the Court had entered for the status conference, so that has pushed us to try to file it for tomorrow, Your Honor..

THE COURT: Okay.

MS. WESTWATER: And our intent is for it to be a fully dispositive motion to dismiss dealing with all of -- we believe potentially resolving all of the issues in this case.

THE COURT: Can you tell me if any motion similar to yours have been filed in any other cases?

MS. WESTWATER: No, they have not because in all of the other cases up until this point the party -- the Plaintiffs have used preliminary injunctions and for the cases where there has not been a definitive ruling on the preliminary injunction, those cases are actually pending argument next week in the majority. So I think as this Court knows there was a Motion for Preliminary Injunction Hawaii, which was granted, is currently on appeal and argument I believe is the 15th of May. The 4th Circuit there was two decisions; one was in the District of Maryland. That was granted. It was more limited focusing simply on Section 2(c). That has been appealed to the 4th Circuit and argument is a week prior to that, so that would be I believe at least the 8th, I believe, Your Honor. We'll have in our filing, I'm sorry.

And there was another decision which was in the Eastern District of Virginia which is quite telling. It was actually a reversal of the earlier ruling of the Eastern

District regarding the original Executive Order and in this one the Motion for Preliminary Injunction was denied on the basis there was not a likelihood of success on the merits.

There are two Motions for Preliminary Injunction currently pending in the District of DC. There will be a hearing on that on the 21st on both of those together. There also two cases pending with Motions in the Western District of Washington and there are stay motions pending in that -- those jurisdictions asking the Court to stay resolution of those until the Court has received guidance from the 9th Circuit and based on those the Court has been allowing the Government in that case to prolong and put off its answer while the Court resolves the stay motions.

THE COURT: All right. And again, for Defense Counsel, do you believe that any of the outcomes in these various Motions pending regarding preliminary injunctions would inform the Court here?

MS. WESTWATER: Absolutely, Your Honor. We believe that the 9th Circuit and the 4th Circuit both have I think we would say they're different backgrounds. The Courts will -- the 4th Circuit has already announced it will be going on en banc. The 9th Circuit is considering whether or not to go en banc, and so I think both of these are going to be very important decisions which would certainly assist this Court in any ruling. While perhaps not controlling, I think they'll certainly be persuasive.

THE COURT: And is the en banc hearing the one you said is coming up on May 8th?

MS. WESTWATER: Yes, Your Honor. It is the earlier hearing.

THE COURT: All right. Counsel for Plaintiff, anything you want to put on the record?

MS. AUKERMAN: This is Miriam Auckerman with the ACLU of Michigan. Can you hear me, Your Honor?

THE COURT: The Court Reporter didn't get your name. I told her who it is. It's Miss Aukerman.

MS. AUKERMAN: Yes. So our plan is to file a Motion for Preliminary Injunction, but as the Court noted we had taken a somewhat approach than some of the other Plaintiffs in the litigation. (Inaudible) We certainly don't know what the 9th Circuit or what the 4th Circuit will do, but it's important although not controlling decisions here, but we know that any Injunction issued by this Court would be appealed, and so we feel that it's very critical to proceed with discovery to establish the record that we think this Court will want to have and that we would want the Circuit to have available to it upon appellate review of any Injunction issued by the Court. So our goal here is to move forward, but to get first. (inaudible)

THE COURT: Miss Aukerman, for some reason you are clipping in and out and so it's hard to get everything that you're saying.

MS. AUKERMAN: I'm not sure why that would be. So that's basically our approach. I think what we would like to -- we see discovery as really critical here. There's certainly a great deal of evidence of religious animus that the Government is saying that that is not enough. They're saying that while candidate Trump was a candidate and that there's not a connection to the Executive Orders, and so we're trying to trace that through and we believe that discovery will make even clearer the connection between animus and the Executive Orders and essentially explore what Giuliani described as the right way to do it legally. And if the Government were willing to stipulate that the Executive Orders are motivated by religious animus, we wouldn't need discovery, but I understand they're not willing to stipulate to that and therefore

we want to move forward with discovery and then as soon as we have what we think we need to provide that record, that we hope will help provide this Court what it needs to issue the Preliminary Injunction that we seek.

THE COURT: So Miss Aukerman, give me the timing on this. When the Government is filing a Motion for Summary Judgment tomorrow, Monday a the latest, when would this Motion for Preliminary Injunction be filed?

MS. AUKERMAN: Well, we conferred with the Government on a Rule 26. We have served discovery requests; that occurred last week on Thursday about 24 hours after that conference the Government indicated to us that they did not consider that Rule 26 to have occurred and our -- we have pursuant to the Rule 26 have served interrogatories and requests for production and those are due on May 8th. We're particularly -- what our goal here is to get those initial documents, initial phase of documents, we hope obviously to get those through expedited discovery. We respect that the Court thought that our requests were too broad and so we've really taken that to heart and narrowed those requests.

The discovery that we're seeking is very narrow. We're talking for example, the Giuliani commissioned document is one single document that was requested and we believe that those documents once produced will provide what we need to move forward for the Preliminary Injunction.

THE COURT: Did you say, Miss Aukerman, that the Government did not consider a Rule 26 meeting to have occurred?

MS. AUKERMAN: We, after the Court's Order indicating that we should move forward with a Rule 26, we reached out to the Government requested that they schedule that. They initially did not want to schedule that. Mr. Raofield is leaving -- was on -- I was on vacation at the time. He's on vacation this week. He contacted

Mr. Press to say that in fact he'd be out of the country and could they -- hold the Rule 26(f). They did agree to hold that on Thursday of last week, but then again withdrew what they said was -- they then subsequently is not a Rule 26(f) after we served the discovery requests which we are entitled to do under Rule 26.

THE COURT: So let me -- I have a few questions -- but let me just stick with this Rule 26 conference. My question is for the Government. Did a Rule 26 conference happen, and is it your intention to respond to discovery requests and to produce initial disclosures?

MS. WESTWATER: Your Honor, this is Gisela Westwater again. As we indicated to Plaintiffs in writing when they first requested a 26(f), we believe that under the Rules it is the Court that triggers our obligations under Rule 26(f). We indicated this in writing. We were very clear. Instead Plaintiff's Counsel simply said they were going out of the country, would we have a phone call with them when we were on the phone. We began trying to go through the description of the items in the 26(f) and we objected. We stated we are not prepared for a 26(f). We were not ready to address any of the discovery issues that -- we believed this would be an issue raised with this Court and the appropriateness of discovery. We believe in this Court's Order you specifically said due to the nature of this case, good cause may exist delay entry of a scheduling order and that's a quote and that's exactly -- that is exactly our position. We believe this is absolutely the sort of case where a delay is appropriate, not just because we are going to have a dispositive Motion to Dismiss filed in the next day, but also because if you read in the notes to the rules in the 2015 amendments, this is exactly the type of case and that is why the Court's were given the discretion to find exceptional circumstances, good cause to delay issuing such an Order and that would be questions like this, complex issues such as standing. The Court rule has

incumbent on the Court to examine its own jurisdiction, especially here where Plaintiffs are asking for discovery into the White House into -- we have 14 Defendants who are all huge governmental agencies which could have deliberative process. There's separation of powers issues. There's presidential communication issues that are going to be raised. We believe before the Court would delve into this as we've mentioned to Plaintiffs, this is certainly something to be brought up before the Court and we do not believe that Plaintiffs themselves could call us and turn what we thought was just a discussion between the parties unilaterally into a 26(f) conference.

THE COURT: So Miss Westwater, is it the Government's position that there are no issues of fact presented by this case? And are you asking the Court to -- let me finish my question. And are you asking the Court to rule as a matter of law on all of the claims in Plaintiffs' Amended Complaint?

MS. WESTWATER: Well, first Your Honor, we would have as we said sort of standing questions and other threshold jurisdictional issues. If the Court did not dismiss based upon those, we do believe yes, Your Honor, that there are no factual issues, disputes that would keep this Court from ruling as a matter of law.

THE COURT: So I take it that Plaintiff feels very differently about that.

MS. AUKERMAN: Absolutely, Your Honor. I mean as is it clear by the fact that there are existing Injunctions from multiple Courts and that multiple Preliminary Injunctions have been issued. We don't think that the likelihood of success on their Motion to Dismiss is very high. However, it is very clear from the case law that they're simply filing a Motion to Dismiss does not -- is not a basis to stop moving forward with discovery. I mean there's extensive case law which we'd be happy to provide to the Court within the Eastern District as well as elsewhere, saying that essentially that would grind the wheels of justice to a halt if every time a

defendant filed a dispositive motion, discovery simply has to stop.

With respect to the Government's assertions that we're trying to reach into the White House, I think one of the things that we've done is to be extremely careful and very limited in what we're requesting. We are not dealing with issues where there's exacted as privileged presidential communication privilege. (sic) We have sought documents that predate the inauguration. Defendants have elsewhere in other filings made it very clear that they consider Candidate Trump to be a private citizen, not a Government employee and that therefore, arguing those things shouldn't be taken to reflect any kind of animus attributable to him as President, but that same argument that mean that must also take a position that he's a private citizen for the purposes of discovery.

So we're not talking about discovery into the White House. We're talking about only pre-election discovery which is very different in terms of the issues that it raises. I think the Defendants' position as they made very clear, and Mr. Maskay can talk more about the Rule 26 conference because he participated in the conference and the fact that they went through all of the Rule 26 issues. I wasn't personally involved, but he can speak to that better than I can and the fact that they went through of that.

But I think where we're at, Your Honor, is the Government is taking a position that this should not be discovery at all, and our position is that they need to provide an argument for why that should be the case. The normal rules of discovery are that (inaudible) regardless of whether there's a dispositive motion pending and we would like to move forward as quickly as possible so that we can provide -- we can move forward with that Preliminary Injunction where we feel we need that discovery because we want to provide the Court and the 6th Circuit with the record that it needs.

So what we will propose, Your Honor, that you treat today's conference --

THE COURT: Excuse me.

THE COURT REPORTER: I'm not getting much of what you're saying.

MS. AUKERMAN: Could you not hear me?

THE COURT REPORTER: No, I can't hear you well.

MS. AUKERMAN: Is this better?

THE COURT: Are you on a landline or a cell phone?

MS. AUKERMAN: I am on a landline. I'm not on speakerphone, so I'm not sure what the issue is.

THE COURT REPORTER: I can hear you better now.

MS. AUKERMAN: I'll try to repeat what I said before. So our view is that we want to provide the Court with -- we want to move forward with discovery. The Government's position is that there should be no discovery whatsoever, and so at this point really the case law is very clear that there's no basis to stop discovery simply because one has filed a Motion to Dismiss. There's tons of case law in the Eastern District as well as elsewhere on that point.

So what we would like to see this Court do is move forward with a Scheduling Order. We'd be happy to provide the Court with proposed dates for discovery. We can do that by tomorrow with a Proposed Order. I'm not sure that a further Rule 26 conference with the Government makes sense because their position is simply that there should be no discovery at all. So we would like to propose some dates to the Court for what we think is appropriate. We would like the Court to -- we'd like to make sure that we get the discovery that we've already served in a timely fashion, that that be responded to in a timely fashion because there really is no burden there and it was properly served and so that we can proceed to provide the Court to move forward to preliminary injunction that we would like to file, but where we feel we need to have

that discovery to supply this Court and ultimately the 6th Circuit with the full record that we think the Court deserves.

THE COURT: Miss Westwater, these standing and threshold jurisdiction questions that you say this case presents, they have been argued by the Government in similar cases filed by Plaintiffs?

MS. WESTWATER: Some of them have, Your Honor, and they have actually been meritorious in some; in as I said in the Eastern District of Virginia and originally in the District of Massachusetts. Those are also things that seem to be giving pause to the Judge in the Western District of Washington who is consider staying the case to receive guidance from the 9th Circuit.

THE COURT: So I just have a question. In the Eastern District of Virginia and in Massachusetts the Courts held there was no jurisdiction?

MS. WESTWATER: Oh, I'm sorry. The Courts found --

THE COURT: Excuse me. Excuse me.

MR. PRESS: Your Honor, there was no standing to challenge certain provisions by certain Plaintiffs. For example, in this case we have organizational Plaintiffs who appear to be making their own free speech claims, as well as their own associational claims through some of the other individual Plaintiffs and --

THE COURT: Did a Court -- did a Court say that the organizational Plaintiffs had no standing?

MR. PRESS: So the District of Massachusetts in early or late January said that they only had standing as to their own First Amendment claim and that none of the Plaintiffs had standing to challenge the refugee provisions, for example.

MS. WESTWATER: Your Honor, this is again Gisela Westwater. In this case Plaintiff challenged the entire Order which contains many provisions for which

they do not have standing to challenge.

THE COURT: Who's speaking?

MS. WESTWATER: I should also add, Your Honor, that while Plaintiff characterizes that there should never be any discovery at this point and therefore that there's no reason to confer with us, we don't believe we've ever put that forward as our position. We have said simply that we believe at this juncture discovery is not appropriate. We do believe that our dispositive Motion to Dismiss could be granted, in which case discovery would never be needed, but depending on the ruling that comes out of this Court on that dispositive motion, we're unable to say what might be proper or might be discoverable in the future. So we do believe tomorrow with our Motion to Dismiss we also intend to file a motion to extend the Rule 16 scheduling conference and although the Plaintiffs have said that a Motion to Dismiss is not enough for staying all discovery, in truth there is law in this Circuit that shows a Motion to Dismiss along with other factors which we are including in our brief do actually counsel and favor of staying and we would believe even if the Court were to rule as we have in our brief the factors under Rule 16, that counsel for extending the deadline, actually all of those are present in this case. It's a complex case and there's threshold issues. It raises issues of first impression; in fact, Constitutional level.

This is a very important case. There's discovery would be burdensome. I know that Plaintiffs say it's not. However, they keep referring to discovery from private citizen Trump. I am actually -- all of us hear from the Defendants' side are representing officials and agencies, so officials in their official capacity and agencies, so this is discovery of anything. Those are who they would be from. They would be documents in the possession of Government officials and so this does raise lots of questions of first impression merely on the merits, but if this Court were to go into

discovery, it would raise significant issues of constitutional proportions s of discovery. Even this, what Plaintiff characterizes as a limited discovery and therefore to characterize it as posing no burden on the parties and this Court is really incorrect. We would urge this Court instead to simply -- tomorrow we will be filing our motions, as we said, so also a Motion to Extend and we would ask the Court to allow us to fully brief why this is a case in which it makes sense to extend the scheduling -- the discovery deadlines, including the original Scheduling Order so that the Court can proceed in a well-reasoned manner and at a pace that I think will give due authority or due recognition of really the important issues in front of the Court.

MS. AUKERMAN: This is Miriam Aukerman again. Can you hear me? If I may, you ask about how other Courts have responded to these arguments and the same disability arguments about standing for example, have been raised in opposition to the Preliminary Injunction motions in Maryland, in Hawaii, in Washington and the Courts have again and again rejected those and have found that the Plaintiffs have standing, and it's very clear that the Plaintiffs here will have standing and if there should be one Plaintiff who doesn't haven't standing, even if there's a single Plaintiff without standing, then there's standing for the purposes of the case. And so it's very clear based on how other Courts ruled that the Plaintiffs here will have standing.

So what we see, Your Honor, is an effort at delay by the Government. These are really delay tactics that the Government has been employing. This case was filed at the end of January. We are now in April. We're seeking basically to insure that we get discovery, that the requests that we served get responded to by the beginning of May, May 8th and that we then be able to move forward. This is just a continual process of trying to delay and delay and keep us from getting to -- moving forward and getting the information that we need in order to provide the Court with the

Preliminary Injunction that we would like to file. We want to get that evidence, and there's no reason why we should off. The Government has made it very clear that think it's complicated and that they're going to fight tooth and nail not to release anything and that they think that they're complicated issues. If that's so, then there's no reason not to get started with briefing those issues and let them respond to our -- I mean we should move forward and if they think that there's privilege issues, then they should articulate those and we should brief those and move forward with those rather than just delaying everything and then two months from now after this Court has rejected -- or three months from now after their Motion to Dismiss. Then we move forward into briefing whether or not exactly the privilege applies to a private citizen and we spend another two or three months on that. We want this case to move forward. The Court should not countenance this sort of delay tactics that the Government is using to prevent us from moving forward with the case.

THE COURT: I've got a couple reactions. We're not really operating by a date the end of January. I think the parties themselves through stipulation and otherwise did not move this case forward for whatever reason, and then there was an amended complaint that was filed March 8th, I believe. March 16th -- March 16th, so that's the date. That's the operative date now and because of things that happened before then, there really could not have been a scheduling conference to set dates. So we're using March 16th as the date.

The Court is aware that even though an initial Motion to Dismiss or Motion for Summary Judgment may be filed in response to an Amended Complaint, that doesn't -- or in response to a Complaint, that doesn't mean that discovery is always at a standstill. In fact, in many cases I still will enter a discovery plan even though there are those kinds of motions that are pending because of the possibility for delay and

because the case warrants that kind of attention.

So I understand that there are reasons not to enter a Scheduling Order when a dispositive motion is pending, but there are also reasons to move forward. So I will look at your -- the papers that the Government plans on filing by Monday and the two Motions that you plan on filing and will make a decision about whether the Court is going to require the parties to have a Rule 26 conference and this would be a real conference that comports with the court rules and you would submit your joint plan for discovery and the Court would hold the conference with the parties but I will wait and see what gets filed.

Also, standing jurisdiction issues are discoverable, are matters that the parties can have discovery on, so if there is a question presented with respect to those issues, they would be and could be a matter for discovery as well.

That's what I have. If anyone has anything else they want to put on the record but if not, we'll just wait for your papers to be filed. Anything else that anyone has?

MS. WESTWATER: Nothing for the Defendants, Your Honor.

THE COURT: Plaintiffs, anything?

MS. AUKERMAN: Does my co-counsel have anything?

MR. STEINBERG: No.

THE COURT: No? Okay. All right counsel. Thank you very much. We're adjourned.

(Proceedings adjourned at about 3:12 p.m.)

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COURT REPORTER'S CERTIFICATION

STATE OF MICHIGAN)
) SS.
COUNTY OF WAYNE)

I, Janice Coleman, Federal Official Court Reporter, in and for the United States District Court for the Eastern District of Michigan, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported telephone proceedings held in this matter to the best of my ability and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

/S/ JANICE COLEMAN
JANICE COLEMAN, CSR NO. 1095, RPR
FEDERAL OFFICIAL COURT REPORTER

DATED: MAY 5, 2017

EXHIBIT 3

FOR PUBLICATION

FILED

MAR 17 2017

MOLLY C. DWYER, CLERK
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

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[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.

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[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.