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

Alexandria Division

TAREQ AQEL MOHAMMED AZIZ, et al.,	)	
	)	
Petitioners,	)	
	)	
THE COMMONWEALTH OF VIRGINIA,	)	
	)	
Intervenor-Petitioner,	)	Civil Action No. 1:17-cv-116
	)	
v.	)	
	)	
DONALD TRUMP, President of the United States, et al.,	)	
	)	
Respondents.	)	

REPLY BRIEF IN SUPPORT OF
THE COMMONWEALTH OF VIRGINIA'S
MOTION FOR A PRELIMINARY INJUNCTION

Mark R. Herring
Attorney General of Virginia

Trevor S. Cox (VSB No. 78396)
Deputy Solicitor General
tcox@oag.state.va.us

Matthew R. McGuire (VSB No. 84194)
Assistant Attorney General
mmcguire@oag.state.va.us

Stuart A. Raphael (VSB No. 30380)
Solicitor General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7240 – Telephone
(804) 371-0200 – Facsimile
sraphael@oag.state.va.us

Counsel for the Commonwealth of Virginia

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TABLE OF CONTENTS

NOTE ON SUPPLEMENTAL MATERIALS AND ADMISSIBILITY OF HEARSAY

Yesterday, the Commonwealth filed a declaration by Assistant Attorney General Mamoona Siddiqui (ECF No. 61), attaching the articles cited in our opening brief (ECF No. 31). While newspaper stories are normally inadmissible, it is settled law that such hearsay is admissible on a motion for a preliminary injunction.[1] Because the hearsay nature of a newspaper article goes to its weight, not admissibility, it is reversible error to exclude such hearsay.[2] Nonetheless, the Commonwealth has done its best in the time allowed to locate actual video recordings documenting Respondents' admissions. (ECF No. 61 ¶¶ 14(a)-(e), 27(a)-(e).)

The Commonwealth has also submitted the following additional declarations:

- a joint declaration by former Secretary of State Madeleine Albright and nine other former national security, foreign policy, and intelligence officials in the U.S. Government, who served in both Republican and Democratic administrations. (ECF No. 57 (the "National Security Declaration").) The declaration demonstrates the unprecedented nature of the blanket ban and the absence of legitimate security considerations supporting it.

- a declaration by Najwa Elyazgi, a Libyan student left stranded in Istanbul, Turkey for a week when she was trying to return through Dulles for her fourth-year studies at George Mason University. (ECF No. 54.) She was able to return last Saturday only because of the TRO in *Washington v. Trump*,[3] not because of any assistance from the Government in this case. Although Najwa "love[s] the people of the United States," the "nightmare" she experienced and

[1] *E.g.*, *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 725 (4th Cir.) (following *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)), *mandate recalled, stay granted*, 136 S. Ct. 2442, *cert. granted in part*, 137 S. Ct. 369 (2016).

[2] *Id*. at 726 ("[T]he district court abused its discretion when it denied G.G.'s request for a preliminary injunction without considering G.G.'s proffered [hearsay] evidence.").

[3] No. 17-cv-141 (W.D. Wash.), *appeal pending* No. 17-35105 (9th Cir.) (oral argument held on Feb. 7, 2017).

the uncertainty that the President has injected into immigration policy has forced her to look to Canada to pursue her Master's degree. (*Id*. ¶ 17); and

- declarations by former plaintiff Tareq Aziz (ECF No. 55) and his immigration attorney, Roy Hodge (ECF No. 56), describing the multi-year process that Aziz and his brother (both Yemeni nationals) went through to obtain their visas, only to experience their own nightmare upon arrival at Dulles on January 28, where they were barred from entering the United States and coerced into signing a release they didn't understand to relinquish their visa status before being removed, at their own expense, back to Addis Ababa, Ethiopia.

ARGUMENT

I. Under the voluntary-cessation doctrine, the Government's ad hoc decision to stop applying the Executive Order to LPRs does not moot that part of the controversy.

The February 1 memo from White House Counsel McGahn "that Sections 3(c) and 3(e) do not apply" to lawful permanent residents ("LPRs") does not moot that part of the controversy. That guidance cannot alter the plain language of § 3, which—as this Court already found—covers LPRs in spite of McGahn's opinion.[4] McGahn's opinion also contradicts the position of the Department of Homeland Security ("DHS"), only three days earlier, that § 3 applies to LPRs but that LPR "status will be a dispositive factor in our case-by-case determinations."[5] As those events prove, snap decisions can be easily reversed, so the issue is plainly not moot under the voluntary-cessation doctrine.[6] "[B]ald assertions of a defendant—whether governmental or private—that it will not resume a challenged policy fail to satisfy any burden of showing that a claim is moot."[7] Indeed, reports that White House Strategist Steve Bannon ordered Secretary

[4] ECF No. 42 at 2 & n.1.

[5] ECF No. 34-1.

[6] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

[7] *Wall v. Wade*, 741 F.3d 492, 498 (4th Cir. 2014).

Kelly *not* to exempt LPRs, and Secretary Kelly refused, confirm the need to protect LPRs.[8]

II. The Government's arguments on the merits are unpersuasive.

A. The President is not above the law and his actions are not immune from judicial review.

The Government makes the breathtaking claim that the President is not bound by the Constitution when it comes to immigration policy. It argues that 8 U.S.C. § 1182(f) gives the President unreviewable power to "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," and that he can do so whenever he 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."[9]

That argument is self-evidently wrong. For starters, § 1182(f) deals only with "entry," not with those already present, like LPR and visa holders who reside in Virginia. More importantly, Congress cannot authorize the President to violate the Constitution. What if the President wanted to ban entry of Jews? Or persons of color? May he freely discriminate on the basis of race or religion? Section 1182(f) also empowers the President to impose restrictions on aliens as a condition of entry. Could the President require aliens to wear a Red Crescent, a yellow Star of David, or a Cross, according to their faith? Could he require Muslims to be listed in a "Muslim registry" or "Muslim database," something candidate Trump suggested in his campaign?[10]

We urge the Court to press the Government for an answer. Judge Robart could not extract one, with the Government demurring that "I don't think your Honor needs to answer that

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[8] Josh Rogin, *Inside the White House-Cabinet battle over Trump's immigration order*, Wash. Post (Feb. 4, 2017, 6:13 p.m.), https://goo.gl/3aYFlI.

[9] 8 U.S.C. § 1182(f).

[10] *See, e.g.*, Aaron Blake, *Trump says we've known his Muslim ban and database plans 'all along.' But we still don't—not really*," Wash. Post (Dec. 21, 2016), https://goo.gl/bgRA9D.

question to decide this case."[11] The Ninth Circuit panel likewise got no response.[12] The absence of a limiting principle alone proves the error of the Government's defense.

The fact that past presidents have exercised § 1182(f) powers does not help the Government either. As a recent CRS survey found, § 1182(f) has never before been used to restrict a class of aliens based on the President's belief—however sincerely held—that *religion alone* makes them dangerous.[13] The National Security Declaration provides another reality check: "The Order is of unprecedented scope."[14]

> We know of no case where a President has invoked his statutory authority to suspend admission for such a broad class of people. Even after 9/11, the U.S. Government did not invoke the provisions of law cited by the Administration to broadly bar entrants based on nationality, national origin, or religious affiliation. In past cases, suspensions were limited to particular individuals or subclasses of nationals who posed a specific, articulable threat based on their known actions and affiliations.[15]

The CRS survey—published only four days before the Executive Order was signed—noted that very little law has emerged on the limits of § 1182(f), but that "future executive actions . . . could potentially be seen *to raise legal issues that have not been prompted* by the Executive's prior exercise of this authority,"[16] such as an incompatibility of religion-based restrictions with "the

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[11] Video transcript of hearing at 31:10-32:50, *Washington v. Trump*, No. 17-CV-00141-JLR (W.D. Wash. Feb. 3, 2017) (Argument of Ms. Bennett, DOJ), https://goo.gl/DCNddg.

[12] Audio Transcript at 17:38 to 21:38, *Trump v. Washington*, No. 17-35105 (9th Cir. Feb. 7, 2017), https://goo.gl/NryTVn.

[13] *See* Kate M. Manuel, *Executive Authority to Exclude Aliens: In Brief* 6 (Cong. Research Serv. Jan. 23, 2017), https://fas.org/sgp/crs/homesec/R44743.pdf ("In no case to date . . . has the Executive purported to take certain types of action, such as . . . distinguishing between categories of aliens based on their religion.").

[14] ECF No. 57 ¶ 8.

[15] *Id*.

[16] Manuel, *supra* note 13, at 2 (emphasis added).

First Amendment."[17]

History also teaches that the Judicial Branch must not take it on faith when the President insists that "national security" justifies actions that, in any other context, would be patently unconstitutional. During World War II, Solicitor General Charles Fahy misled the United States Supreme Court in two landmark cases—*Hirabayashi* and *Korematsu*—insisting that curfews and internment camps were needed to protect the country against the risk of sabotage by Japanese-American citizens and Japanese aliens living on the West Coast.[18] His defense of such measures sounds word-for-word like the Government's defense here: that it is not "invidious . . . discrimination," but rather that "the group as a whole contained an unknown number of persons who could not readily be singled out and who were a threat to the security of the nation; and in order to impose effective restraints upon them it was necessary not only to deal with the entire group, but to deal with it at once."[19] Sadly, Solicitor General Fahy concealed contrary evidence, known to the Government and to others in the Office of the Solicitor General, "that only a tiny percentage, at most, of Japanese-Americans were potentially disloyal; that the ones who were disloyal were almost all known to the government; and any other problems could be handled on an individual basis."[20] We know there are *many* such contrary views in the Government about

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[17] *Id*. at 6.

[18] *See* Neal Kumar Katyal, *The Solicitor General and Confession of Error*, 81 Fordham L. Rev. 3027, 3032-34 (2013) (detailing the Government's concealment of information from the Supreme Court in *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944)). *See also Korematsu v. United States*, 584 F. Supp. 1406, 1416-20 (N.D. Cal. 1984) (vacating Korematsu's conviction because "there is substantial support in the record that the government deliberately omitted relevant information and provided misleading information in papers before the court"); *Hirabayashi v. United States*, 828 F.2d 591, 592, 596-99 (9th Cir. 1987) (same, vacating Hirabayashi's conviction).

[19] *Hirabayashi*, 828 F.2d at 596 (quoting U.S. Brief).

[20] Katyal, *supra* note 18, at 3033.

§ 3(c), as shown by the dissent memo at the Department of State.[21]

A congressional commission found in the early 1980s that the Supreme Court's unjust rulings in *Hirabayashi* and *Korematsu* resulted from a systemic failure caused by "'prejudice, war hysteria and a failure of political leadership.'"[22] When Judge Patel vacated Fred Korematsu's conviction in 1984, he warned Americans—in chilling prose worth reading and re-reading—never to forget the painful lesson of undue deference to the Executive Branch:

> [*Korematsu*] stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.[23]

B. Section 3(c) denies procedural due process.

The Commonwealth is likely to succeed on its procedural-due-process claim.

1. *Din* and *Ibrahim* show that Virginia residents have a constitutionally protected interest in not having their visas and LPR status arbitrarily canceled.

The Government simply elides the due-process claims of *resident* aliens who are already in the United States with those of *non-resident* aliens who are trying to enter.[24] "It has been settled for over a century that all aliens *within our territory* are 'persons' entitled to the

[21] ECF No. 61-11.

[22] *Korematsu*, 584 F. Supp. at 1417 (quoting *Personal Justice Denied* 18 (Washington, D.C., 1982)).

[23] *Korematsu*, 584 F. Supp. at 1420.

[24] For instance, the Massachusetts TRO on which the Government relies focused on the fact that the claims were brought by "non-resident aliens" who were "coming into the United States," *Louhghalam v. Trump*, 2017 WL 479779, at *4, *6 (D. Mass. 2017), failing to distinguish LPRs and visa holders who already are present in the United States.

protection of the Due Process Clause.'"[25] "The constitutional protection of an alien's person and property is particularly strong in the case of aliens lawfully admitted to permanent residence (LPRs)."[26] Accordingly, the Government implicitly concedes that LPRs have due process rights, even if they have been absent and are in the process of returning to the U.S.[27]

Virginia residents holding student and work visas enjoy similar due process protection. In *Ibrahim*, a case the Government ignores, the court held that the Government denied due process to a Muslim PhD student from Malaysia with an F-1 visa to study at Stanford.[28] Dr. Ibrahim was denied a visa to reenter the United States after the Government mistakenly put her name on the "no fly" list and revoked her visa.[29] Ibrahim suffered numerous indignities, "any one of which" established a constitutionally protected interest:

> [T]he private interests at stake in her 2005 deprivations were the right to travel, *Kent v. Dulles*, 357 U.S. 116, 125 (1958), and the right to be free from incarceration, *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004), and from the stigma and humiliation of a public denial of boarding and incarceration, *Paul v. Davis*, 424 U.S. 693, 701, 711 (1976), any one of which would be sufficient and all three of which apply on this record.[30]

That Virginia's resident-visa holders enjoy a similar interest in not having their status arbitrarily revoked also finds support in the position of six of the nine Justices in *Kerry v. Din*.[31] Din, an American citizen, claimed that the Government violated her due process rights by refusing to approve a visa for her husband to travel from Afghanistan. Five justices agreed that

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[25] *Demore v. Kim*, 538 U.S. 510, 543 (2003) (Souter, J., concurring in part) (emphasis added).

[26] *Id*.

[27] *Landon v. Plasencia*, 459 U.S. 21, 33 (1982) ("[T]he returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him." (citing *Rosenberg v. Fleuti*, 374 U.S. 449, 460 (1963))).

[28] *Ibrahim v. Dep't of Homeland Sec.*, 62 F. Supp. 3d 909, 927-28 (N.D. Cal. 2014).

[29] *Id*. at 911.

[30] *Id*. at 928.

[31] 135 S. Ct. 2128 (2015).

Din failed to state a due process claim in challenging the denial of her husband's visa, but they divided on the rationale. Three Justices, in a plurality opinion by Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, concluded that Din had not alleged a sufficient liberty interest.[32] In a concurring opinion, Justice Kennedy, joined by Justice Alito, assumed without deciding that Din had a constitutionally protected liberty interest, but they found that adequate process was afforded because the Government informed Din that her husband's visa had been denied under the terrorism bar.[33] Since Din admitted that her husband worked for the Taliban, he had "at least a facial connection to terrorist activity," so the terrorism exclusion was warranted.[34]

Because the concurrence in *Din* provided the narrowest grounds for the decision, it controls.[35] So it is significant that Justices Kennedy and Alito left open whether they agreed with the four dissenting Justices about how constitutionally protected interests arise.

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, explained that "[t]he liberty interest that Ms. Din seeks to protect consists of her freedom to live together with her husband in the United States. She seeks *procedural*, not *substantive*, protection for this freedom."[36] Importantly for this case, Justice Breyer described two ways such interests arise:

> Our cases make clear that the Due Process Clause entitles her to such procedural rights as long as (1) she seeks protection for a

[32] *Id*. at 2135 (plurality) ("Nothing in the cases Din cites establishes a free-floating and categorical liberty interest in marriage (or any other formulation Din offers) sufficient to trigger constitutional protection whenever a regulation in any way touches upon an aspect of the marital relationship.").

[33] *Id*. at 2139 (Kennedy, J., concurring).

[34] *Id*. at 2141.

[35] *See* Bryan Garner et al., *The Law of Judicial Precedent* 195 (2016) ("With a plurality decision, the only opinion to be accorded precedential value is that which decides the case on the narrowest grounds."); *Marks v. United States*, 430 U.S. 188, 193 (1977) (same).

[36] *Din,* 135 S. Ct. at 2142 (Breyer, J, dissenting, joined by Ginsburg, Sotomayor and Kagan, JJ.).

> liberty interest sufficiently important for procedural protection to flow "implicit[ly]" from the design, object, and nature of the Due Process Clause, or (2) nonconstitutional law (a statute, for example) creates "an expectation" that a person will not be deprived of that kind of liberty without fair procedures.[37]

Both of those formulations show that Virginia residents have a constitutionally protected interest in their visa status. First, Virginia residents who are present in the Commonwealth on student, work, or family visas have made significant investments of time and money in reliance on the baseline assumption that their visas, and the accompanying right to travel, will not be arbitrarily and capriciously canceled. This Court intuitively grasped the magnitude of those reliance interests in light of the extensive vetting that visa holders undergo and the lengthy investment of time required to study or teach at Virginia's colleges and universities.[38] President Reveley described the disruption that necessarily results when visiting students, scholars, and faculty cannot trust that they will be free to travel to and from Virginia under validly issued visas.[39] Foreign students will cancel their enrollment or decline additional studies; for instance, Najwa Elyazgi, a senior at George Mason University, has been forced to look to Canada to pursue her Master's degree when she graduates.[40]

Second, immigration-law procedures have created the type of reasonable "expectation" described by Justice Breyer. If President Trump had ordered the Secretary of State to revoke the visas of students and faculty currently residing in Virginia because they are Muslim or come from the seven majority-Muslim countries, they would have been afforded individualized

[37] *Id*. at 2142 (citation omitted).

[38] ECF No. 43, at 35:17-36:5.

[39] ECF No. 32.

[40] ECF No. 54 ¶ 17.

process in the form of a removal proceeding to challenge the visa revocation.[41] In removal proceedings under 8 U.S.C. § 1229 and § 1229a, visa holders would receive written notice advising them of: (1) "[t]he nature of proceedings"; (2) "[t]he legal authority under which the proceedings are conducted"; (3) "[t]he acts or conduct alleged to be in violation of law"; (4) "[t]he charges against the alien and the statutory provisions alleged to have been violated"; and (5) "[t]he time and place at which the proceedings will be held."[42] They would have the right to "be represented by counsel."[43] The removal proceeding would be held before an immigration judge, who would "receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses."[44] Those rules have thus "create[d] 'an expectation' that a person will not be deprived of that kind of liberty without fair procedures."[45]

Notably, the Government does not even try to claim that § 3(c) of the Executive Order provides fair process or individualized review. So Virginia is likely to succeed on its procedural-due-process claims, at a minimum, with respect to LPRs and persons residing in Virginia on student or worker visas (and accompanying family and spousal visas).

2. *Katzenbach* presents no bar to Virginia's claims.

The Government claims that the Commonwealth cannot assert those due process claims because, under *South Carolina v. Katzenbach*, a State is not a "person" within the meaning of the due process clause, and because States do not have "standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate *parens*

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[41] *See* 8 U.S.C. § 1201(i) (stating that judicial review of visa revocation is available "in the context of a removal proceeding if such revocation provides the sole ground for removal under section 237(a)(1)(B)").

[42] *See* 8 U.S.C. § 1229(a)(1)(A)-(D), (G).

[43] 8 U.S.C. §§ 1229(a)(1)(E), 1229a(1)(b)(4)(A).

[44] 8 U.S.C. § 1229a(b)(1).

[45] *Din*, 135 S. Ct. at 2142 (citation omitted).

patriae of every American citizen."[46] Neither argument has merit.

First, Virginia is not claiming that its *own* due process rights are violated by § 3(c). Rather, it claims that it is directly injured (particularly its colleges and universities) as a result of the Government's violation of its residents' rights. Second, the Government continues to misapply the law of *parens patriae* standing and fails to credit that Virginia is also bringing this case in its *proprietary* capacity for direct injuries to the Commonwealth. As the Court explained last Friday, the *parens patriae* restrictions on standing in cases like *Mellon* and *Katzenbach* cannot be read as broadly as the Government would like, in light of *Massachusetts v. EPA*, and in light of the fact that a State's challenge to unlawful *executive* action stands on a different footing from a challenge to *legislative* action.[47] The Government does not even mention the Court's opinion (or acknowledge that the Court already found that Virginia has standing).[48]

And even assuming for argument's sake that a State may not use *parens patriae* standing to complain about the Government's denial of its residents' due process rights, the doctrine in *Bond v. United States*[49] shows that a State can bring such claims when based on *proprietary* standing. In that case, Bond sought revenge against her husband's paramour by placing a caustic substance on the victim's mailbox, car-door handle, and door knob. Bond was convicted and sentenced to six years' imprisonment for violating 18 U.S.C. § 229, a statute enacted to implement a chemical-weapons treaty. Bond attacked her conviction on the ground that the

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[46] 383 U.S. 301, 323-24 (1966). *See also Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923) ("[T]he citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof.").

[47] ECF No. 42 at 7-10.

[48] And in any case, on a preliminary injunction, the movant needs only a "substantial likelihood of standing." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015).

[49] 564 U.S. 211 (2011).

statute infringed States' rights under the Tenth Amendment. The lower courts ruled that she lacked standing to assert the States' federalism interests.[50] But in reversing, the Supreme Court explained that Bond's criminal conviction gave her standing to challenge the statute's constitutionality, and once she had standing, she was free to raise the federalism claim.[51] Under *Bond*, "[i]f the constitutional structure of our Government that protects individual liberty is compromised, *individuals who suffer otherwise justiciable injury may object*."[52]

The same is true in this case. Because the Government's violation of the civil rights of Virginia's LPRs and visa holders is causing direct injury to the Commonwealth itself, Virginia is entitled to complain about it and to seek to stop it. Indeed, it is analogous to the plaintiff in *Din* complaining about the denial of a visa to her husband, and to the scholars in *Mandel* complaining about the denial of a visa to a Marxist theoretician.[53]

C. The Executive Order is based on anti-Muslim animus and therefore violates both the Establishment Clause and the Equal Protection aspects of the Due Process Clause.

1. Even before discovery has commenced, the evidence of anti-Muslim animus is overwhelming and warrants a preliminary injunction.

The Government does not deny that the President promised during his campaign to impose a temporary ban on Muslims entering the country, nor does it deny the myriad other statements, including those of Mr. Giuliani, collected in the Siddiqui Declaration (ECF No. 61),

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[50] *Id*. at 214-15.

[51] *Id*. at 217; *see also id*. at 225-26 ("[W]here the litigant is a party to an otherwise justiciable case or controversy, she is not forbidden to object that her injury results from disregard of the federal structure of our Government.").

[52] *Id*. at 223 (emphasis added).

[53] *Din*, 135 S. Ct. at 2131; *Kleindienst v. Mandel*, 408 US. 753, 762 (1972). *See* Audio Transcript, *supra* note 12, at 17:38 to 21:38 (repeated questioning by Judge Clifton asking the Government why the State of Washington is not asserting its own injury, just like the plaintiffs in *Din* and *Mandel*).

that show that the Executive Order is how the President kept his promise.[54] That direct evidence of the President's actual motivation is buttressed by strong circumstantial evidence. Although the Order purports to be justified by the events of 9/11, *not one* of the 9/11 attackers came from the seven countries at issue and the Executive Order inexplicably fails to address persons from the countries from which the actual attackers came.[55] Moreover, the refugee provision in § 5 contains a preference for religious minorities, which President Trump has said he views as helping "persecuted Christians."[56]

The overwhelming evidence that § 3(c) was based on animus towards Muslims justifies looking behind the facially neutral language of that paragraph. Indeed, it is settled that a facially neutral law may be invalidated by an unconstitutional motive, regardless of whether the claim is brought under the Establishment Clause[57] or as an Equal Protection challenge.[58] The Supreme

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[54] *See also* Audio Transcript, *supra* note 12, at 1:03:54 to 1:04:11 (statement by DOJ lawyer Flentje that the Government does not deny Trump's campaign promise or Giuliani's statement).

[55] National Security Declaration, ECF No. 57, ¶ 4.

[56] ECF No. 61-6 at 2.

[57] *E.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307 n.21 (2000) ("Even if the plain language of the October policy were facially neutral, the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.") (citation and quotation marks omitted); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 693 (1994) (invalidating facially-neutral school district drawn to be coextenstive with and to benefit Satmar Hasidim sect); *Larson v. Valente*, 456 U.S. 228, 244 (1982) (invalidating facially-neutral registration-and-reporting exemption for charitable organizations that disfavored the Unitarian Church); Erwin Chemerinsky, *Constitutional Law: Principles & Policies* 1243-44 (4th ed. 2011) ("It is firmly established that the government violates the establishment clause if it discriminates among religious groups. Such discrimination will be allowed only if strict scrutiny is met. All of the Justices on the current Court, regardless of their theory of the establishment clause, adhere to this principle.").

[58] *E.g.*, *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring) ("[T]he Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion."); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65, 267-68 (1977) (explaining that action that does not discriminate on its face may violate the Equal Protection Clause if it is based on discriminatory intent, which may be derived from "historical background of the decision," the

Court said in *Larson* that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[59] The Court similarly said in *Romer* that "'[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.'"[60] The unconstitutional motive invalidates the order, even assuming that the order might have been otherwise valid.[61]

The Government relies on Justice Kennedy's concurrence in *Din* for the proposition that courts should not "'look behind' the Government's exclusion of [visa applicants] for additional factual details beyond what its express reliance on [the statute] encompassed."[62] But the Government omits the crucial qualifier in that sentence: courts will not look behind the Government's stated reason "[a]bsent *an affirmative showing of bad faith* on the part of the consular officer."[63] Even assuming that the standard applicable to consular officers applies, there is abundant evidence of the requisite "bad faith" here. The Executive Order is the Muslim ban that candidate Trump promised to implement, and he has kept his promise. So *Din* provides no support for the Government's claim that a court cannot "look behind" the language of § 3(c). Nothing in *Din* silently overruled decades of Equal Protection and Establishment Clause

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"specific sequence of events," and "legislative or administrative history"); *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) ("[C]lassifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny.").

[59] 456 U.S. at 244.

[60] *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

[61] *E.g.*, *McCreary Cty. v. ACLU*, 545 U.S. 844, 866 n.14 (2005) ("One consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage. This presents no incongruity, however, because purpose matters.").

[62] Government Br. at 15 (citing *Din*, 135 S. Ct. at 2141)).

[63] 135 S. Ct. at 2141 (emphasis added).

doctrine.

It does not matter that § 3(c) does not yet ban "all" Muslims from entering the United States. First, § 3(e) contemplates that additional countries may be added. Second, Giuliani corroborated the religious pedigree of § 3(c) when he admitted that President Trump wanted a "Muslim ban" and wanted help "to do it legally."[64] Third, the fig leaf of limiting the order initially to seven countries—as a pretense to survive legal challenge—cannot purge the unconstitutional motive. Courts look for unconstitutional motive in the history and context of a challenged law.[65] They do not apply the standard of "an absentminded objective observer," who simply forgets everything that came before.[66] As the Court emphasized in *McCreary*, "reasonable observers have reasonable memories, and our precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.'"[67] Fourth, the seven countries chosen effectively hit the mark if the motive is anti-Muslim: four have Muslim populations of 99% or more (Iran, Iraq, Somalia, and Yemen), Libya is 96.6% Muslim, Syria 92.8% and Sudan 90.7%.[68] And finally, recent polling shows that a majority of Americans *perceive* the Executive Order as a Muslim ban,[69] *especially* minorities and young people; 80% of Hispanic-Americans,

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[64] ECF No. 61-4 at 1.

[65] *E.g.*, *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309 (examining the "evolution" and history" of the high-school-football prayer policy to conclude that it promoted religion); *McCreary*, 545 U.S. at 857 (rejecting changes to Ten Commandments display designed to cover up the initial religious motivation).

[66] *McCreary*, 545 U.S. at 866.

[67] *Id*.

[68] Pew Research Ctr., The Global Religious Landscape: a Report on the Size and Distribution of the World's Major Religions as of 2010, 47-50 (2012), https://goo.gl/HVoVJI.

[69] Public Policy Polling, *After 2 Weeks, Voters Yearn For Obama* 1, 4 (Feb. 2, 2017) (finding in poll conducted on January 30-31, 2017 that "52% of voters think that the order was intended to be a Muslim ban, to only 41% who don't think that was the intent"), https://goo.gl/1L5psC. *See also CNN/ORC Int'l Poll* 9 (Feb. 3, 2017) (55% think the Executive Order "is a ban on Muslims"), https://goo.gl/0xE98B.

78% of African-Americans, and 80% of people between ages of 18 and 29.[70] That perception alone is problematic because § 3(c) obviously "conveys an unmistakable message of endorsement [of Christianity over Islam] to the reasonable observer."[71]

At this stage of the proceeding, therefore, before discovery has even commenced, the evidence of anti-Muslim animus is so overwhelming as to appear irrefutable. And the Supreme Court held in *McCreary* that a district court may properly grant a preliminary injunction, as we are requesting here, when the court finds sufficient evidence that government action is unconstitutionally motivated.[72] The Court can and should apply that rule here.

2. The Government is wrong that Virginia cannot press the Establishment Clause and Equal Protection arguments.

The Government's argument that Virginia cannot raise Establishment Clause and Equal Protection objections fails for the same reasons as its quarrel about the due process claim. Even if such a limitation exists on *parens patriae* authority after *Massachusetts v. EPA*, the Commonwealth has proprietary standing resulting from its own direct harms. So under *Bond*, Virginia is free to assert any constitutional objection to the Executive Order that, if sustained, would invalidate it and thereby redress Virginia's injuries.

III. The Commonwealth, its residents, and its public universities are suffering ongoing irreparable harm.

The declarations by President Reveley (ECF No. 32) and GMU student Najwa Elyazgi (ECF No. 54) establish the irreparable harm being suffered by the Commonwealth and the

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[70] Public Policy Polling, *supra* note 69, at 30, 36.

[71] *McCreary*, 545 U.S. at 883 (O'Connor, J., concurring); *Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593-94 (1989) ("The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'") (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

[72] 545 U.S. at 873-74.

faculty and students at Virginia's public colleges and universities. In addition, a recent analysis by the firm College Factual concluded that, as of 2015, there were 23,763 students from the seven banned countries studying in the United States under a student visa.[73] It estimated the nationwide economic impact if students discontinue their education at public colleges to be $466.6 million, and $235 million for private colleges.[74] It estimated the adverse financial impact to Virginia alone to be $20.9 million.[75] Another recent analysis, by *Business Insider*, noted that Virginia Tech is one of the nation's top 10 universities that would suffer the most financial harm from the loss of tuition from foreign students from the seven banned countries; it estimated the loss of tuition, room, and board for those students to be $8.2 million at Virginia Tech alone.[76] Because the United States has not agreed to waive its immunity to make Virginia whole for those losses, those losses will be irreparable if § 3(c) is not enjoined.

IV. The balance of equities weighs in favor of granting the injunction.

The National Security Declaration (ECF No. 57) discredits the Government's assertion that it will suffer injury by having to revert to its already-extensive vetting process for persons coming from the seven majority-Muslim countries. Indeed, the Government's position in this case is irrational. The Government's premise is that people from those countries pose a unique terrorism risk. But the Government is not taking any action against such persons who are already in the United States; it is only if they leave and want to come back that they will be denied reentry, thereby keeping the alleged threats bottled up here. That makes no sense and

[73] College Factual, *How Trump's Executive Order Affects Thousands of International Students in the U.S.* (Jan. 31, 2017), https://goo.gl/RRxHLv.

[74] *Id*.

[75] *Id*.

[76] ECF No. 61-16 (Abby Jackson, *The 10 US colleges that stand to lose the most from Trump's immigration ban*, Business Insider (Feb. 1, 2017), https://goo.gl/JKS1cp).

shows that the Government's putative security concern is a pretext for the promised Muslim ban.

The Government, in short, is asking the Court to repeat the mistakes of *Hirabayashi* and *Korematsu* by simply trusting the President's word that he has a valid security concern. History proved after World War II that there was "no reasonable military assessment of an emergency at the time," that the orders "were based upon racial stereotypes," and that the orders caused "needless suffering and shame."[77] That horrible mistake must not be repeated here.

V. The public interest strongly favors the injunction.

The Government cannot seriously dispute that "upholding constitutional rights surely serves the public interest."[78] The public interest also favors not disrupting Virginia's colleges and Virginia's private employers.[79]

VI. The Court should enter the proposed preliminary-injunction order and issue appropriate findings of fact.

Paragraph 1 of Virginia's proposed order (ECF No. 31-1) properly enjoins enforcement of § 3(c) nationwide. The Fourth Circuit recognized in *Richmond Tenants Organization v. Kemp* that district courts have discretion to issue nationwide injunctions when necessary to provide effective relief to the plaintiff, particularly when the defendant is the United States.[80] Noncitizens traveling to Virginia from a foreign country obviously do not arrive only through the port of entry at Dulles International Airport. And the Fifth Circuit has twice held that a

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[77] *Hirabayashi*, 828 F.2d at 593.

[78] *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013).

[79] The Court may also take judicial notice of the amicus brief filed in *Washington v. Trump* by one hundred leading companies (including Apple and Google) describing the adverse effect on American businesses flowing from the travel ban in § 3(c). *See* Br. of Tech. Cos. & Other Business as Amicus Curiae in Support of Appellees 10, *Washington v. Trump*, No. 17-35105 (9th Cir.), ECF No. 19-2 ("The Order has had immediate, adverse effects on the employees of American businesses. Several major companies reported substantial disruptions from the Order, because their employees were ensnared in the Order's travel restrictions.").

[80] 956 F.2d 1300, 1308-09 (4th Cir. 1992).

nationwide injunction was needed to block enforcement of President Obama's DAPA program because of the constitutional requirement of uniformity in enforcing the nation's immigration rules.[81] It would be odd and create a huge risk of error if a Virginia-only injunction required CBP officials at the nation's ports of entry to allow passage by *only* Virginia-bound LPRs and visa holders. The remaining paragraphs of the proposed order are mostly self-explanatory.[82]

Because the Government can be expected to immediately appeal a preliminary injunction order, the Court should issue accompanying findings of fact and conclusions of law to facilitate appellate review. The decision to issue a preliminary injunction is reviewed for "abuse of discretion," and a district court abuses its discretion only if "its decision is guided by erroneous legal principles or rests upon a clearly erroneous factual finding."[83] The Commonwealth's suggested factual findings and conclusions of law are filed with this reply brief.

In particular, the Commonwealth urges the Court to make findings on both the procedural-due-process and the religious-animus claims. The religious-animus finding supports broadly invalidating the application of § 3(c). Virginia residents have a stronger due process claim than nonresidents who were overseas at the time that the order was issued. If the Court decided the matter solely on procedural-due-process grounds, the relief might not be adequate. It

[81] *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015) (upholding nationwide injunction against DAPA), *aff'd by equally divided Court*, 136 S. Ct. 2271 (2016); *Texas v. United States*, 787 F.3d 733, 768-69 (5th Cir. 2015) (denying emergency stay of nationwide injunction).

[82] For instance, Paragraph 2 prevents the Government from coercing visa holders and LPRs into relinquishing rights protected by the preliminary injunction—a provision necessitated by reports that CBP pressured the Aziz plaintiffs to do just that. Paragraph 5 ensures that the Marshal Service will enforce the preliminary injunction without interference. Reports emerged in Los Angeles that the Marshal Service there refused to serve the court's TRO on CBP while awaiting "instruction from the U.S. Attorney's office." *See* Erik Sherman, *U.S. Marshals Accused of Not Serving Court Orders About Immigration Ban*, Forbes (Feb. 1, 2017), https://goo.gl/6Xek19. Paragraph 5 directs the Marshal Service to seek any needed guidance from the Court, not the U.S. Attorney. And Paragraph 6 makes clear that it does not alter any immigration law that was in effect before the Executive Order was issued.

[83] *G.G.*, 822 F.3d at 724 (citations and quotation marks omitted).

might not cover, for instance, the Iranian PhD candidate who had been approved and cleared for a visa to return to the United States to defend his dissertation, but who does not presently have a Virginia residence.[84]

Moreover, because this case involves an unprecedented abuse of Executive Power by a President who kept his campaign promise to implement a Muslim ban, the Judicial Branch must call it out for what it is. We cited *Plessy* in our opening brief about the importance of rooting out the seeds of religious hatred that are planted under the sanction of the Executive Order. But *Korematsu* broods over this case too. In vacating Korematsu's conviction because of the "profound injustices" resulting from the Government's untruths about the threat of sabotage by Japanese-Americans and Japanese aliens living in California, Judge Patel said that "extraordinary instances require extraordinary relief."[85] The extraordinary abuse of power at issue in this case warrants a commensurate finding that § 3(c) is based on Muslim animus. Nothing short of that will begin to heal the wound that the Executive Order has inflicted on our Republic.

CONCLUSION

The Court should issue the preliminary injunction substantially in the form proposed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,

By: /s/

Stuart A. Raphael (VSB No. 30380)
Solicitor General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7240 – Telephone

[84] ECF No. 32 ¶ 6.

[85] 584 F. Supp. at 1413.

(804) 371-0200 – Facsimile
sraphael@oag.state.va.us

Mark R. Herring
Attorney General of Virginia

Trevor S. Cox (VSB No. 78396)
Deputy Solicitor General
tcox@oag.state.va.us

Matthew R. McGuire (VSB No. 84194)
Assistant Attorney General
mmcguire@oag.state.va.us

Counsel for the Commonwealth of Virginia

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the counsel of record for the parties registered on the CM/ECF system.

By: /s/
Stuart A. Raphael