

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,)	
)	
v.)	Civil Action No. 1:17-cv-116
)	
DONALD TRUMP, President of the United)	
States, et al.,)	
)	
Respondents.)	

**THE COMMONWEALTH OF VIRGINIA’S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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The Commonwealth of Virginia respectfully submits the following proposed findings of fact and conclusions of law in connection with its motion for a preliminary injunction.

PROPOSED FINDINGS OF FACT

1. Section 3(c) of the Executive Order issued on January 27, 2017 entitled “Protecting the Nation from Foreign Terrorist Entry into the United States” bans for 90 days lawful permanent residents and individuals who have been issued a visa (other than foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas) from Iran, Iraq, Syria, Sudan, Libya, Yemen, and Somalia from entering or, if they temporarily depart, from reentering the United States. ECF No. 7-1.

2. Section 3(c) of the Executive Order is inflicting irreparable harm on Virginia’s public colleges and universities by preventing students, faculty, and employees who reside in Virginia, pursuant to lawful-permanent-residence (“LPR”) or approved visa status, from traveling to or from the United States. *See* Reveley Decl. ¶¶ 5-8, 11-13 (ECF No. 32). At least 350 students and dozens of faculty and employees come from the seven majority-Muslim countries at issue; the Order (if not enjoined) prevents them from leaving the United States on penalty of not being readmitted. *Id.* ¶ 5. At least five visiting scholars have had to cancel plans to travel to the United States. *Id.* ¶ 9. Virginia’s colleges and universities are also suffering irreparable financial and reputational harm as a result of the Order’s effect on students’ ability and willingness to attend. Even at this early date, two Sudanese applicants and several Iranian engineering students have withdrawn their applications because of the Order. *Id.* ¶ 11. The irreparable harm and disruption includes two students attempting to return to the United States who were blocked from entry, *id.* ¶ 6, one of whom was later able to enter the United States only because of the temporary restraining order issued in *Washington v. Trump*, No. 17-CV-00141-

JLR (W.D. Wash.), *appeal pending* No. 17-35105 (9th Cir.) (oral argument held on Feb. 7, 2017). (ECF No. 54 ¶ 11.) A recent analysis estimates that the lost revenue to Virginia’s colleges and universities to be \$20.9 million if students from the seven countries withdraw from enrollment.¹ That financial harm is irreparable because the United States does not concede it will be liable to Virginia for those losses. In addition, the reputational harm to Virginia’s colleges and universities is incalculable and therefore irreparable. The Order also inflicts irreparable economic harm on Virginia by disrupting the ability of LPRs and visa holders to continue to work for Virginia employers, thereby reducing tax revenue received by the Commonwealth from such individuals. *See* IRS Publication 519, at 3-4 (2016) (defining as “U.S. residents” for tax purposes LPRs and others who have been “substantially present” in the United States); Va. Dep’t of Taxation, *Residency Status* <http://www.tax.virginia.gov/content/residency-status>.

3. Lawful permanent residents and visa holders undergo lengthy, extensive vetting processes and often have developed significant reliance interests based on the approval of their immigration status by the United States government. *See, e.g.*, Aziz Decl. ¶¶ 5-9, 11-16 (ECF No. 55); Elyazgi Decl. ¶¶ 1, 4-6, 7-9, 12-14, 16 (ECF No. 54); Hodge Decl. ¶¶ 5-13, 19 (ECF No. 56).

4. After the Commonwealth filed its motion to intervene in this case on January 31, 2017, White House Counsel Donald McGahn issued guidance on February 1 stating “that Sections 3(c) and 3(e) do not apply” to LPRs. The President, however, has not revised the Executive Order in response to that guidance, and the guidance conflicts with the position of

¹ College Factual, *How Trump’s Executive Order Affects Thousands of International Students in the U.S.* (Jan. 31, 2017), <http://inside.collegefactual.com/blog/how-trumps-travel-ban-affects-thousands-of-international-students>.

Respondent Kelly that § 3 applies to LPRs, but that LPR “status will be a dispositive factor in our case-by-case determinations.” ECF No. 34-1.

5. Section 3 of the Executive Order provides no process through which LPRs and visa holders who reside in Virginia can contest the restriction the Order imposes on their ability to travel or the burdens it imposes on them when they leave and reenter the United States. *See* ECF No. 7-1.

6. While a candidate, President Trump made numerous statements that reflect anti-Muslim animus. *See generally* Siddiqui Decl., ECF No. 61 to 61-22. Respondents do not contest the accuracy of any of the statements attributed to Mr. Trump and his advisors.

7. In December 2015, then-candidate Trump, in a press statement, called “for a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.” Siddiqui Decl. ¶ 4, Ex. 2, ¶ 16, Ex. 12.

8. Immediately after issuing the December 2015 press release, then-candidate Trump stated in an interview that under his plan individuals would be stopped at the border, asked if they were Muslim, and if they answered yes, they would not be allowed in the United States. Siddiqui Decl. ¶ 5, Ex. 3.

9. In January 2017, President Trump’s political advisor Rudy Giuliani, who was significantly involved in crafting the Executive Order, publicly commented that the impetus for the Order was to legally implement the “Muslim ban” proposed by then-candidate Trump. Siddiqui Decl. ¶ 6, Ex. 4.

10. Secretary John Kelly of the Department of Homeland Security corroborated Mr. Giuliani’s comments by stating at a January 31, 2017 news conference addressing the implementation of the Executive Order that, “[t]his whole approach was part of what then-

candidate Trump talked about for a year or two.” Siddiqui Decl. ¶ 14.a.

11. President Trump has asserted that he is a man of his word, and that he will do what he says. Siddiqui Decl. ¶ 9, Ex. 7. The numerous statements by President Trump and his advisors demonstrate that Section 3(c) of the Executive Order effectuates the Muslim ban that then-candidate Trump promised in the presidential campaign.

PROPOSED CONCLUSIONS OF LAW

1. The February 1, 2017 guidance memorandum does not moot Virginia’s claims with regard to LPRs because Respondents’ “voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice,” and it remains uncertain whether Respondents will revert to the challenged practice in the future. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014) (“[W]hen a defendant retains the authority and capacity to repeat an alleged harm, a plaintiff’s claims should not be dismissed as moot.”).

2. Virginia has both *parens patriae* standing and proprietary standing for the reasons previously set forth in the Court’s Memorandum Opinion of February 3, 2017. ECF No. 42.

3. Lawful permanent residents and individuals who have been issued a visa and who reside in Virginia have a constitutionally-protected interest in their immigration status that is protected by the Due Process Clause of the Fifth Amendment. *See Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982) (“[T]he United States has conceded that [a lawful permanent resident] has a right to due process”); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 576 (1972) (property interests “may take many forms” and attaches as “a safeguard of the security interests that a person has already acquired in specific benefits”); *Ibrahim v. Dep’t of Homeland Sec.*, 62 F. Supp. 3d 909, 920 (N.D. Cal. 2014).

4. Lawful permanent residents and individuals who have been issued a visa who

reside in Virginia have liberty interests, such as the right to travel, that are protected by the Due Process Clause of the Fifth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Kent v. Dulles*, 357 U.S. 116 (1957); *Ibrahim*, 62 F. Supp. 3d at 927-28.

5. Section 3(c) of the Executive Order violates the Due Process Clause of the Fifth Amendment by arbitrarily depriving lawful permanent residents and visa holders residing in Virginia of their property and liberty interests without affording them any process, simply because they come from one of seven majority-Muslim countries. *See Landon*, 459 U.S. at 34; *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972).

6. The Establishment Clause of the First Amendment “mandates governmental neutrality between religion and religion” and where a “law grant[s] a denominational preference,” the law is suspect and strict scrutiny applies. *Larson v. Valente*, 456 U.S. 228, 244, 246 (1982); *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring) (“[T]he Establishment Clause forbids the government to use religion as a line drawing criterion.”). Section 3(c) violates the Establishment Clause because it is motivated by animus towards Muslims.

7. The Equal Protection component of the Fifth Amendment protects citizens as well as noncitizens from being treated differently solely on account of their religion, nationality or alienage. *See, e.g., Harris v. McRae*, 448 U.S. 297, 297 (1980); *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Section 3(c) violates the Equal Protection aspects of the Due Process Clause because it is motivated by animus towards Muslims. *See United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013); *Romer v. Evans*, 517 U.S. 620, 632 (1996). The Executive Order is unconstitutional under the Equal Protection component of the Fifth Amendment regardless of whether strict scrutiny applies to Section 3(c)’s blanket ban on individuals from the seven

majority-Muslim countries, because the Order was motivated by animus. *See Graham*, 403 U.S. at 372; *see also Windsor*, 133 S. Ct. at 2693 (“The Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.”).

8. Virginia, its public colleges and universities, and its residents are suffering immediate, irreparable harm due to the ongoing religious discrimination sanctioned by Section 3(c) of the Executive Order. The damage to the reputation of, and the disruption to, Virginia’s colleges and university is irreparable because it is incalculable. And forgone taxes and tuition, even assuming those figures were calculable, are irreparable “due to the government’s immunity to a subsequent damages award.” *Computerware, Inc. v. Knotts*, 626 F. Supp. 956, 961 (E.D.N.C. 1986).

9. The Executive Branch will not be harmed by the preliminary injunction because it operates solely to “prevent[] the [Government] from enforcing restrictions likely to be found unconstitutional.” *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013) (citation omitted). In addition, the Government has made no showing of such harm.

10. The public interest greatly favors granting the injunction because “upholding constitutional rights surely serves the public interest.” *Id.* The “‘loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury’” to the public. *See Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

11. A nationwide injunction against the enforcement of § 3(c) is appropriate in order to afford complete relief to Virginia. *Richmond Tenants Org. v. Kemp*, 956 F.2d 1300, 1308-09 (4th Cir. 1992). Noncitizens traveling to Virginia from a foreign country do not arrive only

