Another reform involves new screening tests for all applicants that include, and this is so important, especially if you get the right people. And we will get the right people. An ideological certification to make sure that those we are admitting to our country share our values and love our people.

(APPLAUSE)

Thank you. We're very proud of our country. Aren't we? Really? With all it's going through, we're very proud of our country. For instance, in the last five years, we've admitted nearly 100,000 immigrants from Iraq and Afghanistan. And these two countries according to Pew Research, a majority of residents say that the barbaric practice of honor killings against women are often or sometimes justified. That's what they say.

(APPLAUSE)

That's what they say. They're justified. Right? And we're admitting them to our country. Applicants will be asked their views about honor killings, about respect for women and gays and minorities. Attitudes on radical Islam, which our president refuses to say and many other topics as part of this vetting procedure. And if we have the right people doing it, believe me, very, very few will slip through the cracks. Hopefully, none.

(APPLAUSE)

Number seven, we will insure that other countries take their people back when they order them deported.

(APPLAUSE)

There are at least 23 countries that refuse to take their people back after they've been ordered to leave the United States. Including large numbers of violent criminals, they won't take them back. So we say, O.K., we'll keep them. Not going to happen with me, not going to happen with me.

Due to a Supreme Court decision, if these violent offenders cannot be sent home, our law enforcement officers have to release them into your communities.

(APPLAUSE)

And by the way, the results are horrific, horrific. There are often terrible consequences, such as Casey Chadwick's tragic death in Connecticut just last year. Yet despite the existence of a law that commands the secretary of state to stop issuing visas to these countries.

Secretary Hillary Clinton ignored this law and refused to use this powerful tool to bring nations into compliance. And, they would comply if we would act properly.

In other words, if we had leaders that knew what they were doing, which we don't.

The result of her misconduct was the release of thousands and thousands of dangerous criminal aliens who should have been sent home to their countries. Instead we have them all over the place. Probably a couple in this room as a matter of fact, but I hope not.

According to a report for the Boston Globe from the year 2008 to 2014 nearly 13,000 criminal aliens were released back into U.S. communities because their home countries would not, under any circumstances, take them back. Hard to believe with the power we have. Hard to believe.

We're like the big bully that keeps getting beat up. You ever see that? The big bully that keeps getting beat up.

These 13,000 releases occurred on Hillary Clinton's watch. She had the power and the duty to stop it cold, and she decided she would not do it.

(BOOING)

And Arizona knows better than most exactly what I'm talking about.

Those released include individuals convicted of killings, sexual assaults, and some of the most heinous crimes imaginable.

The Boston Globe writes that a Globe review of 323 criminals released in New England from 2008 to 2012 found that as many as 30 percent committed new offenses, including rape, attempted murder, and child molestation. We take them, we take them.

(BOOING)

Number eight, we will finally complete the biometric entry-exit visa tracking system which we need desperately.

(APPLAUSE)

For years Congress has required biometric entry-exit visa tracking systems, but it has never been completed. The politicians are all talk, no action, never happens. Never happens.

Hillary Clinton, all talk. Unfortunately when there is action it's always the wrong decision. You ever notice?

In my administration we will ensure that this system is in place. And, I will tell you, it will be on land, it will be on sea, it will be in air. We will have a proper tracking system.

Approximately half of new illegal immigrants came on temporary visas and then never, ever left. Why should they? Nobody's telling them to leave. Stay as long as you want, we'll take care of you.

Beyond violating our laws, visa overstays pose — and they really are a big problem — pose a substantial threat to national security. The 9/11 Commission said that this tracking system should be a high priority and would have assisted law enforcement and intelligence officials in August and September 2001 in conducting a search for two of the 9/11 hijackers that were in the United States on expired visas.

And you know what that would have meant, what that could have meant. Wouldn't that have been wonderful, right? What that could have meant.

Last year alone nearly half a million individuals overstayed their temporary visas. Removing these overstays will be a top priority of my administration.

(APPLAUSE)

If people around the world believe they can just come on a temporary visa and never, ever leave, the Obama-Clinton policy, that's what it is, then we have a completely open border, and we no longer have a country.

We must send a message that visa expiration dates will be strongly enforced.

Number nine, we will turn off the jobs and benefits magnet.

(APPLAUSE)

We will ensure that E-Verify is used to the fullest extent possible under existing law, and we will work with Congress to strengthen and expand its use across the country.

Immigration law doesn't exist for the purpose of keeping criminals out. It exists to protect all aspects of American life. The work site, the welfare office, the education system, and everything else.

That is why immigration limits are established in the first place. If we only enforced the laws against crime, then we have an open border to the entire world. We will enforce all of our immigration laws.

(APPLAUSE)

And the same goes for government benefits. The Center for Immigration Studies estimates that 62 percent of households headed by illegal immigrants use some form of cash or non-cash welfare programs like food stamps or housing assistance.

Those who abuse our welfare system will be priorities for immediate removal.

(APPLAUSE)

Number 10, we will reform legal immigration to serve the best interests of America and its workers, the forgotten people. Workers. We're going to take care of our workers.

And by the way, and by the way, we're going to make great trade deals. We're going to renegotiate trade deals. We're going to bring our jobs back home. We're going to bring our jobs back home.

We have the most incompetently worked trade deals ever negotiated probably in the history of the world, and that starts with Nafta. And now they want to go TPP, one of the great disasters.

We're going to bring our jobs back home. And if companies want to leave Arizona and if they want to leave other states, there's going to be a lot of trouble for them. It's not going to be so easy. There will be consequence. Remember that. There will be consequence. They're not going to be leaving, go to another country, make the product, sell it into the United States, and all we end up with is no taxes and total unemployment. It's not going to happen. There will be consequences.

(APPLAUSE)

We've admitted 59 million immigrants to the United States between 1965 and 2015. Many of these arrivals have greatly enriched our country. So true. But we now have an obligation to them and to their children to control future immigration as we are following, if you think, previous immigration waves.

We've had some big waves. And tremendously positive things have happened. Incredible things have happened. To ensure assimilation we want to ensure that it works. Assimilation, an important word. Integration and upward mobility.

(APPLAUSE)

Within just a few years immigration as a share of national population is set to break all historical records. The time has come for a new immigration commission to develop a new set of reforms to our legal immigration system in order to achieve the following goals.

To keep immigration levels measured by population share within historical norms. To select immigrants based on their likelihood of success in U.S. society and their ability to be financially self- sufficient.

(APPLAUSE)

We take anybody. Come on in, anybody. Just come on in. Not anymore.

You know, folks, it's called a two-way street. It is a two-way street, right? We need a system that serves our needs, not the needs of others. Remember, under a Trump administration it's called America first. Remember that.

(APPLAUSE)

To choose immigrants based on merit. Merit, skill, and proficiency. Doesn't that sound nice? And to establish new immigration controls to boost wages and to ensure that open jobs are offered to American workers first. And that in particular African-American and Latino workers who are being shut out in this process so unfairly.

(APPLAUSE)

And Hillary Clinton is going to do nothing for the African-American worker, the Latino worker. She's going to do nothing. Give me your vote, she says, on November 8th. And then she'll say, so long, see you in four years. That's what it is.

She is going to do nothing. And just look at the past. She's done nothing. She's been there for 35 years. She's done nothing. And I say what do you have to lose? Choose me. Watch how good we're going to do together. Watch.

(APPLAUSE)

national interest. We've been living under outdated immigration rules from decades ago. They're decades and decades old.

To avoid this happening in the future, I believe we should sunset our visa laws so that Congress is forced to periodically revise and revisit them to bring them up to date. They're archaic. They're ancient. We wouldn't put our entire federal budget on auto pilot for decades, so why should we do the same for the very, very complex subject of immigration?

So let's now talk about the big picture. These 10 steps, if rigorously followed and enforced, will accomplish more in a matter of months than our politicians have accomplished on this issue in the last 50 years. It's going to happen, folks. Because I am proudly not a politician, because I am not behold to any special interest, I've spent a lot of money on my campaign, I'll tell you. I write those checks. Nobody owns Trump.

I will get this done for you and for your family. We'll do it right. You'll be proud of our country again. We'll do it right. We will accomplish all of the steps outlined above. And, when we do, peace and law and justice and prosperity will prevail. Crime will go down. Border crossings will plummet. Gangs will disappear.

And the gangs are all over the place. And welfare use will decrease. We will have a peace dividend to spend on rebuilding America, beginning with our American inner cities. We're going to rebuild them, for once and for all.

For those here illegally today, who are seeking legal status, they will have one route and one route only. To return home and apply for reentry like everybody else, under the rules of the new legal immigration system that I have outlined above. Those who have left to seek entry —

Thank you.

Thank you. Thank you. Those who have left to seek entry under this new system — and it will be an efficient system — will not be awarded surplus visas, but will have

future.TRUMP: We will break the cycle of amnesty and illegal immigration. We will break the cycle. There will be no amnesty.

(APPLAUSE)

Our message to the world will be this. You cannot obtain legal status or become a citizen of the United States by illegally entering our country. Can't do it.

(APPLAUSE)

This declaration alone will help stop the crisis of illegal crossings and illegal overstays, very importantly. People will know that you can't just smuggle in, hunker down and wait to be legalized. It's not going to work that way. Those days are over.

(APPLAUSE)

Importantly, in several years when we have accomplished all of our enforcement and deportation goals and truly ended illegal immigration for good, including the construction of a great wall, which we will have built in record time. And at a reasonable cost, which you never hear from the government.

(APPLAUSE)

And the establishment of our new lawful immigration system then and only then will we be in a position to consider the appropriate disposition of those individuals who remain.

That discussion can take place only in an atmosphere in which illegal immigration is a memory of the past, no longer with us, allowing us to weigh the different options available based on the new circumstances at the time.

(APPLAUSE)

Right now, however, we're in the middle of a jobs crisis, a border crisis and a terrorism crisis like never before. All energies of the federal government and the legislative process must now be focused on immigration security. That is the only

Whether it's dangerous materials being smuggled across the border, terrorists entering on visas or Americans losing their jobs to foreign workers, these are the problems we must now focus on fixing. And the media needs to begin demanding to hear Hillary Clinton's answer on how her policies will affect Americans and their security.

(APPLAUSE)

These are matters of life and death for our country and its people, and we deserve answers from Hillary Clinton. And do you notice, she doesn't answer.

She didn't go to Louisiana. She didn't go to Mexico. She was invited.

She doesn't have the strength or the stamina to make America great again. Believe me.

(APPLAUSE)

What we do know, despite the lack of media curiosity, is that Hillary Clinton promises a radical amnesty combined with a radical reduction in immigration enforcement. Just ask the Border Patrol about Hillary Clinton. You won't like what you're hearing.

The result will be millions more illegal immigrants; thousands of more violent, horrible crimes; and total chaos and lawlessness. That's what's going to happen, as sure as you're standing there.

This election, and I believe this, is our last chance to secure the border, stop illegal immigration and reform our laws to make your life better. I really believe this is it. This is our last time. November 8. November 8. You got to get out and vote on November 8.

(APPLAUSE)

It's our last chance. It's our last chance. And that includes Supreme Court

I am going to ask — these are really special people that I've gotten to know. I'm going to ask all of the "Angel Moms" to come join me on the stage right now.

These are amazing women.

(APPLAUSE)

These are amazing people.

(APPLAUSE)

AUDIENCE: USA! USA! USA!

I've become friends with so many. But Jamiel Shaw, incredible guy, lost his son so violently. Say just a few words about your child.

(SPEAKER'S VOICE): My son Ronald da Silva (ph) was murdered April 27, 2002 by an illegal alien who had been previously deported. And what so — makes me so outrageous is that we came here legally.

Thank you, Mr. Trump. I totally support you. You have my vote.

TRUMP: Thank you, thank you.

(SPEAKER'S VOICE): God bless you.

(APPLAUSE)

TRUMP: You know what? Name your child and come right by. Go ahead.

(SPEAKER'S VOICE): Laura Wilkerson. And my son was Joshua Wilkerson. He was murdered by an illegal in 2010. And I personally support Mr. Trump for our next president.

(APPLAUSE)

(SPEAKER'S VOICE): My name is Ruth Johnston Martin (ph). My husband

2002. And I support this man who's going to change this country for the better. God bless you.

(APPLAUSE)

(SPEAKER'S VOICE): My name Maureen Maloney (ph), and our son Matthew Denise (ph) was 23 years old when he was dragged a quarter of a mile to his death by an illegal alien, while horrified witnesses were banging on the truck trying to stop him.

(APPLAUSE)

(SPEAKER'S VOICE): Our son Matthew Denise, if Donald Trump were president in 2011, our son Matthew Denise and other Americans would be alive today.

(APPLAUSE)

(SPEAKER'S VOICE): Thank you. My name is Kathy Woods (ph). My son Steve (ph), a high school senior, 17 years old, went to the beach after a high school football game. A local gang came along, nine members. The cars were battered to — like war in Beirut. And all I can say is they murdered him and if Mr. Trump had been in office then the border would have been secure and our children would not be dead today.

(APPLAUSE)

(SPEAKER'S VOICE): Hi. My name is Brenda Sparks (ph), and my son is named Eric Zapeda (ph). He was raised by a legal immigrant from Honduras only to be murdered by an illegal in 2011. His murderer never did a second in handcuffs or jail. Got away with killing an American. So I'm voting for trump. And by the way, so is my mother.

(APPLAUSE)

Little Rock, Arkansas. Thank you. And if you don't vote Trump, we won't have a country. Trump all the way.

(APPLAUSE)

(SPEAKER'S VOICE): I'm Shannon Estes (ph). And my daughter Shaley Estes (ph), 22 years old, was murdered here in Phoenix last July 24 by a Russian who overstayed his visa. And vote Trump.

(APPLAUSE)

(SPEAKER'S VOICE): I'm Mary Ann Mendoza, the mother of Sergeant Brandon Mendoza, who was killed in a violent head-on collision in Mesa.

Thank you.

I want to thank Phoenix for the support you've always given me, and I want to tell you what. I'm supporting the man who will — who is the only man who is going to save our country, and what we our going to be leaving our children.

(APPLAUSE)

(SPEAKER'S VOICE): I'm Steve Ronnebeck, father of Grant Ronnebeck, 21 years old. Killed January 22, 2015 by an illegal immigrant who shot him in the face. I truly believe that Mr. Trump is going to change things. He's going to fight for my family, and he's going to fight for America.

(APPLAUSE)

TRUMP: These are amazing people, and I am not asking for their endorsement, believe me that. I just think I've gotten to know so many of them, and many more, from our group. But they are incredible people and what they're going through is incredible, and there's just no reason for it. Let's give them a really tremendous hand.

(APPLAUSE)

So, now is the time for these voices to be heard. Now is the time for the media to begin asking questions on their behalf. Now is the time for all of us as one country, Democrat, Republican, liberal, conservative to band together to deliver justice, and safety, and security for all Americans.

Let's fix this horrible, horrible, problem. It can be fixed quickly. Let's our secure our border.

(APPLAUSE)

Let's stop the drugs and the crime from pouring into our country. Let's protect our social security and Medicare. Let's get unemployed Americans off the welfare and back to work in their own country.

This has been an incredible evening. We're going to remember this evening. November 8, we have to get everybody. This is such an important state. November 8 we have to get everybody to go out and vote.

We're going to bring — thank you, thank you. We're going to take our country back, folks. This is a movement. We're going to take our country back.

Thank you.

(APPLAUSE)

Thank you.

This is an incredible movement. The world is talking about it. The world is talking about it and by the way, if you haven't been looking to what's been happening at the polls over the last three or four days I think you should start looking. You should start looking.

(APPLAUSE)

Together we can save American lives, American jobs, and American futures. Together we can save America itself. Join me in this mission, we're going to make

Thank you. I love you. God bless you, everybody. God bless you. God bless you, thank you.

Find out what you need to know about the 2016 presidential race today, and get politics news updates via Facebook, Twitter and the First Draft newsletter.

Exhibit KK

JANUARY 30, 2017

Key facts about refugees to the U.S.

BY JENS MANUEL KROGSTAD (HTTP://WWW.PEWRESEARCH.ORG/AUTHOR/JKROGSTAD/) AND JYNNAH RADFORD (HTTP://WWW.PEWRESEARCH.ORG/AUTHOR/JRADFORD/)

Syrian refugees take notes during their vocational ESL class at the International Rescue Committee center in San Diego on Aug. 31, 2016. (Frederic J. Brown/AFP/Getty Images)

An executive order (https://www.nytimes.com/2017/01/27/us/politics/refugee-muslim-executive-order-trump.html) signed Jan. 27 by President Donald Trump suspends refugee admissions for 120 days while security procedures are reviewed, though the resettlement of persecuted religious minorities may continue during this time on a case-by-case basis. Under the plan, the maximum number of refugees allowed into the U.S. in fiscal 2017 will likely decline from 110,000 to 50,000. Separately, admission of Syrian refugees will be suspended pending a revision of security screening measures.

About 3 million refugees have been resettled in the U.S. since Congress passed the Refugee Act of 1980 (https://www.acf.hhs.gov/orr/resource/the-refugee-act) , which created the Federal Refugee Resettlement Program and the current national standard for the screening and admission of refugees into the country.

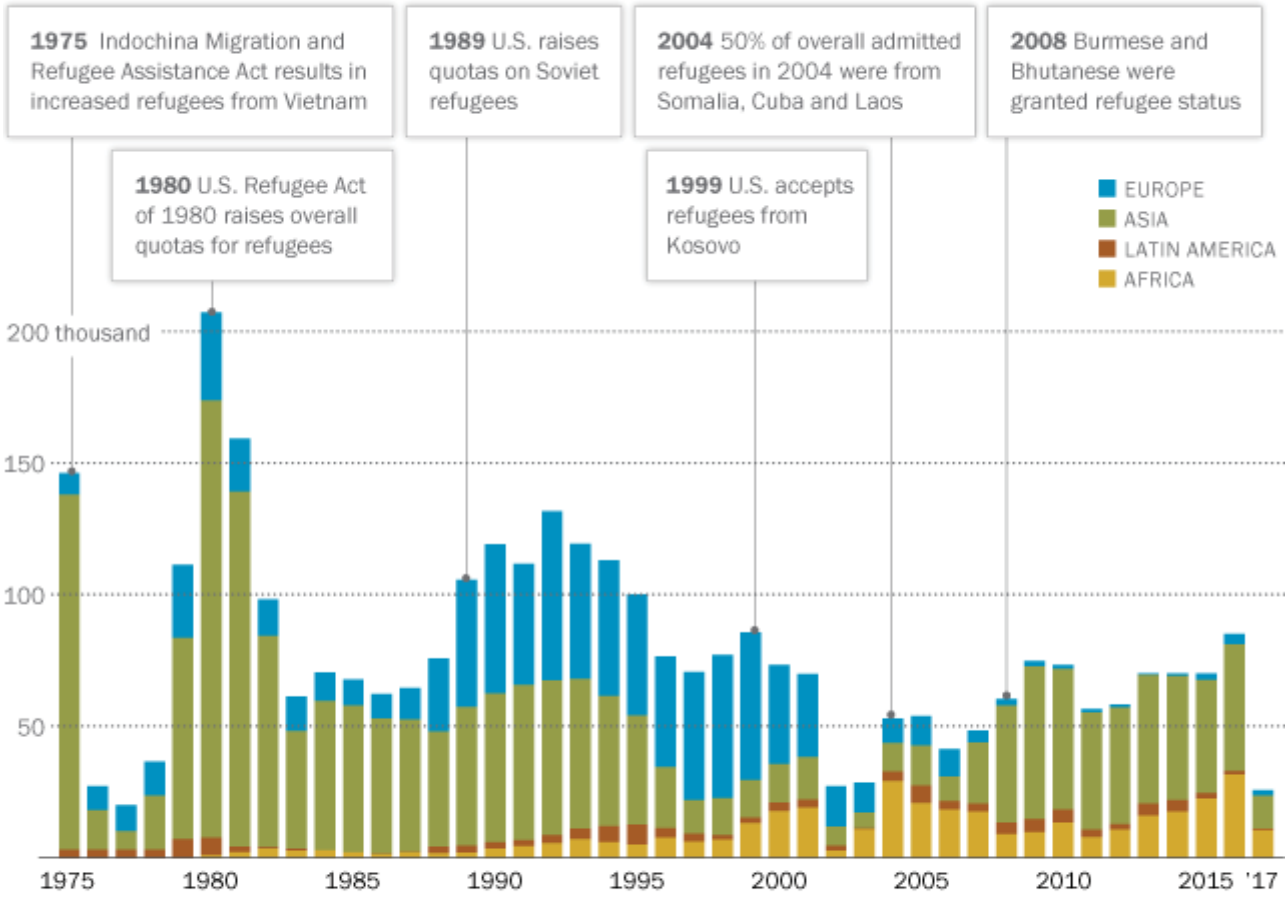
This is not the first time U.S. refugee admissions have been stopped. After the 2001 terrorist attacks, the U.S. largely suspended refugee resettlement for three months while security measures were examined. Today, the refugee admissions process (https://www.state.gov/j/prm/ra/admissions/) can take up to 18 to 24 months, and includes a review of applications by the State Department and other federal agencies, in-person interviews, health screenings and, for many, cultural orientations.

Here are key facts from our research about refugees entering the United States:

1 Historically, **the total number of refugees coming to the U.S. has fluctuated** (http://www.pewresearch.org/fact-tank/2016/06/17/where-refugees-to-the-u-s-come-from/) **along with global events and U.S. priorities**. From 1990 to 1995, an average of about 112,000 refugees arrived in the U.S. each year, with many coming from the former Soviet Union. However, refugee admissions dropped off to fewer than 27,000 in 2002 following the terrorist attacks in 2001. This number has since trended up.

The shifting origins of refugees to the U.S. over time

Number of refugees admitted to the U.S., by region of origin of principal applicant and fiscal year



Source: Refugee Processing Center, 1975-2016.
Note: Data do not include special immigrant visas and certain humanitarian parole entrants. Does not include refugees admitted under the Private Sector Initiative. Europe includes former Soviet Union states. Asia includes Middle Eastern and North African countries. Africa includes sub-Saharan Africa, but also Sudan and South Sudan. Latin America includes Caribbean. Data for fiscal 2017 are through Dec. 31, 2016; fiscal 2017 began Oct. 1, 2016.

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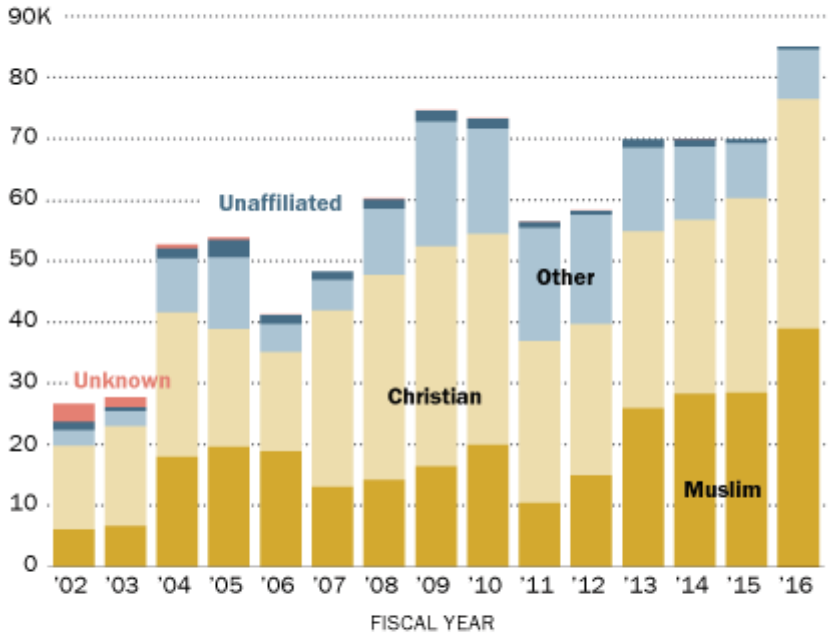
2 **The U.S. admitted 84,995 refugees in the fiscal year ending in September 2016, the most in any year during the Obama administration**. An additional 31,143 refugees have been admitted to the U.S. from Oct. 1 through Jan. 24, including more than 1,136 refugee admissions since Trump became president on Jan. 20. Though refugee admissions would drastically drop under Trump's proposal, the U.S. had been on pace to reach the Obama administration's goal of admitting 110,000 refugees (http://www.pewresearch.org/fact-tank/2017/01/20/u-s-on-track-to-reach-obama-administrations-goal-of-resettling-110000-refugees-this-year/) in fiscal 2017, which would have been the highest number since 1994.

3 In fiscal 2016, **the highest number of refugees from any nation came from the Democratic Republic of Congo**. The Congo accounted for 16,370 refugees followed by Syria (12,587), Burma (aka Myanmar, with 12,347), Iraq (9,880) and Somalia (9,020). Over the past decade, the largest numbers of refugees have come from Burma (159,692) and Iraq (135,643).

U.S. admits its highest number of Muslim refugees on record in fiscal 2016

Number of refugees entering the U.S. by religious affiliation



Note: "Other religions" include Hindus, Buddhists, Jews and other religions. Data do not include special immigrant visas and certain humanitarian parole entrants. Fiscal years are Oct. 1 through Sept. 30 each year.
Source: U.S. State Department's Refugee Processing Center accessed Oct. 3, 2016.

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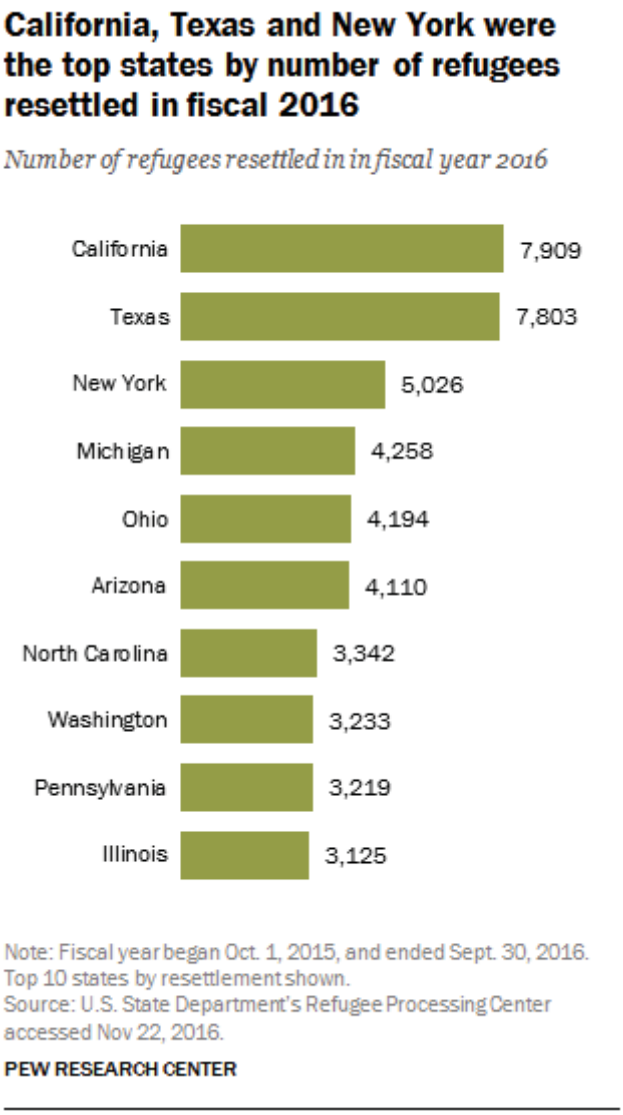
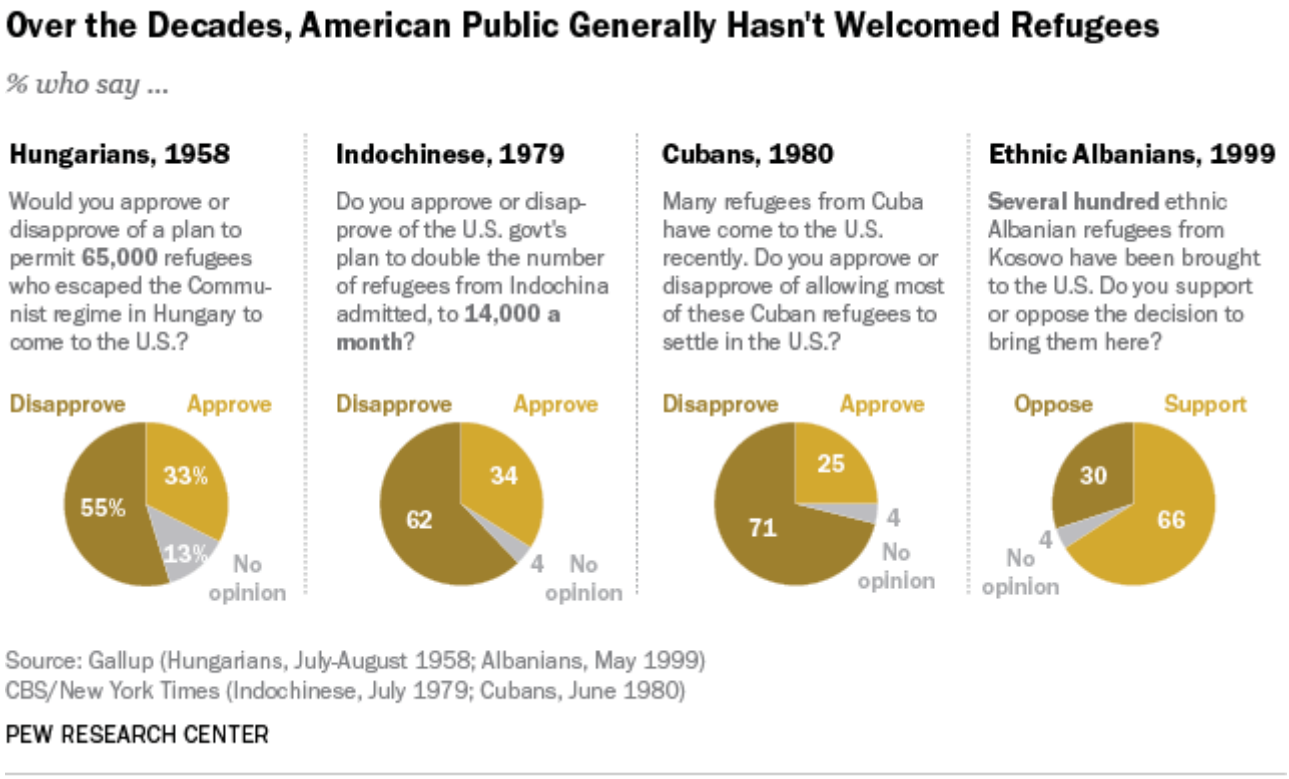
4 **Nearly 39,000 Muslim refugees** (http://www.pewresearch.org/fact-tank/2016/10/05/u-s-admits-record-number-of-muslim-refugees-in-2016/) **entered the U.S. in fiscal 2016, the highest number on record,** according to a Pew Research Center analysis of data from the State Department's Refugee Processing Center (http://ireports.wrapsnet.org/Interactive-Reporting/EnumType/Report?ItemPath=/rpt_WebArrivalsReports/MX%20-%20Arrivals%20by%20Nationality%20and%20Religion) . Muslims made up nearly half (46%) of refugee admissions, a higher share than for Christians, who accounted for 44% of refugees admitted. Muslims exceeded Christians on this measure for the first time since 2006, when a large number of Somali refugees entered the U.S. From fiscal years 2002 to 2016, the U.S. admitted 399,677 Christian refugees and 279,339 Muslim refugees, meaning that 46% of all refugees who have entered the U.S. during this time have been Christian while 32% have been Muslim.



(http://www.pewresearch.org/fact-tank/2016/12/06/just-10-states-resettled-more-than-half-of-recent-refugees-to-u-s/ft_16-12-02_usrefugees_total/) **5** **California, Texas and New York** (http://www.pewresearch.org/fact-tank/2016/12/06/just-10-states-resettled-more-than-half-of-recent-refugees-to-u-s/) **resettled nearly a quarter of all refugees in fiscal 2016**, together taking 20,738 refugees. Other states that received at least 3,000 refugees included Michigan, Ohio, Arizona, North Carolina, Washington, Pennsylvania and Illinois. By contrast, Arkansas, the District of Columbia and Wyoming each resettled fewer than 10 refugees. Delaware and Hawaii took in no refugees.

6 **The U.S. public has seldom approved of accepting large numbers of refugees.** In October 2016, 54% of registered voters said the U.S. (http://www.people-press.org/2016/10/27/7-opinions-on-u-s-international-involvement-free-trade-isis-and-syria-russia-and-china/) does not have a responsibility to accept refugees from Syria, while 41% said it does. There was a wide partisan gap on this measure, with 87% of Trump supporters saying the U.S. doesn't have a responsibility to accept Syrians, compared with only 27% of Clinton supporters who said the same. U.S. public opinion polls (http://www.pewresearch.org/fact-tank/2015/11/19/u-s-public-seldom-has-welcomed-refugees-into-country/) from previous decades show Americans have largely opposed admitting large numbers of refugees from countries where people are fleeing war and oppression.



Note: This is an update of a post originally published on Jan. 27, 2017.

Jens Manuel Krogstad (http://www.pewresearch.org/author/jkrogstad/) *is a writer/editor focusing on Hispanics, immigration and demographics at Pew Research Center.*

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Jynnah Radford (http://www.pewresearch.org/author/jradford/) *is a research assistant focusing on global migration at Pew Research Center.*

POSTS | EMAIL

60 Comments

Anonymous • 1 month ago (#comment-674937)

Believe or not, we know that most of "so-called Congolese Refugees" are actually Rwandese from RWANDA. They will all tell you that they are from Rutshuru or Mulenge, because these are the regions that were infiltrated by them. The Congolese citizenship is inherited from blood and as a rule in the East, you have to proof from which family you come

Exhibit LL

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

HAMEED KHALID DARWEESH, et al., on behalf of themselves and others similarly situated, *Petitioners*, v. DONALD J. TRUMP, President of the United States, et al., *Respondents*.	Case No. 1:17-cv-00480 (Amon, J.) Date: February 16, 2017

BRIEF OF FORMER NATIONAL SECURITY OFFICIALS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici curiae are former national security, foreign policy and intelligence officials who have worked on pressing national security matters in the U.S. government. A number of amici have worked at senior levels in administrations of both political parties. Amici have collectively devoted decades to combatting the various terrorist threats that the United States faces in an increasingly dangerous and dynamic world. Amici have all held the highest security clearances. A significant number were current on active intelligence regarding credible terrorist threat streams directed against the United States as recently as one week before the issuance of the January 27, 2017 Executive Order on "Protecting the Nation from Foreign Terrorist Entry into the United States" ("Order").[1]

Amici all agree that the United States faces real threats from terrorist networks and must take all prudent and effective steps to combat them, including the appropriate vetting of travelers to the United States. Amici are nevertheless not aware of any specific threat that would justify the broad bans on entry into the United States established by this Order. In amici's professional opinion, the Order

[1] This amicus brief derives from the sworn Joint Declaration of ten of the signatories, first submitted in *Washington v. Trump*, No. 17-35105, __ F.3d__, 2017 WL 526497, slip op. (9th Cir. Feb. 9, 2017) [hereinafter "Ninth Circuit Opinion"], and also attached to the Petitioners' motion.

cannot be justified on national security or foreign policy grounds, and ultimately, the Order undermines—rather than enhances—the security of the United States.

ARGUMENT

The Order serves no rational national security or foreign policy purpose. Certainly, it does not perform its declared task of "protecting the nation from foreign terrorist entry into the United States." To the contrary, the Order disrupts thousands of lives, including those of refugees and visa holders who have already been vetted by standing procedures that Respondents have not shown to be inadequate.

Left in place, the Order could do long-term damage to our national security and foreign policy interests. It will endanger troops in the field, and disrupt key counterterrorism and national security partnerships. It will aid the propaganda effort of the Islamic State in Iraq and the Levant ("ISIL") and support its recruitment message. By feeding the narrative that the United States is at war with Islam, the Order will impair relationships with the very Muslim communities that law enforcement professionals rely on to address the threat of terrorism. And it will have a damaging humanitarian and economic impact.

In prior cases, courts have deferred to the "considered judgment" of the President only after administrative records have revealed that the President's decision rested on counsel from expert agencies with broad experience on the

matters presented. Here, there is no evidence that the Order was subjected to an interagency legal and policy process. Rebranding a proposal first advertised as a "Muslim Ban" as "Protecting the Nation from Foreign Terrorist Entry into the United States" does not disguise the Order's discriminatory intent, or make it necessary, effective or faithful to America's Constitution, laws, and values.

I. THE EXECUTIVE ORDER CANNOT BE JUSTIFIED ON NATIONAL SECURITY OR FOREIGN POLICY GROUNDS.

On January 27, 2017, President Donald Trump signed an executive order imposing a number of bans on the entry of non-citizens into the United States.[2] The President's stated goals for the Order were to "protect[] the nation from foreign terrorist entry into the United States" and to "ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism."[3]

As former U.S. officials responsible for the national security and foreign relations of the United States in multiple presidential administrations, we have devoted our careers to the same goals. Our first priority has always been the

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[2] Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017). The Order bans entry into the United States by nationals of Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen for 90 days, bans all refugee admissions for 120 days, and indefinitely bans the entry of all Syrian refugees. The Order exempts diplomats (from the ban on entry for nationals) and refugees whom on a case-by-case basis are deemed to be in the national interest (from the ban on all refugee admissions for 120 days).

[3] *Id.*

safety and welfare of the American people. Yet the Order bears no rational relation to the President's stated aims. It targets countries whose nationals have committed no lethal terrorist attacks on U.S. soil in the last forty years. It bars the entry of refugees—the vast majority of whom are vulnerable women and children[4]—when in the modern era of screening, no refugee has ever killed a U.S. citizen in a terrorist attack in the United States.[5]

Even now, weeks after the signing of the Order, Respondents have supplied no information that would justify such a categorical ban. They identify no basis for believing that there is a heightened or particularized threat from these seven countries. They make no showing that our immigration system has suffered from inadequate consideration of national origin or religious affiliation, and identify no flaw in the current individualized vetting procedures—developed by national security officials across several presidential administrations in response to particular threats identified by U.S. intelligence.[6]

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[4] U.S. Dep't of State, *The Refugee Processing and Screening System*, https://www.state.gov/documents/organization/266671.pdf.

[5] Alex Nowrasteh, *Little National Security Benefit to Trump's Executive Order on Immigration*, CATO at Liberty (Jan. 25, 2017) [hereinafter "Nowrasteh 2017"].

[6] Ninth Circuit Opinion, *supra* note 1, at 26 ("Although we agree that the Government's interest in combating terrorism is an urgent objective of the highest order, the Government has done little more than reiterate that fact." (internal citations and quotation marks omitted)); *Aziz v. Trump*, No. 1:17-cv-00116-LMB-TCB, __ F.Supp.3d__ at 6, 2017 WL 580855 (E.D. Va. Feb. 13, 2017)

A. There is no national security or foreign policy basis for suspending entry of aliens from the seven named countries.

No rational national security purpose is served by the Order's blanket ban on entry into the United States of nationals of Iraq, Syria, Sudan, Iran, Somalia, Libya, and Yemen.

First, not a single American has died in a terrorist attack on U.S. soil at the hands of citizens of these seven nations in the last forty years.[7] The Order opens with a reference to the September 11, 2001 attacks, and White House officials have since pointed to those attacks as justification for its restrictions.[8] But none of the September 11 hijackers were citizens of the seven targeted countries.[9] In fact, the overwhelming majority of individuals who were charged with—or who died in the course of committing—terrorist-related crimes inside the United States since September 11 have been U.S. citizens or legal permanent residents.[10]

("Defendants . . . have not offered any evidence to identify the national security concerns that allegedly prompted this EO, or even described the process by which the president concluded that this action was necessary." (citations omitted)).

[7] Nowrasteh 2017, *supra* note 5.

[8] Jan. 27 Order §1; Sabrina Siddiqui, *Trump Signs 'Extreme Vetting' Executive Order for People Entering the US*, The Guardian (Jan. 27, 2017).

[9] Central Intelligence Agency, *11 September 2001 Hijackers*, https://www.cia.gov/news-information/speeches-testimony/2002/DCI_18_June_testimony_new.pdf.

[10] *See* Peter Bergen et al., *Terrorism in America After 9/11,* New America Foundation, www.newamerica.org/in-depth/terrorism-in-america/; George Washington University Program on Extremism, *ISIS in America: From Retweets to*

Second, Respondents have identified no information or basis for believing that a heightened or particularized future threat has suddenly arisen from the seven named countries. Those of us who were current on active intelligence concerning all credible terrorist threat streams directed against the United States as of January 20, 2017 know of no specific threat—just seven days later—that would justify the ban of these seven countries. The Order itself points to no such factual basis, and Respondents have offered none.[11]

Third, Respondents have identified no flaw in existing procedures that would justify the bans in the Order. They offer no reason to shift abruptly to group-based bans, when the United States already has a tested system of individualized vetting, developed and implemented by national security professionals across the government. Since the September 11, 2001 attacks, the United States has developed a rigorous system of security vetting, leveraging the

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Raqqa 6 (Dec. 2015), https://cchs.gwu.edu/isis-in-america; Nora Ellingsten, *It's Not Foreigners Who Are Plotting Here: What the Data Really Show*, Lawfare (Feb. 7, 2017); *see also* Felicia Schwartz & Ben Kesling, *Countries Under U.S. Entry Ban Aren't Main Sources of Terror Attacks*, The Wall St. J. (Jan. 29, 2017). One other set of data, relied on by White House officials, has been widely criticized for its definition of terrorism-related offenses, among other issues. *See, e.g.,* Molly Redden, *Trump Powers "Will Not be Questioned" on Immigration, Senior Official Says*, The Guardian (Feb. 12, 2007), https://www.theguardian.com/us-news/2017/feb/12/trump-administration-considering-narrower-travel-ban.

[11] Oral Argument, *Washington v. Trump*, No. 17-35105, at 9:30, http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010885.

full capabilities of the law enforcement and intelligence communities. This vetting system is applied to travelers not once, but multiple times, and it is continually re-evaluated to ensure its effectiveness. Successive administrations have strengthened the vetting process through robust information-sharing and data integration. This allows the government to identify potential terrorists without resorting to blanket bans on countries or refugees.[12]

Finally, the Order cannot be defended as a mere continuation of recent U.S. counterterrorism policy. Because threat streams constantly evolve, we sought continually to improve vetting when serving as national security officials. That effort included reviews in 2011 and 2015-16, when the U.S. government acted in response to particular threats identified by intelligence sources. In 2011, after receiving derogatory information regarding two Iraqi nationals who had entered the United States as refugees, the U.S. government undertook an extensive interagency review of its vetting system. The flow of refugees from Iraq slowed during the pendency of the review,[13] and upon completion of the review, the U.S.

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[12] *See, e.g., The Security of U.S. Visa Programs: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2016) (written statements of David Donahue and Sarah R. Saldaña), https://www.hsgac.senate.gov/hearings/the-security-of-us-visa-programs.

[13] Refugee Processing Center, Interactive Reporting, http://ireports.wrapsnet.org/Interactive-Reporting/EnumType/Report?ItemPath=/rpt_WebArrivalsReports/MX%20-%20Arrivals%20by%20Nationality%20and%20Religion; Jon Finer, *Sorry, Mr.*

government implemented new, stronger security procedures in areas of identified vulnerability.[14]

Likewise, in late 2015 and early 2016, in response to the emerging threat posed by ISIL, the U.S. government took several steps to strengthen the Visa Waiver Program, which allows citizens from thirty-eight approved countries to travel to the United States without first obtaining a visa. President Obama introduced a series of new measures to enhance security screenings and traveler risk assessments in the program and bolster our relationship with partner countries.[15] Around the same time, President Obama signed into law a statute that removed from the Visa Waiver Program those nationals of existing Visa Waiver Program countries who: (1) had been present in Iraq, Syria, Iran or Sudan after

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President: The Obama Administration Did Nothing Similar to Your Immigration Ban, Foreign Policy (Jan. 30, 2017).

[14] *Ten Years After 9/11: Preventing Terrorist Travel, Hearing Before the United States S. Comm. on Homeland Sec. and Governmental Affairs*, 112th Cong. 522 (2011) (written statements of Rand Beers and Janice L. Jacobs), https://www.hsgac.senate.gov/hearings/ten-years-after-9/11-preventing-terrorist-travel; Andorra Bruno, *Iraqi and Afghan Special Immigrant Visa Programs*, Cong. Research Serv., 14 (2016).

[15] The White House, *Visa Waiver Program Enhancements* (Nov. 30, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/11/30/fact-sheet-visa-waiver-program-enhancements; U.S. Dep't of Homeland Security, *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016), https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program.

March 1, 2011, or (2) were dual nationals of one of those four countries.[16] Several months later, the Secretary of Homeland Security—acting under the new statute and in consultation with the Director of National Intelligence and the Secretary of State—expanded the list of four countries to include Yemen, Libya and Somalia.[17]

Contrary to Respondents' claims, these previous reforms provide no justification for a blanket, group-based ban on the entry of nationals from these seven countries. The enhancement of security in the refugee system allowed for *more searching, individualized vetting* of travelers, the opposite of the categorical ban in this Order. Likewise, the reforms to the Visa Waiver Program did not automatically bar anyone—including nationals of any country—from travel to the United States. The affected individuals were simply required to obtain *individually-vetted visas* before entering the United States, just as nationals from the more than 150 other nations not currently part of the Visa Waiver Programs must do.

To keep our country safe from terrorist threats, the U.S. government must gather all credible evidence about growing threat streams—including through the

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[16] 8 U.S.C. § 1187; U.S. Dep't of State, *Visa Waiver Program*, https://travel.state.gov/content/visas/en/visit/visa-waiver-program.html.

[17] The exemptions for Yemen, Libya and Somalia only applied to those who had traveled to or been present in one of those countries, not dual nationals. U.S. Dep't of Homeland Security, *DHS Announces Further Travel Restrictions for the Visa Waiver Program*, *supra* note 15.

best available intelligence—to thwart those threats before they ripen. Through the years, national security-based immigration restrictions have: (1) responded to specific, credible threats based on individualized information, (2) rested on the best available intelligence, and (3) been subject to thorough interagency legal and policy review. The present Order does not rest on such tailored grounds, but rather on (1) generalized bans, (2) that are not supported by any new intelligence that Respondents have cited or of which we are aware, and (3) were not vetted through careful interagency legal and policy review.

B. The suspension of refugee admissions is not justified by national security or foreign policy concerns.

The Order's 120-day ban on refugee admissions, and its indefinite ban on Syrian refugee admissions, serve no national security or foreign policy purpose. We know of no factual basis for Respondents' claim that refugees pose a particular security threat to the United States that would justify the Order's categorical bans.

From 1975 to the end of 2015, over three million refugees have been admitted to the United States. According to a recent study, only three have killed people in terrorist attacks on U.S. soil.[18] All three were Cuban refugees, who murdered three people in two attacks in the 1970s. Critically, these refugees were admitted and carried out their crimes before the creation of the modern refugee

[18] Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, Cato Institute (Sept. 13, 2016).

vetting system in 1980.[19] No refugee has killed an American in a terrorist attack in the United States since that system was put in place.[20] According to the study, over that same period, only twenty refugees were convicted of any terrorism-related crimes on U.S. soil at all.[21]

In part, this is because refugees already receive the most thorough vetting of any travelers to the United States.[22] Refugee candidates are vetted recurrently throughout the resettlement process, as "pending applications continue to be checked against terrorist databases, to ensure new, relevant terrorism information has not come to light."[23] By the time refugees referred by the United Nations High Commissioner for Refugees ("UNHCR") are approved for resettlement in the United States, they have been reviewed not only by UNHCR but also by the National Counterterrorism Center, the Federal Bureau of Investigation, the Department of Homeland Security, the Department of Defense, the Department of State and the U.S. intelligence community more broadly.[24]

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[19] *Id.*

[20] *Id.*

[21] *Id.; see also* Nowrasteh 2017, *supra* note 5.

[22] U.S. Dep't of State, *U.S. Refugee Admissions Program FAQs*, https://www.state.gov/j/prm/releases/factsheets/2017/266447.htm.

[23] Amy Pope, *The Screening Process for Refugee Entry into the United States* (Nov. 20, 2015), https://obamawhitehouse.archives.gov/blog/2015/11/20/infographic-screening-process-refugee-entry-united-states.

[24] U.S. Dep't of State, *U.S. Refugee Admissions Programs FAQs*, supra note 22.

The refugee vetting process is also reviewed and strengthened on an ongoing basis in response to particular threats.[25] For Syrian applicants, the Department of Homeland Security recently added a layer of enhanced review that involves collaboration between the Refugee, Asylum, and International Operations Directorate and the Fraud Detection and National Security Directorate. Among other measures, this review provided additional, intelligence-driven support to refugee adjudicators that U.S. officials could then use to more precisely question refugees during their security interviews.[26] Respondents allege no specific information about any vetting step omitted by current procedures.

While the United States' own individualized vetting process is the most important step, additional considerations make the U.S. refugee system difficult for terrorists to exploit. Under current vetting procedures, refugees often wait eighteen to twenty-four months to be cleared for entry into the United States.[27] Further, of all refugees determined by the UNHCR to be eligible for resettlement, less than

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[25] U.S. Dep't of Homeland Security, *U.S. Citizenship and Immigration Services* (Dec. 3, 2015), https://www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20Asylum%2C%20and%20Int%27l%20Ops/Refugee_Security_Screening_Fact_Sheet.pdf.

[26] U.S. Dep't of State, *The Refugee Processing and Screening System*, *supra* note 5; Andorra Bruno, *Syrian Refugee Admissions and Resettlement in the United States: In Brief*, Cong. Research Serv., 4-5 (2016).

[27] U.S. Dep't of State, *U.S. Refugee Resettlement Processing for Iraqi and Syrian Beneficiaries of an Approved I-130 Petition* (Mar. 11, 2016), https://www.state.gov/j/prm/releases/factsheets/2016/254649.htm.

one percent were resettled in any country at all in 2015,[28] meaning that a would-be terrorist posing as a refugee has very little chance of being resettled *anywhere*. Finally, the UNHCR resettlement program places refugees in dozens of countries, and refugees do not decide where they are resettled or which country accepts them, meaning that the odds of any individual refugee being settled into the United States in particular are exceedingly low.

II. THE ORDER'S OVERBREADTH HARMS OUR NATIONAL SECURITY AND FOREIGN POLICY INTERESTS.

The Order's overreach will do lasting harm to the national security and foreign policy interests of the United States.

A. The Order is of unprecedented scope.

The Order effectively amounts to a bar on entry to the United States of nationals from any of the seven listed countries. The Order revoked the visas of anywhere between 60,000 to 100,000 people,[29] initially encompassed as many as 500,000 green card holders,[30] and creates a forward-looking ban on countless more

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[28] U.N. High Commissioner for Refugees, *Resettlement*, http://www.unhcr.org/en-us/resettlement.html.

[29] Justin Jouvenal et al., *Justice Dept. Lawyer Says 100,000 Visas Revoked Under Travel Ban; State Dept. Says about 60,000*, Wash. Post (Feb. 3, 2017).

[30] Marcelo Rochabrun, *Trump Order Will Block 500,000 Legal U.S. Residents from Returning to America from Trips Abroad*, ProPublica (Jan. 28, 2017). The Order could conceivably again encompass green card holders depending upon whether a

individuals. The Order bars doctors and patients, grandmothers and infants, parents and children, tourists and business travelers, police officers and those fighting alongside our Service Members abroad, all without regard to individual threat or circumstance.

This is an order of unprecedented scope. We know of no case where a president has invoked authority under the Immigration and Nationality Act to suspend admission of such a sweeping class of people. Even after the September 11 attacks, 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. Across the decades, executive orders under the Immigration and Nationality Act have generally targeted specific government officials,[31] undocumented immigrants[32] or individuals whose personalized screenings indicated that they posed a national security risk.[33]

White House Counsel opinion is deemed authoritative by the implementing agencies. *See* Ninth Circuit Opinion, *supra* note 2, at 21-22.

[31] *See, e.g.*, Proclamation No. 6958, 61 Fed. Reg. 60,007 (Nov. 22, 1996).

[32] *See, e.g.*, Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (May 24, 1992); Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981).

[33] *See, e.g.*, Exec. Order No. 13,726, 81 Fed. Reg. 23,559 (Apr. 19, 2016); Exec. Order No. 13,694, 80 Fed. Reg. 18,077 (Apr. 1, 2015).

Some have claimed that historical examples involving Cuba, Iran, or Haiti are akin to this Order. But the first two orders included large exceptions,[34] and the third imposed no restrictions on lawful travel by visa holders at all.[35] And above

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[34] In 1980, during the Iranian Hostage Crisis, President Carter invalidated all visas issued or reissued to Iranian citizens for future entry into the country. Sanctions Against Iran Remarks Announcing U.S. Actions, April 7, 1980, http://www.presidency.ucsb.edu/ws/?pid=33233. But the White House also carved out exceptions for humanitarian need, to include those "visiting a sick aunt," and students who were in a course of study in the United States. The White House even encouraged Iranians in the United States whose visas were set to expire to apply for asylum. One White House official said, "[o]nce in the good old United States legally, or illegally for the matter, they are cloaked in the mantle of the constitutional and legal protections we all value." Charles R. Babcock, *Carter's Visa Crackdown Won't Hurt Immediately*, Wash. Post (Apr. 9, 1980); Robert Pear, *Visa Restrictions Chiefly Apply to Iranians Outside of America*, N.Y. Times (Apr. 8, 1980); *see* U.S. Dep't of Justice, 1980 Statistical Yearbook of the Immigration and Naturalization Service (1981).

In 1986, in the course of a diplomatic impasse over a migration agreement, President Reagan issued a presidential proclamation suspending the "[e]ntry of Cuban nationals as immigrants" into the United States. Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986). But that proclamation included a major exception for the immediate relatives of U.S. citizens. *Id.*; U.S. Dep't of Justice, 1987 Statistical Yearbook of the Immigration and Naturalization Service (1987); *see also* David Bier, Trump's Ban on Immigration from Certain Countries is Illegal, Cato at Liberty, Dec. 8, 2016. Both actions were taken to exert pressure against a particular national government—and in the case of Cuba, to "resume normal migration"—not to minimize a threat posed by particular people.

[35] In 1991, President Bush issued an Executive Order that imposed restrictions on "undocumented aliens" who were "coming by sea to the United States without necessary documents." Exec. Order 12,807, 57 Fed. Reg. 23,133 (June 1, 1992). However, legal travel and immigration continued from Haiti into the United States in this period. Even as to those without documents, the Bush Administration offered those repatriated the option of seeking in-country refugee processing. Maureen Taft-Morales, Cong. Research Serv., *Haiti: Efforts to Restore President*

all, no modern example even approaches the unqualified sweep of this Order, which bans nearly 220 million people from seven separate countries from traveling to the United States.

B. The Order will do serious damage to our national security and foreign policy interests.

The Order will harm the interests of the United States in a number of respects.

1. The Order will endanger U.S. troops in the field.

Every day, U.S. Service Members work and fight alongside allies from some of the named countries, who put their lives on the line to protect Americans and further American interests abroad. Those barred by the Order include individuals working alongside our men and women in Iraq fighting against ISIL.[36] Soldiers from these countries have already voiced resentment at the Order.[37] The Order

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Aristide, 1991-1994, 14 (1995); U.S. Dep't of State, Bureau of Consular Affairs, *Report of the Visa Office* (2000), tables XII, XIII, XIV, XV, XVIII, XIX, https://travel.state.gov/content/visas/en/law-and-policy/statistics/annual-reports/report-of-the-visa-office-2000.html.

[36] Rebecca Kheel, *Trump Travel Order Complicates ISIS Fight in Iraq*, The Hill (Feb. 1, 2017); Dan de Luce, *Trump's Immigration Order Gives Ammunition to ISIS, Endangers U.S. Troops,* Foreign Policy (Jan. 29, 2017).

[37] David Zucchino, *Travel Ban Drives Wedge Between Iraqi Soldiers and Americans*, N.Y. Times (Feb. 3, 2017).

may also obstruct ongoing training, education, and other security cooperation programs underway with several of the listed countries.[38]

Moreover, the Order will affect interpreters and others who have assisted our troops at great risk to their own lives. The Order initially banned all such individuals from coming to the United States. Days later, U.S. officials announced that it would allow "the entry of Iraqi nationals with a Special Immigrant Visa to the United States."[39] But even that step leaves unaddressed tens of thousands of others who assisted the United States and who are waiting for admission as "Priority 2" refugees outside of the now closed Special Immigrant Visa program.[40] By discouraging future assistance and cooperation from these and other affected military allies and partners, the Order will jeopardize the safety and effectiveness of our troops.

2. The Order will disrupt essential counterterrorism, foreign policy, and national security partnerships.

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[38] U.S. Dep't of Defense & Dep't of State, *Joint Report to Congress: Foreign Military Training* (FY 2015-2016).

[39] U.S. Customs and Border Protection, *Protecting the Nation from Foreign Terrorist Entry into the United States* (Feb. 2, 2017).

[40] U.S. Dep't of State et al., *Report to the Congress, Proposed Refugee Admissions for Fiscal Year 2016,* at 57 (2016); Stephanie Ott, *What Happens to Iraqis who Worked with the U.S. military*, Al Jazeera (Feb. 1, 2017); Urban Justice Center, International Refugee Assistance Project, *IRAP Stands With Iraqi Allies of the United States Affected by Executive Order* (Feb. 1, 2017).

The Order will disrupt key counterterrorism, foreign policy, and national security partnerships that are critical to our country's efforts to address the threat posed by terrorist groups such as ISIL. The Order has sparked intense international criticism and alienated U.S. allies. Partner countries in the Middle East, on whom we rely for vital counterterrorism cooperation, are expressing disapproval and even threatening reciprocity, jeopardizing years of diplomatic effort.[41]

The Order will also endanger U.S. intelligence sources in the field. For up-to-date information, our intelligence officers often rely on human sources in some of the countries listed. The Order breaches faith with those very sources, who have risked much or all to keep Americans safe—and whom our officers had promised to protect.[42] Finally, by suspending visas, this Order halts the collection of important intelligence that occurs during visa screening processes, information that can be used to recruit agents and identify regional trends of instability.[43]

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[41] Rebecca Savransky, *Iraq Parliament Approves 'Reciprocity Measure' In Trump Immigration Ban's Wake*, The Hill (Jan. 30, 2017); Loveday Morris, *Iraqi Leader to U.S.: Americans Come to Iraq to Fight With ISIS, but I Haven't Banned You*, Wash. Post (January 31, 2017); Kevin Liptak, *Travel Ban Remains Sticking Point in Trump Calls with US Allies*, CNN (Feb. 9, 2017).

[42] Michael V. Hayden, *Former CIA Chief: Trump's Travel Ban Hurts American Spies – and America*, Wash. Post (Feb. 5, 2017).

[43] This process is particularly important in countries like Iran and Libya, where internal conflict or lack of diplomatic ties limit on-the-ground intelligence collection.

3. The Order will hinder domestic law enforcement efforts.

Domestic law enforcement relies heavily on partnerships with American Muslim communities to fight homegrown terrorism.[44] One report found that in the years since September 11, 2001, Muslim communities have helped U.S. security officials prevent nearly two out of every five Al-Qaeda plots threatening the United States.[45] By alienating Muslim-American communities in the United States, the Order will harm our efforts to enlist their aid in identifying radicalized individuals who might launch attacks of the kind recently seen in San Bernardino and Orlando.

The Order's disparate impact on Muslim travelers and immigrants feeds ISIL's propaganda narrative and sends the wrong message to the Muslim community at home and abroad: that the U.S. government is at war with them based on their religion.[46] Less than a day after President Trump signed the Order,

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[44] Kristina Cooke & Joseph Ax, *U.S. Officials Say American Muslims Do Report Extremist Threats*, Reuters (Jun. 16, 2016).

[45] Muslim Public Affairs Council, *Data on Post-9/11 Terrorism in the United States* (Jun. 2012), http://www.mpac.org/assets/docs/publications/MPAC-Post-911-Terrorism-Data.pdf.

[46] Muslim refugees from the seven listed countries made up 82.2 percent of all Muslim refugee arrivals to the United States from January 1, 2016 to February 11, 2017. Refugee Processing Center, Interactive Reporting, Admissions and Arrivals http://ireports.wrapsnet.org/InteractiveReporting/EnumType/Report?ItemPath=/rpt_WebArrivalsReports/MX%20%20Arrivals%20by%20Nationality%20and%20Religion.

jihadist groups began citing its contents in recruiting messages online.[47] The Order may even endanger Christian communities overseas, by handing ISIL a recruiting tool and propaganda victory that spreads their message that the United States is engaged in a religious war.

4. The Order will have a devastating humanitarian impact.

The Order will have an immediate and devastating humanitarian impact. First and foremost, the Order disrupts the travel of men, women and children who have been victimized by actual terrorists. Tens of thousands of other travelers today face deep uncertainty about whether they may travel to or from the United States for reasons including medical treatment, study or scholarly exchange, funerals or other pressing family reasons. While the Order allows the Secretaries of State and Homeland Security to admit travelers from targeted countries on a case-by-case basis, in our experience it would be unrealistic for these overburdened agencies to apply such procedures to every one of the thousands of affected individuals with urgent and compelling needs to travel. Finally, closing our borders to refugees who otherwise would have had the opportunity to resettle in the United States will keep them in dangerous conditions and shift the burden to overstretched allies who are currently accepting far more than their fair share of refugees.

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[47] Joby Warrick, *Jihadist Groups Hail Trump's Travel Ban as a Victory*, Wash. Post (Jan. 29 2017).

5. The Order will cause economic damage to American citizens and residents.

Finally, the Order will affect many foreign travelers who annually inject hundreds of billions of dollars into the U.S. economy, supporting well over a million U.S. jobs.[48] Since the Order was issued, dozens of affected companies have noted the damaging impact it can be expected to have on strategic economic sectors including defense, technology, and medicine.[49] About a third of U.S. innovators were born outside the United States, and their scientific and technological innovations often contribute to making our nation and the world safe.[50] The harm caused by the ban to the economic dynamism of our country will carry long-term negative and serious consequences for our national security.

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[48] U.S. Dep't of Commerce, *Department of Commerce Releases October Travel and Tourism Expenditures* (Dec. 15, 2016), http://trade.gov/press/press-releases/2016/department-of-commerce-releases-october-travel-tourism-expenditures-121516.asp.

[49] *See, e.g.,* Br. for Technology Companies and Other Businesses as Amici Curiae in Support of Appellees, Washington v. Trump, No. 17-35105, __ F.3d__, 2017 WL 526497 (9th Cir. Feb. 9, 2017).

[50] Adams Nager, et al., *The Demographics of Innovation in the United States*, Information Technology & Innovation Foundation 29 (Feb. 2016), http://www2.itif.org/2016-demographics-of-innovation.pdf. Iran's universities, for example, have produced an "inordinate amount of intellectual talent in computer science and cybersecurity." These scientists are drawn to universities in the United States, where their research is then used by entities such as the Office of Naval Research and DARPA. Patrick O'Neill, *How Academics Are Helping Cybersecurity Students Overcome Trump's Immigration Order*,

III. THE ORDER WAS ILL-CONCEIVED, POORLY IMPLEMENTED AND ILL-EXPLAINED.

Respondents have presented no evidence that the Order was subject to the thorough interagency policy and legal processes designed to address current terrorist threats.

In every recent administration, presidents considering a change to immigration policy have followed an interagency review process that allows experts and security professionals to ensure that all relevant uncertainties are addressed by policy and legal experts, appropriate preparations are made for implementation, and any potential risks are effectively mitigated. Before recommendations are submitted to the President, the National Security Council oversees a legal and policy process that typically includes the following important components: a review by the career professionals in institutions of the U.S. government charged with implementing an order; a review by the career lawyers in those institutions to ensure legality and consistency in interpretation; and a senior policy review across all relevant agencies, including Deputies and Principals at the cabinet level.

Cyberscoop (Jan. 30, 2017), https://www.cyberscoop.com/trump-immigration-ban-cybersecurity-iran-protests/.

This practice of interagency deliberation has been followed even—and especially—in times of national emergency in order to set temporary exclusions or establish criteria for admission to the United States. In the immediate aftermath of the September 11, 2001 attacks, when the Bush Administration considered whether the President should invoke 8 U.S.C. § 1182(f) to bar certain immigrants or take other actions to secure the border, officials engaged in consultations across the national security agencies to arrive at a decision.[51] The reexamination of the vetting system in 2011[52] and the security reforms to the Visa Waiver Program in 2015-16[53] reflect similar interagency consultation.

The process that produced this Order departed from decades of standard practice across administrations of both parties.[54] Respondents offer no evidence that the present Order resulted from experienced intelligence and security professionals recommending changes in response to identified threats. We know

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[51] Edward Alden, *The Closing of the American Border* 104-06 (2008); Thomas R. Eldridge, et al., *9/11 and Terrorist Travel: A Staff Report of the National Commission on Terrorist Attacks Upon the United States* 151-54 (2004); Memorandum from Stuart Levey, Assoc. Deputy Att'y Gen., to Dan Levin, Counsel to the Att'y Gen., & David Ayres, Dep't of Justice Chief of Staff (Oct. 3, 2001).

[52] Jon Finer, *supra* note 13.

[53] *See supra* notes 15-17 and surrounding text.

[54] This is no less true of executive orders issued at the start of a new presidency. *See, e.g.,* Henry B. Hogue, Cong. Research Serv., *Presidential Transition Act: Provisions and Funding* (2016); William Glaberson & Helene Cooper, *Obama's Plan to Close Prison at Guantánamo May Take Year*, N.Y. Times (Jan. 12, 2009).

of no process underway before January 20, 2017 to change current immigration vetting procedures. According to extensive reporting, since that date, Respondents followed no such process.[55] Nor, apparently, did the White House consult officials from any of the seven agencies tasked with enforcing immigration laws, much less the congressional committees and subcommittees that oversee them. Respondents' repeated need to clarify confusion that ensued in the wake of the Order only confirms that the Order received little, if any, advance scrutiny by the Departments of State, Justice, Homeland Security or the intelligence community.[56]

As telling, this Order was apparently issued without interagency legal process. In recent history, administrations of both political parties have followed a protocol of submitting proposed Orders to the Attorney General, the Justice Department's Office of Legal Counsel ("OLC") and all other agency legal offices

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[55] The Secretary of Homeland Security reportedly received his first full briefing as the President signed the Order. Michael D. Shear & Ron Nixon, *How Trump's Rush to Enact an Immigration Ban Unleashed Global Chaos*, N.Y. Times (Jan. 29, 2017). The Secretary of Defense was neither consulted during the drafting of the order nor given an opportunity to provide input. Evan Perez et al., *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017). Most State Department officials reportedly first heard of the Order through the media. Jonathan Allen & Brendan O'Brien, *How Trump's Abrupt Immigration Ban Sowed Confusion at Airports, Agencies*, Reuters (Jan. 29, 2017).

[56] Customs and border officials reported that their superiors could not provide clear guidance about the new policy. Shear & Nixon, *supra* note 55; *see also* Allen & O'Brien, *supra* note 54 (quoting CBP chief of passenger operations at John F. Kennedy International Airport declaring, "[w]e are as much in the dark as everybody else.").

involved with enforcing the law.[57] Legal review by multiple agencies helps to identify potentially unforeseen legal implications of an order, determines the lawfulness of the proposed action, and analyzes whether the proposed language has established legal meaning that can be interpreted consistently with other laws and regulations governing the field. Here, the White House reportedly never asked the Department of Homeland Security for legal review in advance of the Order being promulgated, so "[t]he Department . . . was left making a legal analysis on the order after [President] Trump signed it."[58] Unsurprisingly, the resulting Order contains numerous ambiguities and inconsistencies that immediately caused confusion, forcing implementing agencies to improvise.[59]

On January 27, the Office of Legal Counsel issued a cursory memorandum that declared the Order "approved with respect to form and legality."[60] But the OLC memorandum conspicuously omits any legal analysis or discussion of either the Order's impact on permanent U.S. residents or the constitutional provisions plainly implicated, *i.e.*, the Due Process, Equal Protection, and Establishment and Free Exercise of Religion Clauses. Soon thereafter, the Acting Attorney General

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[57] *See, e.g.,* Exec. Order No. 11,030, 27 Fed. Reg. 5,847 (Jun. 19, 1962).
[58] Perez et al., *supra* note 54; Shear & Nixon, *supra* note 54.
[59] Allen & O'Brien, *supra* note 54.
[60] Memorandum from Curtis E. Gannon, Acting Assistant Att'y Gen. (Jan. 27, 2017).

concluded that the Department of Justice would not defend the Order because she was not "convinced that the Executive Order is lawful."[61]

The Department of Homeland Security initially construed the Executive Order not to apply to people with lawful permanent residence. Overnight, the White House overruled the Department and instructed the agency to allow lawful permanent residents entry only on a case-by-case basis. Five days later, the White House reversed itself and announced that the Order did not apply to either "green card holders"[62] or dual nationals.[63]

When courts in previous cases have deferred to the "considered judgment" of the President, they did so on the basis of administrative records showing that the President's decision rested on cleared views from expert agencies with broad experience on the matters presented to him. And as the Supreme Court has noted, "[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role."[64]

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[61] Memorandum from Sally Yates, Acting Att'y Gen., to the Dep't of Justice (Jan. 30, 2017).

[62] Memorandum from Donald F. McGahn II, Counsel to the President, to the Acting Sec'y of State, the Acting Att'y Gen., and the Sec'y of Homeland Sec. (Feb. 1, 2017).

[63] Geneva Sands et al., *Officials Aim to Clarify Impact on Dual Nationals From Trump's Immigration Executive Order*, ABC News (Feb. 1, 2017).

[64] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977).

CONCLUSION

Ours is a nation of immigrants, committed to the faith that we are all equal under the law and that we abhor discrimination, whether based on race, religion, sex, or national origin. As government officials, we sought diligently to protect our country, even while maintaining an immigration system free from intentional discrimination, a system that applies no religious tests and that measures individuals by their merits, not by stereotypes of countries or groups.

Unjustified blanket bans of certain countries or classes of people are beneath the dignity of the nation and Constitution that we took oaths to protect. Although our nation was founded by immigrants fleeing religious persecution, the Order discriminates based on religion. Although our Constitution enshrines the principle that all are equal under the law, the Order discriminates on the basis of national origin. And although the United States accepted over four million refugees in the decades after World War II,[65] the Order willfully ignores the greatest refugee crisis since that time.

Allowing the Order to take effect would wreak havoc on our nation's security and deeply held American values and threaten innocent lives. Blocking the Order while the underlying legal issues are being adjudicated would not

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[65] Carl J. Bon Tempo, *Americans at the Gate: The United States and Refugees during the Cold War* 1 (2008).

jeopardize national security. It would simply preserve the *status quo ante,* still subjecting individuals to all the rigorous legal vetting processes that are currently in place.

For all of these reasons, the January 27, 2017 Executive Order does not further—but instead harms—sound U.S. national security and foreign policy.

Respectfully Submitted,

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* We are grateful to Phil Spector, Danieli Evans, Clare Ryan, and the student members of the Yale Law School Rule of Law Clinic—Benjamin Alter, Colleen Culbertson, Idriss Fofana, Alexandra Mahler-Haug, Abigail Olson, Aisha Saad, Mitzi Steiner, Aleksandr Sverdlik, Beatrice Walton, Emily Wanger, Zoe Weinberg, Tianyi Xin, and Nathaniel Zelinsky—for their contributions to this submission. Yale Law School's Rule of Law Clinic is organized separately from the school's Jerome N. Frank Legal Services Organization ("LSO"), one of the counsel for Petitioners. The views expressed by Yale Law School's legal clinics are not necessarily those of the Yale Law School.

APPENDIX: LIST OF *AMICI*

1. Madeleine K. Albright served as Secretary of State from 1997 to 2001. A refugee and naturalized American citizen, she served as U.S. Permanent Representative to the United Nations from 1993 to 1997. She has also been a member of the Central Intelligence Agency External Advisory Board since 2009 and of the Defense Policy Board since 2011, in which capacities she has received assessments of threats facing the United States.

2. Jeremy Bash served as Chief of Staff at the U.S. Department of Defense from 2011 to 2013, and as Chief of Staff at the Central Intelligence Agency from 2009 to 2011.

3. Rand Beers served as Deputy Homeland Security Advisor to the President of the United States from 2014 to 2015.

4. Daniel Benjamin served as Ambassador-at-Large for Counterterrorism at the U.S. State Department from 2009 to 2012.

5. Antony Blinken served as Deputy Secretary of State from 2015 to January 20, 2017. He also served as Deputy National Security Advisor to the President of the United States from 2013 to 2015.

6. R. Nicholas Burns served as Under Secretary of State for Political Affairs from 2005 to 2008. He previously served as U.S. Ambassador to NATO and as U.S. Ambassador to Greece.

7. William J. Burns served as Deputy Secretary of State from 2011 to 2014. He previously served as Under Secretary of State for Political Affairs from 2008 to 2011, as U.S. Ambassador to Russia from 2005 to 2008, as Assistant Secretary of State for Near Eastern Affairs from 2001 to 2005, and as U.S. Ambassador to Jordan from 1998 to 2001.

8. James Clapper served as U.S. Director of National Intelligence from 2010 to January 20, 2017.

9. David S. Cohen served as Under Secretary of the Treasury for Terrorism and Financial Intelligence from 2011 to 2015 and as Deputy Director of the Central Intelligence Agency from 2015 to January 20, 2017.

10. Ryan Crocker served as U.S. Ambassador to Afghanistan from 2011 to 2012, U.S. Ambassador to Iraq from 2007 to 2009, U.S. Ambassador to Pakistan from 2004 to 2007, U.S. Ambassador to Syria from 1998 to 2001, U.S. Ambassador to Kuwait from 1994 to 1997, and U.S. Ambassador to Lebanon from 1990 to 1993.

11. Daniel Feldman served as U.S. Special Representative for Afghanistan and Pakistan from 2014 to 2015, Deputy U.S. Special Representative for Afghanistan and Pakistan from 2009 to 2014, and previously Director for Multilateral and Humanitarian Affairs at the National Security Council.

12. Jonathan Finer served as Chief of Staff to the Secretary of State from 2015 until January 20, 2017, and Director of the Policy Planning Staff at the U.S. State Department from 2016 until January 20, 2017.

13. Robert S. Ford served as U.S. Ambassador to Syria from 2011 to 2014, as Deputy Ambassador to Iraq from 2009 to 2010, and as U.S. Ambassador to Algeria from 2006 to 2008.

14. Michèle Flournoy served as Under Secretary of Defense for Policy from 2009 to 2013.

15. Avril D. Haines served as Deputy National Security Advisor to the President of the United States from 2015 to January 20, 2017. From 2013 to 2015, she served as Deputy Director of the Central Intelligence Agency.

16. General (ret.) Michael V. Hayden, USAF, served as Director of the Central Intelligence Agency from 2006 to 2009. From 1995 to 2005, he served as Director of the National Security Agency.

17. Christopher R. Hill served as Assistant Secretary of State for East Asian and Pacific Affairs from 2005 to 2009. He also served as U.S. Ambassador to Macedonia, Poland, the Republic of Korea, and Iraq.

18. John F. Kerry served as Secretary of State from 2013 to January 20, 2017.

19. Marcel Lettre served as Under Secretary of Defense for Intelligence from 2015 to 2017.

20. John E. McLaughlin served as Deputy Director of the Central Intelligence Agency from 2000 to 2004 and as Acting Director in 2004. His duties included briefing President-elect Bill Clinton and President George W. Bush.

21. Lisa O. Monaco served as Assistant to the President for Homeland Security and Counterterrorism and Deputy National Security Advisor from 2013 to January 20, 2017.

22. Michael J. Morell served as Acting Director of the Central Intelligence Agency in 2011 and from 2012 to 2013; as Deputy Director of the Central Intelligence Agency from 2010 to 2013; and as a career official from 1980 onward. His duties included briefing Presidents George W. Bush and Barack Obama.

23. Janet A. Napolitano served as Secretary of Homeland Security from 2009 to 2013.

24. James C. O'Brien served as Special Presidential Envoy for Hostage Affairs from 2015 to January 20, 2017. He served in the State Department from 1989 to 2001, including as Principal Deputy Director of Policy Planning and as Special Presidential Envoy for the Balkans.

25. Matthew G. Olsen served as Director of the National Counterterrorism Center from 2011 to 2014.

26. Leon E. Panetta served as Secretary of Defense from 2011 to 2013. From 2009 to 2011, he served as Director of the Central Intelligence Agency.

27. Samantha J. Power served as U.S. Permanent Representative to the United Nations from 2013 to January 20, 2017. From 2009 to 2013, she served as Senior Director for Multilateral and Human Rights on the National Security Council.

28. Susan E. Rice served as U.S. Permanent Representative to the United Nations from 2009 to 2013 and as National Security Advisor from 2013 to January 20, 2017.

29. Anne C. Richard served as Assistant Secretary of State for Population, Refugees and Migration from 2012 to January 20, 2017.

30. Eric P. Schwartz served as Assistant Secretary of State for Population, Refugees and Migration from 2009 to 2011. From 1993 to 2001, he was responsible for refugee and humanitarian issues on the National Security Council, ultimately serving as Special Assistant to the President for National Security Affairs and Senior Director for Multilateral and Humanitarian Affairs.

31. Wendy R. Sherman served as Under Secretary of State for Political Affairs from 2011 to 2015.

32. Vikram Singh served as Deputy Special Representative for Afghanistan and Pakistan from 2010 to 2011 and as Deputy Assistant Secretary of Defense for Southeast Asia from 2012 to 2014.

33. James B. Steinberg served as Deputy National Security Adviser from 1996 to 2000 and as Deputy Secretary of State from 2009 to 2011.

34. Jake Sullivan served as National Security Adviser to the Vice President from 2013 to 2014. From 2011 to 2013, he served as Director of the Policy Planning Staff at the U.S. State Department.

35. Samuel M. Witten served as Principal Deputy Assistant Secretary of State for Population, Refugees, and Migration from 2007 to 2010. From 2001 to 2007, he served as Deputy Legal Adviser at the State Department.

CERTIFICATE OF SERVICE

I, Jonathan Freiman, hereby certify that on February 16, 2017, the foregoing document was filed and served through the CM/ECF system. Parties may access the filings through the Court's CM/ECF System.

/s/ Jonathan Freiman
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Exhibit MM

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17-35105

STATE OF WASHINGTON, et al. Plaintiffs-Appellees, vs. DONALD J. TRUMP, President of the United States, et al., Defendants-Appellants.	**JOINT DECLARATION OF MADELEINE K. ALBRIGHT, AVRIL D. HAINES MICHAEL V. HAYDEN JOHN F. KERRY JOHN E. McLAUGHLIN LISA O. MONACO MICHAEL J. MORELL JANET A. NAPOLITANO LEON E. PANETTA SUSAN E. RICE**

We, Madeleine K. Albright, Avril D. Haines, Michael V. Hayden, John F. Kerry, John E. McLaughlin, Lisa O. Monaco, Michael J. Morell, Janet A. Napolitano, Leon E. Panetta, and Susan E. Rice declare as follows:

1. We are former national security, foreign policy, and intelligence officials in the United States Government:
   a. Madeleine K. Albright served as Secretary of State from 1997 to 2001. A refugee and naturalized American citizen, she served as U.S. Permanent Representative to the United Nations from 1993 to 1997 and has been a member of the Central Intelligence Agency External Advisory Board since 2009 and the Defense Policy Board since 2011, in which capacities she has received assessments of threats facing the United States.
   b. Avril D. Haines served as Deputy Director of the Central Intelligence Agency from 2013 to 2015, and as Deputy National Security Advisor from 2015 to January 20, 2017.
   c. Michael V. Hayden served as Director of the National Security Agency from 1999 to 2005, and Director of the Central Intelligence Agency from 2006 to 2009.
   d. John F. Kerry served as Secretary of State from 2013 to January 20, 2017.

e. John E. McLaughlin served as Deputy Director of the Central Intelligence Agency from 2000-2004 and Acting Director of CIA in 2004. His duties included briefing President-elect Bill Clinton and President George W. Bush.
f. Lisa O. Monaco served as Assistant to the President for Homeland Security and Counterterrorism and Deputy National Security Advisor from 2013 to January 20, 2017.
g. Michael J. Morell served as Acting Director of the Central Intelligence Agency in 2011 and from 2012 to 2013, Deputy Director from 2010 to 2013, and as a career official of the CIA from 1980. His duties included briefing President George W. Bush on September 11, 2001, and briefing President Barack Obama regarding the May 2011 raid on Osama bin Laden.
h. Janet A. Napolitano served as Secretary of Homeland Security from 2009 to 2013.
i. Leon E. Panetta served as Director of the Central Intelligence Agency from 2009-11 and as Secretary of Defense from 2011-13.
j. Susan E. Rice served as U.S. Permanent Representative to the United Nations from 2009-13 and as National Security Advisor from 2013 to January 20, 2017.

2. We have collectively devoted decades to combatting the various terrorist threats that the United States faces in a dynamic and dangerous world. We have all held the highest security clearances. A number of us have worked at senior levels in administrations of both political parties. Four of us (Haines, Kerry, Monaco and Rice) were current on active intelligence regarding all credible terrorist threat streams directed against the U.S. as recently as one week before the issuance of the Jan. 27, 2017 Executive Order on "Protecting the Nation from Foreign Terrorist Entry into the United States" ("Order").

3. We all agree that the United States faces real threats from terrorist networks and must take all prudent and effective steps to combat them, including the appropriate vetting of travelers to the United States. We all are nevertheless unaware of any specific threat that would justify the travel ban established by the Executive Order issued on January 27, 2017. We view the Order as one that ultimately undermines the national security of the United States, rather than making us safer. In our professional opinion, this Order cannot be justified on national security or foreign policy grounds. It does not perform its declared task of "protecting the nation from foreign terrorist entry into the United States." To the contrary, the Order disrupts thousands of lives, including those of refugees and visa holders all previously vetted by standing procedures that the Administration has not shown to be inadequate. It could do long-term damage to our national security and foreign policy interests, endangering U.S. troops in the field and disrupting counterterrorism and national security partnerships. It will aid ISIL's propaganda effort and serve its recruitment message by feeding into the narrative that the United States is at war with Islam. It will hinder relationships with the very communities that law enforcement professionals need to address the threat. It will have a damaging humanitarian and economic impact on the lives and jobs of American citizens and residents. And apart from all of these concerns, the Order offends our nation's laws and values.

4. There is no national security purpose for a total bar on entry for aliens from the seven named countries. Since September 11, 2001, not a single terrorist attack in the United States has been perpetrated by aliens from the countries named in the Order. Very few attacks on U.S. soil since September 11, 2001 have been traced to foreign nationals at all. The overwhelming majority of attacks have been committed by U.S. citizens. The Administration has identified no information or basis for believing there is now a heightened or particularized future threat from the seven named countries. Nor is there any rational basis for exempting from the ban particular religious minorities (e.g., Christians), suggesting that the real target of the ban remains one religious group (Muslims). In short, the Administration offers no reason why it abruptly shifted to group-based bans when we have a tested individualized vetting system developed and implemented by national security professionals across the government to guard the homeland, which is continually re-evaluated to ensure that it is effective.

5. In our professional opinion, the Order will harm the interests of the United States in many respects:

a. The Order will endanger U.S. troops in the field. Every day, American soldiers work and fight alongside allies in some of the named countries who put their lives on the line to protect Americans. For example, allies who would be barred by the Order work alongside our men and women in Iraq fighting against ISIL. To the extent that the Order bans travel by individuals cooperating against ISIL, we risk placing our military efforts at risk by sending an insulting message to those citizens and all Muslims.
b. The Order will disrupt key counterterrorism, foreign policy, and national security partnerships that are critical to our obtaining the necessary information sharing and collaboration in intelligence, law enforcement, military, and diplomatic channels to address the threat posed by terrorist groups such as ISIL. The international criticism of the Order has been intense, and it has alienated U.S. allies. It will strain our relationships with partner countries in Europe and the Middle East, on whom we rely for vital counterterrorism cooperation, undermining years of effort to bring them closer. By alienating these partners, we could lose access to the intelligence and resources necessary to fight the root causes of terror or disrupt attacks launched from abroad, before an attack occurs within our borders.
c. The Order will endanger intelligence sources in the field. For current information, our intelligence officers may rely on human sources in some of the countries listed. The Order breaches faith with those very sources, who have risked much or all to keep Americans safe – and whom our officers had promised always to protect with the full might of our government and our people.
d. Left in place, the Executive Order will likely feed the recruitment narrative of ISIL and other extremists that portray the United States as at war with Islam. As government officials, we took every step we could to counter violent extremism. Because of the Order's disparate impact against Muslim travelers and immigrants, it feeds ISIL's narrative and sends the wrong message to the Muslim community here at home and all over the world: that

the U.S. government is at war with them based on their religion. The Order may even endanger Christian communities, by handing ISIL a recruiting tool and propaganda victory that spreads their message that the United States is engaged in a religious war.

e. The Order will disrupt ongoing law enforcement efforts. By alienating Muslim-American communities in the United States, it will harm our efforts to enlist their aid in identifying radicalized individuals who might launch attacks of the kind recently seen in San Bernardino and Orlando.

f. The Order will have a devastating humanitarian impact. When the Order issued, those disrupted included women and children who had been victimized by actual terrorists. Tens of thousands of travelers today face deep uncertainty about whether they may travel to or from the United States: for medical treatment, study or scholarly exchange, funerals or other pressing family reasons. While the Order allows for the Secretaries of State and Homeland Security to agree to admit travelers from these countries on a case-by-case basis, in our experience it would be unrealistic for these overburdened agencies to apply such procedures to every one of the thousands of affected individuals with urgent and compelling needs to travel.

g. The Order will cause economic damage to American citizens and residents. The Order will affect many foreign travelers, particularly students, who annually inject hundreds of billions into the U.S. economy, supporting well over a million U.S. jobs. Since the Order issued, affected companies have noted its adverse impacts on many strategic economic sectors, including defense, technology, medicine, culture and others.

6. As a national security measure, the Order is unnecessary. National security-based immigration restrictions have consistently been tailored to respond to: (1) specific, credible threats based on individualized information, (2) the best available intelligence and (3) thorough interagency legal and policy review. This Order rests not on such tailored grounds, but rather, on (1) general bans (2) not supported by any new intelligence that the Administration has claimed, or of which we are aware, and (3) not vetted through careful interagency legal and policy review. Since the 9/11 attacks, the United States has developed a rigorous system of security vetting, leveraging the full capabilities of the law enforcement and intelligence communities. This vetting is applied to travelers not once, but multiple times. Refugees receive the most thorough vetting of any traveler to the United States, taking on the average more than a year. Successive administrations have continually worked to improve this vetting through robust information-sharing and data integration to identify potential terrorists without resorting to a blanket ban on all aliens and refugees. Because various threat streams are constantly mutating, as government officials, we sought continually to improve that vetting, as was done in response to particular threats identified by U.S. intelligence in 2011 and 2015. Placing additional restrictions on individuals from certain countries in the visa waiver program –as has been done on occasion in the past – merely allows for more individualized vettings before individuals with particular passports are permitted to travel to the United States.

7. In our professional opinion, the Order was ill-conceived, poorly implemented and ill-explained. The "considered judgment" of the President in the prior cases where courts have

deferred was based upon administrative records showing that the President's decision rested on cleared views from expert agencies with broad experience on the matters presented to him. Here, there is little evidence that the Order underwent a thorough interagency legal and policy processes designed to address current terrorist threats, which would ordinarily include a review by the career professionals charged with implementing and carrying out the Order, an interagency legal review, and a careful policy analysis by Deputies and Principals (at the cabinet level) before policy recommendations are submitted to the President. We know of no interagency process underway before January 20, 2017 to change current vetting procedures, and the repeated need for the Administration to clarify confusion after the Order issued suggest that that Order received little, if any advance scrutiny by the Departments of State, Justice, Homeland Security or the Intelligence Community. Nor have we seen any evidence that the Order resulted from experienced intelligence and security professionals recommending changes in response to identified threats.

8. The Order is of unprecedented scope. 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. In adopting this Order, the Administration alleges no specific derogatory factual information about any particular recipient of a visa or green card or any vetting step omitted by current procedures.

9. Maintaining the district court's temporary restraining order while the underlying legal issues are being adjudicated would not jeopardize national security. It would simply preserve the status quo ante, still requiring that individuals be subjected to all the rigorous legal vetting processes that are currently in place. Reinstating the Executive Order would wreak havoc on innocent lives and deeply held American values. Ours is a nation of immigrants, committed to the faith that we are all equal under the law and abhor discrimination, whether based on race, religion, sex, or national origin. As government officials, we sought diligently to protect our country, even while maintaining an immigration system free from intentional discrimination, that applies no religious tests, and that measures individuals by their merits, not stereotypes of their countries or groups. Blanket bans of certain countries or classes of people are beneath the dignity of the nation and Constitution that we each took oaths to protect. Rebranding a proposal first advertised as a "Muslim Ban" as "Protecting the Nation from Foreign Terrorist Entry into the United States" does not disguise the Order's discriminatory intent, or make it necessary, effective, or faithful to America's Constitution, laws, or values.

10. For all of the foregoing reasons, in our professional opinion, the January 27 Executive Order does not further – but instead harms – sound U.S. national security and foreign policy.

Respectfully submitted,

s/MADELEINE K. ALBRIGHT*
s/AVRIL D. HAINES
s/MICHAEL V. HAYDEN
s/JOHN F. KERRY
s/JOHN E. McLAUGHLIN
s/LISA O. MONACO
s/MICHAEL J. MORELL
s/JANET A. NAPOLITANO
s/LEON E. PANETTA
s/SUSAN E. RICE

*All original signatures are on file with Harold Hongju Koh, Rule of Law Clinic, Yale Law School, New Haven, CT. 06520-8215 203-432-4932

We declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. [Individual signature pages follow]

EXECUTED this 5th day of February, 2017

Madeleine Albright

MADELEINE K. ALBRIGHT

EXECUTED this 5th day of February, 2017

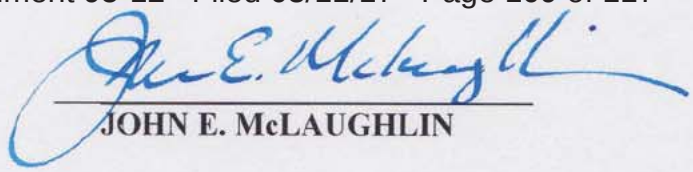
AVRIL D. HAINES

EXECUTED this 5th day of February, 2017

MICHAEL V. HAYDEN

EXECUTED this 5th day of February, 2017

JOHN F. KERRY



JOHN E. McLAUGHLIN

EXECUTED this 5th day of February, 2017

Lisa Monaco

LISA O. MONACO

EXECUTED this 5th day of February, 2017

MICHAEL J. MORRELL

MORELL

EXECUTED this 5th day of February, 2017

/s/
JANET A. NAPOLITANO

EXECUTED this 5th day of February, 2017

LEON E. PANETTA

EXECUTED this 5th day of February, 2017

/s/
SUSAN E. RICE

Exhibit NN

TRUMP'S EXECUTIVE ORDER MANDATES GOVERNMENT REPORTS ON HONOR KILLINGS COMMITTED BY MIGRANTS

6922 42

Arif Ali/AFP/Getty Images

by KATIE MCHUGH 6 Mar 2017 4,465

President Donald Trump's executive order halting the importation of refugees from six terror-exporting countries also includes a section requiring the government to publicly release information on crimes committed by foreign nationals, including honor killings of women.

This lets the government "be more transparent with the American people and to implement more effectively policies and practices that serve the national interest," the order states. Department of Homeland Security Secretary John Kelly and U.S. Attorney General Jeff Sessions must work together to provide the public with a report on foreign nationals charged with and convicted of terrorism-related offenses, including those who associate with or provide support to terrorist organizations.

The order also instructs the government to release information on honor-killings. The government will now track cases involving foreign-born individuals who commit "gender-based violence against women," or honor killings. Honor killings are a brutal practice wherein Muslim males will murder or mutilate female family members accused of bringing shame and dishonor to their families and Islam. Like female genital mutilation, it is a practice that would not exist in the U.S. without mass immigration bringing its practitioners into U.S. communities.

"Cases of honor killings and/or violence in the U.S. are often unreported because of the shame it can cause to the victim and the victim's family. Also, because victims are often young women, they may feel that reporting the crime to authorities will draw too much attention to the family committing the crime," former U.S. government analyst Farhana Qazi explained to Fox News in November 2015.

The order requires the government to release its inaugural report by September 2017, close to the sixteenth anniversary of the 9/11 terror attacks committed by Islamic foreign nationals admitted to the U.S. on various visas. Reports shall be issued every six months from then on.

The transparency will likely increase the broad support Trump's immigration policies enjoy. Typically, the government conceals or refuses to collect immigration-related statistics that reveal troubling consequences of mass immigration policies. A Feb. 8 Morning Consult poll found 55 percent of voters supported Trump's executive order, including 82 percent of Republicans. Another McLaughlin & Associates poll release Feb. 8 found 57 percent support for a halt of refugee settlement to implement better screening procedures. A Rasmussen Reports poll released on Feb. 2 found 52 percent of voters favored a freeze on all refugee resettlement until the government could better screen out terrorists, including 57 percent of young voters.

A 2015 report detailing honor killings can be read here.

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Big Government, Immigration, Donald Trump, Executive Order, Honor Killing, Islam, Muslim immigration, refugee resettlement

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MARYLAND

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, et al., Plaintiffs, vs. DONALD J. TRUMP, et al., Defendants.	CASE NO. 8:17-cv-00361-TDC

TRANSCRIPT OF PROCEEDINGS
HEARING FOR TEMPORARY RESTRAINING ORDER
BEFORE THE HONORABLE THEODORE D. CHUANG
WEDNESDAY, MARCH 15, 2017; 9:40 A.M.
GREENBELT, MARYLAND

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P R O C E E D I N G S

THE COURTROOM DEPUTY: The matter now pending before this Court is Civil Number TDC-17-0361, International Refugee Assistance Project, et al., versus Donald J. Trump, et al. We're here for the purpose of a temporary restraining order hearing.

Counsel, please identify yourselves for the record.

MR. JADWAT: Omar Jadwat, Your Honor, from the ACLU, for plaintiffs.

MR. COX: Justin Cox, from the National Immigration Law Center, for plaintiffs.

MS. TUMLIN: Good morning Your Honor. Karen Tumlin, National Immigration Law Center, for plaintiffs.

MR. MACH: Good morning. Daniel Mach, from the ACLU, for plaintiffs.

MR. GELERNT: Good morning, Your Honor. Lee Gelernt from the ACLU, for plaintiffs.

MS. SUNG: Good morning, Your Honor, Esther Sung, with the National Immigration Law Center, for the plaintiffs.

MR. ROCAH: Good morning, Your Honor. David Rocah, ACLU of Maryland, for plaintiffs.

THE COURT: Good morning to you all.

MR. WALL: Good morning, Your Honor. Jeffrey Wall for the United States.

MR. KNEEDLER: Good morning, Your Honor. Edwin

Kneedler, from the Department of Justice, for the United States.

MR. GARG: Good morning, Your Honor. Arjun Garg, from the Department of Justice, for the defendants.

MR. SCHWEI: Good morning. Daniel Schwei, from the Defendant of Justice, for the defendants.

THE COURT: Good morning to everyone. I know there's other counsel in the audience and others as well.

We're here on the motion for a temporary restraining order and a preliminary injunction filed by the various plaintiffs. I think the procedure I had suggested was 30 minutes for each side. I understand the plaintiff would like to reserve five minutes for rebuttal. And to the extent that I feel the need to go beyond that, we'll make sure each side gets equal time.

So we'll hear first from the plaintiffs. I understand it's Mr. Jadwat?

ARGUMENT BY MR. JADWAT FOR PLAINTIFFS

MR. JADWAT: Yes, Your Honor. Thank you. And we are dividing the argument to the extent that Mr. Cox will handle questions regarding standing harms and the 50,000 refugee limit, the Section 5(d) PI, which is also pending.

THE COURT: Okay.

MR. JADWAT: So on our constitutional claims, Your Honor, this Court can begin and end with *Lemon* and *McCreary*

and, specifically, the purpose prong of *Lemon.*

Is the primary purpose of this Executive Order to disfavor Muslims? The Government never disputes that if you take all of the publicly available evidence together, that it shows that purpose. Instead, it's asking the Court to turn a blind eye to much of the evidence which is apparent to everybody, and that's exactly what *McCreary* tells us not to do.

THE COURT: So is there a limit to what the Court can consider? The Government identifies what they think is a limit. You disagree with that. But is there some limit?

MR. JADWAT: Sure. The limit is what a reasonable observer would find relevant or probative on the question of what the Government's objective and purpose is. I think that's the real teaching both of *McCreary* and of other cases in the Supreme Court's religious jurisprudence.

If you look at, for example, *Lakumi*, the Court considered there reactions of audience members during a hearing regarding the bill in question.

If you look at *McCreary* itself, the Court considered the speech given by a pastor, who was not a government official, at the unveiling of the Ten Commandments display.

The real, I think, thrust of what the Courts have said is that it's a question of what a reasonable person would understand, and that it doesn't make sense to blind the Court, just as it doesn't make sense to presume that a reasonable

person in the public would be blinded to information that's readily available and is reliable.

Again, there's no question here that the President made the statements that he made, that his spokespeople made the statements they made, or that they were true.

So again, it would be unnatural and not in keeping with the inquiry, that the Court is supposed to conduct under the establishment clause, to cast that aside.

THE COURT: So let's assume that I consider all those statements. The Government, in the Second Executive Order, has provided a national security rationale for the order. Generally, the Courts defer, at least to some degree, on national security issues to the Government.

Do I need to conclude that the Government's purpose in the national security -- the national security purpose is a sham and is false in order to rule in your favor?

MR. JADWAT: I think you need to conclude that the original purpose of the order -- the original purpose of the original order continues through to the second order, and that's what the Government itself has told us. What's what the senior White House official said, that it was aimed to achieve the same effect, with a few tweaks to deal with what the courts have said.

THE COURT: But the Government, in the Executive Order, says that a purpose of the Executive Order is the need

to protect the public. On what basis can I just completely overrule that?

MR. JADWAT: Well, I don't think you need to overrule it. I think you need to think about it in the same context that the Court thought about the effort in *McCreary* to back fill what it had already done by adding, in that case, additional features to the display and also additional statements about purpose. Those didn't dilute sufficiently and didn't divorce the third display at issue in that case from the first and second displays at issue in that case, just as the addition of some national security language to this order doesn't divorce it from the first order and the purpose behind the first order.

In addition, I think it's important to note that the Government's invocation of these national security concerns ignores the Government's own specific report on the question of whether a seven-country ban or a six-country ban would serve a national security purpose.

THE COURT: You're talking about the DHS INA report?

MR. JADWAT: That's right, and the other DHS report, both of which were clearly prepared for the purpose of examining whether this approach made sense. Instead, they rely on previously compiled information from the State Department about things that might lead to an idea that there was some increased terrorism risk in these six countries.

But as the Interfaith brief, amicus brief points out, even if you take the order on its own terms, that is a faulty application of the methodology they claim to be using, because there are at least two non-Muslim countries that present greater concerns on the criteria that they outline --

THE COURT: Which countries are those?

MR. JADWAT: Venezuela and the Philippines, I believe.

THE COURT: I'm sorry, the Philippines and where?

MR. JADWAT: Venezuela. I mean, if you go to the questions of are they terrorist-safe havens, are there issues --

THE COURT: Where is that in the record?

MR. JADWAT: It's in the amicus brief of the Interfaith organizations. They did an analysis of all of the reports -- or all of the statements in those reports. Again, also, the amicus brief of the national security officials --

THE COURT: So where would the limit be? Because suppose the administration or executive branch determines that there is a need to do more or even to restrict travel from any particular country for reasons completely unrelated to the President's statements, how could they ever do that without you coming back with the exact same argument? Where would the alleged taint from these statements end? Is it a matter of time, or is it a matter of something else?

MR. JADWAT: I think time would matter. The actual nature of the order would matter.

THE COURT: But national security issues may not wait for time. There could be some event that requires an action tomorrow, and you would say because he made these statements a month and a half ago, they can't do anything?

MR. JADWAT: In that event, there would actually be something to point to that would explain why they needed this order now.

And that's, again, what *McCreary* says. They addressed this concern that you've kind of tied the hands of the Government going forward. They said no, you know, a reasonable person will make a reasonable judgment, right? This reasonable observer is able to take into account what's changed, what's different, both in the order itself or the law itself and in the conditions on the ground. That's all that we would be asking.

What's absolutely clear is that we're on the other side of that spectrum right now --

THE COURT: Well, what I'm just trying to understand then is, since they have offered some additional information, are you saying that I need to find that's offered in bad faith?

MR. JADWAT: I think you need to evaluate the information, right, and see whether it negates what, again, is an undisputed -- what they do not dispute is clear evidence of

an improper purpose.

And I think the fact that these national security justifications that they've offered in the new order, one, are kind of trying to backfill an order that's the same in structure and the same in effect as the original order. The fact that the statements themselves, again, if you actually take a look at them and see whether they make sense, they fail on their own terms and --

THE COURT: Well, give me a scenario where either what they say in the order or what happens on the ground or what analysis is provided, where you would acknowledge that an action is not the result of the President's prior statements but is based on a judgment by the national security officials now.

MR. JADWAT: Sure. If there was a credible threat of a specific -- I'm not saying this is the only scenario; I'm just trying to think of one -- a credible threat of a specific attack that they knew was associated -- that they had some reason to think was coming from a particular group of people in a particular country that was Muslim or even from an organization that was, you know, an Islamic terrorist organization in a particular country, and the best way to account for that threat was to impose some sort of travel restriction, I don't think we would say that that's necessarily following through on this improper purpose.

But that's not what we have here. What we have here is the President saying, before he was elected, that he was going to go forward with a plan to ban Muslims. He gets elected. A week later he introduces a plan to ban Muslims. Imperfectly. Not every Muslim, but to ban Muslims. And then when faced -- only when faced with resistance from the Court, goes back and reengineers it -- again, in his own words -- to accommodate the Court's ruling, not to go back and figure out what's the best thing from a national security perspective, and to try to move forward with the same plan.

So there's really no -- again, it would be not reasonable. It wouldn't make sense for a reasonable observer to look at this new order as having been born afresh, without any of the history being taken into account.

THE COURT: So are you arguing that the refugee provisions are impacted by these alleged statements regarding the Muslim ban? Because your brief and your argument seems to focus primarily on the ban of travel from citizens of the six countries.

MR. JADWAT: Well, I think it's clear from the way that this order is put together that the Government -- or that President Trump, when he created this, thought of it as one coherent system, right, and that I think the purpose --

THE COURT: Where in the record is that? You've identified statements in which the President referenced the

concept of identifying dangerous territories and barring travel from there. I did not see references to the President referring to the idea that banning refugees would be a way to effectuate a Muslim ban.

MR. JADWAT: Well, there are actually a lot of statements, some of which are -- I think it's footnote 12 of our reply -- are, again, the President's own statements conflating refugees with Muslims and making very clear that, in his mind, the danger of Muslims and the danger of refugees is all one combined danger, and I think that's why you do see this refugee ban as part of the Muslim ban.

And in addition, if you look at the effect of the ban, again, as President Trump pointed out, the people that were actually banned -- or unbanned when the court orders went into effect, 70-plus percent of the people who came in in the ensuing weeks were from the seven banned countries, those people who came in as refugees. There were some special circumstances, perhaps, that explain that, but our understanding is that over 50 percent of the refugees who typically enter the United States are, in fact, Muslim. And so there's a factual -- which, of course, is very disproportionate to their actual population in the world. So if you were trying to ban Muslims from the United States, banning refugees one good way to do it.

THE COURT: What's the most compelling statement in

the record that the President or one of his agents indicated that banning refugees was a proxy for banning Muslims?

MR. JADWAT: I just want to flag, Your Honor, that I'm about halfway through our time.

If you could give us a moment, maybe I'll have the specific statement for you in a moment. But I think, again, if you look at the whole Twitter compilation, which we provide in that footnote, of the statements of the President regarding refugees, that that conflation is very clear.

THE COURT: Okay. Let me ask you some questions about the INA issue, Section 202 of the INA.

MR. JADWAT: Sure.

THE COURT: So the statute refers to visa issuance or immigrant visa issuance. The Executive Order refers to entry, as does 212(f). Isn't there a difference between those two terms? And why doesn't that make a difference in this case?

MR. JADWAT: Well, there is a difference between those two terms. And in fact, it is significant in this case, but it significantly supports our contention that Section 202 is at issue here and does prevent exactly what they're doing, because even though the order talks about entry, they're not barring the entry of people with visas anymore. They're not barring the entry of people with green cards. They're only effectuating this ban by barring the issuance of new visas to people from these countries.

THE COURT: So the Executive Order does not say they're barring the issuance of visas. I think your argument, as a practical matter, that's what happening?

MR. JADWAT: I think --

THE COURT: Is there some action by the Secretary of State that indicates that visas are now not being issued or not being processed as a result of the Executive Order?

MR. JADWAT: That's right. And actually, I believe it was the Government's contention that we wouldn't know whether our clients were actually banned until they had had both a decision on their visa application and a decision on the waiver, which they say is part of the visa application process. So I don't think there's actually any dispute between the parties -- although I'm sure they'll tell you if I'm wrong -- that the way this ban operates is by freezing the issuance of visas.

THE COURT: Right, but what action has been taken in that regard? Is there some action by the Secretary of State saying no further visas will issue to people from these countries or something to that effect?

MR. JADWAT: Like how do they implement it, is that --

THE COURT: The President's Executive Order, as I read it, does not say you cannot issue a visa. It says you cannot allow entry, which is a different question. So where is

the action saying no visas will be issued?

MR. JADWAT: I think it's the clear implication of the order, and I think it's also what they plan to do --

THE COURT: Well, do you have any facts in the record that indicate that that is actually what has happened? The Government said that visas will be processed to the point of looking at waivers, but is there some contrary fact stating that they're actually -- they've shut the door at the visa office in these various countries or they've done something different, like the embassy?

MR. JADWAT: But even if they process them to the point of deciding on a waiver, what they are not saying, I think very clearly, is that they're going to issue visas to applicants from these countries absent a waiver.

Again, I'm sure that they're probably in a better position to clarify this than I am, but I really don't think there's any question of fact about whether visa issuance is going to happen if this order goes into effect except -- again, except for people who are --

THE COURT: So what would be the order you would be looking for in this area? Because INA Section 202 talks about visa issuance and perhaps -- assuming you're entitled to some conclusion that they can't prevent the issuance of visas, what would you be asking an order to say?

MR. JADWAT: Well, if it was just the Section 202 --

THE COURT: Just on that, yes.

MR. JADWAT: Just a pure Section 202 order I think would say that they could not not -- refusing to issue visas or -- implementing the terms of the order that would require them to deny visas to applicants from these countries would be enjoined.

THE COURT: But there's nothing in the order that says you can't issue a visa, as far as I can see.

MR. JADWAT: Again, I --

THE COURT: Would it be enjoining the terms of the Executive Order or enjoining the terms of some other document issued by the Secretary of State or someone else?

MR. JADWAT: It would be at least enjoining the effect of the Executive Order as to visa issuance. And I think more to the point, the question is not just whether Section 202 specifically prohibits the actions they're taking here, but also whether Section 212 authorizes what they're doing here.

Again, I think section --

THE COURT: Are you aware of any cases where a court has found that a president has overreached on a 212(f) action?

MR. JADWAT: No, but I'm also --

THE COURT: -- for whatever reason?

MR. JADWAT: There's also no 212(f) proclamation that compares to this, either in its scope or in its discriminatory nature. So I don't think that the lack of -- just in the same

way that there's not another case involving establishment clause violations with respect to the immigration laws is not, I think, a knock on our case. I think it demonstrates just how unusual and extreme what the administration is doing here.

THE COURT: So even if there was some order barring anybody from blocking the issuance of visas, is there any basis to order that the Government cannot bar entry when they present at the border? Isn't that a different situation?

MR. JADWAT: Right. Well, I mean, I do think that the -- so I think the 202's effect doesn't stop at the point of visa issuance, in the sense that Section 212 has to be read against both Section 202, against the other provisions for issuance of visas, and against the inadmissibility grounds that are specified in the statute, and, of course, against RIFRA and the Constitution. I think all of those things limit the ability of the Government to use 212(f) -- like, statutorily limit the ability of the Government to use 212(f) in the manner that it was trying to do in the first order, to actually bar people at the gate. And so I think that --

THE COURT: Would you agree that entry and admission are the same thing, or does entry mean something different than admission as defined in the INA?

MR. JADWAT: I think there's some distinctions between them. I don't think they're necessarily relevant here.

I just wanted to flag, Your Honor, I see we're down to

five minutes and --

THE COURT: I'll probably extend a little bit and give some time to your colleague.

MR. JADWAT: Okay.

THE COURT: Let me just see if I have another question on that topic.

I did want to ask, the Government makes the argument that under section B, that is 1152(a)(1)(B), that some of the actions that might be taken fall within that provision, in that they are not outright stopping visa issuances forever; they're just modifying the procedures. What's your response to that?

MR. JADWAT: I'd make two points, Your Honor. First, it's not clear that they're not stopping them forever. They're stopping them, initially, for 90 days. There's a provision to extend the ban indefinitely or until such time as the agency decides that the ban should be lifted. And so that's just, I think, a background point, but that's relevant.

And I don't think that a suspension of issuance is really the sort of procedural thing that's encompassed in (B). I think the ordinary way that you would understand procedures around issuance would be things like, you know, literally, what's the procedure. Who in the State Department has to make what decision? How are those things related to each other? But I don't think that they -- especially given the meat of 202, like that the provisions part allows for a suspension.

THE COURT: Are there any cases that set an outer limit on what could be defined as an activity under section (B) that doesn't implicate section (a)?

MR. JADWAT: I'm not aware of any, but I'd be happy to very quickly research that at the end of the hearing.

THE COURT: Okay. So why don't we stop for now. Let's move on to Mr. Cox, and we'll plan to make it about ten minutes and still allowing you to keep the extra rebuttal time. And then we'll give the Government equal time.

ARGUMENT BY MR. COX FOR PLAINTIFFS

MR. COX: Thank you, Your Honor. Justin Cox, from the National Immigration Law Center, for plaintiffs.

As Your Honor is obviously aware, this Executive Order goes into effect at 12:01 in the morning tomorrow. The Executive Order, as we've tried to explain in our briefing, threatens to inflict a variety of injuries on our plaintiffs, which, collectively, have standing on a variety of different types of standing --

THE COURT: Can you explain or identify for me which of the individual or organizational plaintiffs is your best case for standing on each of the claims? So establishment clause, INA Section 202 and the Refugee Act.

MR. COX: Sure. I think the establishment clause claim, there are -- and for that matter, the equal protection claim, virtually all of our plaintiffs have standing in one

form or another. So IRAP, for example, has third party standing to represent the interests of its clients, including those in the United States --

THE COURT: Well, as I understand it, just to proceed with this case or to get to the merits, I only need to find one plaintiff. But which is the one that's your most compelling case, the easiest one to find standing from, from your perspective for each of these?

MR. COX: Sure. That would probably be one of the individual plaintiffs who is here. So, for example, John Doe Number 1, at page 45 of the joint record, his declaration talks about how the anti-Muslim views driving the Executive Order have inflicted an injury on him, this condemnation of his religion.

The same is true of John Doe Number 3, paragraph 12 of his declaration.

Mr. Meteab, paragraph 14, joint record 53.

All of these individuals have expressed that they feel that their religion has been condemned by this Executive Order.

But beyond that, of course, it's not just a psychological injury in these cases. These individuals have -- in addition to suffering the condemnation injury, have -- and will be if the Executive Order goes into effect -- will be separated from their families, that delay that's already significant --

THE COURT: What about on the INA claim, what's your

best case for a plaintiff who has standing?

MR. COX: On the INA claim, Your Honor, I believe that we -- so the organizational plaintiffs would certainly. So IRAP's clients' third-party standing would have standing there because several of their clients get visas -- or would get visas. They have I-130 petitions pending --

THE COURT: The theory on that is a U.S. resident having standing based on the fact they have a family member who wants to come over?

MR. COX: Yes, Your Honor. If you want --

THE COURT: And does it have to be someone in that case who is looking for an immigrant visa as opposed to coming in as a refugee?

MR. COX: I'm not sure that it matters doctrinally, but they have both. IRAP and HIAS have clients who have a variety of immigration relief available to them.

If you want an individual, Mr. Harrison, the United States citizen who is in Texas. His same-sex partner is in Iran and is petitioning for -- he's petitioning for a K-1 visa on behalf of his partner who is in dire risk -- he's at constant risk of harassment and not just persecution but prosecution in Iran, where homosexuality is a crime. So he would clearly have standing with regards to that claim.

On the equal protection claim, I think virtually all -- the equal protection injury is the deprivation, the denial of

equal treatment. So of course, that is --

THE COURT: For the applicant or for the sponsor in the United States?

MR. COX: The sponsor in the United States would certainly have standing to assert that because their petition is being treated differently because of the relative for whom they are petitioning is in one of these particular countries.

THE COURT: What about Refugee Act?

MR. COX: The Refugee Act, we would have -- Jane Doe Number 2 would certainly have standing there because, as we explained in the briefing, her family is in Saudi Arabia, on the border. They're filing a -- she has an I-130 petition pending, but through the Direct Access Program, certain -- after that I-130 petition is approved. It gets converted into a refugee claim, which cuts the wait time, in order for her sister's family to come in, from approximately 13 years to more like 18 to 24 months.

THE COURT: Let me ask you about the Refugee Act then. So the Government's identified some potential issues with some threshold issues. One question is whether the APA applies here, and what's not clear to me is what exactly is the final agency action that you're challenging? Can you tell me what that is?

MR. COX: So I think there a variety of actions that we've identified in the complaint as being final agency action

in this regard. So the Department of State has suspended new security checks, for example, for the processing of refugees --

THE COURT: Are there documents that effectuate these decisions, like a memo or directive or something?

MR. COX: There are e-mails, for example, that go out. So, for example, on Monday, March 13th, a Department of State official e-mailed to advise that, quote, there should be no travel booked after March 30th of refugees.

THE COURT: So does that count as a final agency action? Do you have any authority for that?

MR. COX: Well, as we cited in our reply memorandum, a press release can be a final agency action or it can reflect final agency action. And if a press release can, then it certainly seems that a directive from the Department of State to the resettlement agencies, who have this statutorily codified rule in the refugee resettlement process in which they're advised, for example, that the previous representations made by the Department of State about how many refugees each resettlement agency will be resettling in a particular year, has been recalculated to reflect the new lowered admissions level. That certainly seems like final agency actions. Legal consequences certainly flow from that, and the agency's decision-making process is final as of that point. I mean, there's nothing more to be done.

THE COURT: So even if you get to the merits of that,

and then, even if I were to find that the action was in conflict with the statute, what exactly is the relief that you would be seeking?

I get the impression you would like me to order that the President admit 110,000 this year, but I'm not sure how we would do that. So what actually are you looking for?

MR. COX: Well, Your Honor, in this case, an injunction of Section 5(d), of the current Executive Order, and Section 6(d), of the one tomorrow, should give our clients full relief. Prior to the Executive Orders, as the record is undisputed on this point, the United States was on target to hit this cap of 110,000 refugees. The only thing that is standing between us right now and that point was the Executive Order. That's the only thing that's changed.

THE COURT: So even if one were to enjoin that section, what would prevent the Executive Branch from slowing down the processing to the point that they don't actually process 110,000 this year? Just as a matter of process or procedure, why couldn't they just do that?

MR. COX: Well, I think as a practical matter, the Executive Orders have been so disruptive at this point that it is perhaps unlikely to hit the 110,000 mark that we were previously on track to hit. Nonetheless, there's no reason that tens of thousands of individuals, who should have been resettled in this country this fiscal year, wouldn't be

resettled. If the Executive Branch attempts to circumvent this Court's order, I think that that would be a different question. But we have no reason to believe -- there's no practical consideration that we're aware of --

THE COURT: Well, would it be a circumvention of the order if -- I mean, all that happened in that section was the President set a 50,000 person maximum. So it didn't require any change in processes or procedures; that's not in the order.

So what exactly would be the effect of enjoining that section, in terms of the President's ability to increase or decrease the specific number that end up getting admitted that year, so long as he doesn't change the statutory maximum?

MR. COX: Well, Your Honor, I think as a practical matter in this case, the fact is that the PRM, population refugee and migration, has indicated that they're limiting the number of individuals who can travel in any particular week because of the lowered ceiling, for example. That's undisputed in the record. They've stopped refugee processing. They're not processing applications, and it's all because of the lowered ceiling. There's no fact question on that.

So as a practical matter, it seems to us undisputed that this is going to have real real-world consequences for our clients and their clients as well, because but for the Executive Order, there was every expectation -- and in fact, many of them are already booked for travel --

THE COURT: So I guess the question is if I enjoin that section and say, effectively, that this change in the cap is invalid, and the Executive Branch continues to do what it's doing, have they violated the order, or have they simply processed refugees at a particular pace and not changed the maximum of 110,000?

MR. COX: I think that would be a question of fact, Your Honor. I think that as a practical matter, if they have legitimate logistical/operational reasons for slowing down the pace of refugee resettlement, that would be, certainly, a different question.

But the record indicates that, in fact, to read from the e-mail, bookings are still limited to approximately 400 individuals per week, globally, due to the FY17 ceiling of 50,000. This e-mail, by the way, is not in the record yet because we just got it, I believe, yesterday. But it's also undisputed that the entire process has just ground to a halt.

THE COURT: Okay. So then one last question on the Refugee Act. I believe the Government makes an argument that the APA doesn't apply because even if there is agency action at issue by State or Homeland Security, it flows from the Executive Order, not from a statue or some other source of authority.

Do you have any authority to counter that argument, that if it goes through the President, it's not subject to the APA?

MR. COX: Well, my recollection, Your Honor, is that the cases that they cite for that proposition, in those cases the agency was -- they were carrying out actions on the President's order pursuant to sort of -- there was an expressed statutory mandate that the President, effectively, had delegated to the agencies. That's not the case here. In fact, to the contrary. The statute sets the procedure through which the annual limit on refugee admissions is set.

Essentially, the argument is that the agencies are supposed to follow and adhere to the process that the Refugee Act sets out. The Refugee Act says we go through this process, and then at the end we have a limit. So the President has effectively ordered them to do otherwise, but that order was invalid because it violates the Refugee Act itself; it's not authorized by 212(f). And so the agency is violating the Refugee Act in ignoring the proper process through which this limit is set each year.

THE COURT: Okay. Well, thank you very much.

MR. COX: Thank you, Your Honor.

THE COURT: We'll save those five minutes for the Government. So I think it's approximately 40 minutes that we used for the plaintiffs.

So we'll hear from the Government now, Mr. Wall.

To clarify, we used about 35 minutes, so the Government has 40 at this point.

ARGUMENT BY MR. WALL FOR THE DEFENDANTS

MR. WALL: Thank you, Your Honor. Jeffrey Wall for the United States. I'm going to address the harm and the standing issues and also the merits, the establishment clause, and, to the extent Your Honor wants to hear about it, the statutory claims. They didn't spend a lot of time on that in their brief and argument, but we would certainly want to address those if the Court is thinking about addressing them in any order.

Mr. Garg will talk about the refugee cap. That was obviously briefed separately, put on a separate schedule. We don't read that to be the subject of their TRO or PI motion. But in any event, Mr. Garg is going to address the refugee cap issue --

THE COURT: Right, it's a separate motion, but we said we might talk about it today, as we have already. So go ahead.

MR. WALL: So I'm going to defer to him on those issues.

THE COURT: Okay.

MR. WALL: Your Honor, as you know, the Ninth Circuit had concerns about the original order. It asked the Executive to narrow it, and the President, rather than litigate, did exactly that. After consulting with the attorney general, the Secretaries of State and Homeland Security directly, serially

addressed, in the new order, the Ninth Circuit's concerns and --

THE COURT: Those concerns were due process concerns, if I recall, at least the ones that were specifically articulated. And there's no due process challenge here, so.

MR. WALL: Well, that is true in part, Your Honor, but I think there were a number of concerns that the order addressed. It no longer covers lawful permanent residents; it no longer covers aliens who are located in the United States; it no longer singles out Syrian refugees; it no longer gives any preference to victims of religious persecution; and we've now clarified how the waiver process works as part of the visa application and interview process, and that was a subject of some concern to the plaintiffs in the Ninth Circuit.

I think what's remarkable is that despite all of the substantial changes that the President made to the order and the fact that there is no grave harm to the plaintiffs when this order takes effect at 12:01 tomorrow morning, they're here asking for emergency, immediate relief.

I want to start with the harms and then move to the merits, if I could, because I want to get into the record just a little bit.

When you asked about the individual plaintiffs, and on the visa side, counsel started with John Doe 1 and Harrison. As far as we can tell from our records, Mr. Harrison's fiance

was issued a visa within the last couple of days and, thus, would not be subject to the order, and his claim would be moot. Now, it's obviously on plaintiffs to come forward and update the Court. We don't have those facts, but as best we can tell, his K1 visa has been issued or it is set to be issued in advance of the order taking effect.

On John Doe 1, his wife is currently waiting on an interview, a visa interview, and, of course, as part of that interview will be eligible for a waiver.

So again, I don't think it has any imminent harm that plaintiffs could demonstrate during the brief period that would be covered by a TRO.

THE COURT: So they raised the establishment clause as one of their arguments, and that harm is not as specific as a visa issuance. I think it maybe harms -- in fact, I think the Courts generally seem to indicate that irreparable harm is almost presumed in that circumstance. Do you agree with that?

MR. WALL: Well, the Courts have talked about the harms that flow from the First Amendment violation but, of course, every time you have a First Amendment claim, you can't come into court and get a TRO or a PI. You've got to demonstrate some immediate irreparable harm beyond just the injury you're claiming from the violation itself.

Here, on the establishment clause side, they don't have anyone who can do it. The aliens, of course, don't have any

establishment clause rights, and they haven't claimed that they do.

To the extent that there are people in the U.S. raising those claims, what we would say is that the organizations can't raise them on their client's behalf because there's no hindrance to the plaintiffs raising them themselves, as they have, and they also run straight into the doctrine of consular nonreviewability. It's long been the case --

THE COURT: Well, but they're not arguing that a particular visa should or should not be issued. They're arguing that the Government has established a disfavoring of Muslims in a general sense. So why is that covered by consular nonreviewability?

MR. WALL: Well, I think there's two different harms to which they're pointing. One is the delay or denial of the visa, and on that side they run smack dab into consular nonreviewability.

On the stigma side, I do think you're right but --

THE COURT: But aren't they challenging the policy? They're not challenging the individual determination.

MR. WALL: Well, it's not -- they have asked you to enjoin the entire order but, of course, the only violations that these organizations and plaintiffs can claim and get relief for are violations that harm them, which is to say the family members or clients that they claim should be able to get

a visa, that are going to be denied one under the order.

And as far as what we're looking at for the establishment clause harm is not the denial of the visa itself, which judicial review has precluded it from that, but just the stigma of, as they say, being associated with a policy that, in their view, discriminates. Courts have repeatedly held that that kind of stigmatic injury doesn't satisfy Article III unless you are the person directly subjected to the treatment at issue, and that class of people is the affected aliens who have no establishment-clause right in the first place.

So I think they've got serious problems no matter how they break down the standing argument. And in any event, even if they could show a plaintiff with standing, that's not what they need for a TRO. They need immediate, imminent, irreparable injury during the brief period that would be covered by a TRO, and they can't point to anyone on that.

I mean, take their claim on the refugee side. They point to Jane Doe 2, who wants her sister to come into the country. She's still at the point where -- what we're talking about is an I-130, which is just a DHS document. That petition, as far as we know, hasn't even been approved. If it does, then Jane Doe 2's sister would enter the visa process, but the backlog for sisters and siblings is many, many years. The idea that this order is going to operate against Jane Doe 2's sister in the next couple of weeks is frankly -- it's not remotely

plausible.

So what they're lacking with regard to either visas or refugees is someone who is going to face imminent injury in the next couple weeks, and the only person about whom they possibly could have made that claim was Mr. Harrison's fiance. And again, as I say, as far as we can tell, that K-1 visa has issued, and his fiance is no longer subject to the order.

THE COURT: So on standing, you raise this issue of -- or you cite at least one case, I think *Lujan*, that refers to the injury needing to be a legally protected interest. As far as I can tell, other Supreme Court cases since then don't always use that term. Sometimes they do; sometimes they don't.

How do you define that term, and how does application of that term -- how can we apply that without effectively getting into the merits, which we're not supposed to do?

MR. WALL: Well, I think there is some overlap with the merits, but courts have said that standing analysis sometimes requires looking at issues that may, to some extent, overlap with the merits --

THE COURT: Well, it can't mean that we have to resolve the merits. So what is the line there?

MR. WALL: I think the line is whether you fall -- what courts have said, when they're trying to figure out whether you have a legally cognizable interest for standing purposes, is whether you fall within the zone of interest meant

to be protected by the law at issue.

Here, I think the very real problem that they have is that -- and the doctrine of consular nonreviewability is a great example of this. The alien can't challenge it. So it would be passing strange if the third party could challenge it, let alone the organizational plaintiffs who want to raise it on behalf of their U.S. clients. So we're sort of two degrees removed --

THE COURT: But they don't have to show that they would be successful on a claim, correct?

MR. WALL: For standing purposes, that's right.

THE COURT: For standing.

MR. WALL: They've got to show likelihood of success on the merits separately.

THE COURT: But just to have standing, they just need to show that they have a claim that -- perhaps one could frame it as a claim that is not obviously foreclosed?

MR. WALL: I think they've got to demonstrate a concrete impending injury. They've got to demonstrate Article III injury in order to have standing. And the problem -- it's most clear -- I grant you, with the organizational plaintiffs, they're the easier case because they've got no claim to legally cognizable injury, because they're just --

THE COURT: Well, I guess that's the question. It seems to me that HIAS has indicated that, as a practical

matter, they will be harmed, in the sense that money will be lost in some form, and you're saying that if we look ahead, there's no way they could ever recover that money from the Government, so there's no standing. Is that your argument?

MR. WALL: I'm saying two things. One, we think it is very speculative that the harm that they've -- because the funding comes in, as we understand it, per refugee. So the fewer refugees they process, the fewer funds come in, but the less they spend. It's not at all clear to us, based on their pleadings, that they're going to suffer a financial loss. But even if they were, it's not a financial loss that's legally cognizable under the immigration laws.

THE COURT: Well, I guess that's the question. If it's caused by the defendants' conduct, which their theory is it is; that because of this Executive Order, we now have less money, and perhaps accepting the plaintiffs' version of that for the moment here in the hearing, then perhaps the question is is it necessary, under the law, for there to be a conclusion that they're going to be able to recover from the Government? Or is it enough to say the Government has actually caused this injury?

Maybe they can't win on a breach of contract issue, but they've been harmed by this action, and to the extent the action is invalid, they have a right to challenge it, even if they could never recover on a breach of contract theory.

MR. WALL: Yeah, I'd say a couple of things. Setting aside the fact that we think the harms are speculative, but assuming they are --

THE COURT: Just for the moment.

MR. WALL: Right, just for the moment. It's not the kind of harm that's legally cognizable, because the harm flows simply from not being able to resettle refugees into the United States and having to resettle them somewhere else, and that's not a legally cognizable harm because those aliens have no right to be resettled in the United States, and they can't claim an injury from that one degree removed.

Even if you set that to the side, that would get you to standing, but it wouldn't remotely get you to the kind of harm that you would need to enter a TRO for the next couple weeks.

What they certainly can't show is that they're facing some kind of imminent, irreparable harm over the next couple weeks so that the Court needs to decide that right now, rather than in the normal course of the litigation.

So I think they've got both of the problems. They've got the Article III problem, and they've got the TRO emergency relief problem.

THE COURT: So let's talk a little bit about the establishment clause. Am I correct as a matter of fact that this six-country ban is not something that 212(f) has ever done? I think, at most, there's been, arguably, a relatively

complete ban of individual -- one country at a time on one or two occasions but not more than that; is that correct?

MR. WALL: I think that's right, Your Honor. We did have the Cuban ban, and then we have a couple that drew nationality-based distinctions -- for Panamanians and Nicaraguans, Sudanese -- that also drew other distinctions in addition to nationality.

But I want to be very clear about what has happened here. What happened under the previous Administration was they said, look, there are certain nationals and travelers to various countries that we're going to take out of the Visa Waiver Program; we're no longer going to let nationals from these listed countries qualify for the Visa Waiver Program --

THE COURT: They were dual nationals, right? Because the countries weren't under the Visa Waiver Program themselves.

MR. WALL: That's right; dual nationals, that's right. And what this Administration came in and did was it took the same judgment, on the basis of the same risk for the same listed countries, and said, basically, we're making a different judgment about how much risk we're going to be willing to tolerate, and what we want is a brief pause while we ensure that the governments of these troubled countries are able to provide us with reliable information so that we can determine whether their nationals present a threat to the United States or not.

Now, that is certainly a step beyond what the previous Administration did, but it's done with respect to the same countries and on the basis of the same risk. And what the President did in the new order, actually, is go country by country by country and lay out exactly the kind of factual record that the plaintiffs had criticized the Government for not providing before in the original order.

So I think what this order does -- granted, it is a step beyond what the previous Administration did, but it's on the basis of the same distinction. It takes the same countries that have the same sort of troubled political conditions, the same concerns about getting reliable information about their nationals, and it says, look, we just want to put a pause on this for a few months while we ensure we have vetting procedures in place that will get us reliable information, and while we do that, we're going to have a waiver process, as part of the visa application process, to still allow people to come into the country.

THE COURT: So even if we accept the notion that that is something that the Government's been thinking about and has reached that conclusion, doesn't *McCreary* indicate that the issue is which is the primary purpose, that or some religious purpose?

MR. WALL: Well, yes, Your Honor, but it judges the purpose by looking at an official action -- the resolutions

passed by the city council, what they put up on the walls of the courthouse, what people did in office. The law is pretty clear on this that where the official action is a facially legitimate and bona fide reason, courts don't look behind it.

Here, this order, it doesn't say anything about religion, it doesn't draw any religious distinctions, and the one religious distinction that it did draw in the old order, which was to provide preference for victims of religious persecution the new order removed in response to establishment clause concerns. So in *McCreary* --

THE COURT: So has this facially legitimate, bona fide standard been applied in a case involving religion and the establishment clause specifically?

MR. WALL: I'm not sure about that, Your Honor. Right off hand, I'd have to confer with my colleagues. It's been applied in a number of other contexts. *Fiallo*, of course, was to a federal statute.

But I think even if you thought that that weren't the standard and you just took *McCreary* and that body of establishment clause law, even those cases are clear that what you look at is the official act. And in those cases, you had an explicitly religious message, and the question was just did you have enough surrounding it that you could draw some secular message or understanding from it.

That's not what we have here at all --

THE COURT: Well, *McCreary* seems to go beyond where it was before. There's a lot of cases, pre-*McCreary* and going back *Lemon*, in which they talk about just finding any purpose. But *McCreary* seems to indicate the question is whether it was more than -- whether it was a primary/predominant/preeminent purpose. That's the issue.

MR. WALL: Oh, I completely agree, Your Honor, but judged as against the official act, you've got to look at the official action and what was the purpose for that. Here, the official action is an order that the President took after consulting with three cabinet-level officials whose motives have not been impugned.

THE COURT: But nobody argued -- at least I don't think you're arguing that we just look at the four corners of the document and can't consider any outside information, correct?

MR. WALL: Well, I think you can consider outside information that was official action. For instance --

THE COURT: So *McCreary* has language which you've cited, but I don't see in there any limitation or any statement that these are, in fact, the only -- it, frankly, was made in passing, I think, by the Court. It doesn't say we're discussing the question of what can be considered, and here's the list of things that can be considered.

So what authority is there that's more explicit on that

point, if any?

MR. WALL: Well, I think in the immigration context, *Mandel* and *Fiallo* couldn't be more explicit about it. If the Executive puts forward a facially legitimate and bona fide reason, then that's the end of courts' analysis, with the possible exception of whether you draw some narrow exception under *Din*, and we can talk about that.

But I do want to focus on that on the establishment clause side, *McCreary* is the sort of rare case in which, looking at the official action, you would say, all right, we're going to say that the Government's stated purpose is a sham; is not, in fact, secular. But there, the message was explicitly religious.

Here, this is an order that draws no religious distinctions at all --

THE COURT: Well, there are a number of cases they were facially neutral, and there's still an establishment clause problem based on the context, based on the history.

So beyond that argument, I think you focussed on the national security issue, which we've talked about a little bit --

MR. WALL: I don't know, Your Honor, that I think that the *McCreary* line of cases is long, but for that line of cases, there can be a subset in which you've got a religious message that pervades, whatever the Government conduct is or

that's clearly illustrated by official action that's directly linked to it.

I just want to emphasize this case has gone the opposite way from *McCreary*. In *McCreary*, the city council kept doubling down, kept trying to make the same religious message. Here, the President went the opposite direction. Plaintiffs raised establishment clause concerns, and the President said I'm going to take out the one provision that does anything to refer to religion.

On its face, this does exactly what the previous Administration did with the Visa Waiver Program, right? It just applies --

THE COURT: Well, again, it doesn't do it on nationality. It doesn't ban them entirely. It simply, basically, created a higher level of scrutiny for those individuals.

MR. WALL: That's right, it created a higher level of scrutiny, and this does the same for all nationals of the listed countries, without regard to religion. It applies to all nationals coming in from these six-listed countries. It doesn't draw any distinctions on the basis of religion, not on its face and not in operation.

I think what the other side hasn't provided is, as you say, some long line of cases where you've got a law that doesn't -- on its face, in its text or in operation -- draw any

religious distinction. It doesn't send a religious message, right? There's nothing explicitly religious. This is not the Ten Commandment display in *McCreary*. And yet, still, the Court looks behind it. And by the way, you have to go one step further. They want you to look behind it on the basis, largely, of statements that were made before the President ever took office.

THE COURT: So hypothetically, if all those statements they're referring to were made after he took office, from the White House, during a press conference or otherwise, would you be saying that there is no establishment clause issue here nonetheless?

MR. WALL: I think it would be a much harder case, Your Honor, and I think we would acknowledge that. But what you don't have --

THE COURT: So the operative distinction for you is when the statements were made, not that the statements themselves are insufficient to accomplish their aims.

MR. WALL: I think there are two operative distinctions. You asked the other side where would you draw the line. I'd draw it in two places.

One, here, these statements occurred before we had a candidate, who took an oath to support and defend the Constitution, who formed an administration, who consulted with the Attorney General and the Secretaries of State and Homeland

Security --

THE COURT: Well, he didn't before the first order, correct?

MR. WALL: No, that's right, so that was my second fault line, right? He took the original order, went back, right, and rather than fight on the same ground, serially addressed all of the other side's concerns, including the establishment concern, and took out the preference for victims of religious persecution.

So I think there are two fault lines. The first is coming into office and the difference between a President and a candidate, right, who swears an oath, who forms an administration and consults with them. And the second is it's not the old order that's before you; it's the new order.

And I think the President's statements, even if you consider all of them over time, have been clearer and clearer that what he is concerned about are radical Islamist terrorists, and that's what this order is designed to get at.

THE COURT: But the portion that they're challenging now changed only in that Iraq was removed for some specific reasons, and there were some categories that were exempted or subject to waiver, but to some degree it appears that those were all made to address the due process issues. They weren't made to address establishment clause concerns.

MR. WALL: Well, Your Honor, I think what addressed

the establishment clause concern was taking out the only provision of the order that referred to religion. What you have now are provisions that do not distinguish on the basis of religion. Nationals from these countries --

THE COURT: But they have an impact, a disparate impact, which is not a legally-cognizable standard, but when it gets into the question of identifying purpose, it's something that one looks at.

MR. WALL: But as you recognize, not a legally-cognizable theory under the establishment clause. The statements which they try to get at for the purpose part of their establishment clause claim are preelection statements by a candidate Trump, not President Trump.

They're pointing to the history of the order. This order is different in the way that it functions.

And you're right, it does it with respect to the same countries that the previous order did, except for Iraq, because conditions had changed with respect to Iraq just in the last few weeks. But, of course, those were the same countries singled out by Congress and the previous Administration on what everybody concedes, I think, are religion-neutral grounds, because they were state sponsors of terrorism or countries of concern because ISIL and Al Qaeda operate there heavily.

And so the distinction on which this Administration borrowed from the previous Administration, that distinction

nobody has claimed was ever drawn on the basis of religion.

And so I just think this is a very, very tough context with this law, which draws no religious distinctions on its face or in operations, to try to press that claim. I think in some sense they're trying to fight the last battle and not really wanting -- in *McCreary* and all these cases, it's still what is the law before the Court? How does that law operate? What does it do? Here, this order comfortably passes that test.

THE COURT: So a factual question based on what the plaintiffs have asserted. They assert that even though the first order has been in effect and still is in effect, at least the portions that weren't enjoined, the State Department and Homeland Security have not started issuing the reports that were required by that. Is that correct or not?

MR. WALL: My understanding is that the internal review and consultation has begun. I don't think that there have been any reports issued. I believe that's right.

There are certain portions of the order dealing with suspension of entry that have been enjoined. We have not been attempting to enforce those. Those will be revoked and replaced by the new order when it takes effect.

THE COURT: But the reporting requirements were not enjoined, and you're saying they're working on it, but they haven't issued any reports, even though I think the 30-day

report has already been due. Not that the Government always meets deadlines for reports, I understand.

MR. WALL: Your Honor, I would have to check on that. I'm not entirely sure what has happened with that provision.

THE COURT: Okay. So let me ask about the statutory argument. To some degree I want to address the same issue I raised with the plaintiffs, the distinction between an entry and a visa issuance and what does that do here. Because it does appear to some degree that, at a minimum, the practical effect seems to be that visas are either not being issued or their processing has been slowed down.

First of all, can you tell us, factually, if that's correct?

MR. WALL: Well, my understanding is that the State Department is continuing to process visas as it did before, and once the new order takes effect, the question will simply be during the interview -- the visa interview, whether the applicant is eligible for a waiver, and that will all be part of the current process. There's no additional process to it.

THE COURT: But will they be denied a visa because they're from this country and they can't get a waiver? Or will they be given a visa and just told, look, you're still going to have to wait before you can actually go to the United States?

MR. WALL: No. My understanding is that they will be denied a visa if they are a national from the listed country,

and they don't qualify for a visa during the brief pause that this order places on the process so that we can check to make sure that the vetting procedures are reliable.

And so we haven't focussed here on the distinction between admission and entry for that reason. Although we have focussed on why 1152 doesn't apply for other reasons. It only applies to the issuance of immigrant visas. The vast majority of people covered by this order are not seeking immigrant visas. It doesn't apply to procedures. That's clearly what this is. It's a temporary pause to reassess procedures, which, by its definition, is a procedural change.

And even if you got past all of that, 1182(f) has always been read and treated as a sort of catch-all power under the immigration laws, so that where the President determines that some class not picked up by other immigration provisions is actually -- he needs to suspend entry immediately in the interests of the United States, that's the power that the President has.

THE COURT: But isn't that the issue, is that 1182(f) or 212(f) allows the President to bar entry? It doesn't say anything about altering the visa process. Aren't those two different things? Even if we can say, because of emergency reasons or otherwise, you can't come into the country, cannot present for admission at the border to Customs and Border Protection, that issuing visas is not covered by 212(f)?

MR. WALL: Your Honor, that would be an additional reason why the order would be perfectly lawful. We have not tried to push --

THE COURT: But it would be a reason why the 212(f) authority might not allow the Government to change the visa processes, because the authority just goes to barring entry.

MR. WALL: Well, but if the Court said that, I think it's true then -- and issued any emergency relief, I think it's true then we would have to continue to process and issue visas. But then we could physically stop everyone at the border, since entry is the actual physical entry into the country, and we haven't depended on that distinction because we haven't wanted to set up a system in which we're issuing visas to people and then literally stopping them at the border. So we haven't tried to draw that distinction, but if the Court did, I think that's what would result.

THE COURT: It would seem to be a chaotic approach. Although perhaps from a timing standpoint, it might help people in that situation get the visa steps out of the way and not delay them in that regard. Because otherwise, they would be delayed by a certain period of time.

MR. WALL: But I would point out even then, Your Honor, under 1185(a), the President would still have the power to suspend those visas, because he's got the power to place limitations and exceptions on other provisions in the

immigration laws. So I think --

THE COURT: When has that been done for that particular step of suspending visas? I know it's been used for other reasons, including the Iran hostage crisis situation.

MR. WALL: Your Honor, I don't know that it has, but no court has ever read into 1182(f) any limits on the President's authority to suspend entry into the United States. So if this Court or others went down that road, we would be, I think, in uncharted water. The understanding up to now has always been that the President could detain any -- suspend the entry of any class of aliens when he deemed it in the national interest.

And I just want to -- I do want to walk through all the statutory arguments, but I want to be very clear about where they lead.

I think on plaintiffs' approach that what they're committed to saying is that if the President got actionable intelligence tomorrow that a Yemeni national, knowing nothing more, were about to bring a bomb into the United States, the President could not temporarily suspend the entry of Yemeni nationals into the United States without violating other provisions of the immigration laws. That is not the way courts have ever understood 1182(f). They have understood it as a catchall provision for just that sort of circumstance.

THE COURT: Well, their argument might be that but,

again, as I read the statute, it focuses on visa issuance, which may or may not -- I mean, that's a technical issue. As a practical matter, I think you're right; the issue would be whether they could enter under that provision.

You also cite Section (b), I believe, that indicates there might be some exceptions to the nondiscrimination provisions regarding processing. What authority, if any, do you have that would closely approximate this situation, indicating that -- I know, for example, the location of an office was added as part of that. But either way, that was deemed part of this issue or at least enough that they put it into the statute.

But given in that case they had to add that language, do you have any cases or other authority that indicate that this activity of suspending for 90 days would fall safely within that provision?

MR. WALL: I don't know of good cases one way or the other, Your Honor.

On the scope of the procedures provision, I'd say two things. One, I think it's pretty clear that where you're talking about taking a temporary three-month pause to assess procedures, that what you're talking about is, by definition, a procedural change.

And to the extent that it were ambiguous, the President and the Attorney General are entitled to deference in their

reading of the immigration laws. And indeed, that's codified, as you know, in the immigration laws; that the Attorney General's interpretation of these laws is concerning.

So to the extent I think there's doubt about what 1152(a)(2) means or (b) means, I think our interpretation ought to prevail both for the deference reason and because their interpretation raises a very serious constitutional question about the scope of the President's constitutional authority to detain people at the border.

That's never been an issue before because courts have treated 1182(f) as contiguous with the President's constitutional authority. He can suspend any class of aliens when he determined it in the national interest. If plaintiffs are right, the Courts can look behind that and narrow that authority. That's going to raise a serious constitutional question, which is itself a reason not to interpret the statute that way.

THE COURT: But the Justice Department -- or no one has actually yet interpreted that provision formally to say that the delay of three months or delay of any kind is covered by that, as opposed to changing procedures.

MR. WALL: Well, a couple of things, Your Honor --

THE COURT: I suppose they might try to interpret it if it was forced to do so at some point.

MR. WALL: We would have to examine that issue. But

certainly under 1185(a) and that general power, the Office of Legal Counsel did say that you could have nationality-based restrictions with certain classes of Iranians, and the following year after it was enacted, President Carter did exactly that with Iranian students.

And then, obviously, we have the Cuban, Panamanian and Nicaraguan orders under 1182(f).

And the Supreme Court statement in *Sale* that it was perfectly clear, the Supreme Court said, perfectly clear that the President could put up a naval blockade to stop Haitian migrants from coming into this country.

So I think at least the Supreme Court and the Office of Legal Counsel --

THE COURT: Wasn't that case dealing with extraterritoriality of the authority, rather than just the basic notion of whether that activity was covered?

MR. WALL: I don't think so, Your Honor. It was dealing with an order that prevented unlawful entry by sea. And I grant that the order itself may not have drawn a nationality-based distinction, but it was clearly aimed at the Haitian refugee crisis, and the Supreme Court casting it that way and thinking of it that way said perfectly clear that the President can do this.

The plaintiffs -- to the extent we want to talk about sort of where the case is, the plaintiffs haven't come forward

with a single case that reads into 1182(f) any limit with respect to any order that the President has ever put out, provided that it made the national security determination. Once the President puts forward that facially legitimate reason, that it is in the country's national security interest, courts haven't looked behind it, and they haven't narrowed the scope of the President's authority under that statute. It would be a really, really serious thing to do.

Now, we already talked about 1152. There is also an argument about the other provisions of 1182(a), and if you want to talk about it, I'd be happy to address it. But otherwise --

THE COURT: I'm not sure it's really necessary at this point, but I appreciate that.

Just in terms of the -- I think you said you were also covering the overall relief at issue or asked for some sort of -- assuming we get this far, which I know is not where you want to go but, hypothetically, the relief that the plaintiffs are seeking some sort of nationwide injunction. Given that there are not just people around the country who have these issues in this Uniform Rule of Naturalization concept, but, in fact, plaintiffs are scattered in different places, what would be -- you asked this to be narrowed only to the individual plaintiffs, and then they ask for the nation. There are a number of options in between. Is there one that is focussed on the broad harm, but not nationwide, that you could offer that

is principled?

MR. WALL: Yes. So this is a critically important question, and I just -- if I can lay out a couple things that I don't think the Court should do, and then what I think could be the middle ground, if you will.

So the first thing is I don't think the Court should enjoin the entire order because there are provisions of the order that, although they say they're challenging the entire thing, they don't brief them, they don't --

THE COURT: No, I understand. There's the assessments, the biometric entry, there's various issues.

MR. WALL: Exactly. So we would say not against the entire order.

We would say it can't be facial because many of the applications of the challenge provisions, for instance, with respect to aliens abroad, who have no close connection, no family or relative in the United States, we would say those applications are clearly lawful. No one's constitutional rights are even arguably implicated.

So we'd say it can't be facial. We'd say it has to be as applied challenges to people who are denied a waiver, and courts can decide those on more developed records.

And we would say it can't be nationwide. It has to be limited to the particular alleged violations here.

So I think at the most -- I don't want to help the other

side craft its TRO, but I think, at the most, the Court could enter a TRO or a preliminary injunction with respect to the particular aliens that the family members here seek to bring over -- that covers the individual plaintiffs -- and the particular refugees who have a close relationship with Iraq or HIAS, who face an imminent risk of injury and who are otherwise eligible for refugee admission.

Now, again, we don't think any form of emergency relief is necessary because they can't show the harm. But if the Court disagrees with us, the relief has got to be tailored to the plaintiffs here and the violations they're claiming. It can't be nationwide, and it can't be facial --

THE COURT: Doesn't that depend on what the harm is? I mean, the statute is one thing. Would you have a different analysis for the establishment clause?

MR. WALL: No, not at all, Your Honor. A facial challenge or a theory that something is wrong in all its applications, and I know that's what their establishment clause claim is, that it's tainted in every root and branch, that's just a legal theory about why something is lawful or unlawful.

Article III and rules on equitable relief still require that the relief has got to be tailored to these plaintiffs. Otherwise, if they can get nationwide relief on behalf of plaintiffs who aren't before the Court, it effectively converts it into a class action without all the procedures that are

required, and it shuts off other courts from considering --

THE COURT: So do you think the Ninth Circuit's injunction was unlawful? It was due process, but it was certainly affecting people who weren't in the case and even people who might not have had a good argument for why they should be allowed to enter.

MR. WALL: We think that the nationwide injunction was certainly too broad, but the circumstances there were a little different, because the old order covered lots of groups that this one doesn't cover. And the Ninth Circuit didn't say that it shouldn't enter a narrower injunction. It said we're not sure how to do that; we're going to send it back to the Executive and let the Executive take a first crack at it.

Now we have. We've narrowed the order, and it is now very possible -- and Virginia did something like this. The Western District of Wisconsin did something like this. It's now possible for this Court to enter relief that, as Article III requires, is tailored to the plaintiffs before the Court. The particular refugees that these organizations want to bring in, the particular family members these plaintiffs want to bring in, that's the only thing that could be the subject of equitable relief.

THE COURT: So going back to the establishment clause as one perhaps more complicated area for this. It seems most of the time there's an establishment clause violation. The

remedy might be to remove the offending activity.

So given that there's a slew of these Ten Commandment cases, it might say take down the whole display. It doesn't matter that others -- it doesn't say take it down whenever the plaintiffs come to the courthouse. It says just take it down generally, because it has a pernicious effect generally, because the Government is endorsing this -- regardless of who walks in the door and regardless of whether they actually were part of the lawsuit or not.

What is the equivalent here? If this is an order that is unconstitutional in that regard, it doesn't necessarily matter then whether the people trying to enter or the family members who are waiting for someone to enter were or were not part of the lawsuit. How is it different from that situation?

MR. WALL: So I think the difference, Your Honor, is that in the religious message cases, you're right. The relief to which that particular plaintiff is entitled, not having the Ten Commandments on the courthouse wall, also inures to the benefit of others.

But this is a case in which it is possible for the Court and, thus, we would say, constitutionally required for the Court to enter narrower relief. Because these plaintiffs, these organizations and individuals are complaining about restrictions on their particular ability to bring other folks into the country. The Court can address that --

THE COURT: But there are others who have that same issue, who did not file suit.

MR. WALL: Well, but they filed suit in other places. If the Court enters a facial nationwide injunction, what it effectively does is it converts it into a class action, and it prevents other courts from addressing the same issues at the same time.

Now, again, for us, this is all the reason why we ought to be seeing as-applied challenges once the waiver system plays itself out. Many of the plaintiffs here are not in line to have an interview in any imminent period. And the ones who are -- and it's not clear that they're already, but maybe there are one or two. Once they have the visa interview and we know they've been denied a waiver, then they can bring an as-applied challenge, and you've got an actual record to decide it.

So I think the kinds of questions you're raising are not -- they shouldn't counsel in favor of broader relief. They should counsel in favor of saying the plaintiffs have run into court too soon. We ought to allow the order to take effect. We ought to see if, in fact, these plaintiffs suffer any injury. Some of them, based on their pleadings, are likely not to because they qualify for a waiver. And if they don't get a waiver, then they come, they bring an as-applied challenge, and we can adjudicate it on a record where we actually know what happened.

THE COURT: So you mentioned TRO at one point. You mentioned preliminary injunction. Does the Government have a view on which of those is appropriate here?

Because I noticed in the Ninth Circuit they filed a TRO at one point, and it was immediately appealed anyway and treated as a preliminary injunction. So is that the effect one way or the other?

MR. WALL: So I think our view would be that if --

THE COURT: By either side.

MR. WALL: -- the Court wants to grant emergency relief, it should grant the temporary restraining order they've asked for, and then we can confer with the other side about whether it should be converted into a preliminary injunction, and then come back to the Court.

I mean, they've come in and said we're going to suffer harm now; we want a TRO. We think that's wrong. None of them have shown any imminent, concrete harm coming in the next few weeks.

But if Your Honor decides otherwise, which would be the premise for any injunctive relief today, than I think today it should be a TRO, and then we'll confer with the other side on whether to convert it to a preliminary junction.

THE COURT: But what else is there to do? We've briefed this. We've argued it on a difficult schedule but, still, we've covered a lot of ground.

MR. WALL: Your Honor, I have to say I think the plaintiffs don't provide nearly as much detail as they could or should, at least on the individual plaintiffs and also on some of the organizational plaintiffs, where they are in the process and what injuries they face over the next couple of weeks. As I say, as far as we can tell, one of the plaintiff's claims is moot.

So I think that they're -- again, the burden is on them to supply that, and they haven't. So it ought to cut against emergency relief. But in the event you enter it, I don't think it's clear that nothing will change over the next few weeks.

THE COURT: Okay. Thank you. Let me get five minutes with Mr. Garg, and then I'll add five minutes to the plaintiffs' rebuttal.

MR. WALL: Thank you, Your Honor.

THE COURT: Thank you.

ARGUMENT BY MR. GARG FOR THE DEFENDANTS

MR. GARG: Good morning, Your Honor. Arjun Garg for the defendants.

THE COURT: Good morning. So I think on this issue of the Refugee Act, I think I raised some of the issues that I'm interested in with the plaintiffs, the question of the applicability of the APA.

So why is it that these actions of suspending refugee security checks, suspending all screening interviews, why

aren't those actions that can be challenged?

MR. GARG: Your Honor, I think plaintiffs' counsel said it himself actually. What they're really challenging is the President's action. The specific agency activities that are going on --

THE COURT: But they can be challenging both, and then we could say the challenge to the President is one thing, but there's a different issue we need to analyze.

MR. GARG: Your Honor, I don't think you can say that, because they're not saying here's what would be a stronger claim, if they're saying that they're challenging agency activity, what the agencies are doing. They would say, well, look, we know there's a 50,000 refugee cap -- we're going to accept that for purposes of this argument -- but you changed our allocation, as a resettlement agency, from 4,000 to 2,000, and that was not the right number to change it; you took our number way down further than you took anyone else's number. That might be a claim where you're really targeting what the agency did.

All they're targeting are the basic implementation actions that any agency would have to do if the President said, okay, we're going to limit this year's refugee flow to 50,000. The words that were said was it's all due to the lowered ceiling.

And so what the agencies are doing here are ministerial

actions that carry out the President's directive. So you can't get around the bar on review of Presidential action under the APA by pointing to those ministerial implementing actions.

THE COURT: So suppose the State Department and Homeland Security took the actions for resource reasons. They said we don't have enough people because of hiring freezes or otherwise; we're going to reduce or even suspend screening interviews for the rest of the fiscal year. Could they challenge that?

MR. GARG: Your Honor, I don't believe they could. They haven't pointed to any provision of law that --

THE COURT: Well, let's say that they have this argument that that violates the statute itself. They're not worried about the President having done anything; they're just saying the statute says 110. I'm not saying I agree this would be a good theory, but assuming that's their theory, why would that not be something they could challenge under the APA, that the agencies have violated the statute by taking these actions?

MR. GARG: Your Honor, first of all, I don't think -- those actions, in themselves, are not final agency action. There's not a consummation of a final process in terms of did an alien who was seeking refugee status actually get denied. There's no final decision. It's just a later decision because processes are, in the interim, suspended.

As far as agency action, again, what legal consequences

are flowing from this? No decision has been made one way or another on a refugee applicant's application. So what is the legal consequence to the refugee from this decision that we need to pause our processes for budgetary reasons or whatever it may be?

As to the organizations themselves, they don't point to -- and this gets a little bit to what was being discussed before. They don't point to any specific entitlement to I was guaranteed 4,000 refugees; there was a contract there that I was guaranteed to it. They weren't given an expectation level that was never guaranteed. There's no legal consequence that flows from an adjustment of that expectation level where there was never a guarantee.

So I don't think they could claim final agency action, even if you are accepting that there was some legally plausible basis to say that a statute restricted the agency from changing it's processes.

THE COURT: So on the merits of the statute itself, I assume one of your arguments is that -- and you've done the brief saying that the statute doesn't prevent a change in the maximum or a lowering of the maximum. It just prevents a change in the -- an increase, absent some procedural steps.

Is there some point though where -- I mean, let's say the President said zero this year. Would that violate the Refugee Act in the sense that it goes beyond the concept that there

needs to be -- that Congress has said we're going to have a program?

MR. GARG: Your Honor, I don't believe it would violate the Refugee Act. If the President had a reason where he determined it would be detrimental to the interests of the United States, based on whatever information he's learned, that we cannot have refugee flows this year at all, 1182(f) would authorize that. I don't see that there's any limit that he can only cut it by half but not all the way. I think 1182(f) contemplates whatever the President thinks is necessary to protect the national interest.

THE COURT: Okay. Thank you very much. Let's go back to the plaintiff for ten minutes.

REBUTTAL ARGUMENT BY MR. COX FOR THE PLAINTIFFS

MR. COX: Thank you, Your Honor. I just wanted to address a handful of issues with regard to standing and irreparable injury.

First, with regard to Mr. Harrison, actually, no visa has been issued for him. The record is clear. His application has been approved, but that's a very separate step from a visa being issued. The record is undisputed that the visa has not been issued. And for that reason, he won't qualify for the exception in Section (3)(A) of the next Executive Order, which requires that a visa to have been issued prior to, essentially, 12:01 a.m. tomorrow.

Second, with regard to HIAS, HIAS plainly will be injured by this Executive Order for all the reasons explained in the second Hatfield declaration. And the argument that the Government is putting forward here is actually the same argument that then-Governor of Indiana Mike Pence put forward in the *Exodus* case that we cited. And for all the reasons explained in that opinion and that Your Honor has explored, that argument is simply wrong.

With regards to irreparable injury, of course the definition here is an injury that can't be remedied by any other way. And in a variety of ways, irreparable injury will occur at 12:01 a.m. tomorrow, absent an injunction.

So first, of course, we have the establishment clause violation. At 12:01 a.m. tomorrow, there will be an official policy in this country, absent an injunction, condemning Islam, and that can't be remedied, as courts have routinely said, through any other way.

It certainly can't be remedied with the sort of narrow injunction that the Government is proposing, where, essentially, you put up a curtain over the statue of the Ten Commandments when the particular plaintiffs walk by, but then you take it down when anyone else is around and the plaintiff is gone --

THE COURT: Let me ask the question I asked Mr. Wall regarding the TRO versus the PI. I don't know if the answer is

different depending on the outcome but, theoretically, it should be similar, in that are we ready for a preliminary injunction or not or ready for a denial of a preliminary injunction or not? Is there any reason why we can't go straight to that, given that there's been briefing and there have been arguments one way or the other?

MR. COX: I guess the one thing I would say on that, Your Honor, is that we've covered a lot of ground in the briefing but, of course, there are some issues that, perhaps, if Your Honor thought additional briefing would be necessary, then I think certainly a TRO would be appropriate in that instance.

In the Washington case, the reason they converted it to a preliminary injunction is because there was no time limit on it. And so in our view, so long as there was a time limit that kept it within the confines of the rule, that -- and Your Honor wanted supplemental briefing on additional issues, that it would be appropriate to do a TRO first and then perhaps convert it into a preliminary injunction later.

THE COURT: So supplemental briefing or supplemental argument. Obviously, at that point we would come back. But otherwise, you're comfortable one way or the other?

MR. COX: I think so, yes.

THE COURT: Perhaps more one way than the other, but you're comfortable.

MR. COX: Yes, Your Honor. We would defer to Your Honor's preferences with regards to what the Court would find helpful in that regard.

Back to irreparable injury for a moment. The Government points to the possibility of waivers as eliminating irreparable injury. But of course, that can't eliminate the equal protection or establishment clause injury. As the case law has held, a discriminatory process that's set up itself inflicts the injury.

If there was, as I mentioned on a call on Friday, a special permitting process for black folks who want to live in a particular neighborhood, you wouldn't say their claims not ripe until after they apply and get denied. You would say that being subjected to that process itself is part and parcel with the injury; and, therefore, their claims are ripe even without having to go through that process.

And then with regards to the delay, the Government does not dispute, as a factual matter, that the Executive Order will prolong the times in which our plaintiffs and their families will be separated. Instead, the Government sort of asserts that that's not irreparable because they're already separated, which doesn't make a lot of sense in our view, particularly with regards to particular plaintiffs.

So Mr. Mohammed, for example, who is from Somalia, his family, his wife and kids, are not here yet. They have refugee

applications approved, but they don't have travel documents. And in the meantime, his kids are not being educated. They're not in school, and so they're missing out on vital education. I think that the idea that even an additional couple of weeks delay of separation, in the abstract, is irreparable. You can't remedy that with damages.

And when so many of the plaintiffs and the organizational plaintiffs' clients are living in dangerous and deplorable conditions, it's particularly irreparable. Any additional delay is irreparable.

And with regard to the organizational plaintiffs and their clients, Your Honor, the Government asserts that you can't take into account the irreparable injury to third parties but hasn't actually cited any cases that support that proposition.

Again, here the *Exodus* case is on point, where the irreparable injury was to the Syrian refugee clients, and yet the resettlement agency was the one asserting their rights, and the court found that that injury was irreparable.

THE COURT: Let me ask again on this issue -- again, it's all hypothetical, but on this issue of an injunction. I understand there's another case in the Ninth Circuit on similar issues. I know you're not in that case, but the Government certainly is.

Do you have plaintiffs in the Ninth Circuit? I could

see, one way or the other, if there were conflicting opinions, some confusion if courts go to the breadth of a nationwide injunction in that situation.

MR. COX: So none of our individual plaintiffs are in the Ninth Circuit. I believe that our organizational plaintiffs both operate in some fashion in the Ninth Circuit and have clients who -- I haven't confirmed this, but just given the pure numbers, it seems possible that they would have clients in the Ninth Circuit as well.

I'm getting confirmation from HIAS and IRAP that they do, indeed, have clients that would be within the Ninth Circuit, yes, Your Honor.

THE COURT: Let me go back to an issue that Mr. Wall raised, this facially legitimate bona fide standard. Why does that not apply here?

MR. COX: If I would defer to Mr. Jadwat on that issue.

THE COURT: Okay. Well, why don't we just switch out just for the last few minutes on that. I think that was my last main question.

MR. COX: Fair enough. Thank you, Your Honor.

REBUTTAL ARGUMENT BY MR. JADWAT FOR THE PLAINTIFFS

MR. JADWAT: To start there, Your Honor, on the facially legitimate and bona fide question, two main points.

First, the Ninth Circuit explained that the origins of

that test and the situations in which it's been applied are typically situations involving the application of a rule to a particular visa --

THE COURT: But not always. Not every case is like that. Where is the line between those situations and your situation, to the extent you can argue on a different side of it?

MR. JADWAT: Right. I think there's a couple lines. First, there is no case involving an Executive order involving a claim under the establishment clause. There's no case that's on all fours with this case, where the court has applied a facially legitimate and bona fide test.

And if you look across the variety of constitutional claims that have been brought with respect to actions in the immigration sphere, sometimes, very occasionally, honestly, it's the facially legitimate and bona fide test. Many other situations, again, as the Ninth Circuit pointed out, it's the standard constitutional analysis that you would apply to that question anywhere else.

But the other point that I don't want to lose here is that, ultimately, in our view, it doesn't matter. If you look both at Justice Kennedy's decision in *Din*, if you look at the case out of the Eastern District of Virginia addressing the first Executive Order, if you look at the Napolitano case out of the Second Circuit, *AAR versus Napolitano,* or if you look,

for that matter, at *Abourezk*, the case that the Government cites in their brief for a different issue, there is review available under that facially legitimate and bona fide standard, and what they try to read out of the standard is the bona fide part.

THE COURT: But on this idea that there may be some constitutional challenges that fall outside of that standard, again, other than saying your case doesn't fall within it, what would be the line that one could draw or the principle one could apply that say what types of cases fall on this side and what types of cases fall on that side?

MR. JADWAT: I think here, the question is -- maybe I'll back into the question. I think there is evidence here, that's available at the outset of the case, that takes it out of the sphere of the concerns that animate the facially legitimate and bona fide standard.

There's no question here about us delving into what the Government -- what some particular visa issuer might have been thinking, or the reasons why, inside the Government, the Government might have undertaken this action.

We're going under the establishment clause based on what a reasonable observer would understand based on the facts that are available to the public.

THE COURT: So what's the rule then?

MR. JADWAT: So I think the rule would be that the

facially legitimate and bona fide standard, when it does apply, applies when there are these concerns about reaching through and into and behind government processes in order to raise the claim, but that's not what we're doing here.

THE COURT: Okay.

MR. JADWAT: There are a few other points I'd like to raise --

THE COURT: We've run out of time now, I think. I think we've been going for quite a while. Okay. Well, thank you very much.

I'll take the matter under advisement. I appreciate everyone's advocacy, both in the briefs and in the session today. And again, I'll try to issue a written ruling, hopefully today, but not necessarily.

Is there anything else we should discuss on this case while we're here as a matter of process?

Okay, thank you very much.

(The hearing concluded at 11:15 a.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, Cindy S. Davis, Federal Official Court Reporter in and for the United States District Court for the Southern District of Maryland, do hereby certify that I reported, by machine shorthand in my official capacity, the proceedings had in the case of International Refugee Assistance Project, et al., versus Donald J. Trump, et al., case number 8:17-cv-00361-TDC, in said court on March 15, 2017.

I further certify that the foregoing 74 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes to the best of my ability.

In witness whereof, I have hereto subscribed my name this 16th day of March, 2017.

Cindy S. Davis

CINDY S. DAVIS, RPR
FEDERAL OFFICIAL COURT REPORTER

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UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *a project of the Urban Justice Center, Inc., on behalf of itself and its clients*,
HIAS, INC., *on behalf of itself and its clients*,
MIDDLE EAST STUDIES ASSOCIATION *of North America, Inc., on behalf of itself and its members*,
MUHAMMED METEAB,
PAUL HARRISON,
IBRAHIM AHMED MOHOMED,
JOHN DOES Nos. 1 & 3, and
JANE DOE No. 2,

Plaintiffs,

v.

DONALD J. TRUMP, *in his official capacity as President of the United States*,
DEPARTMENT OF HOMELAND SECURITY,
DEPARTMENT OF STATE,
OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE,
JOHN F. KELLY, *in his official capacity as Secretary of Homeland Security*,
REX W. TILLERSON, *in his official capacity as Secretary of State*, and
MICHAEL DEMPSEY, *in his official capacity as Acting Director of National Intelligence*,

Defendants.

Civil Action No. TDC-17-0361

MEMORANDUM OPINION

On March 6, 2017, President Donald J. Trump issued an Executive Order which bars, with certain exceptions, the entry to the United States of nationals of six predominantly Muslim

countries, suspends the entry of refugees for 120 days, and cuts by more than half the number of refugees to be admitted to the United States in the current year. This Executive Order follows a substantially similar Executive Order that is currently the subject of multiple injunctions premised on the conclusion that it likely violates various provisions of the United States Constitution. Pending before the Court is Plaintiffs' Motion for a Temporary Restraining Order or a Preliminary Injunction, filed on March 10, 2017. At issue is whether the President's revised Executive Order, set to take effect on March 16, 2017, should likewise be halted because it violates the Constitution and federal law. For the reasons set forth below, the Motion is GRANTED IN PART and DENIED IN PART.

INTRODUCTION

On January 27, 2017, President Trump issued Executive Order 13,769, "Protecting the Nation from Foreign Terrorist Entry into the United States" ("First Executive Order" or "First Order"), 82 Fed. Reg. 8977 (Jan. 27, 2017). On February 7, 2017, Plaintiffs filed a Complaint alleging that the First Executive Order violated the Establishment Clause of the First Amendment to the United States Constitution, U.S. Const. amend. I; the equal protection component of the Due Process Clause of the Fifth Amendment, U.S. Const. amend. V; the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-1537 (2012); the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012); the Refugee Act, 8 U.S.C. §§ 1521-1524 (2012); and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706 (2012). On March 6, 2017, in the wake of several successful legal challenges to the First Executive Order, President Trump issued Executive Order 13,780 ("Second Executive Order" or "Second Order"), which bears the same title as the First Executive Order. 82 Fed. Reg. 13209

(Mar. 9, 2017). The Second Executive Order, by its own terms, is scheduled to go into effect and supplant the First Executive Order on March 16, 2017.

On March 10, 2017, Plaintiffs amended their Complaint to seek the invalidation of the Second Executive Order. Plaintiffs substituted certain individual plaintiffs and added an organizational plaintiff. Their causes of action remain the same. That same day, Plaintiffs filed the pending Motion, seeking to enjoin the Second Executive Order in its entirety before it takes effect. Defendants have received notice of the Motion and filed a brief in opposition to it on March 13, 2017. After Plaintiffs filed a reply brief on March 14, 2017, the Court held a hearing on the Motion on March 15, 2017. With the matter fully briefed and argued, the Court construes the Motion as a Motion for a Preliminary Injunction. The Court now issues its findings of fact and conclusions of law and rules on the Motion.[1]

FINDINGS OF FACT

I. Executive Order 13,769

The stated purpose of the First Executive Order is to "protect the American people from terrorist attacks by foreign nationals admitted to the United States." 1st Order Preamble. To that end, the First Executive Order states that the United States must be "vigilant during the visa-issuance process," a process that "plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States." 1st Order § 1. The First Executive Order therefore mandates, as relevant here, two courses of action. The first, set forth in Section 3

[1] On February 22, 2017, Plaintiffs filed a Motion for a Preliminary Injunction of § 5(d) of the Executive Order, ECF No. 64, requesting that the Court enjoin a specific provision of the First Executive Order. With the agreement of the parties, the Court set a briefing and hearing schedule extending to March 28, 2017. The Court will resolve that Motion, which the parties have agreed should be construed to apply to the successor provision of the Second Executive Order, in accordance with the previously established schedule.

entitled "Suspension of Issuance of Visas and Other Immigration Benefits to Nationals of Countries of Particular Concern," invokes the President's authority under 8 U.S.C. § 1182(f) to suspend for 90 days "the immigrant and nonimmigrant entry into the United States of aliens" from the countries of Iraq, Iran, Libya, Sudan, Somalia, Syria, and Yemen as "detrimental to the interests of the United States." 1st Order § 3(c). Each of these countries has a predominantly Muslim population, including Iraq, Iran, and Yemen which are more than 99 percent Muslim. In addition to providing certain exceptions for diplomatic travel, the provision contains exceptions on a "case-by-case basis" when such an exception is "in the national interest," a term not defined elsewhere in the Order. 1st Order § 3(g). During this 90-day period, the Secretary of Homeland Security, the Secretary of State, and the Director of National Intelligence are to "immediately conduct a review to determine the information needed from any country" to assess whether an individual from that country applying for a "visa, admission, or other benefit . . . is not a security or public-safety threat" and provide a report on their review to the President within 30 days of the issuance of the Order. 1st Order § 3(a)-(b).

The second course of action relates to refugees. As set out in Section 5(d), the President ordered, pursuant to § 1182(f), that "the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States" and thus suspended the entry of any refugees above that figure. 1st Order § 5(d). The Order also immediately suspended the U.S. Refugee Admissions Program ("USRAP") for 120 days and imposed an indefinite ban on the entry of refugees from Syria. The Order further required changes to the refugee screening process "to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." 1st Order § 5(b).

The drafting process for the First Executive Order did not involve traditional interagency review by relevant departments and agencies. In particular, there was no consultation with the Department of State, the Department of Defense, the Department of Justice, or the Department of Homeland Security. When the Order was issued in the early evening of Friday, January 27, 2017, the State Department immediately stopped conducting visa interviews of, and processing visa applications from, citizens of any of the seven banned countries. Between 60,000 and 100,000 visas have been revoked.

II. Legal Challenges to the First Executive Order

The First Executive Order prompted numerous legal challenges, including an action filed by the State of Washington and the State of Minnesota in the United States District Court for the Western District of Washington based on the Due Process, Establishment, and Equal Protection Clauses of the Constitution that resulted in a nationwide temporary restraining order against several sections of the First Order. On February 9, 2017, the United States Court of Appeals for the Ninth Circuit, construing the order as a preliminary injunction, upheld the entry of the injunction. *Washington v. Trump*, 847 F.3d 1151, 1165-66 (9th Cir. 2017). Although it did not reach the Establishment Clause claim, the Ninth Circuit noted that the asserted claim raised "serious allegations" and presented "significant constitutional questions." *Id.* at 1168. On February 13, 2017, the United States District Court for the Eastern District of Virginia found that plaintiffs had shown a likelihood of success on the merits of an Establishment Clause claim and issued an injunction against enforcement of Section 3(c) of the First Executive Order as to Virginia residents or students enrolled a Virginia state educational institution. *Aziz v. Trump*, --- F. Supp. 3d ---, No. 1:17-cv-116, 2017 WL 580855 (E.D. Va. Feb. 13, 2017). These injunctions remain in effect.

III. Executive Order 13,780

On March 6, 2017, President Trump issued a revised Executive Order, to become effective on March 16, 2017, at which point the First Executive Order will be revoked. 2d Order §§ 13, 14. The Second Executive Order reinstates the 90-day ban on travel for citizens of Iran, Libya, Somalia, Sudan, Syria, and Yemen ("the Designated Countries"), but removes Iraq from the list based on its recent efforts to enhance its travel documentation procedures and ongoing cooperation between Iraq and the United States in fighting ISIS. The scope of the ban, however, was narrowed expressly to respond to "judicial concerns." 2d Order § (1)(i). The Order states that it applies only to individuals outside the United States who did not have a valid visa as of the issuance of the First Executive Order and who have not obtained one prior to the effective date of the Second Executive Order. In addition, the travel ban expressly exempts lawful permanent residents ("LPRs"), dual citizens traveling under a passport issued by a country not on the banned list, asylees, and refugees already admitted to the United States. The Second Executive Order also provides a list of specific situations in which a case-by-case waiver "could be appropriate." 2d Order § 3(c).

The refugee provisions continue to suspend USRAP for 120 days and to reduce the number of refugees to be admitted in fiscal year 2017 to 50,000. However, the minority religion preferences in refugee applications and the complete ban on Syrian refugees have been removed entirely.

Unlike the First Executive Order, the Second Executive Order provides certain information relevant to the national security concerns underlying the decision to ban the entry of citizens of the Designated Countries. The Second Order notes that "the conditions in these

countries present heightened threats" because each country is "a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones." 2d Order § 1(d). It provides information from the State Department's *Country Reports on Terrorism 2015* identifying Iran, Sudan, and Syria as longstanding state sponsors of terrorism and describing the presence of members of certain terrorist organizations within those countries. The asserted consequences of these conditions are that the governments of these nations are less willing or less able to provide necessary information for the visa or refugee vetting process, and there is a heightened chance that individuals from these countries will be "terrorist operatives or sympathizers." 2d Order § (1)(d). In light of these factors, the Second Order concludes, the United States is unable "to rely on normal decision-making procedures about travel" as to individuals from these nations, making the present risk of admitting individuals from these countries "unacceptably high." 2d Order § 1(b)(ii), (f). The Second Order expressly disavows that the First Executive Order was motivated by religious animus.

The Second Order also states that "Since 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States" and references two Iraqi refugees who were convicted of terrorism-related offenses and a naturalized U.S. citizen who came to the United States from Somalia as a child refugee and has been convicted of a plot to detonate a bomb at a Christmas tree lighting ceremony. 2d Order § 1(h). The Second Order further states that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations. It does not identify any instances of individuals who came from Iran, Libya, Sudan, Syria, or Yemen engaging in terrorist activity in the United States.

The same day that the Second Executive Order was issued, Attorney General Jeff Sessions and Secretary of Homeland Security John Kelly submitted a letter to the President recommending a temporary suspension on the entry to the United States of nationals of certain countries so as to facilitate a review of security risks in the immigration system, for reasons that largely mirror the statements contained in the Second Executive Order.

IV. Public Statements About the Executive Orders

On December 7, 2015, then-presidential candidate Donald Trump posted a "Statement on Preventing Muslim Immigration" on his campaign website in which he "call[ed] for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on." J.R. 85. Trump promoted the Statement on Twitter that same day, stating that he had "[j]ust put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country. We must be vigilant!" J.R. 209. In a March 9, 2016 interview with CNN, Trump professed his belief that "Islam hates us," and that the United States had "allowed this propaganda to spread all through the country that [Islam] is a religion of peace." J.R. 255-57. Then, in a March 22, 2016 Fox Business interview, Trump reiterated his call for a ban on Muslim immigration, explaining that his call for the ban had gotten "tremendous support" and that "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.R. 261. In a July 24, 2016 interview on Meet the Press soon after he accepted the Republican nomination, Trump asserted that immigration should be immediately suspended "from any nation that has been compromised by terrorism." J.R. 219. When questioned whether his new formulation was a "rollback" of his December 2015 call for a "Muslim ban," Trump characterized it instead as an "expansion." J.R. 220. He explained that "[p]eople were so upset when I used the word Muslim," so he was

instead "talking territory instead of Muslim." J.R. 220. On December 21, 2016, when asked whether a recent attack in Germany affected his proposed Muslim ban, President-Elect Trump replied, "You know my plans. All along, I've proven to be right. 100% correct." J.R. 245. In a written statement about the events, he lamented the attack on people "prepared to celebrate the Christmas holiday" by "ISIS and other Islamic terrorists [who] continually slaughter Christians in their communities and places of worship as part of their global jihad." J.R. 245.

On January 27, 2017, a week after his inauguration, President Trump stated in an interview on the Christian Broadcasting Network that the First Executive Order would give preference in refugee applications to Christians. Referring to Syria, President Trump stated that "[i]f you were a Muslim you could come in, but if you were a Christian, it was almost impossible," a situation that he thought was "very, very unfair." J.R. 201. When President Trump was preparing to sign the First Executive Order later that day, he remarked, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." J.R. 142 The day after the Order was issued, former New York City Mayor Rudolph W. Giuliani appeared on Fox News and asserted that President Trump told him he wanted a Muslim ban and asked Giuliani to "[s]how me the right way to do it legally." J.R. 247. Giuliani, in consultation with others, proposed that the action be "focused on, instead of religion . . . the areas of the world that create danger for us," specifically "places where there are [*sic*] substantial evidence that people are sending terrorists into our country." J.R. 247-248.

In response to the court-issued injunctions against provisions of the First Executive Order, President Trump maintained at a February 16, 2017 news conference that the First Executive Order was lawful but that a new Order would be issued. J.R. 91. Stephen Miller, Senior Policy Advisor to the President, described the changes being made to the Order as

"mostly minor technical differences," emphasizing that the "basic policies are still going to be in effect." J.R. 319. White House Press Secretary Sean Spicer stated that "[t]he principles of the [second] executive order remain the same." J.R. 118. As of February 12, 2017, Trump's Statement on Preventing Muslim Immigration remained on his campaign website. J.R. 207.

Upon the issuance of the Second Executive Order, Secretary of State Rex Tillerson described it as "a vital measure for strengthening our national security." J.R. 115. In a March 7, 2017 interview, Secretary of Homeland Security Kelly stated that the Order was not a Muslim ban but instead was focused on countries with "questionable vetting procedures," then noted that there are 13 or 14 countries with questionable vetting procedures, "not all of them Muslim countries and not all of them in the Middle East." J.R. 150.

In a joint affidavit, 10 former national security, foreign policy, and intelligence officials who served in the White House, Department of State, Department of Homeland Security, and Central Intelligence Agency in Republican and Democratic Administrations, four of whom were aware of the available intelligence relating to potential terrorist threats to the United States as of January 19, 2017, have stated that "there is no national security purpose for a total bar on entry for aliens" from the Designated Countries and that they are unaware of any prior example of a president suspending admission for such a "broad class of people." J.R. 404, 406. The officials note that no terrorist acts have been committed on U.S. soil by nationals of the banned countries since September 11, 2001, and that no intelligence as of January 19, 2017 suggested any such potential threat. Nor, the former officials assert, is there any rationale for the abrupt shift from individualized vetting to group bans. J.R. 404.

V. The Plaintiffs

Plaintiffs, comprised of six individuals and three organizations, assert that they will be harmed by the implementation of the Second Executive Order. Collectively, they assert that because the Individual Plaintiffs are Muslim and the Organizational Plaintiffs serve or represent Muslim clients or members, the anti-Muslim animus underlying the Second Executive Order inflicts stigmatizing injuries on them all. The Individual Plaintiffs, who each have one or more relatives who are nationals of one of the Designated Countries and are currently in the process of seeking permission to enter the United States, also claim that if the Second Executive Order is allowed to go into effect, their separation from their loved ones, many of whom live in dangerous conditions, will be unnecessarily prolonged.

Two of the Organizational Plaintiffs, the Hebrew Immigrant Aid Society and the International Refugee Assistance Project, which provide services to refugees, assert that injuries they have suffered under the First Executive Order will continue if the Second Executive Order goes into effect, including lost revenue arising from a reduction in refugee cases that may necessitate reductions in staff. They also assert that their clients, many of whom are refugees now re-settled in the United States, will be harmed by prolonged separation from relatives in the Designated Countries currently seeking to join them. Plaintiff Middle East Studies Association, many of whose members are nationals of one of the Designated Countries, claims that the Second Executive Order would make it more difficult for certain members to travel for academic conferences and field work, and that the inability of its members to enter the United States threatens to cripple its annual conference, on which it relies for a large portion of its yearly revenue.

In light of these alleged imminent harms, Plaintiffs now ask this Court to preliminarily enjoin enforcement of the Second Executive Order.

CONCLUSIONS OF LAW

In this Motion, Plaintiffs seek a preliminary injunction based on their claims that the Second Executive Order violates (1) the Immigration and Nationality Act and (2) the Establishment Clause.

I. Standing

Article III of the Constitution limits the judicial power of the federal courts to actual "Cases" or "Controversies." U.S. Const. art. III, § 2, cl. 1. To invoke this power, a litigant must have standing. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). A plaintiff establishes standing by demonstrating (1) a "concrete and particularized" injury that is "actual or imminent," (2) "fairly traceable to the challenged conduct," (3) and "likely to be redressed by a favorable judicial decision." *Id.*; *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 428 (4th Cir. 2007). Standing must be demonstrated for each claim. *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014). The presence of one plaintiff with standing renders a claim justiciable. *Id.* at 370-71.

A. Immigration and Nationality Act

Several Individual Plaintiffs, specifically John Doe No. 1, John Doe No. 3 and Jane Doe No. 2, have standing to assert the claim that the travel ban for citizens of the Designated Countries violates the INA's prohibition on discrimination in the issuance of immigrant visas on the basis of nationality, 8 U.S.C. § 1152(a). These Individual Plaintiffs are all U.S. citizens or lawful permanent residents who have sponsored relatives who are citizens of one of the Designated Countries and now seek immigrant visas to enter the United States. They argue that

the delay or denial of the issuance of visas will cause injury in the form of continued separation from their family members. *Cf. Covenant Media*, 493 F.3d at 428 (stating that not having an application processed in a timely manner is a form of cognizable injury).

Although neither the United States Supreme Court nor the United States Court of Appeals for the Fourth Circuit has explicitly endorsed this basis for standing, the Supreme Court has reviewed the merits of cases brought by U.S. residents with a specific interest in the entry of a foreigner challenging the application of the immigration laws to that foreign individual. *See Kerry v. Din*, 135 S. Ct. 2128, 2131, 2138-42 (2015) (considering an action brought by a U.S. citizen challenging the denial of her husband's visa that failed to result in a majority of the Court agreeing whether the plaintiff had a constitutionally-protected liberty interest in the processing of her husband's visa); *Kleindienst v. Mandel*, 408 U.S. 753, 756, 762-65 (1972) (considering the merits of a claim brought by American plaintiffs challenging the denial of a visa to a Belgian journalist whom they had invited to speak in various academic forums in the United States); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998) (stating that because standing relates to a court's power to hear and adjudicate a case, it is normally "considered a threshold question that must be resolved in [the litigant's] favor before proceeding to the merits"); *Abourezk v. Reagan*, 785 F.2d 1043, 1050 (D.C. Cir. 1986) ("Presumably, had the Court harbored doubts concerning federal court subject matter jurisdiction in *Mandel*, it would have raised the issue on its own motion."). Other courts have done the same. *See Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008) (considering an action by a United States citizen challenging the denial of her husband's visa and holding that the citizen had a procedural due process right to a "limited judicial inquiry regarding the reason for the decision"); *Allende v. Shultz*, 845 F.2d 1111, 1114 & n.4 (1st Cir. 1988) (evaluating the merits of a claim brought by

scholars and leaders who extended invitations to a foreign national challenging the denial of her visa).

The United States Court of Appeals for the District of Columbia Circuit has found that U.S. citizens and residents have standing to challenge the denial of visas to individuals in whose entry to the United States they have an interest. *See Abourezk*, 785 F.2d at 1050 (finding that U.S. citizens and residents had standing to challenge the denial of visas to foreigners whom they had invited to "attend meetings or address audiences" in the United States); *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 45 F.3d 469, 471 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996). In *Legal Assistance*, the court specifically held that U.S. resident sponsors had standing to assert that the State Department's failure to process visa applications of Vietnamese citizens in Hong Kong violated the provision at issue here, 8 U.S.C. § 1152. *Id.* at 471. The court articulated the cognizable injury to the plaintiffs as the prolonged "separation of immediate family members" resulting from the State Department's inaction. *Id.* Here, the three Individual Plaintiffs who seek the entry of family members from the Designated Countries into the United States face the same harm of continuing separation from their respective family members. This harm is "fairly traceable to the challenged conduct" in that the Second Executive Order and its implementation, in barring their entry, would cause the prolonged separation, and the injury is "likely to be redressed by a favorable judicial decision" because invalidation of the relevant provisions of the Executive Order would remove a barrier to their entry. *Hollingsworth*, 133 S. Ct. at 2661.

Defendants nevertheless argue that the Individual Plaintiffs' harm does not arise from a "legally protected interest," citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (describing an "injury in fact" as a "legally protected interest" which is "concrete and

particularized"). However, the case cited by *Lujan* in referencing the "legally protected interest" requirement referred to an injury "deserving of legal protection through the judicial process." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972), *cited with approval in Lujan*, 504 U.S. at 561. Indeed, in *Lujan*, the Court also noted that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." *Lujan*, 504 U.S. at 562-63. Since *Lujan*, courts have clarified that a party is not required to have a "substantive right sounding in property or contract" to articulate a legally protected injury. *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001) (recognizing aesthetic and recreational enjoyment as a legally protected interest); *see also Warth v. Seldin*, 422 U.S. 490, 500 (1975) (explaining that although standing "often turns on the nature and source of the claim asserted," "standing in no way depends on the merits" of a plaintiff's claim); *Judicial Watch, Inc. v. United States Senate*, 432 F.3d 359, 363-66 (D.C. Cir. 2005) (Williams, J., concurring) (suggesting that a legally protected interest is merely another label for a judicially cognizable interest). Plaintiffs' interests arising from the separation from family members are consistent with the injury requirement.

Because this claim is a statutory cause of action, these Individual Plaintiffs must also meet the requirement of having interests that fall within the "zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014). The APA grants standing to a person "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702; *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 394 (1987). In the context of the APA, the "zone of interests" test is "not especially demanding." *Lexmark*, 134 S. Ct. at 1389. A plaintiff's interest need only "arguably" fall within the zone of interests, and the test "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent

with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Id.* (internal quotation marks omitted) (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012)). Because implementing the "underlying intention of our immigration laws regarding the preservation of the family unit" is among the INA's purposes, the interests of these Individual Plaintiffs, who have sponsored family members who will be denied entry pursuant to the Second Executive Order, fall within the zone of interest protected by the statute. *Legal Assistance*, 45 F.3d at 471-72 (quoting H.R. Rep. No. 82-1365, at 29 (1952), *as reprinted in* 1952 U.S.C.C.A.N. 1653, 1680). The Court therefore finds that these three Individual Plaintiffs have standing to assert the claim under 8 U.S.C. § 1152.

Finally, although some of the Individual Plaintiffs' relatives may be eligible for a waiver under the Second Executive Order, because the waiver process presents an additional hurdle that would delay reunification, their claims are ripe. *See Jackson v. Okaloosa Cty.*, 21 F.3d 1531, 1541 (11th Cir. 1994) (finding in a Fair Housing Act action that plaintiffs' claim was ripe where, "assuming that [plaintiffs] successfully prove at trial that this [challenged] additional hurdle was interposed with discriminatory purpose and/or with disparate impact, then the additional hurdle itself is illegal whether or not it might have been surmounted").

B. Establishment Clause

At least three of the Individual Plaintiffs, Muhammed Meteab, John Doe No. 1, and John Doe No. 3, each of whom is a Muslim and a lawful permanent resident of the United States, have standing to assert the claim that the Second Executive Order violates the Establishment Clause. John Doe No. 1 and John Doe No. 3 each has a wife who is an Iranian national, currently residing in Iran, who would be barred from entry to the United States by the Executive Orders.

John Doe No. 1 has stated that the travel ban has "created significant fear, anxiety, and insecurity" for him and his wife and that the "anti-Muslim views" underlying the Executive Orders have caused him "significant stress and anxiety" to the point that he "worr[ies] that I may not be safe in this country." J.R. 45. John Doe No. 3 has stated that the "anti-Muslim attitudes that are driving" the Executive Orders cause him "stress and anxiety" and lead him to "question whether I even belong in this country." J.R. 49. Meteab, who has Iraqi family members seeking entry as refugees but who are now subject to the Executive Orders' suspension of refugee admissions, has stated that the "official anti-Muslim sentiment" of the Executive Orders has caused "mental stress" and has rendered him "isolated and disparaged" in his community. J.R. 53.

Courts have recognized that for purposes of an Establishment Clause claim, non-economic, intangible harms to "spiritual, value-laden beliefs" can constitute a particularized injury sufficient to support standing. *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997); *Awad v. Ziriax*, 670 F.3d 1111, 1122-23 (10th Cir. 2012) (holding that a Muslim plaintiff residing in Oklahoma suffered a cognizable injury in the form of condemnation of his religion and exposure to "disfavored treatment" based on a voter-approved state constitutional amendment prohibiting Oklahoma state courts from considering Sharia law); *Catholic League v. City & Cty. of San Francisco*, 624 F.3d 1043, 1048 (9th Cir. 2010) (stating that a "psychological consequence" constitutes a concrete injury where it is "produced by government condemnation of one's own religion or endorsement of another's in one's own community"). The injury, however, needs to be a "personal injury suffered" by the plaintiff "*as a consequence* of the alleged constitutional error." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). Such a "personal injury" can result, for

example, from having "unwelcome direct contract with a religious display that appears to be endorsed by the state," *Suhre*, 131 F.3d at 1086, or from being a member of the geographic community in which the governmental action disfavoring their religion has an impact, *see Awad*, 670 F.3d at 1122-23; *Catholic League*, 624 F.3d at 1048 (finding that two devout Catholics and a Catholic advocacy group, all based in San Francisco, had standing to challenge an allegedly anti-Catholic resolution passed by the city government). Here, where the Executive Order was issued by the federal government, and the three Individual Plaintiffs have family members who are directly and adversely affected in that they are barred from entry to the United States as a result of the terms of the Executive Orders, these Individual Plaintiffs have alleged a "personal injury" as a "consequence" of the alleged Establishment Clause violation. *Valley Forge Christian Coll.*, 454 U.S. at 485.

The harm is "fairly traceable to the challenged conduct" in that the Second Executive Order and its implementation will allegedly effect the disfavoring of Islam, and the injury is "likely to be redressed by a favorable judicial decision" invalidating the relevant provisions of the Executive Order. *Hollingsworth*, 133 S. Ct. at 2661. The Court therefore finds that these three Individual Plaintiffs have standing to assert an Establishment Clause challenge.

Having identified at least one plaintiff with standing to assert the claims to be addressed on this Motion, the Court need not address the standing arguments of the other Plaintiffs.

II. Legal Standard

To obtain a preliminary injunction, moving parties must establish that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see Dewhurst v.*

Century Aluminum Co., 649 F.3d 287, 290 (4th Cir. 2011). A moving party must satisfy each requirement as articulated. *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 347 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010). Because a preliminary injunction is "an extraordinary remedy," it "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22.

III. Likelihood of Success on the Merits

Because "courts should be extremely careful not to issue unnecessary constitutional rulings," *Am. Foreign Serv. Ass'n v. Garfunkel*, 490 U.S. 153, 161 (1989) (per curiam), the Court first addresses the statutory claim and then proceeds, if necessary, to the constitutional claim.

A. Immigration and Nationality Act

Plaintiffs assert that the President's travel ban violated provisions of the INA. The formulation of immigration policies is entrusted exclusively to Congress. *Galvan v. Press*, 347 U.S. 522, 531 (1954). In the Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163, Congress delegated some of its power to the President in the form of what is now Section 212(f) of the INA, codified at 8 U.S.C. § 1182(f) ("§ 1182(f)"), which provides that:

> 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). In the Second Executive Order, President Trump invokes § 1182(f) in issuing the travel ban against citizens of the Designated Countries. *See* 2d Order § 2(c).

Plaintiffs argue that by generally barring the entry of citizens of the Designated Countries, the Second Order violates Section 202(a) of the INA, codified at 8 U.S.C. § 1152(a) ("§ 1152(a)"), which provides that, with certain exceptions:

> No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence[.]

8 U.S.C. § 1152(a)(1)(A).

Section 1152(a) was enacted as part of the Immigration and Nationality Act of 1965, which was adopted expressly to abolish the "national origins system" imposed by the Immigration Act of 1924, which keyed yearly immigration quotas for particular nations to the percentage of foreign-born individuals of that nationality who were living in the continental United States, based on the 1920 census, in order to "maintain, to some degree, the ethnic composition of the American people." H. Rep. No. 89-745, at 9 (1965). President Johnson sought this reform because the national origins system was at odds with "our basic American tradition" that we "ask not where a person comes from but what are his personal qualities." *Id.* at 11.

At first glance, President Trump's action appears to conflict with the bar on discrimination on the basis of nationality. However, upon consideration of the specific statutory language, the Court finds no direct conflict. Section 1182(f) authorizes the President to bar "entry" to certain classes of aliens. 8 U.S.C. § 1182(f). Section 1152(a) bars discrimination based on nationality in the "issuance of an immigrant visa." *Id.* § 1152(a)(1)(A). Although entry is not currently defined in the INA, until 1997 it was defined as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, voluntary or otherwise." *Id.* § 1101(a)(13) (1994). In the same section of the current INA, the term "admission" is defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *Id.* § 1101(a)(13)(A). The term "immigrant visa" is separately defined as "an immigrant visa required by this chapter and properly issued by a

consular officer at his office outside the United States to an eligible immigrant under the provisions of this chapter." *Id.* § 1101(a)(16). The INA, in turn, makes clear that "[n]othing in this Act shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted to the United States." *Id.* § 1201(h). Thus, § 1152(a) and § 1182(f) appear to address different activities handled by different government officials. When two statutory provisions "are capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). Accordingly, an executive order barring entry to the United States based on nationality pursuant to the President's authority under § 1182(f) does not appear to run afoul of the provision in § 1152(a) barring discrimination in the issuance of immigrant visas.

Although the Second Executive Order does not explicitly bar citizens of the Designated Countries from receiving a visa, the Government acknowledged at oral argument that as a result of the Second Executive Order, any individual not deemed to fall within one of the exempt categories, or to be eligible for a waiver, will be denied a visa. Thus, although the Second Executive Order speaks only of barring entry, it would have the specific effect of halting the issuance of visas to nationals of the Designated Countries. Under the plain language of the statute, the barring of immigrant visas on that basis would run contrary to § 1152(a). Just as § 1152(a) does not intrude upon the President's § 1182(f) authority to bar entry to the United States, the converse is also true: the § 1182(f) authority to bar entry does not extend to the issuance of immigrant visas. The power the President has in the immigration context, and certainly the power he has by virtue of the INA, is not his by right, but derives from "the statutory authority conferred by Congress." *Abourezk*, 785 F.2d at 1061. Notably, the

Government has identified no instance in which § 1182(f) was invoked to bar the issuance of visas based on nationality, a step not contemplated by the language of the statute.

To the extent the Government argues that § 1152(a) does not constrain the ability of the President to use § 1182(f) to bar the issuance of immigrant visas, the Court finds no such exception. Section 1152(a) requires a particular result, namely non-discrimination in the issuance of immigrant visas on specific, enumerated bases. Section 1182(f), by contrast, mandates no particular action, but instead sets out general parameters for the President's power to bar entry. Thus, to the extent that § 1152(a) and § 1182(f) may conflict on the question whether the President can bar the issuance of immigrant visas based on nationality, § 1152(a), as the more specific provision, controls the more general § 1182(f). *See Edmond v. United States*, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs."); *United States v. Smith*, 812 F.2d 161, 166 (4th Cir. 1987). Moreover, § 1152(a) explicitly excludes certain sections of the INA from its scope, specifically §§ 1101(a)(27), 1151(b)(2)(A)(i), and 1153. 8 U.S.C. § 1152(a)(1)(A). Section 1182(f) is not among the exceptions. Because the enumerated exceptions illustrate that Congress "knows how to expand 'the jurisdictional reach of a statute,'" the absence of any reference to § 1182(f) among these exceptions provides strong evidence that Congress did not intend for § 1182(f) to be exempt from the anti-discrimination provision of § 1152(a). *Reyes-Gaona v. N.C. Growers Ass'n*, 250 F.3d 861, 865 (4th Cir. 2001) (quoting *Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991)).

The Government further argues that the President may nevertheless engage in discrimination on the basis of nationality in the issuance of immigrant visas based on 8 U.S.C. § 1152(a)(1)(B), which states that "[n]othing in [§ 1152(a)] shall be construed to limit the authority

of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed." As that statutory provision expressly applies to the Secretary of State, it does not provide a basis to uphold an otherwise discriminatory action by the President in an Executive Order. Even if the Court were to construe Plaintiffs' claim to be that the State Department's anticipated denial of immigrant visas based on nationality for a period of 90 days would run contrary to § 1152(a), the text of § 1152(a)(1)(B) does not comfortably establish that such a delay falls within this exception. Although § 1152(a)(1)(B) specifically allows the Secretary to vary "locations" and "procedures" without running afoul of the non-discrimination provision, it does not include within the exception any authority to make temporal adjustments. Because time, place, and manner are different concepts, and § 1152(a)(1)(B) addresses only place and manner, the Court cannot readily conclude that § 1152(a)(1)(B) permits the imminent 90-day ban on immigrant visas based on nationality despite its apparent violation of the non-discrimination provision of § 1152(a)(1)(A).

Finally, the Government asserts that the President has the authority to bar the issuance of visas based on nationality pursuant to Section 215(a) of the INA, codified at 8 U.S.C. § 1185(a) ("§ 1185(a)"), which provides that:

> Unless otherwise ordered by the President, it shall be unlawful for an alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.

8 U.S.C. § 1185(a)(1). As support for this interpretation, the Government cites President Carter's invocation of 8 U.S.C. § 1185(a)(1) to bar entry of Iranian nationals during the Iran Hostage Crisis in 1979. Crucially, however, President Carter used § 1185(a)(1) to "prescribe limitations and exceptions on the rules and regulations" governing "Iranians holding

nonimmigrant visas," a category that is outside the ambit of § 1152(a). 44 Fed. Reg. 67947, 67947 (1979). The Government has identified no instance in which § 1185(a) has been used to control the immigrant visa issuance process. Under the principle of statutory construction that "all parts of a statute, if at all possible, are to be given effect," *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973), the Court concludes that, as with § 1182(f), the most fair reading of § 1182(a)(1) is that it provides the President with the authority to regulate and control whether and how aliens enter or exit the United States, but does not extend to regulating the separate activity of issuance of immigrant visas.

Because there is no clear basis to conclude that § 1182(f) is exempt from the non-discrimination provision of § 1152(a) or that the President is authorized to impose nationality-based distinctions on the immigrant visa issuance process through another statutory provision, the Court concludes that Plaintiffs have shown a likelihood of success on the merits of their claim that the Second Executive Order violates § 1152(a), but only as to the issuance of immigrant visas, which the statutory language makes clear is the extent of the scope of that anti-discrimination requirement. They have not shown a likelihood of success on the merits of the claim that § 1152(a) prevents the President from barring entry to the United States pursuant to § 1182(f), or the issuance of non-immigrant visas, on the basis of nationality.

Beyond § 1152(a), Plaintiffs make the additional argument under the INA that because the Second Executive Order's nationality-based distinctions are ostensibly aimed at potential terrorist threats, the Order conflicts with 8 U.S.C. § 1182(a)(3)(B), which renders an individual inadmissible based on an enumerated list of terrorism considerations. *See* 8 U.S.C. § 1182(a)(3)(B)(i)(I), (IV), and (VII). Plaintiffs contend that these provisions indicate that Congress has established a mechanism for the individualized assessment of the terror risk an

immigrant poses, such that Congress did not envision that terrorism would be addressed through broad nationality- or religion-based bans pursuant to § 1182(f). But Plaintiffs provide no support for their contention and make no showing that § 1182(a)(3)(B) and § 1182(f) "cannot mutually coexist." *Radzanower*, 426 U.S. at 155. Although Plaintiffs try to cast § 1182(a) as an emphatically individualized enterprise, neither § 1182(a) nor § 1182(f) purports to limit the President to barring entry only to classes of aliens delineated in § 1182(a). Thus, Plaintiffs are unlikely to succeed on the merits of this claim.

B. Establishment Clause

Plaintiffs assert that the travel ban on citizens from the Designated Countries is President Trump's fulfillment of his campaign promise to ban Muslims from entering the United States. They argue that the Second Executive Order therefore violates the Establishment Clause. The First Amendment prohibits any "law respecting an establishment of religion," U.S. Const. amend. I, and "mandates governmental neutrality between religion and religion, and between religion and nonreligion," *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). When a law does not differentiate among religions on its face, courts apply the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Hernandez v. C.I.R.*, 490 U.S. 680, 695 (1989). Under the *Lemon* test, to withstand an Establishment Clause challenge (1) an act must have a secular purpose, (2) "its principal or primary effect must be one that neither advances nor inhibits religion," and (3) it must not "foster 'an excessive government entanglement with religion.'" *Id.* at 612-613 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). All three prongs of the test must be satisfied. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

The mere identification of any secular purpose for the government action does not satisfy the purpose test. *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860, 865 n.13

(2005). Such a rule "would leave the purpose test with no real bite, given the ease of finding some secular purpose for almost any government action." *Id.* ("[A]n approach that credits *any* valid purpose . . . has not been the way the Court has approached government action that implicates establishment." (emphasis added)). Thus, although governmental statements of purpose generally receive deference, a secular purpose must be "genuine, not a sham, and not merely secondary to a religious objective." *Id.* at 864. If a religious purpose for the government action is the predominant or primary purpose, and the secular purpose is "secondary," the purpose test has not been satisfied. *Id.* at 860, 862-65; *see also Edwards*, 482 U.S. at 594 (finding a violation of the Establishment Clause where the "primary purpose" of the challenged act was "to endorse a particular religious doctrine").

An assessment of the purpose of an action is a "common" task for courts. *McCreary*, 545 U.S. at 861. In determining purpose, a court acts as an "objective observer" who considers "the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." *McCreary*, 545 U.S. at 862 (internal quotation marks omitted) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). An "understanding of official objective" can emerge from "readily discoverable fact" without "judicial psychoanalysis" of the decisionmaker. *Id.*

Plaintiffs argue that the Second Executive Order fails the purpose prong because there is substantial direct evidence that the travel ban was motivated by a desire to ban Muslims as a group from entering the United States. Plaintiffs' evidence on this point consists primarily of public statements made by President Trump and his advisors, before his election, before the issuance of the First Executive Order, and since the decision to issue the Second Executive Order. Considering statements from these time periods is appropriate because courts may

consider "the historical context" of the action and the "specific sequence of events" leading up to it. *Edwards*, 482 U.S. at 594-95. Such evidence is "perfectly probative" and is considered as a matter of "common sense"; indeed, courts are "forbid[den] . . . 'to turn a blind eye to the context in which [the] policy arose.'" *McCreary*, 545 U.S. at 866 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000)); *cf. Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1987) (including the "historical background of the decision," the "specific sequence of events leading up [to] the challenged decision," and "contemporary statements of the decisionmaking body" as factors indicative of discriminatory intent), *cited with approval in Edwards*, 482 U.S. at 595.

> 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.

McCreary, 545 U.S. at 866 n.14.

Specifically, the evidence offered by Plaintiffs includes numerous statements by President Trump expressing an intent to issue a Muslim ban or otherwise conveying anti-Muslim sentiments. For example, on December 7, 2015, then a Republican primary candidate, Trump posted a "Statement on Preventing Muslim Immigration" on his campaign website "calling for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on." J.R. 85. In a March 9, 2016 interview with CNN, Trump professed his belief that "Islam hates us," and that the United States had "allowed this propaganda to spread all through the country that [Islam] is a religion of peace." J.R. 255-57. Then in a March 22, 2016 Fox Business interview, Trump reiterated his call for a ban on Muslim immigration, explaining that his call for the ban had gotten "tremendous support" and that "we're having problems with the Muslims, and we're having problems with Muslims coming into the country."

into the country." J.R. 261. On December 21, 2016, when asked whether a recent attack in Germany affected his proposed Muslim ban, President-Elect Trump replied, "You know my plans. All along, I've proven to be right. 100% correct." J.R. 245. In a written statement about the events, Trump lamented the attack on people "prepared to celebrate the Christmas holiday" by "ISIS and other Islamic terrorists [who] continually slaughter Christians in their communities and places of worship as part of their global jihad." J.R. 245.

Significantly, the record also includes specific statements directly establishing that Trump intended to effectuate a partial Muslim ban by banning entry by citizens of specific predominantly Muslim countries deemed to be dangerous, as a means to avoid, for political reasons, an action explicitly directed at Muslims. In a July 24, 2016 interview on Meet the Press, soon after becoming the Republican presidential nominee, Trump asserted that immigration should be immediately suspended "from any nation that has been compromised by terrorism." J.R. 219. When questioned whether his new formulation was a "rollback" of his call for a "Muslim ban," he described it as an "expansion" and explained that "[p]eople were so upset when I used the word Muslim," so he was instead "talking territory instead of Muslim." J.R. 220. When President Trump was preparing to sign the First Executive Order, he remarked, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." J.R. 142. The day after the First Executive Order was issued, Mayor Giuliani appeared on Fox News and asserted that President Trump told him he wanted a Muslim ban and asked Giuliani to "[s]how me the right way to do it legally." J.R. 247. Giuliani, in consultation with others, proposed that the action be "focused on, instead of religion . . . the areas of the world that create danger for us," specifically "places where there are [*sic*] substantial evidence that people are sending terrorists into our country." J.R. 247-48. These types of public

statements were relied upon by the Eastern District of Virginia in enjoining the First Executive Order based on a likelihood of success on an Establishment Clause claim, *Aziz*, 2017 WL 580855, at *11, and the Ninth Circuit in concluding that an Establishment Clause claim against that Order raised "serious allegations" and presented "significant constitutional questions." *Washington*, 847 F.3d at 1168.

These statements, which include explicit, direct statements of President Trump's animus towards Muslims and intention to impose a ban on Muslims entering the United States, present a convincing case that the First Executive Order was issued to accomplish, as nearly as possible, President Trump's promised Muslim ban. In particular, the direct statements by President Trump and Mayor Giuliani's account of his conversations with President Trump reveal that the plan had been to bar the entry of nationals of predominantly Muslim countries deemed to constitute dangerous territory in order to approximate a Muslim ban without calling it one—precisely the form of the travel ban in the First Executive Order. *See Aziz*, 2017 WL 580855, at *4 (quoting from a July 17, 2016 interview during which then-candidate Trump, upon hearing a tweet stating "Calls to ban Muslims from entering the U.S. are offensive and unconstitutional," responded "So you call it territories. OK? We're gonna do territories."). Such explicit statements of a religious purpose are "readily discoverable fact[s]" that allow the Court to identify the purpose of this government action without resort to "judicial psychoanalysis." *McCreary*, 545 U.S. at 862. They constitute clear statements of religious purpose comparable to those relied upon in *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), where the court found that a Ten Commandments display at a state courthouse was erected for a religious purpose in part based on the chief justice stating at the dedication ceremony that "in order to establish justice, we must invoke 'the favor and guidance of Almighty God.'" *Id.* at 1286, 1296 ("[N]o

psychoanalysis or dissection is required here, where there is abundant evidence, including his own words, of the Chief Justice's purpose.").

Relying primarily on this record, Plaintiffs asks this Court to issue an injunction against the Second Executive Order on Establishment Clause grounds. In considering this request, the same record of public statements by President Trump remains highly relevant. In *McCreary*, where the Court was reviewing a third attempt to create a courthouse display including the Ten Commandments after two prior displays had been deemed unconstitutional, it held that its review was not limited to the "latest news about the last in a series of governmental actions" because "the world is not made brand new every morning," "reasonable observers have reasonable memories," and to impose such a limitation would render a court "an absentedminded objective observer, not one presumed familiar with the history of the government's action and competent to learn what history has to show." *McCreary,* 545 U.S. at 866.

The Second Executive Order, issued only six weeks after the First Executive Order, differs, as relevant here, in that the preference for religious minorities in the refugee process has been removed. It also removes Iraq from the list of Designated Countries, exempts certain categories of individuals from the ban, and lists other categories of individuals who may be eligible for a case-by-case waiver from the ban. Despite these changes, the history of public statements continues to provide a convincing case that the purpose of the Second Executive Order remains the realization of the long-envisioned Muslim ban. The Trump Administration acknowledged that the core substance of the First Executive Order remained intact. Prior to its issuance, on February 16, 2017, Stephen Miller, Senior Policy Advisor to the President, described the forthcoming changes as "mostly minor technical differences," and stated that the "basic policies are still going to be in effect." J.R. 319. When the Second Executive Order was

signed on March 6, 2017, White House Press Secretary Sean Spicer stated that "[t]he principles of the [second] executive order remain the same." J.R. 118. The Second Executive Order itself explicitly states that the changes, particularly the addition of exemption and waiver categories, were made to address "judicial concerns," 2d Order § 1(i), including those raised by the Ninth Circuit, which upheld an injunction based on due process concerns, *Washington*, 847 F.3d at 1156.

The removal of the preference for religious minorities in the refugee system, which was the only explicit reference to religion in the First Executive Order, does not cure the Second Executive Order of Establishment Clause concerns. Crucially, the core policy outcome of a blanket ban on entry of nationals from the Designated Countries remains. When President Trump discussed his planned Muslim ban, he described not the preference for religious minorities, but the plan to ban the entry of nationals from certain dangerous countries as a means to carry out the Muslim ban. These statements thus continue to explain the religious purpose behind the travel ban in the Second Executive Order. Under these circumstances, the fact that the Second Executive Order is facially neutral in terms of religion is not dispositive. *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 699-702 (1994) (holding that a facially neutral delegation of civic power to "qualified voters" of a village predominantly comprised of followers of Satmas Hasidism was a "purposeful and forbidden" violation of the Establishment Clause); *cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 542 (1993) (holding that a facially neutral city ordinance prohibiting animal sacrifice and intended to target the Santeria faith violated the Free Exercise Clause because "the Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination" and action

targeting religion "cannot be shielded by mere compliance with the requirement of facial neutrality").

Defendants do not directly contest that this record of public statements reveals a religious motivation for the travel ban. Rather, they argue that many of the statements may not be considered because they were made outside the formal government decisionmaking process or before President Trump became a government official. Although *McCreary*, relied upon by Defendants, states that a court considers "the text, legislative history, and implementation" of an action and "comparable" official acts, it did not purport to list the only materials appropriate for consideration.[2] 545 U.S. at 862. Notably, in *Green v. Haskell County Board of Commissioners*, 568 F.3d 784 (10th Cir. 2009), the United States Court of Appeals for the Tenth Circuit considered quotes from county commissioners that appeared in news reports in finding that a Ten Commandments display violated the Establishment Clause. *Id.* at 701. Likewise, in *Glassroth*, the United States Court of Appeals for the Eleventh Circuit found an Establishment Clause violation based on a record that included the state chief justice's campaign materials, including billboards and television commercials, proclaiming him to be the "Ten Commandments Judge." 335 F.3d at 1282, 1284-85, 1297.

Although statements must be fairly "attributed to [a] government actor," *Glassman v. Arlington Cty.*, 628 F.3d 140, 147 (4th Cir. 2010), Defendants have cited no authority concluding

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[2] In *Hamdan v. Rumsfeld*, 548 U.S. 557, 624 n.52 (2006), cited by Defendants, the Court criticized a dissent's reliance on press statements by senior government officials, rather than the President's formal written determination mandated by the Uniform Code of Military Justice, to provide justification for the government's determination that applying court-martial rules to a terrorism suspect's military commission was impracticable. *Id.* at 624 & n.52. It did not address what facts could be considered in assessing government purpose under the Establishment Clause, where courts have held that facts outside the specific text of the government decision may be considered. *See Edwards*, 482 U.S. at 594-95.

that a court assessing purpose under the Establishment Clause may consider only statements made by government employees at the time that they were government employees. Simply because a decisionmaker made the statements during a campaign does not wipe them from the "reasonable memory" of a "reasonable observer." *McCreary*, 545 U.S. at 866. Notably, the record in *Glassroth* also included the fact that the state chief justice, before securing election to that position, had made a campaign promise to install the Ten Commandments in the state courthouse, as well as campaign materials issued by members of his campaign committee. *Glassroth*, 335 F.3d at 1285. Because the state chief justice was the ultimate decisionmaker, and his campaign committee's statements were fairly attributable to him, such material is appropriately considered in assessing purpose under the Establishment Clause. *See id.* at 1285; *Glassman*, 628 F.3d at 147. Likewise, all of the public statements at issue here are fairly attributable to President Trump, the government decisionmaker for the Second Executive Order, because they were made by President Trump himself, whether during the campaign or as President, by White House staff, or by a close campaign advisor who was relaying a conversation he had with the President. In contrast, Defendants' cited case law does not involve statements fairly attributable to the government decisionmaker. *See, e.g., Glassman*, 628 F.3d at 147 (declining to consider statements made by members of a church that was alleged to have benefited from government action); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1031 (10th Cir. 2008) (declining to consider statements by the artist where the government's display of artwork is challenged); *Modrovich v. Allegheny Cty.*, 385 F.3d 397, 411 (3d Cir. 2004) (declining to consider statements by a judge and county residents about a Ten Commandments display where the county government's purpose was at issue).

Defendants also argue that the Second Executive Order explicitly articulates a national security purpose, and that unlike its predecessor, it includes relevant information about national security concerns. In particular, it asserts that there is a heightened chance that individuals from the Designated Countries will be "terrorist operatives or sympathizers" because each country is "a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones," and those governments are therefore less likely to provide necessary information for the immigrant vetting process. 2d Order § 1(d). The Order also references a history of persons born abroad committing terrorism-related crimes in the United States and identifies three specific cases of such crimes. The Order further states that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations.

Plaintiffs argue that the stated national security rationale is limited and flawed. Among other points, they note that the Second Executive Order does not identify examples of foreign nationals from Iran, Libya, Sudan, Syria, or Yemen who engaged in terrorist activity in the United States. They also note that a report from the Department of Homeland Security, Office of Intelligence and Analysis, concluded that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity" and that "few of the impacted countries have terrorist groups that threaten the West." J.R. 158. Furthermore, they note that the 300 FBI investigations are dwarfed by the over 11,000 counterterrorism investigations at any one time, only a fraction of which lead to actual evidence of illegal activity. Finally, they note that Secretary of Homeland Security Kelly stated that there are additional countries, some of which are not predominantly Muslim, that have vetting problems but are not included among the banned

countries. These facts raise legitimate questions whether the travel ban for the Designated Countries is actually warranted.

Generally, however, courts should afford deference to national security and foreign policy judgments of the Executive Branch. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010). The Court thus should not, and will not, second-guess the conclusion that national security interests would be served by the travel ban. The question, however, is not simply whether the Government has identified a secular purpose for the travel ban. If the stated secular purpose is secondary to the religious purpose, the Establishment Clause would be violated. *See McCreary*, 545 U.S. at 864, 866 n.14 (stating that it is appropriate to treat two like acts differently where one has a "history manifesting sectarian purpose that the other lacks"). Making assessments on purpose, and the relative weight of different purposes, is a core judicial function. *See id.* at 861-62.

In this highly unique case, the record provides strong indications that the national security purpose is not the primary purpose for the travel ban. First, the core concept of the travel ban was adopted in the First Executive Order, without the interagency consultation process typically followed on such matters. Notably, the document providing the recommendation of the Attorney General and the Secretary of Homeland Security was issued not before the First Executive Order, but on March 6, 2017, the same day that the Second Executive Order was issued. The fact that the White House took the highly irregular step of first introducing the travel ban without receiving the input and judgment of the relevant national security agencies strongly suggests that the religious purpose was primary, and the national security purpose, even if legitimate, is a secondary *post hoc* rationale.

Second, the fact that the national security rationale was offered only after courts issued injunctions against the First Executive Order suggests that the religious purpose has been, and remains, primary. Courts have been skeptical of statements of purpose "expressly disclaim[ing] any attempt to endorse religion" when made after a judicial finding of impermissible purpose, describing them as a "litigating position." *E.g.*, *Am. Civil Liberties Union of Ky. v. McCreary Cty.*, 607 F.3d 439, 444, 448 (6th Cir. 2010). Indeed, the Second Executive Order itself acknowledges that the changes made since the First Executive Order were to address "judicial concerns." 2d Order § 1(i).

Third, although it is undisputed that there are heightened security risks with the Designated Countries, as reflected in the fact that those who traveled to those countries or were nationals of some of those countries have previously been barred from the Visa Waiver Program, *see* 8 U.S.C. § 1187(a)(12), the travel ban represents an unprecedented response. Significantly, during the time period since the Reagan Administration, which includes the immediate aftermath of September 11, 2001, there have been no instances in which the President has invoked his authority under § 1182(f) or § 1185 to issue a ban on the entry into the United States of all citizens from more than one country at the same time, much less six nations all at once. Kate M. Manuel, Cong. Research Serv., R44743, Executive Authority to Exclude Aliens: In Brief (2017); J.R. 405-406. In the two instances in which nationals from a single country were temporarily stopped, there was an articulable triggering event that warranted such action. Manuel, *supra*, at 10-11 (referencing the suspension of the entry of Cuban nationals under President Reagan after Cuba stopped complying with U.S. immigration requirements and the revocation of visas issued to Iranians under President Carter during the Iran Hostage Crisis). The Second Executive Order does not explain specifically why this extraordinary, unprecedented action is the necessary

response to the existing risks. But while the travel ban bears no resemblance to any response to a national security risk in recent history, it bears a clear resemblance to the precise action that President Trump described as effectuating his Muslim ban. Thus, it is more likely that the primary purpose of the travel ban was grounded in religion, and even if the Second Executive Order has a national security purpose, it is likely that its primary purpose remains the effectuation of the proposed Muslim ban. Accordingly, there is a likelihood that the travel ban violates the Establishment Clause.

Finally, Defendants argue that because the Establishment Clause claim implicates Congress's plenary power over immigration as delegated to the President, the Court need only consider whether the Government has offered a "facially legitimate and bona fide reason" for its action. *See Mandel*, 408 U.S. at 777. This standard is most typically applied when a court is asked to review an executive officer's decision to deny a visa. *See, e.g.*, *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring); or in other matters relating to the immigration rights of individual aliens or citizens, *see Fiallo v. Bell*, 430 U.S. 787, 790 (1977). The *Mandel* test, however, does not apply to the "promulgation of sweeping immigration policy" at the "highest levels of the political branches." *Washington*, 847 F.3d at 1162 (holding that courts possess "the authority to review executive action" on matters of immigration and national security for "compliance with the Constitution"). In such situations, the power of the Executive and Legislative branches to create immigration law remains "subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (quoting *INS v. Chadha*, 462 U.S. 919, 941-42 (1983)).

Even when exercising their immigration powers, the political branches must choose "constitutionally permissible means of implementing that power." *Chadha*, 462 U.S. at 941. Courts have therefore rejected arguments that they forgo the traditional constitutional analysis

when a plaintiff has challenged the Government's exercise of immigration power as violating the Constitution. *See, e.g.*, *Zadvydas*, 533 U.S. at 695 (rejecting deference to plenary power in determining that indefinite detention of aliens violated the Due Process Clause); *Chadha*, 462 U.S. at 941-43 (stating that Congress's plenary authority over the regulation of aliens does not permit it to "offend some other constitutional restriction" and holding that a statute permitting Congress to overturn the Executive Branch's decision to allow a deportable alien to remain in the United States violated constitutional provisions relating to separation of powers); *Washington*, 847 F.3d at 1167-68 (referencing standard Establishment Clause principles as applicable to the claim that the First Executive Order violated the Establishment Clause). Thus, although "[t]he Executive has broad discretion over the admission and exclusion of aliens," that discretion "may not transgress constitutional limitations," and it is "the duty of the courts" to "say where those statutory and constitutional boundaries lie." *Abourezk*, 785 F.2d at 1061.

Mindful of "the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded," *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984), the Court finds that the Plaintiffs have established that they are likely to succeed on the merits of their Establishment Clause claim. Having reached this conclusion, the Court need not address Plaintiffs' likelihood of success on their Equal Protection Clause claim.

IV. Irreparable Harm

Having concluded that Plaintiffs have established a likelihood of success on the merits, the Court turns to whether they have shown a likelihood of irreparable harm. The Supreme Court has held that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976)

(finding irreparable harm upon a violation of the freedom of association). The Fourth Circuit has applied this holding to cases involving the freedom of speech and expression. *E.g.*, *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 190, 191-92 (4th Cir. 2013); *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011). Although the Fourth Circuit has not yet held that a violation of the Establishment Clause likewise necessarily results in irreparable harm, other circuits have. *See, e.g.*, *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006); *Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996); *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2d Cir. 1986); *Am. Civil Liberties Union of Ill. v. City of St. Charles*, 794 F.2d 265, 275 (7th Cir. 1986) (finding irreparable harm in an Establishment Clause case and stating that the "harm is irreparable as well as substantial because an erosion of religious liberties cannot be deterred by awarding damages to the victims of such erosion").

Here, as in *Elrod*, "First Amendment interests were either threatened or in fact being impaired at the time relief was sought." *Elrod*, 427 U.S. at 373. "[W]hen an Establishment Clause violation is alleged, infringement occurs the moment the government action takes place." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 303. The Court accordingly finds that Plaintiffs have established a likelihood of irreparable harm when the Second Executive Order takes effect.

V. Balance of the Equities and the Public Interest

While Plaintiffs would likely face irreparable harm in the absence of an injunction, Defendants are not directly harmed by a preliminary injunction preventing them from enforcing an Executive Order likely to be found unconstitutional. *See Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003); *Aziz*, 2017 WL 580855, at *10.

Preventing an Establishment Clause violation has significant public benefit beyond the interests of the Plaintiffs. The Supreme Court has recognized the "fundamental place held by the Establishment Clause in our constitutional scheme." *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). The Founders "brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion" because they understood that "governmentally established religions and religious persecution go hand in hand." *Engel v. Vitale*, 370 U.S. 421, 432-33 (1962). When government chooses sides among religions, the "inevitable result" is "hatred, disrespect, and even contempt" from those who adhere to different beliefs. *See id.* at 431. Thus, to avoid sowing seeds of division in our nation, upholding this fundamental constitutional principle at the core of our Nation's identity plainly serves a significant public interest.

At the same time, the Supreme Court has stated that "no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). Defendants, however, have not shown, or even asserted, that national security cannot be maintained without an unprecedented six-country travel ban, a measure that has not been deemed necessary at any other time in recent history. Thus, the balance of the equities and the public interest favor the issuance of an injunction.

VI. Scope of Relief

Plaintiffs have asked the Court to issue an injunction blocking the Executive Order in its entirety. The Court declines to grant such broad relief. The Plaintiffs' Establishment Clause and INA arguments focused primarily on the travel ban for citizens of the six Designated Countries in Section 2(c) of the Second Executive Order. The Court will enjoin that provision only. Although Plaintiffs have argued that sections relating to the temporary ban on refugees also

offend the Establishment Clause, they did not sufficiently develop that argument to warrant an injunction on those sections at this time. As for the remaining portions of the Second Order, Plaintiffs have not provided a sufficient basis to establish their invalidity. Thus, the Court declines to enjoin the Second Order in its entirety.

With respect to Section 2(c), the Court concludes that nationwide relief is warranted. It is "well established" that a federal district court has "wide discretion to fashion appropriate injunctive relief in a particular case." *Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1308 (4th Cir. 1992); *see also Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015) (holding that the "Constitution vests the District Court with 'the judicial Power of the United States,'" which "extends across the country" (quoting U.S. Const. art. III § 1)), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). Injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). However, nationwide injunctions are appropriate if necessary to afford relief to the prevailing party. *See id.*; *Richmond Tenants Org., Inc.*, 956 F.3d at 1308-39; *Texas*, 809 F.3d at 188.

The Court has found that Plaintiffs are likely to be able to establish that Section 2(c) of the Second Executive Order violates the Establishment Clause. Both the Individual Plaintiffs and clients of the Organizational Plaintiffs are located in different parts of the United States, indicating that nationwide relief may be appropriate. *Richmond Tenants Org., Inc.*, 956 F.3d at 1309 (holding that a nationwide injunction was "appropriately tailored" because the plaintiffs lived in different parts of the country). Moreover, although the Government has argued that relief should be strictly limited to the specific interests of the Plaintiffs, an Establishment Clause violation has impacts beyond the personal interests of individual parties. *Joyner v. Forsyth Cty.*,

653 F.3d 341, 355 (4th Cir. 2011) ("[T]hese plaintiffs are not so different from other citizens who may feel in some way marginalized on account of their religious beliefs and who decline to risk the further ostracism that may ensue from bringing their case to court or who simply lack the resources to do so."); *City of St. Charles*, 794 F.2d at 275 (stating that a violation of the Establishment Clause causes "harm to society"). Here, nationwide relief is appropriate because this case involves an alleged violation of the Establishment Clause by the federal government manifested in immigration policy with nationwide effect. *See Decker v. O'Donnell*, 661 F.2d 598, 618 (7th Cir. 1980) (affirming a nationwide injunction in a facial challenge to a federal statute and regulations on Establishment Clause grounds).

Finally, under these facts, a "fragmented" approach "would run afoul of the constitutional and statutory requirement for uniform immigration law and policy." *Washington*, 847 F.3d at 1166-67. "Congress has instructed that the immigration laws of the United States should be enforced vigorously and *uniformly*, and the Supreme Court has described immigration policy as a comprehensive and *unified* system." *Texas*, 80 F.3d at 187-88 (footnotes and quotation marks omitted). In light of the constitutional harms likely to befall Plaintiffs in the absence of relief, and the constitutional mandate of a uniform immigration law and policy, Section 2(c) of the Second Executive Order will be enjoined on a nationwide basis.

CONCLUSION

For the foregoing reasons, the Motion is GRANTED IN PART and DENIED IN PART. The Court will issue an injunction barring enforcement of Section 2(c) of the Second Executive Order. A separate Order shall issue.

Date: March 15, 2017

THEODORE D. CHUANG
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *a project of the Urban Justice Center, Inc., on behalf of itself and its clients*,
HIAS, INC., *on behalf of itself and its clients*,
MIDDLE EAST STUDIES ASSOCIATION *of North America, Inc., on behalf of itself and its members*,
MUHAMMED METEAB,
PAUL HARRISON,
IBRAHIM AHMED MOHOMED,
JOHN DOES Nos. 1 & 3, and
JANE DOE No. 2,

Plaintiffs,

v.

DONALD J. TRUMP, *in his official capacity as President of the United States*,
DEPARTMENT OF HOMELAND SECURITY,
DEPARTMENT OF STATE,
OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE,
JOHN F. KELLY, *in his official capacity as Secretary of Homeland Security*,
REX W. TILLERSON, *in his official capacity as Secretary of State*, and
MICHAEL DEMPSEY, *in his official capacity as Acting Director of National Intelligence*,

Defendants.

Civil Action No. TDC-17-0361

ORDER

For the reasons stated in the accompanying Memorandum Opinion, the Court finds that the Plaintiffs have standing to maintain this civil action and have established that they are likely

to prevail on the merits, that they are likely to suffer irreparable harm in the absence of injunctive relief, and that the balance of the equities and the public interest favor an injunction.

Accordingly, it is hereby ORDERED that:

1. Plaintiffs' Motion for a Preliminary Injunction and/or Temporary Restraining Order of the Executive Order is construed as a Motion for a Preliminary Injunction.

2. The Motion, ECF No. 95, is GRANTED IN PART and DENIED IN PART.

3. The Motion is GRANTED as to Section 2(c) of Executive Order 13,780 ("Executive Order Protecting the Nation from Foreign Terrorist Entry Into the United States"). **Defendants, and all officers, agents, and employees of the Executive Branch of the United States government, and anyone acting under their authorization or direction, are ENJOINED from enforcing Section 2(c) of Executive Order 13,780.**

4. This Preliminary Injunction is granted on a nationwide basis and prohibits the enforcement of Section 2(c) of Executive Order 13,780 in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas, pending further orders from this court.

5. Plaintiffs are not required to pay a security deposit.

6. The Court declines to stay this ruling or hold it in abeyance should an emergency appeal of this Order be filed.

7. The Motion is DENIED as to all other provisions of Executive Order 13,780.

Date: March 15, 2017

THEODORE D. CHUANG
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*, Plaintiffs, v. DONALD TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	No. 8:17-cv-00361-TDC

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the defendants Donald Trump, in his official capacity as President of the United States; Department of Homeland Security; Department of State; Office of the Director of National Intelligence; John F. Kelly, in his official capacity as Secretary of Homeland Security; Rex W. Tillerson, in his official capacity as Secretary of State; and Daniel Coats, in his official capacity as Director of National Intelligence,[1] hereby appeal to the United States Court of Appeals for the Fourth Circuit from the Memorandum Opinion and Order at ECF Nos. 149 and 150, both dated March 15, 2017 and entered on March 16, 2017, enjoining enforcement of Section 2(c) of Executive Order 13,780.

Dated: March 17, 2017

Respectfully submitted,

JEFFREY B. WALL
Acting Solicitor General

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Daniel Coats is substituted for Michael Dempsey as a defendant in this case.

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2017, I electronically filed the foregoing Notice of Appeal using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

/s/ Arjun Garg
ARJUN GARG

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2017, I electronically filed the foregoing Joint Appendix with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ H. Thomas Byron III
H. Thomas Byron III