No. 17-35105

IN THE

United States Court of Appeals for the Ninth Circuit

DONALD J. TRUMP, et al.,
Defendants-Appellants,
v.
STATE OF WASHINGTON, et al.,
Plaintiffs-Appellees

On Appeal from the United States District Court
for the Western District of Washington, No. 2-17-cv-00141
District Judge James L. Robart

STATE OF HAWAII'S OPPOSITION TO DEFENDANTS' MOTION FOR EMERGENCY STAY

DOUGLAS S. CHIN
Attorney General of the State of Hawai'i
CLYDE J. WADSWORTH
Solicitor General of the State of Hawai'i
DEIRDRE MARIE-IHA
KIMBERLY T. GUIDRY
DONNA H. KALAMA
ROBERT T. NAKATSUJI
Deputy Attorneys General

DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI'I
425 Queen Street
Honolulu, HI 96813
Telephone: (808) 586-1500
Fax: (808) 586-1239

NEAL K. KATYAL
COLLEEN ROH SINZDAK
MITCHELL P. REICH
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: (202) 637-5600
Fax: (202) 637-5910
Email: neal.katyal@hoganlovells.com

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
Telephone: (212) 918-3000
Fax: (212) 918-3100

SARA SOLOW
HOGAN LOVELLS US LLP
1835 Market St., 29th Floor
Philadelphia, PA 19103
Telephone: (267) 675-4600
Fax: (267) 675-4601

Attorneys for Proposed Intervenor, State of Hawai‘i

INTRODUCTION

On January 27, 2017, President Donald Trump signed an Executive Order that bans visitors and immigrants from seven Muslim-majority countries; slams the door shut on refugees; and creates a preference for Christians when refugees are admitted at all. Recognizing that the Order is unconstitutional and unlawful several times over, the District Court stayed its enforcement. The Federal Government now challenges that stay. But its brief says little about the Constitution or the laws the President swore an oath to uphold. Instead, it paints a picture of federal courts powerless in the face of presidential prerogative, arguing that the President has "unreviewable authority" to bar aliens. The Government even ventures, strikingly, that "[j]udicial second-guessing of the President's national security determination *in itself* imposes substantial harm." Mot. 2, 21 (emphasis added).

Not so. The President does not "have the power to switch the Constitution on or off at will"; it is not for "the President * * * [to] say 'what the law is.'" *Boumediene* v. *Bush*, 553 U.S. 723, 765 (2008) (quoting *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)). That is the judiciary's responsibility, and this case demonstrates why. Without a judicial check, Hawai'i and the country face an Order that tramples our core constitutional values and flouts Congress's commands. In establishing a policy designed to "ban Muslims," the Order violates

the Establishment Clause and the guarantee of Equal Protection. In summarily preventing resident aliens from returning from abroad, it violates the Due Process Clause. And in openly discriminating on the basis of nationality, it contravenes a landmark statute of Congress. The stay should be rejected.

FACTUAL BACKGROUND

Then-candidate Donald Trump made it crystal-clear throughout his campaign that, if elected, he planned to bar Muslims from the United States. Shortly after the Paris attacks in December 2015, Mr. Trump called for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." Compl. ¶ 30 [attached as **Exhibit C].** In resonant terms for Hawaii's residents, he compared the idea to President Roosevelt's internment of Japanese Americans during World War II, saying, "[Roosevelt] did the same thing." *Id.* ¶ 31. And when asked what the customs process would look like for a Muslim non-citizen attempting to enter the United States, Mr. Trump said: "[T]hey would say, are you Muslim?" An interviewer responded: "And if they said 'yes,' they would not be allowed into the country." Mr. Trump said: "That's correct." *Id.*

Later, as the presumptive Republican nominee, Mr. Trump began using neutral language to describe the Muslim ban; he described his proposal as stopping immigration from countries "where there is a proven history of terrorism." *Id.*

¶ 34. But when asked in July 2016 whether he was retracting his call to ban Muslim immigrants, he said: "I actually don't think it's a pull back. In fact, you could say it's an expansion." *Id.* ¶ 36. And he explained: "People were so upset when I used the word Muslim. 'Oh, you can't use the word Muslim * * *. And I'm okay with that, because I'm talking territory instead of Muslim." *Id.*

Indeed, it is now clear that Mr. Trump—apparently recognizing that he could not implement a naked ban legally—was working behind the scenes to create a subterfuge. In a recent interview, one of the President's surrogates explained: "So when [Donald Trump] first announced it, *he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally*.'" *Id.* ¶ 54. After his election, on December 21, 2016, the President-Elect was asked whether he had decided "to rethink or re-evaluate [his] plans to create a Muslim registry or ban Muslim immigration to the United States." He replied: "You know my plans. All along, I've been proven to be right." *Id.* ¶ 38.

Within one week of his swearing-in, President Trump acted upon his ominous campaign promises. On January 27, 2017, he signed an Executive Order, entitled "Protecting the Nation From Terrorist Entry into the United States." *Id.* ¶¶ 2, 41. When signing the Order, President Trump read its title, looked up, and said: "We all know what that means." *Id.* ¶ 41.

As set forth at length in Washington's brief, the Order has two dramatic effects. First, it categorically bans immigration from seven Muslim-majority countries for a set period. Order § 3(c). Second, it halts admission of any refugees, subject to a targeted carve-out for members of "minority religion[s]" in each country. *Id.* § 5(a)-(b), (e).

President Trump's Order was greeted by widespread protests and condemnation, as well as reports of chaotic conditions at the nation's airports. Within days, more than 100 people had been detained at U.S. airports pursuant to the Order's directives, and more than 60,000 visas were revoked.

ARGUMENT

I. THIS MOTION IS PROCEDURALLY IMPROPER.

It is black-letter law that review of a TRO "cannot be by appeal as of right, but is limited to the consideration of a petition for mandamus." *Wilson* v. *U.S. Dist. Court for Northern Dist. of California*, 161 F.3d 1185, 1187 (9th Cir. 1998). The appeal of the TRO must therefore be dismissed.

The Government attempts to evade this obstacle by claiming that the TRO is in fact a preliminary injunction. Mot. 8. Not so. The District Court has ordered the parties to set a briefing schedule for "the States' motion for a preliminary injunction" by 5:00 pm Monday so that it can "promptly" decide if such an injunction is appropriate. D.Ct. Order at 6. Plainly, the District Court has not

already issued a preliminary injunction. And in light of the impending hearing, there is no reason to think that the TRO will "exceed[] * * * ordinary duration," or that the court below has already heard adequate presentation of the arguments. Mot. 8. The Government's premature attempt to seek appellate review is improper.

II. THE GOVERNMENT IS NOT ENTITLED TO A STAY.

Even if the instant appeal were appropriate, it wholly lacks merit. The Order violates the Immigration and Nationality Act (INA), the Establishment Clause, and the Due Process Clause. And while the Government suffers no hardship under the TRO—which merely preserves the status quo that has prevailed for literally decades—Hawai‘i and much of the Nation will suffer irreparable harm to their laws, economies, and most fundamental values if the TRO is lifted.

A. The Government Cannot Succeed On The Merits.

1. The Government Does Not Have Unreviewable Power to Issue The Order.

The Government offers no satisfying explanation as to how a policy that began life as a "Muslim ban" is nonetheless consistent with the INA, the Establishment Clause and the Fifth Amendment. Instead it relies primarily on the so-called "plenary power" doctrine. But that doctrine "is subject to important constitutional limitations." *Zadvydas* v. *Davis*, 533 U.S. 678, 695 (2001). At most, it means that an Executive decision that "burdens * * * constitutional rights"

is valid "when it is made 'on the basis of a facially legitimate and *bona fide* reason.'" *Kerry* v. *Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring in the judgment) (quoting *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972) (emphasis added)). Justice Kennedy's controlling concurrence in *Din* made clear that courts may "look behind" the stated rationale for an exclusion if there is "an affirmative showing of bad faith." *Id.*; *see Cardenas* v. *United States*, 826 F.3d 1164, 1171-72 (9th Cir. 2016) (holding that Justice Kennedy's *Din* concurrence is controlling). If President Trump and his surrogates' repeated statements that the purpose of the Order was to effect a "Muslim ban" do not satisfy that standard, nothing will.

Moreover, because the ban conflicts with the INA, the President's "power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring in the judgment).

2. The Order Is Inconsistent with the Immigration and Nationality Act.

In general, "the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Bond* v. *United States*, 134 S. Ct. 2077, 2087 (2014). The plain terms of the immigration laws suffice to resolve this appeal. The Order "discriminate[s]" against prospective immigrants based on "nationality," in violation of 8 U.S.C. § 1152(a)(1)(A), and it grossly

misapplies the President's authority to "suspend the entry" of aliens, 8 U.S.C. § 1182(f).

a. The order's nationality-based classifications violate the INA.

To start, the Order violates the INA's flat prohibition on nationality-based discrimination. Section 202(a)(1)(A) of the INA provides that "[e]xcept as specifically provided" in certain subsections, "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). As Judge Sentelle has written, "Congress could hardly have chosen more explicit language": It "unambiguously directed that no nationality-based discrimination shall occur." *Legal Assistance for Vietnamese Asylum Seekers* v. *Dep't of State*, 45 F.3d 469, 473 (D.C. Cir. 1995) ("*LAVAS*"), *vacated on other grounds*, 519 U.S. 1 (1996).

The Order flouts this clear command. Tracking the words of the statute almost verbatim, it purports to prohibit the "*Issuance of Visas* * * * *to Nationals* of Countries of Particular Concern," § 3(a) (emphasis added), by "suspend[ing] the entry into the United States" of aliens "from" seven designated countries, § 3(c). It further provides that "*nationals of countries for which visas* and other benefits are otherwise *blocked*" by this suspension can only obtain entry to the United States "on a case-by-case basis, and when in the national interest." *Id.* § 3(e) (emphases

added). In words too plain to mistake, this Order directs that aliens should "receive preference or priority [and] be discriminated against in the issuance of an immigrant visa because of * * * nationality." 8 U.S.C. § 1152(a)(1)(A).

Remarkably, the Government suggests the Order does not mandate nationality-based discrimination "in the issuance of visas" because section 3(c) only says that it "suspend[s] the *entry*" of nationals of seven countries. Mot. 14 (emphasis added). Nonsense. The Order expressly says that it suspends the "Issuance of Visas * * * to Nationals of [those] Countries," § 3(a), and that the "suspension pursuant to subsection (c) * * * block[s]" immigration officials from "issu[ing] visas" to them, § 3(e). Moreover, the only purpose of a visa is to permit "entry." It would gut section 202(a)(1)(A) if the President could circumvent its prohibition simply by denying visas any *effect* on the basis of nationality.

The Government also claims (at 14-15) that the Order falls within an exception to section 202(a)(1)(A) concerning "the authority of the Secretary of State to determine the *procedures* for the *processing* of immigrant visa applications." 8 U.S.C. § 1152(a)(1)(B) (emphases added). But the Order plainly does not just change "the procedures for the processing of" visa applications. It "block[s]" altogether the issuance of "visas or other immigration benefits" to hundreds of millions of individuals. § 3(g). The fact that one of the stated (and

highly dubious) rationales for that ban is to speed a review of visa rules does not transform the ban itself into a matter of mere procedure.

Finally, ignoring the text of the statute entirely, the Government claims (at 13) that courts and Presidents have previously authorized discriminatory bans on entry. No. Courts have sometimes held that already-admitted aliens may be subjected to nationality-based reporting rules, *Narenji* v. *Civiletti*, 617 F.2d 745, 746 (D.C. Cir. 1979), and registration requirements, *Rajah* v. *Mukasey*, 544 F.3d 427, 433-435 (2d Cir. 2008). In *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), the Supreme Court approved an order that made no distinction based on nationality at all. *See id.* at 160 (order prohibited any unlawful entry by sea). No court has held—nor could it—that the Government may engage in nationality-based discrimination in visa-issuance decisions, in clear violation of section 202(a)(1)(A)'s text. *See Jean* v. *Nelson*, 727 F.2d 957, 978 n.30 (11th Cir. 1984) (en banc), *aff'd*, 472U.S. 846 (1985) (expressly distinguishing between "administrative" rules that draw nationality-based distinctions and the system for "the issuance of immigrant visas"). Indeed, many courts have made clear that the Government may not. *See, e.g.*, *LAVAS*, 45 F.3d at 473; *Olsen*, 990 F. Supp. at 37; *Bertrand v. Sava*, 684 F.2d 204, 213 n.12 (2d Cir. 1982).

Until now, Presidents accepted this limit. Since Congress enacted section 8 U.S.C. § 1182(f) in 1952, Presidents have relied on that provision over 40 times to

suspend entry by limited groups of aliens. *See* Cong. Research Serv., Executive Authority to Exclude Aliens: In Brief 6-10 (Jan. 23, 2017), https://fas.org/sgp/crs/homesec/R44743.pdf. The only instance the Government can find in which a President supposedly engaged in nationality-based discrimination is a 1986 order that briefly limited Cuban immigration. *See* Mot. 4, 13. That order, however, had a standalone and last-in-time source of authority: It enforced an immigration treaty that Cuba had violated. 1986 WL 796773; *see* U.S.-Cuba Immigration Agreement, TIAS 11057 (Dec. 14, 1984) (agreeing to permit immigration from Cuba contingent on certain terms). The order did not claim—as this President does—limitless power to shut the Nation's ports of entry to any group of nationals the President deems unwanted.[1]

b. The Order's categorical bans exceed the President's authority.

Further, even apart from its blatant discrimination, the Order exceeds the President's authority by imposing categorical and arbitrary bans on entry that the immigration laws do not permit. As a basis for its sweeping bans, the Order again relies on 8 U.S.C. § 1182(f). But in every prior instance in which Presidents have invoked section 1182(f), they used it to suspend entry of a *discrete* set of

[1] The Government claims that reading section 202(a)(1)(A) to limit the President's power to suspend entry in time of war would "raise a serious constitutional question." Mot. 15. That issue is not presented in this case; the Nation is not at war with any of the seven countries whose nationals the Order bans.

individuals based on an *individualized* determination that *each* prohibited member of the class had engaged in conduct "detrimental to the [United States'] interests." 8 U.S.C. § 1182(f); *see* CRS Report at 6-10. Before now, no President attempted to invoke this statute to impose a *categorical* bar on admission based on a *generalized* (and unsupported) claim that *some* members of a class *might* engage in misconduct. And no President has taken the further step of establishing an *ad hoc* scheme of exceptions that allows immigration officers to admit whomever they choose on either a "case-by-case basis," Order § 3(g), or categorically, *see* Statement by Secretary John Kelly on the Entry of Lawful Permanent Residents Into the United States (Jan. 29, 2017).

If these novel assertions of authority were accepted, the immigration laws could be nullified by executive fiat. It is always possible to claim that some broad group might include dangerous individuals. The President's logic would permit him to abandon Congress's immigration system at will, and replace it with his own rules of entry governed by administrative whim.

That is not the law Congress enacted. "Congress * * * does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions"—it does not, as Justice Scalia wrote, "hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Enabling the President to unilaterally suspend the immigration laws would surely be an

elephant; and the vague terms of Section 1182(f)—never once in six decades interpreted in the manner the President now proposes—are a quintessential mousehole. *See FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-160 (2000). Indeed, it is doubtful that Congress *could* delegate such unbounded authority to the President. *See Whitman*, 531 U.S. at 472 (Congress cannot delegate powers without an "intelligible principle" to govern their exercise).

3. The Order Violates the Establishment Clause.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). To determine whether a particular policy runs afoul of that command, the Ninth Circuit typically applies the three-part test from *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). *See, e.g.*, *Access Fund* v. *U.S. Dep't of Agric.*, 499 F.3d 1036, 1042-43 (9th Cir. 2007). "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion * * *; finally the statute must not foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-613 (internal quotation marks omitted). The Order cannot satisfy a single one of these requirements.

While the Government has asserted that the Order serves the secular purpose of protecting against terrorism, "an 'avowed' secular purpose is not sufficient to

avoid conflict with the First Amendment" where the order's actual aim is establishing a religious preference. *Stone* v. *Graham*, 449 U.S. 39, 41 (1980) (per curiam). Here, the President and his aides have made it abundantly clear that their aim is to exclude individuals of the Muslim faith. Compl. ¶¶ 27-43, 53-54. And sections 5(b) and 5(e) explicitly direct the government to prioritize religious refugee claims if the "religion of the individual is a minority religion in the individual's country"—a provision that President Trump told the media was expressly designed to favor Christians. *Id.* ¶¶ 51, 53.

In the Establishment Clause context, these statements matter. Because *Lemon*'s first step is concerned with "whether [the] government's actual purpose is to endorse or disapprove of religion," courts routinely look to the public declarations of an act's originator to discern its true aim. *Wallace* v. *Jaffree*, 472 U.S. 38, 56-57 (1985) (finding a constitutional violation where a bill's sponsor "inserted into the legislative record * * * a statement indicating that the legislation was an 'effort to return voluntary prayer' to the public schools"); *Edwards* v. *Aguillard*, 482 U.S. 578, 586-587 (1987) (examining the remarks of a bill's sponsor to determine whether a stated secular purpose was "sincere and not a sham"). That is particularly so when the head of our government publicly expresses "a purpose to favor religion"; in doing so, he "sends the message to nonadherents that they are outsiders, not full members of the political community."

McCreary Cty., Ky. v. *Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860-861 (2005) (internal quotation marks and ellipses omitted). An otherwise constitutional policy therefore may be invalidated "if the government justifies the decision with a stated desire" to promote a particular religion. *Id.*

Further, there is no question that the President's public statements have caused citizens to reasonably *believe* that the policy is aimed at the Muslim faith: *Supra* at pp. 2-4. That is enough to demonstrate an Establishment Clause violation under the second prong of *Lemon*, which "asks whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Access Fund*, 499 F.3d at 1045 (internal quotation marks omitted); *see McCreary*, 545 U.S. at 868 n.14. And the Order is also unconstitutional under *Lemon*'s third prong because its exception for members of religious minorities alone "foster[s] an excessive government entanglement with religion." 403 U.S. at 612-613 (internal quotation marks omitted).

There is also no question that the Establishment Clause fully applies in the immigration context. Indeed, in one of the Supreme Court's most recent Establishment Clause cases, six members of the Court agreed that requiring "an immigrant seeking naturalization * * * to bow her head and recite a Christian prayer" would unquestionably violate the Establishment Clause. *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1834 (2014) (Alito, J., joined by Scalia, J.,

concurring); *id.* at 1842 (Kagan, J., joined by Ginsburg, J., Breyer, J., and Sotomayor, J., dissenting).

The Government has no response to any of this. It says (at 19) that section 5(b) is "neutral" because on its face it applies to any refugee who belongs to a "minority" faith in his country, wishing away the President's statement that this provision's "purpose" was to aid Christians. *Wallace*, 472 U.S. at 56. Nor does it explain how Section 3(c)'s ban on any travel from seven Muslim-majority nations—a restriction intended and widely understood as an effort to disfavor Muslims—is consistent with the Establishment Clause. Although reasonable minds may disagree as to what quantum of financial support that Clause permits for private education, *Agostini* v. *Felton*, 521 U.S. 203 (1997), or whether the Establishment Clause is violated by a purportedly secular monument of the Ten Commandments, *McCreary*, 545 U.S. at 844, there can be no dispute that the Clause is violated where the Executive announces and makes good on a desire to exclude or privilege the entrance of individuals into the country depending on their faith.

4. The Order Violates Equal Protection.

The Order also violates the equal protection component of the Due Process Clause. Classifications based on religion and national origin are subject to strict scrutiny, and so must be "narrowly tailored to achieving a compelling * * *

interest." *Miller* v. *Johnson*, 515 U.S. 900, 904 (1995); *see Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 107 n.30 (1976); *Employment Div.* v. *Smith*, 494 U.S. 872, 886 n.3 (1990) The Order expressly and intentionally differentiates among people based on national origin, §§ 3(c), 5(c), and religion, §§ 3(c), 5(b), (e). And it is nowhere near "tailored" enough to justify that differentiation: Despite its assertion that it is meant to prevent terrorism, the Order ensnares countless resident aliens lacking even the remotest connection to terrorism of any sort, yet would not have prohibited entry by *any* of the perpetrators of the worst recent terrorist attacks on American soil. Compl. ¶ 46. This mismatch—so severe that it would flunk even rational-basis review—indicates that the real purpose of the Order was an unlawful intent to "harm a politically unpopular group." *United States* v. *Windsor*, 133 S. Ct. 2675, 2693 (2013) (citation omitted).

The Government (at 17) defends the Order on the basis of the plenary power doctrine. But its blinkered refusal to "look behind" the face of the policy to the "bad faith" that underlies it dooms that argument. *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). The Government also claims (at 19) that there can be no animus here because the countries that the Order targets in section 3(c) were "identified in restricting the waiver program in 2015 and 2016." But that program's restrictions are far less burdensome, and more closely related to their purpose—critical considerations in the narrow tailoring analysis. Moreover,

the fact that the countries were once selected for neutral purposes cannot erase the fact that *here*, as the President's and his surrogates' statements make clear, they were selected to camouflage religious discrimination.

5. The Order Violates Due Process.

Sections 3(c) and 3(e)-(f) of the Order also violate the Fifth Amendment's procedural due process requirements. Denial of reentry "is, without question, a weighty" interest, and a person in that circumstance must be given "an opportunity to present her case effectively." *Landon* v. *Plasencia*, 459 U.S. 21, 34, 36 (1982). But the Order offers no procedural protections whatsoever: It allows for no counsel, no hearings, no inquiry, and no review. That will not do.

The Government responds (at 18) that some of those individuals affected by the Order lack Fifth Amendment rights because they have never been admitted to the United States. That is far from clear; six justices recently indicated that Due Process may demand certain protections for aliens seeking entry. *See Din*, 135 S. Ct. at 2142 (Breyer, J., dissenting); *id.* at 2139 (Kennedy, J., concurring in the judgment). And in any event, the Government offers no defense as to those aliens who *have* been admitted, and are merely seeking to return from abroad. The Court has made crystal clear that "[t]he returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him." *Rosenberg* v. *Fleuti*, 374 U.S. 449, 460 (1963).

6. The State Has Standing to Bring These Challenges to the Order.

The Government attempts to dodge the merits by asserting that States lack standing to challenge the order. Not so.

As an initial matter, the Government studiously ignores *Massachusetts v. EPA*, 549 U.S. 497 (2007), which held that States are due "*special solicitude* in [the] standing analysis" when they challenge executive measures that affect their "sovereign prerogatives," *id.* at 520 (emphasis added). The need for solicitude is particularly acute in cases like this one because unlawful Executive action deprives Hawai‘i of the key structural mechanism the Constitution provides for protecting their sovereign interests—representation in Congress. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985). And this Order will inflict at least four unique injuries on Hawai‘i, making it readily apparent that Hawai‘i would have standing, even without this special solicitude.

First, the Executive Order will irreparably harm Hawaii's sovereign interest in preventing the unconstitutional "establishment" of a national religion in the State. The Government suggests that States lack standing to bring Establishment Clause challenges because they "cannot suffer 'spiritual or psychological harm' or hold 'religious beliefs.'" Mot. 11 n.4. Wrong. The Establishment Clause—whose text instructs that "*Congress* shall make no law respecting an establishment of religion," U.S. Const. amdt. 1(emphasis added)—was added to the Constitution not

only to protect individuals' rights but "as a federalism provision intended to prevent Congress from interfering with *state*" policies on religion. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 49 (Thomas, J., concurring).

Second, the Order gives rise to cognizable Article III injuries because it prevents Hawai'i from fully enforcing its anti-discrimination laws and policies. Hawaii's Constitution protects religious freedom and the equal rights of all persons. Hawai'i Const. art. 1, §§ 2, 4. Its statutes and policies bar discrimination and further diversity. Haw. Rev. Stat. §§ 378-2(1); 489-3; 515-3; Compl. ¶ 72. The Executive Order commands Hawai'i to abandon these sovereign prerogatives by requiring its universities, its agencies, and its instrumentalities to discriminate on the basis of nationality and religion. As the Government notes (at 22), in a related context the Court has held that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers).

Third, the Executive Order will inflict irreparable harm on Hawaii's economy and tax revenues. Tourism is the "state's lead[ing] economic driver"; in 2015 alone, Hawai'i had 8.7 million visitor arrivals, accounting for $15 billion in spending. Compl. ¶ 15. The Order prevents any nationals of the designated countries from visiting the State, and chills tourism from many other countries,

resulting in considerable lost revenues. Ex. B, Decls. E-F (declarations filed by State officials). These consequences will reduce the State's economic output and its tax revenues, and inflict incalculable harm on Hawaii's hard-won reputation as a place of welcome. *See Oracle USA, Inc.* v. *Rimini St., Inc.*, 2016 WL 5213917, at *2 (9th Cir. Sept. 21, 2016).

The Government, citing a 1927 case, erroneously suggests (at 10) that such irreparable injuries to a State's economy, tax revenues, and reputation cannot support standing. False. More recent precedent establishes exactly the opposite. *See Texas v. United States*, 809 F.3d 134, 155-156 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (Texas' "financial loss[es]" that it would bear, due to having to grant DAPA recipients drivers licenses, constituted a concrete and immediate injury for standing purposes); *see also United States v. Windsor*, 133 S. Ct. 2675 (2013) (standing to appeal an order to pay a tax refund); *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992) (standing to sue for "direct injury in the form of a loss of specific tax revenues").

Finally, the Order subjects a portion of Hawaii's population to discrimination and marginalization while denying all residents of the State the benefits of a pluralistic and inclusive society. Hawai‘i has a quasi-sovereign interest in "securing [its] residents from the harmful effects of discrimination." *Alfred L. Snapp & Son*, 458 U.S. 592, 609 (1982). Hawai‘i is home to over 6,000

legal permanent residents, including numerous individuals from the designated countries. Compl. ¶ 10. It currently has 12,000 foreign students, including 27 graduate students from the designated countries at the University of Hawai‘i alone. Ex. B., Decl. D (declaration of University official). The University of Hawai‘i also has at least 10 faculty members who are legal permanent residents from the designated countries, and at least 30 faculty members with valid visas from those countries. *Id.* Section 3(c) of the Order subjects these Hawaii residents to second-class treatment—denying them their fundamental right to travel overseas, preventing them from tending to important family matters, and impairing their ability to complete necessary aspects of their work or study. More broadly, the Order subjects all of Hawai‘i—which prides itself on its ethnic diversity and inclusion—to a discriminatory policy that differentiates among State residents based on their national origin.

B. The Balance of the Equities Bars a Stay.

The Government has identified no exigency that demands immediate implementation of this Order. They have *no* evidence that the Order's wildly over- and under-inclusive bans will actually prevent terrorism or make the Nation more secure. Moreover, their claims of national security dangers are dramatically undercut by the fact that the TRO simply restored the status quo for decades that was in place little more than one week ago.

By contrast, the four harms that establish Hawaii's standing also demonstrate that the State will be irreparably harmed if the TRO is stayed. And the Nation as a whole will be injured for many of these same reasons. Religion is being improperly established, rights are being unconstitutionally denied, and the values and freedoms at the core of our nation are being defied. There is therefore no question that the public interest counsels against a stay. Indeed, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres* v. *Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

Finally, the Government suggests that it was inappropriate for the District Court to issue a "nationwide" injunction. But a "district court has broad discretion in fashioning equitable relief." *Koniag, Inc. v. Koncor Forest Res.*, 39 F.3d 991, 1001 (9th Cir. 1994). And this Court has noted that a "nationwide injunction" setting aside unlawful agency action "is compelled by the text of the Administrative Procedure Act." *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007), *rev'd in part on other grounds*, 555 U.S. 488 (2009). A nationwide injunction is particularly appropriate in the immigration context because of the Constitution's requirement of "a *uniform* Rule of Naturalization." *Texas*, 787 F.3d at 769 (emphasis added).

CONCLUSION

The Motion for an Emergency Stay should be denied.

Respectfully submitted,

/s/ Neal Kumar Katyal

DOUGLAS S. CHIN
Attorney General of the State of Hawai‘i
CLYDE J. WADSWORTH
Solicitor General of the State of Hawai‘i
DEIRDRE MARIE-IHA
KIMBERLY T. GUIDRY
DONNA H. KALAMA
ROBERT T. NAKATSUJI
Deputy Attorneys General

DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI‘I
425 Queen Street
Honolulu, HI 96813
Telephone: (808) 586-1500
Fax: (808) 586-1239

NEAL K. KATYAL
COLLEEN ROH SINZDAK
MITCHELL P. REICH
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: (202) 637-5600
Fax: (202) 637-5910
Email: neal.katyal@hoganlovells.com

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
Telephone: (212) 918-3000
Fax: (212) 918-3100

SARA SOLOW
HOGAN LOVELLS US LLP
1835 Market St., 29th Floor
Philadelphia, PA 19103
Telephone: (267) 675-4600
Fax: (267) 675-4601

Attorneys for Proposed Intervenor, State of Hawai‘i

CERTIFICATE OF COMPLIANCE

I certify pursuant to Circuit Rule 35-4 that the attached Opposition to Defendants' Motion for an Emergency Stay is proportionately spaced, has a typeface of 14 points or more, and contains 5,189 words of text.

/s/ Neal Kumar Katyal
Neal Kumar Katyal

CERTIFICATE OF SERVICE

I certify that the foregoing Opposition to Defendants' Motion for an Emergency Stay was filed with the Clerk using the appellate CM/ECF system on February 5, 2017. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Neal Kumar Katyal
Neal Kumar Katyal