IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

STATE OF HAWAI'I, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No. _____ MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

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INTRODUCTION

On January 27, 2017, President Donald Trump signed an Executive Order that banned immigrants from seven Muslim-majority countries and created a preference for Christian refugees. That Order has triggered an uproar across the United States and the world. And rightfully so: As many have observed, the Order is a distressing departure from an American tradition that has long celebrated immigrants and opened its arms to the homeless, the tempest-tossed.

Hawai‘i joins the many voices that have condemned the Order. But this pleading is not about politics or rhetoric—it is about the law. The simple fact is that the Order is unlawful. By banning Muslims and creating a preference for Christian refugees, the Order violates the Establishment Clause of the United States Constitution. By those same acts, it violates the equal protection guarantee of the Fifth Amendment. By failing utterly to provide procedures or protections of any kind for people detained or turned away at our airports, it violates the Due Process Clause. And by enshrining rank discrimination on the basis of nationality and religion, it flies in the face of statutes enacted by Congress.

Hawai‘i and its residents are being grievously harmed by these violations of the law. The Order is keeping Hawai‘i families apart; it is blocking Hawai‘i residents from traveling; it is using the State’s airport facilities to further discriminatory policies the State abhors; it is harming Hawaii’s critical tourism

industry; it is establishing a religion in Hawai‘i against the will of its residents; and it is blocking Hawaii's businesses and universities from hiring as they see fit. Perhaps most importantly, it is degrading the pluralistic values Hawai‘i has worked hard to protect and subjecting an identifiable portion of its population to discrimination and second-class treatment.

Hawai‘i respectfully asks this Court to enter a temporary restraining order blocking enforcement of key portions of the Order. The test for such a remedy is met: Hawai‘i is likely to succeed in showing on the merits that the Order is unlawful several times over. The State is being irreparably harmed by the Order's enforcement. And those harms far outweigh the non-existent interest the Executive Branch has identified in enforcing its discriminatory regime. The motion should be granted.

FACTUAL BACKGROUND

A. Candidate Trump Calls For A Muslim Ban.

Then-candidate Donald Trump made it crystal clear throughout his presidential campaign that if elected, he planned to bar Muslims from the United States. Shortly after the Paris attacks in December 2015, Mr. Trump issued a press release calling 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 & Ex. 5. When questioned about the idea shortly thereafter, he compared it to

President Roosevelt's race-based internment of the Japanese during World War II, saying, "[Roosevelt] did the same thing." Compl. ¶ 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 facially neutral language to describe the Muslim ban; he described his proposal as stopping immigration from countries "where there's a proven history of terrorism." Compl. ¶ 34. But he continued to link that idea to the need to stop "importing radical Islamic terrorism to the West through a failed immigration system." *Id.* And he continued to admit, when pressed, that his plan to ban Muslims remained intact. Asked in July 2016 whether he was retracting his call for "a total and complete shut-down of Muslim" immigration, he said: "I don't think it's a rollback. In fact, you could say it's an expansion." Compl. ¶ 36 & Ex. 6. 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 come right out and implement his Muslim ban without violating the

law—was working behind the scenes to create a suitable subterfuge. In a recent television interview, one of the President's surrogates explained what happened: "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*.'" Compl. ¶ 54 & Ex. 8. After his election, the President-Elect signaled that he would not retreat from his Muslim ban. On December 21, 2016, he 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." Compl. ¶ 38.

Donald Trump's comments also targeted more specific groups. Throughout the presidential campaign, he vowed to curb refugee admissions, particularly from Syria. In June 2016, he issued a press release stating: "We have to stop the tremendous flow of Syrian refugees into the United States." Compl. ¶ 35. At one point, he promised to deport the 10,000 Syrian refugees the Administration had accepted for 2016. Compl. ¶ 29. Meanwhile, he asserted (wrongly) that Christian refugees from Syria were being blocked. He said in July 2015: "If you're * * * a Christian, you cannot come into this country." Compl. ¶ 28.

B. President Trump Implements His Discriminatory Bans.

Within one week of being sworn in as President, Donald Trump acted upon his ominous campaign promises. On January 27, 2017, he signed an Executive

Order ("Order"), entitled "Protecting the Nation From Terrorist Entry into the United States." Compl. ¶¶ 2, 41 & Ex. 1. When signing the Order, President Trump read its title, looked up, and said: "We all know what that means." Compl. ¶ 43.

The Order has two dramatic effects: It categorically bans immigration from seven Muslim-majority countries for a set period; and it halts admission of any refugees, subject to a targeted carve-out for members of "minority religion[s]" in each country.

First, Section 3(c) of the Order "suspend[s the] entry into the United States, as immigrants and nonimmigrants," of nearly all aliens from seven Muslim-majority countries—Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen—"for 90 days from the date of this order." Exceptions are made for narrow categories of diplomats. Putting aside those diplomats, Section 3(c) means that for 90 days *all* non-U.S. citizens from those seven countries are barred. And it means that even people who have been living legally in the United States—foreign students enrolled in U.S. universities, refugees already granted asylum here, and people employed in the United States on temporary work visas, among others—will be halted at the border if they travel outside the United States. Section 3(g) gives the Secretaries of Homeland Security and State discretion to "on a case-by-case basis * * * issue visas or other immigration benefits to nationals of countries for which

visas and benefits are otherwise blocked." *Id.* However, it provides no procedure for an alien to request such an exception or for the Secretaries to process one.

By its plain terms, this order bars lawful permanent residents (LPRs) from the seven prohibited nations from reentering the country. Two days after the order was issued, Secretary of Homeland Security Kelly issued a press release purporting to categorically exempt LPRs from the travel ban. Compl. ¶ 62. Four days later, the White House changed its mind and issued a memorandum stating that, despite the order's language, LPRs were not covered in the first place. Compl. ¶ 64.

While the Order's immigration ban currently applies only to people from the seven designated countries, the Order indicates that more will be added to the list. It directs the Secretary of State to "request [that] all foreign governments" provide the United States with information necessary "to adjudicate any visa, admission, or other [immigration] benefit * * * in order to determine that the individual * * * is not a security or public-safety threat." *Id.* § 3(a), (d). Foreign countries must "start providing such information [to the United States] regarding their nationals within 60 days of notification." *Id.* § 3(d). If foreign countries do not comply, the Secretaries of Homeland Security and State are directed to "submit to the President a list of [those] countries recommended for inclusion" in the immigration ban. *Id.* § 3(e).

The Order also bars refugees—and it does so in a way that discriminates based on religion. Sections 5(a) and (b) impose a 120-day moratorium on the U.S. Refugee Admissions Program, and Section 5(c) suspends entry of Syrian refugees indefinitely. When refugee admissions resume, the Order directs the Secretary of State to prioritize refugees claiming religious-based persecution, "provided that the religion of the individual is a minority religion in the individual's country of nationality." *Id.* § 5(b). It also provides that even during the initial 120-day period, the Secretaries of State and Homeland Security can admit refugees on a case-by-case basis, but only when doing so is "in the national interest." *Id.* § 5(e). Three circumstances automatically fulfill that criterion; one is "when the person is a religious minority in his country of nationality facing religious persecution." *Id.*

Because all seven countries named in the Order have majority-Muslim populations, these provisions create a preference for Christians. They mean that Christians (and other non-Muslim religions) may enter the United States as refugees and may obtain priority treatment, while Muslims may not. In an interview on January 27, President Trump told the Christian Broadcasting Network that his intent was to "help" Christian refugees. Compl. ¶ 53& Ex. 7.

C. The Order's Impact

President Trump's Order was greeted by widespread protests and condemnation, as well as reports of chaotic conditions at the nation's airports. Within five days, more than 100 people had been detained at U.S. airports pursuant to the Order's directives. Compl. ¶ 55. That included dozens of lawful permanent residents, an Iraqi national with Special Immigrant Visa status who had worked as an interpreter for the U.S. army in Iraq, and a doctor at the Cleveland Clinic with a work visa who was trying to return home from vacation. Compl. ¶ 57. Hundreds of others were blocked from boarding flights to the United States or have been notified that they can no longer come here—including foreign students with valid visas and Syrian refugees with visas and U.S. placements already lined up. Compl. ¶ 58. According to a Justice Department lawyer, more than 100,000 visas have been revoked since the Order was signed. *Id*.

Meanwhile, thousands of diplomats, former diplomats, and legislators from both parties spoke out against the ban, calling it inhumane and discriminatory. Hundreds of State Department officials signed a memo stating that the Order "runs counter to core American values" including "nondiscrimination," and that "[d]espite the Executive Order's focus on them, a vanishingly small number of terror attacks on U.S. soil have been committed by foreign nationals" here on visas. Compl. ¶ 60 & Ex. 10. Senators John McCain (R-AZ) and Lindsey Graham

(R-SC) stated: "This executive order sends a signal, intended or not, that America does not want Muslims coming into our country." Comp. ¶ 61.

The Order quickly impacted Hawai'i too, as delineated in detail in the attached Complaint. Hawai'i is home to numerous nationals from the seven designated countries—including foreign students, refugees, and temporary workers—whose lives have now been upended by the Order. *See* Compl. ¶¶ 10-11, 14, 68. Because of the Order, they cannot leave the country for family, educational, religious, or business reasons if they wish to return. Indeed, one State employee's travel plans abroad have been severely disrupted by the Order. Decl. of John Doe 2 (Ex. B), ¶¶ 8-11. Conversely, nationals of the seven designated countries cannot relocate to or even visit Hawai'i for any reason. Compl. ¶ 69. Several Hawai'i residents are being thwarted from reuniting with their families as a result of the Order—including a U.S. citizen, and his wife and five children (all also U.S. citizens), who are being prevented from seeing or reuniting and living with their Syrian mother-in-law/mother/grandmother, Decl. of Elshikh (Ex. H), ¶¶4-7; and at least two others who are currently being separated from members of their immediate family but are too fearful of future government retaliation to provide details in a public filing, Decl. of John Doe 1 (Ex. A), ¶¶ 6, 10, 13; Decl. of John Doe 3 (Ex. C), ¶¶ 3-4.

Hawai‘i *qua* Hawai‘i also is being actively harmed by the Order. For example, Defendants are enforcing the Order on Hawai‘i soil, including at Honolulu and Kona International Airports. Compl. ¶ 67. As a result of the Order, the facilities provided by Hawai‘i's State Department of Transportation for international passengers coming into Hawaii will be used by the federal government to carry out the unlawful acts required by the Order. Compl. ¶ 71; Decl. of R. Higashi (Ex. G), ¶¶ 5-7. Likewise, State universities and agencies cannot accept qualified applicants for positions if they are nationals of one of the seven designated countries; other employers within the State cannot recruit and/or hire workers from those countries; and Hawai‘i can no longer welcome their tourists—a direct harm to Hawai‘i's critical tourism business. *See* Compl. ¶¶ 15, 72-78; Decl. of R. Dickson (Ex. D), ¶¶ 13-14; Decl. of G. Szigeti (Ex. F), ¶ 9; Decl. of L. Salaveria (Ex. E), ¶¶ 9-12.

Last but not least, the Order is harming Hawaii's identity and most basic values. For many in Hawai‘i, including State officials, the Order conjures the memory of the Chinese Exclusion Acts and the post-Pearl Harbor imposition of martial law and Japanese internment. As Governor Ige said two days after President Trump signed the Order: "Hawai‘i has a proud history as a place immigrants of diverse backgrounds can achieve their dreams through hard work. Many of our people also know all too well the consequences of giving in to fear of

newcomers. The remains of the internment camp at Honouliuli are a sad testament to that fear. We must remain true to our values and be vigilant where we see the worst part of history about to be repeated." Compl. ¶ 81.

STANDARD OF REVIEW

To obtain a temporary restraining order or a preliminary injunction, a plaintiff must demonstrate that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Winter* v. *Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). The Ninth Circuit has "also articulated an alternate formulation of the *Winter* test, under which 'serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.'" *Farris* v. *Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012) (internal quotation marks omitted).

ARGUMENT

Hawai'i meets this standard. First, it has a substantial likelihood of success on the merits because the Order is unlawful several times over: Among other things, it imposes a "Muslim ban" in violation of the Establishment Clause; discriminates against particular classes of people in violation of the Fifth

Amendment; contravenes the Immigration and Nationality Act's prohibitions on nationality- and religion-based discrimination; and, through its implementation, violates the Administrative Procedure Act (APA). Second, Hawai'i will suffer irreparable harm if relief is not granted: The Order imposes religious harms on the state, imposes immeasurable costs on Hawaii's economy and tax revenues, and discriminates against a portion of the State's population. Third, the balance of equities tips in Hawai'i's favor. The United States will suffer no hardship if the Order is enjoined because the Government can achieve its national security objectives through other means, while remedying constitutional and statutory violations is in the public interest.

A. Hawai'i Is Likely To Succeed on the Merits of Its Claims.

1. The Order Violates the Establishment Clause.

Because Sections 3(c) and Sections 5(a)-(c) and 5(e) of the Order plainly conflict with the Establishment Clause, plaintiffs are likely to succeed on their constitutional claims.

The United States was settled by an ecumenically diverse set of immigrants seeking religious freedom. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 182-183 (2012). The Framers enshrined that freedom in the First Amendment's Religion Clauses. One of those Clauses, the Establishment Clause, "addressed the fear that 'one sect might obtain a pre-

eminence * * * and establish a religion to which they would compel others to conform.'" *Id.*at 184 (quoting 1 Annals of Cong. 730-731 (1789) (remarks of J. Madison)). Thus "[t]he 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 and citation omitted). A failure to satisfy any one of these requirements establishes a constitutional violation. The Order flunks all three.

First, while the Government has asserted in the Order itself that it 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). For example, in *Stone* the Supreme Court invalidated a law requiring that the Ten Commandments be placed on classroom walls. The law

mandated that each display include a statement that "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." *Id.* But that was not enough because the "pre-eminent purpose" of requiring the display was "plainly religious in nature." *Id.*

The same is true here. The President and his aides have made it abundantly clear that they intend to exclude individuals of the Muslim faith, and that this Order—which bans travel only with respect to certain Muslim-majority countries—is part of that plan. *See* Compl. ¶¶ 27-43, 53-54. Sections 5(b) and 5(e) also 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 system of religious preference that President Trump told the media was expressly designed to favor Christians. Compl. ¶¶ 51, 53 & Ex. 7.

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 an Establishment Clause violation because "[t]he sponsor of the bill * * * inserted into the legislative record—apparently without dissent—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 during a legislative hearing to determine whether a stated secular purpose was "sincere and not a sham"). Accordingly, when a challenged policy is generated by the Executive, rather than Congress, the court may examine the statements of the President and his aides. *Cf. Utley* v. *Varian Assocs., Inc.*, 811 F.2d 1279, 1285 (9th Cir. 1987) (in the affirmative action context, if a program was created by the Executive, the "analysis focus[es] on executive rather than congressional intent").

Indeed, public statements of purpose calculated to be heard by a wide audience carry particular weight. When the head of our government publicly expresses "a purpose to favor religion," it "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). Thus, the Supreme Court has explained that a policy that might otherwise pass constitutional muster may be invalidated "if the government justifies the decision with a stated desire" to promote a particular religion. *Id.*

If there were any doubt as to the actual purpose of the policy, 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: Witness, for example, the mass

protests at airports and in cities across the country and the explicit statement of two Republican Senators. *See supra* at pp. 7-8. That in and of itself is enough to demonstrate an Establishment Clause violation under the second prong of *Lemon*. This second "prong * * * 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 also McCreary*, 545 U.S. at 868 n.14 (examining how a challenged action will be perceived by an "objective observer[ ]"). One need hardly do more than articulate this inquiry to understand why the Order fails. And the same is true for *Lemon*'s third prong, which considers whether a policy "foster[s] an excessive government entanglement with religion." 403 U.S. at 612-613 (internal quotation marks omitted). The exception for members of religious minorities alone hopelessly entangles the government in religious matters.

To be sure, courts are inconsistent in how or whether they invoke *Lemon*, and the Supreme Court has applied several different frameworks in analyzing potential Establishment Clause violations. But no framework permits the government to enact a policy that amounts to a governmental preference for or against a particular faith. *See, e.g.*, *Town of Greece, N.Y.* v. *Galloway*, 134 S. Ct. 1811, 1824 (2014) (declining to apply *Lemon* but upholding a policy in part because—unlike the Order—it did not "reflect an aversion or bias on the part of

town leaders against minority faiths"); *Larson*, 456 U.S. at 246 (applying strict scrutiny and invalidating a policy because it unnecessarily "grant[ed] a denominational preference").

Some of the Order's defenders attempt to avoid this conclusion by pointing to older Supreme Court cases discussing Congress's plenary power over immigration. *See, e.g.*, *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972). That argument fails for two independent reasons. First, as discussed in greater length below, even if it is good law, the doctrine would not apply to a policy like this one. *See infra* at pp. 22-25. Second, the plenary power cases are not relevant to the Establishment Clause anyway: The Court has never applied the doctrine with respect to policies that draw religious distinctions in the immigration context. Nor could it. Allowing an immigration exception would swallow the Establishment Clause whole. After all, a primary means of establishing a national religion is to exclude members of another faith from immigrating or to privilege the entry of members of the faith one wishes to establish. 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*, 134 S. Ct. at 1834 (Alito, J., joined by Scalia, J., concurring); *id.*

at 1842 (Kagan, J., joined by Ginsburg, J., Breyer, J., and Sotomayor, J., dissenting).

The Order's defenders have also suggested that if this Order is held to violate the Establishment Clause, then all future immigration policies that disproportionately aid or exclude members of a particular faith will be foreclosed. That is simply not so. An immigration policy with a secular purpose and design that just happens to disproportionately exclude members of a particular faith likely would survive *Lemon*. But that is not this Order. Instead, the President that issued it openly announced a desire to ban Muslims, *told his advisors he wanted their help to do just that while disguising his purpose,* and then followed through by signing a Muslim ban and tossing in a transparent fig leaf. Holding that *that* practice violates the Establishment Clause will foreclose nothing more than cynical attempts to skirt core constitutional commands.

2. The Order Violates Equal Protection and the Fifth Amendment's Due Process Clause.

There is little doubt that, under normal equal-protection and due-process principles, the Order is unconstitutional: It discriminates based on protected classifications, and it cannot survive strict scrutiny. The only question, then, is whether the "plenary power" doctrine excuses the constitutional violations. It does not.

a. The Order violates equal protection and the right to travel.

To begin, the Order violates the Constitution's guarantee of equal protection.[1]

"From its inception, our Nation welcomed and drew strength from the immigration of aliens." *In re Griffiths*, 413 U.S. 717, 719 (1973). The "contributions" of immigrants "to the social and economic life of the country" are "self-evident." *Id*. Thus any government classification based on alienage or national origin is "objectionable." *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 107 n.30 (1976). Similarly, courts must "strictly scrutinize governmental classifications based on religion." *Employment Div.* v. *Smith*, 494 U.S. 872, 886 n.3 (1990). Classifications based on religion and national origin are therefore both subject to strict scrutiny, and must be "narrowly tailored to achieving a compelling * * * interest." *Miller* v. *Johnson*, 515 U.S. 900, 904 (1995)

Sections 3(c) and 3(e)-(f) of the Order plainly flunk that test. They are premised on differentiating among people based on national origin: People from certain countries can enter the United States, and people from other countries cannot. In addition, those provisions as well as Sections 5(a) and (c) treat people

[1] The Fourteenth Amendment's Equal Protection Clause applies only against the states, but "[i]n numerous decisions," the Supreme Court has held that the same equal protection analysis applies to the federal government through the Due Process Clause of the Fifth Amendment. *See, e.g.*, *Davis* v. *Passman*, 442 U.S. 228, 234 (1979).

differently because of their religion: They are intentionally structured in a way that blocks Muslims while allowing Christians.

The Order is nowhere near "tailored" enough to justify that differentiation. It asserts that it is meant to prevent terrorism. But if so, it is wildly over- and under-inclusive. It is over-inclusive because it ensnares countless students, tourists, businesspeople, refugees, and other travelers lacking even the remotest connection to terrorism of any sort. And it is under-inclusive because it would not have covered *any* of the perpetrators of the worst recent terrorist attacks on American soil: September 11, the Boston Marathon bombing, San Bernardino, or Orlando. Not a single fatal terrorist attack has been perpetrated in the United States by a national of one of the seven identified countries since at least 1975. Compl. ¶ 46.

Indeed, the fit between the Order's coverage and its stated purpose is so poor that it would fail even rational-basis review. The mismatch indicates that the real purpose of the Order was simply to harm a politically unpopular group: Muslims. That is unlawful. The "Constitution's guarantee of equality 'must at the very least mean that a bare * * * desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *United States* v. *Windsor*, 133 S. Ct. 2675, 2693 (2013) (citation omitted).

Separately, the Order infringes the right to international travel. "Freedom of movement is basic in our scheme of values." *Kent* v. *Dulles*, 357 U.S. 116, 126 (1958). The right to travel abroad is therefore "part of the 'liberty'" protected by the Due Process Clause. *Id*. at 125. And because the Order curtails this right, it must be "narrowly drawn to prevent the supposed evil." *Id*. at 904. As explained above, it does not come close.

b. The Order violates procedural due process.

Sections 3(c) and 3(e)-(f) of the Order also violate procedural due process requirements. "[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent," *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001), and resident foreigners have liberty interests in being able to re-enter the United States and in being free from detention at the border, *see Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). The Government may only take away those liberty interests by "due process of law." U.S. Const. amend. V. The process that is "due" turns on three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute

procedural requirement would entail." *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

The procedures in place here fall far short. 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*, 459 U.S. at 34, 36. But the Order offers no procedural protections whatsoever: It allows for no counsel, no hearings, no inquiry, no review—no process of any sort. That will not do. At the very least, those barred from the country or detained pursuant to the Order should be given some individualized consideration of their circumstances. "[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," a principle in keeping with "the general proposition that a resident alien who leaves this country is to be regarded as retaining certain basic rights." *Rosenberg* v. *Fleuti*, 374 U.S. 449, 460 (1963).

Similarly, detention of a resident at the border is an invasion of liberty that requires the government to provide concomitant protections. "Even where detention is permissible * * * due process requires 'adequate procedural protections' to ensure that the government's asserted justification for physical confinement 'outweighs the individual's constitutionally protected interest in avoiding physical restraint.'" *Casas-Castrillon* v. *Dep't of Homeland Sec.*, 535

F.3d 942, 950 (9th Cir. 2008) (quoting *Zadvydas*, 533 U.S. at 690). Those protections are nonexistent here.

Moreover, while the Order authorizes executive officials to make certain case-by-case exceptions, *see, e.g.*, Order § 3(g), it creates no mechanism for processing those exceptions and no procedure to ensure they are applied consistently and fairly. That unfettered executive discretion is the antithesis of due process. *See Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972). It is cold comfort for a resident seeking reentry to know that some provision for exceptions is made, if that power is exercised arbitrarily and unreviewably. The Due Process Clause requires more.

c. The plenary-power doctrine does not change the outcome.

The Order's defenders again seek refuge in the plenary-power doctrine. But that doctrine does not help them for two reasons.

First, while it is true that the plenary-power doctrine gives Congress latitude to "make rules for the admission of aliens," *Kleindienst*, 408 U.S. at 766 (citation omitted), the Order here has profound discriminatory effects on aliens *already within* the United States. And the Supreme Court has made clear that political branches' power in that area is not plenary. To the contrary, it "is subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695. Specifically, aliens who are present within the United States are entitled to the full panoply of

equal-protection and due-process protections, "whether their presence here is lawful, unlawful, temporary, or permanent." *Id*. at 693. The Order here runs afoul of both those protections. It prevents people present in the United States from traveling and from seeing their loved ones, and it imposes that burden on the basis of religion and national origin. That is not constitutional, and the incantation of "plenary power" does not make it so. *See Hampton*, 426 U.S. at 101 ("We do not agree * * * that the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens.").

Second, the plenary-power doctrine emphasizes the broad authority of "*Congress*." *See Kleindienst*, 408 U.S. at 766 (emphasis added). Congress is, after all, constitutionally empowered to regulate immigration. U.S. Const. art. I, § 8. Even if the doctrine authorizes Congress to flatly ban a particular racial or religious group from entering the United States—a highly doubtful proposition—it certainly does not authorize the *President* to plow ahead and enact such a ban where Congress has not provided for it. Indeed, the delegation of authority to the President here is expressly subject to the INA's antidiscrimination provision. *See* Part 3, *infra*. And the President surely could not take a general grant of discretion to make immigration rules and use it to decree that only whites or Christians are allowed to immigrate into the United States. *Cf. Kwai Fun Wong* v. *United States*,

373 F.3d 952, 974 (9th Cir. 2004) ("We cannot countenance that the Constitution would permit immigration officials to engage in such behavior as rounding up all immigration parolees of a particular race solely because of a consideration such as skin color.").

The Supreme Court has made this clear. In *Kleindienst*, for example, the Court explained that when Congress "delegate[s]" the exercise of "plenary power" to the Executive, and "the Executive exercises this power negatively *on the basis of a facially legitimate and bona fide reason*, the courts will neither look behind the exercise of that discretion, nor test it." 408 U.S. at 770 (emphasis added). The inverse must also be true: When the Executive *lacks* "a facially legitimate and bona fide reason" for excluding foreigners, the plenary-power doctrine is no shield for unconstitutional discrimination.

That is the case here. As explained above, the profound mismatch between the Order's purported purpose and its scope reveals its true illegitimate purpose: to burden a politically unpopular group. Moreover, the Order's express terms and the statements of President Trump and his advisors cast grave doubt on whether the Order's stated purpose was in fact its "bona fide" impetus.

For this reason, too, the plenary-power doctrine does not insulate the Order from constitutional scrutiny, and the Order must fall.

3. The Order is Inconsistent with the Immigration and Nationality Act.

The Order also violates the plain terms of the immigration laws three times over. It "discriminate[s]" against prospective immigrants based on "nationality," in violation of 8 U.S.C. § 1152(a)(1)(A); it "discriminat[es]" against refugees based on "religion," in violation of the United Nations Convention Relating to the Status of Refugees art. 3, July 28, 1951, 19 U.S.T. 6259; 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.

First, the Order violates the Immigration and Nationality Act's (INA) flat prohibition on nationality-based discrimination.

Section 202(a)(1)(A) of the INA provides:

> Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, 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). "Congress could hardly have chosen more explicit language." *Legal Assistance for Vietnamese Asylum Seekers* v. *Dep't of State, Bureau of Consular Affairs*, 45 F.3d 469, 473 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996). It "unambiguously directed that no nationality-based discrimination shall occur," *id.*, and so "eliminat[ed] * * * the national origins system as the basis for the selection of immigrations to the United States." H.R.

Rep. No. 89-745, at 8 (1965); *see Olsen* v. *Albright*, 990 F. Supp. 31, 37 (D.D.C. 1997).

The Order flouts this clear command. Section 3(c) provides that aliens "from" seven identified "countries" cannot enter the United States. Sections 3(e)-(f) authorizes the President to bar entry by "foreign nationals * * * from [additional] countries" he will subsequently identify. And Section 5 prohibits "the entry of Syrian nationals as refugees," *id.* § 5(c), and permits the Secretary of State to resume refugee admissions "only for nationals of [designated] countries," *id.* § 5(a). Each of these provisions facially discriminates on the basis of "nationality, place of birth, or place of residence," 8 U.S.C. § 1152(a)(1)(A)—exactly what Congress said the Executive cannot do. The Order thus unilaterally resurrects the "national origins system" that Congress ended in 1965.

The President cannot ignore Section 202(a)(1)(A) in this manner. Congress specified exactly when federal officials could take nationality into account: "as specifically provided in paragraph (2) [of Section 202(a)] and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of" title 8. 8 U.S.C. § 1152(a)(1)(A). None of those narrow exceptions is even arguably relevant here; and by enumerating those few exemptions, Congress made clear it did not intend to authorize others. *See, e.g.*, *United Dominion Indus.* v. *United States*, 532 U.S. 822, 836 (2001) (describing *expressio unius* canon). The fact that the immigration laws

give the President some discretion makes no difference. As courts have recognized for decades—and as Section 202(a)(1)(A) makes clear—"discretion" in enforcing the immigration laws "may not be exercised to discriminate invidiously against a particular race or group." *Wong Wing Hang* v. *INS*, 360 F.2d 715, 719 (2d Cir. 1966) (Friendly, J.); *see, e.g.*, *Patel* v. *INS*, 811 F.2d 377, 382 (7th Cir. 1987) (same).

b. The Order's religion-based classifications violate the INA.

Sections 5(b) and 5(e) of the Order also violate the INA by discriminating against refugees on the basis of religion. In 1968, the United States ratified the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 ("UN Protocol"), a multilateral treaty that requires signatory states to treat refugees "without discrimination as to race, religion or country of origin." United Nations Convention Relating to the Status of Refugees art. 3, July 28, 1951, 19 U.S.T. 6259; *see* UN Protocol art. I.1 (incorporating this requirement by reference). Congress subsequently overhauled the INA "to bring United States refugee law into conformity with the Protocol." *Khan* v. *Holder*, 584 F.3d 773, 783 (9th Cir. 2009). Accordingly, the Ninth Circuit (echoing the Supreme Court) has held that courts must "interpret the INA in such a way as to avoid any conflict with the Protocol, if possible." *Id.*; *see INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 426-427 (1999); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 437 (1987). Nothing in the

INA suggests that Congress intended to authorize immigration officials—or the President—to violate the Protocol's straightforward prohibition on religious discrimination. Indeed, the INA expressly prohibits *States* from discriminating against refugees with "regard to race, religion, nationality, sex, or political opinion." 8 U.S.C. § 1522(a)(5). It is inconceivable that Congress intended *federal* officials to engage in such discrimination, in clear violation of the Nation's treaty obligations. As describe above, *see supra* at pp. 19-20, the Order does precisely that, and so cannot stand.

c. The INA does not authorize the President to impose sweeping class-based restrictions on immigration.

Sections 3(c), 3(e)-(f), 5(a), and 5(c) are also unlawful because the President lacks any affirmative authority to impose the Order's sweeping, undifferentiated, and arbitrary bans on entry.

As a basis for its immigration and refugee bans, the Order relies on Section 212(f) of the INA, which states that the President may "suspend the entry of * * * any class of aliens as immigrants or nonimmigrants" if he "finds that the[ir] entry * * * would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f); *see* Order §§ 3(c), 5(c). But Section 212(f) provides no support for the Order.

That is so for two reasons. First—as discussed above—the INA prohibits nationality discrimination, and section 212(f) does not override that limit. *See*

8 U.S.C. § 1152(a)(1)(a). Section 202(a)(1)(A), with its focus on particular categories of protection, is more specific than Section 212(f)'s generalized grant of discretion. It also is later-enacted—1965 versus 1952. And it enumerates specific exceptions to its prohibition that do not include section 212(f). It therefore overrides any authority the President would otherwise have had under Section 212(f). *See United States* v. *Juvenile Male*, 670 F.3d 999 (9th Cir. 2012) (recognizing principle of statutory construction that "[w]here two statutes conflict, the later-enacted, more specific provision generally governs."); *United Dominion*, 532 U.S. at 836.

In any event, the Order's reliance on Section 212(f) stretches that provision far beyond its limits. Presidents have invoked Section 212(f) dozens of times since it was enacted in 1952; in every instance, they used it to suspend entry of a *discrete* set of individuals based on an *individualized* determination that *each* prohibited member of the class had engaged in conduct "detrimental to the [United States'] interests." *See, e.g.*, Pres. Proc. No. 8342 (Jan. 22, 2009) (suspending entry of human traffickers); Pres. Proc. No. 5887 (Oct. 26, 1988) (suspending entry of Sandinistas); *see generally* Cong. Research Serv., Executive Authority to Exclude Aliens: In Brief 6-10 (Jan. 23, 2017), https://fas.org/sgp/crs/homesec/R44743.pdf. Before now, no President attempted to invoke Section 212(f) 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) (determining, within two days of the Order's issuance, that lawful permanent residents are entitled to a blanket exception).

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; many countries, for example, have worse records of terrorism than the seven the President singled out. *See* U.S. Dep't of State, National Consortium for the Study of Terrorism and Responses to Terrorism: Annex of Statistical Information (2016) (showing that 7 of the 10 countries with the most terrorism were not included in the Order). The President's logic would therefore permit him—and any future President—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 212(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) (declining to find that Congress "intended to delegate a decision of [substantial] economic and political significance" whether authority ran "[c]ontrary to [the Executive Branch's] representations" for 80 years). Indeed, it is doubtful that Congress *could* delegate such unbounded authority to the President. *See Clinton* v. *City of New York*, 524 U.S. 417, 443 (1998) (Congress cannot authorize President "to cancel portions of a duly enacted statute"); *Whitman*, 531 U.S. at 472 (Congress cannot delegate powers without an "intelligible principle" to govern their exercise). Section 212(f) cannot be construed to authorize the Order's sweeping and discriminatory immigration bans.

4. The Order's Implementation Violates the APA.

Finally, the Order's implementation violates the APA, both on procedural and substantive fronts.

APA Procedural Requirements. The APA requires that agencies provide public notice and an opportunity for comment on any rule that is "legislative" or "substantive." *Lincoln* v. *Vigil*, 508 U.S. 182, 196 (1993); *see* 5 U.S.C. § 553(b)-

(c). "Substantive rules" are those that "change existing rights and obligations," *Time Warner Cable Inc.* v. *FCC*, 729 F.3d 137, 168 (2d Cir. 2013), and "limi[t] administrative discretion or establish a binding norm" for agency officials to follow, *Sacora* v. *Thomas*, 628 F.3d 1059, 1069 (9th Cir. 2010) (italics omitted).

In this case, Sections 3 and 5 of the Order are substantive because they unquestionably affect existing "rights and obligations": Immigrants and non-immigrants living in the United States can no longer leave and re-enter the country, and nationals of designated countries who have visas can no longer use them. But more to the point, the rules that *agencies* have to create to carry out the Order also are (and will be) substantive rules. After all, the Order speaks in broad generalities and leaves it to the agencies to implement binding norms around everything from which refugees get exemptions, to who counts as "immigrants and nonimmigrants" under Section 3(c), to whether Section 5(e)'s in-the-national-interest exemptions extend beyond the enumerated examples.

Those newly-minted norms will affect existing "rights and obligations" in extraordinary ways. To take just one example, the implementing officials have changed their view as to whether lawful permanent residents fall within the Order's national-interest prong *twice*—and have effectuated each change with no more than a *press release*. Compl. ¶¶ 62-64. That is plainly improper. The same

goes for the many similarly substantive rules that have been and will be promulgated under the Order's auspices.

APA Substantive Requirements. Defendants have also committed substantive violations of the APA. The APA prohibits federal agencies from taking any action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2). The Order, and agency norms promulgated under the Order, are plainly "not in accordance with law." *See supra*, A.1-3. And Defendants' issuance and implementation of the Order has been flagrantly arbitrary and capricious. The Order has been issued and implemented abruptly and with no reasonable explanation of how its various provisions further its stated objective. *See City of Sausalito* v. *O'Neill*, 386 F.3d 1186, 1206 (9th Cir. 2004) (agencies must at least articulate "a rational connection between the factors found and the choices made" (internal quotation marks omitted)). Just within the first 72 hours, Defendants are reported to have changed their minds three times about one of the Order's essential aspects—whether it applies to green card holders. Compl. ¶ 59. A few days later, they changed their minds yet *again*. Comp. ¶ 64. If this is not arbitrary and capricious executive action, it is hard to imagine what would be.

B. Hawai‘i Will Suffer Irreparable Harm If Relief Is Not Granted.

Hawai‘i will be irreparably harmed if Defendants are not temporarily enjoined from enforcing Sections 3(c), 3(e)-(f), 5(a)-(c), and 5(e) of the Order. Implementation of these provisions has already caused significant religious, dignitary, and economic harms in and to Hawai‘i. If Defendants are not enjoined, the damage will be immeasurable. For these reasons, the State *a fortiori* satisfies the requirements of Article III standing as well.

First, the Order is creating an unconstitutional "establishment" of religion in Hawai‘i and across the country. This harm alone is sufficient to warrant injunctive relief; in Establishment Clause cases, irreparable harm is presumed. *See, e.g.*, *Chaplaincy of Full Gospel Churches* v. *England*, 454 F.3d 290, 303 (D.C. Cir. 2006) (if a movant demonstrates a likelihood of success on an Establishment Clause claim, "this is sufficient, without more, to satisfy the irreparable harm prong"); *see also Farris*, 677 F.3d at 868 (9th Cir. 2012) (adopting the same rule for First Amendment claims generally).

Second, the Order is inflicting irreparable harm on the State's sovereign and dignitary interests by commanding instruments of Hawaii's government to support discriminatory conduct that is offensive to its own 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 bar discrimination on the basis of ancestry. Haw.

Rev. Stat. §§ 378-2(1); 489-3; 515-3. And Hawai‘i has a number of policies that aim to further diversity. Compl. ¶ 72. Hawai‘i has a sovereign interest in seeing that its laws and policies are given effect, and in following them *itself*. *See Bond* v. *United States*, 564 U.S. 211, 221 (2011); *Missouri* v. *Holland*, 252 U.S. 416, 431 (1920).

The Order commands Hawai‘i to abandon its sovereign prerogatives, and become complicit in discrimination barred by its own Constitution and statutes: The State's universities cannot enroll qualified persons from the designated countries; state governmental entities cannot hire such persons; and the State's Department of Transportation must provide areas inside the State's international airports to Customs and Border Patrol to detain and deport immigrants barred by the Order. In stopping Hawaii's governmental entities from abiding by the State's own laws and policies, the Order inflicts dignitary harms that have no remedy. *See, e.g.*, *Shelby Cty.* v. *Holder*, 133 S. Ct. 2612, 2623 (2013) (states should "retain broad autonomy in structuring their governments and pursuing legislative objectives"); *Arizona Dream Act Coal.* v. *Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (irreparable harm is threatened when "there is no adequate legal remedy").

Third, the Order is inflicting permanent damage on Hawaii's economy and tax revenues. Tourism is the "state's lead 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, which will result in considerable lost revenues. Decl. of G. Szigeti (Ex. F), ¶¶ 9-11 (showing thousands of visitors in 2015 from the Middle East and Africa). The Order deters Muslim immigrants and non-immigrants across America from engaging in interstate travel that involves an airport, effectively precluding travel to Hawai‘i. And it will likely chill international tourism to Hawai‘i more broadly, as nationals of other countries fear that they too will become subject to an immigration ban. Decl. of L. Salaveria (Ex. E), ¶¶ 11-14. These consequences will drastically reduce the State's economic output and its tax revenues, and they will inflict incalculable harm on Hawaii's reputation as a place of welcome—a brand that it is has spent significant time and energy developing internationally. *See Oracle USA, Inc.* v. *Rimini St., Inc.*, 2016 WL 5213917, at *2 (9th Cir. Sept. 21, 2016) (injunctive relief warranted when "injuries [are] difficult to quantify and compensate").

Finally, the Order inflicts irreparable damage to Hawai‘i because it subjects a portion of its population to discrimination and marginalization, while denying all residents of the State the benefits of a pluralistic and inclusive society. 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. Decl. of R. Dickson (Ex. D), ¶ 9. 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 the countries. *Id.* ¶¶ 10-11. 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. *Id.* ¶ 12; Decl. of John Doe 3 (Ex. C), ¶¶ 3-4 . 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. *See, e.g.*, Decl. of R. Dickson (Ex. D), ¶ 13. Hawai‘i has a quasi-sovereign interest in "securing [its] residents from the harmful effects of discrimination." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 609 (1982). The Order is irreparably undermining that interest.

C. The Balance of the Equities and Public Interest Favor Relief.

The balance of the equities and public interest factors tip decidedly in favor of Hawai‘i. The harms the Order inflicts are immediate and severe, and "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).

Defendants, in contrast, have 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. Defendants can fully achieve the Order's stated goal of strengthening the country's vetting procedures without also depriving millions of people of their rights under the Constitution and federal law.

CONCLUSION

The Motion for a Temporary Restraining Order should be granted, and Defendants should be restrained from continuing to enforce Sections 3(c), 5(a)-(c), and 5(e) of the Executive Order, in Hawai'i and nationwide.

DATED: Honolulu, Hawai'i, February 3, 2017.

Respectfully submitted,

/s/ Douglas S. Chin

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**Pro Hac Vice Applications Forthcoming*

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

STATE OF HAWAI'I, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No.

DECLARATION OF JOHN DOE 1

[Sealed copies provided to the Court for in camera review, pursuant to the concurrently filed *Ex Parte* Motion for In Camera Review of Exhibits A, B, and C to Declaration of Douglas S. Chin in Support of Plaintiff's Motion for Temporary Restraining Order]

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

STATE OF HAWAI'I, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No.

DECLARATION OF JOHN DOE 2

[Sealed copies provided to the Court for in camera review, pursuant to the concurrently filed *Ex Parte* Motion for In Camera Review of Exhibits A, B, and C to Declaration of Douglas S. Chin in Support of Plaintiff's Motion for Temporary Restraining Order]

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

STATE OF HAWAI'I, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No.

DECLARATION OF JOHN DOE 3

[Sealed copies provided to the Court for in camera review, pursuant to the concurrently filed *Ex Parte* Motion for In Camera Review of Exhibits A, B, and C to Declaration of Douglas S. Chin in Support of Plaintiff's Motion for Temporary Restraining Order]

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

STATE OF HAWAI'I, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No.

DECLARATION OF RISA E. DICKSON

EXHIBIT D

I, Risa E. Dickson, do declare and would competently testify as follows.

1. I am Vice President for Academic Planning and Policy, at the University of Hawai'i system. I began this role in February 2015. Previously, I worked at California State University, San Bernardino from 1991-2014. Among the positions I held there included Associate Provost for Academic Personnel. As Associate Provost, my office processed and monitored visas for international faculty.
2. As Vice President I have overall responsibility for leadership, planning, and intercampus coordination of academic affairs, student affairs, policy and planning, institutional research and analysis, international and strategic initiatives, and the Hawai'i P-20 Partnerships for Education. Given my current role with international and strategic initiatives, and my previous experience with recruitment of international faculty, I am well aware of the importance of the role of international faculty in the vibrancy of a healthy university.
3. The University of Hawai'i system was founded in 1907 and includes three universities, seven community colleges, and community-based learning centers across six of the Hawaiian Islands.
4. The University is a leading engine for economic growth and diversification in Hawai'i. The University stimulates the local economy with jobs, research, and skilled workers.
5. The University is a unique and important institution in our island State, and in our nation. Because of Hawai'i's unique geographic location, the University is able to offer unique research and employment opportunities in the fields of astronomy and oceanography.
6. Hawai'i's location in the Pacific Ocean, balanced between east and west, creates opportunities for international leadership and collaboration.

7. The University is an international institution. This is reflected in our diverse faculty, which includes approximately four hundred and seventy-seven international faculty members legally present in the United States. Throughout the University system, we have study abroad or exchange programs in thirty-three different countries. Throughout the University system, we have 489 separate international agreements with 353 institutions in forty different countries, providing opportunities for learning and collaboration for our faculty and scholars.

8. The University has been apprised of the Executive Order entitled, "Protecting the Nation from Foreign Terrorist Entry Into the United States," which was issued by President Donald Trump on January 27, 2017. I have been informed that the Executive Order temporarily bars entry into the United States of any person who is a citizen of any one of seven countries: Syria, Iraq, Iran, Somalia, Sudan, Libya and Yemen. I have also been informed that this bar to travel to the United States applies regardless of whether the person in question poses any individualized threat of violence or any connection to terrorist activities in any way.

9. This Executive Order directly impacts the University of Hawai'i community. The University presently has approximately 27 graduate students from the seven countries affected by the Executive Order. These students attend our institution under valid visas issued by the United States government. These students study and work alongside the University's many thousands of other students, who hail from all over Hawai'i, the United States, and the world.

10. The University has permanent resident faculty from the same seven affected countries, namely Iran, Iraq and Sudan. I am aware of at least ten faculty members who fall within

this category and are subject to the Executive Order. There may be more faculty members who fall within this category, because we do not actively track legal permanent residency.

11. In addition, the University also has visiting faculty and scholars who are directly affected by the Executive Order. The University has at least thirty faculty members with valid visas who are from the seven countries affected by this Executive Order As with all institutions of higher education, the scholarship and community of the University of Hawai'i relies upon the collaborative exchange of ideas and research partnerships. The University relies upon faculty, teaching, research, conferences, and program activities that regularly require travel outside the United States.

12. The Executive Order will affect the ability for the faculty and students discussed above to have the freedom to fully engage in their fields of study, by effectively prohibiting travel outside the United States for those affected individuals who are present here today. It is anticipated that the Executive Order will negatively impact their development as scholars and professors; deprive them of the chance to visit family and friends in their countries of origin, or to attend significant personal events such as weddings and funerals; and prevent their family and friends from being able to reunite with their families, visit Hawai'i or move here permanently. I am aware of faculty who have planned trips to reunite with family members and are concerned about their ability to return to their work and home.

13. The Executive Order will also hinder the diversity of thought and experience that forms the backbone of any institution of higher education. A diverse student body is part of the educational experience for all students. This is immeasurably enriched by our international students and schools, including those from the seven countries targeted in the Executive Order.

14. The University of Hawaii stands with the higher education community nationwide in our concern over the impact the Executive Order has on the free flow of information and ideas. Our experience with higher education indicates that the Executive Order will have not just the direct impacts described here, but will also deter students, scholars and faculty from other affected countries and communities from attending our institutions.

15. The University of Hawai'i and the State of Hawai'i have been immeasurably strengthened through the diversity of the students and faculty we attract. The fundamental values of our nation and our State have long supported the welcoming of others to our Islands and embracing them into our communities.

I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: Honolulu, Hawai'i, February 1, 2017.

Risa E. Dickson

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

STATE OF HAWAI'I, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No.

DECLARATION OF LUIS P. SALAVERIA

EXHIBIT E

DECLARATION OF LUIS P. SALAVERIA

I, LUIS P. SALAVERIA, do declare and would competently testify as follows.

1. I am the Director of the State of Hawaii Department of Business, Economic Development and Tourism (DBEDT). I have held this position since December 2014. Prior to this position, I served as the State's Deputy Director of Finance from 2011 to 2014.

2. As Director, I lead DBEDT's efforts to achieve a Hawaii economy that embraces innovation and is globally competitive and dynamic, providing opportunities for all Hawaii's citizens.

3. Through our attached agencies, we also foster planned community development, create affordable workforce housing units in high-quality living environments, and promote innovation sector job growth.

4. In my professional experience working for and promoting Hawaii, the ability for government and business leaders to travel to each other's respective countries is critical to maintaining Hawaii's tourism economy and to expand our local economy's potential beyond tourism.

5. The networking and trust-building that occurs as a result of travel is not something that can be replicated through phone calls, emails, or video-conferences. Meaningful relationships between government agencies,

private businesses, and community organizations is best accomplished through direct interaction and face-to-face engagements.

6. I have recently traveled to Japan, Korea, and the Philippines to explore opportunities for collaborative engagements in renewable energy and to discuss Hawaii's renewable energy laws.

7. As a result of my trip to the Philippines, a delegation from that country came to Hawaii to participate in our annual Clean Energy Summit. They also participated in one of our business start-up accelerator programs and invested funds into the program. This outcome would not have been possible if not for the willingness of these individuals to travel to Hawaii.

8. The State of Hawaii maintains a number of sister-state relationships with countries throughout world. Countries such as China, Indonesia, Japan, Philippines, and Taiwan are partners to Hawaii in this global economy, and these relationships are integral to maintaining Hawaii's position as a global destination and place of business. The ability to interact with these countries without concern of impeded travel by individuals from those countries is crucial to these relationships.

9. Through news coverage and through conversations with others in state government, I am aware of Executive Order entitled, "Protecting the Nation from Foreign Terrorist Entry Into the United States," which was issued by

President Donald Trump on January 27, 2017. It is my understanding that the Executive Order temporarily bars entry into the United States of any person who is a citizen of any one of six countries: Iraq, Iran, Somalia, Sudan, Libya and Yemen. It is my understanding that the Executive Order indefinitely bars entry into the United States of any person who is a citizen of Syria. It is my understanding that this bar to travel to the United States applies regardless of whether the person in question poses a specific threat of violence or any connection to terrorist activities in any way.

10. I am also aware that a great deal of confusion and inconsistent implementation occurred as the Executive Order was placed into effect nationwide. I am generally aware of the news coverage regarding the Executive Order and how its impact is being felt around the world and here in Hawaii.

11. Based on my professional experience it is my opinion that this Executive Order has the potential to inhibit and impair Hawaii's relationships with foreign countries. Hawaii has millions of visitors annually from all over the world. I expect, given the instability it has caused to international travel generally, that this Executive Order may depress tourism, business travel, and financial investments in Hawaii. It is also my opinion that the confusion and difficulties brought about by the Executive Order may result in visitors

who would choose to visit Hawaii to instead look at other destinations where travel will not be impeded.

12. In my experience as DBEDT director, Hawaii has always been viewed as a place of acceptance, hospitality, and cultural diversity. Any potential action that could jeopardize that reputation has the ability to do irreparable harm to our State's brand. For many of our visitors, Hawaii is a vacation destination, and people generally take vacations to places where they feel welcome, invited, and safe.

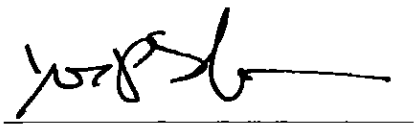
13. In addition to being a tourist destination, Hawaii has been positioning itself for many years as a hub of international business, located midway between Asia and the continental United States. In my time in state government I have witnessed and been part of efforts to attract business and financial investments to Hawaii by emphasizing our inclusiveness and diversity. I believe that the Executive Order causes harm to this reputation and may negatively impact Hawaii's ability to attract future investments from countries that are not currently named in the Executive Order.

14. In my professional travel experience working to expand Hawaii's businesses, I have learned how important it is that Hawaii maintain its reputation as a place of inclusivity and welcome. I believe the Executive Order threatens this reputation.

15. There is no recent parallel to this situation and the Executive Order was recently issued. At this point, it is difficult to determine with precision how its effects will play out for Hawaii's air travelers. Hawaii is uniquely positioned geographically, in the middle of the Pacific Ocean. For the vast majority of our visitors, flying is the only way to travel here. Given the confusion, controversy, and shifting instructions from the federal government regarding the Executive Order, travelers may consider the current situation as a reason for not undertaking travel to Hawaii.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 2nd of February, 2017, in Honolulu, Hawaii.



Luis P. Salaveria

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I

STATE OF HAWAI‘I, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No.

DECLARATION OF GEORGE SZIGETI

EXHIBIT F

DECLARATION OF GEORGE SZIGETI

I, GEORGE SZIGETI, do declare and would competently testify as follows.

1. I am the President and Chief Executive Officer of the Hawaii Tourism Authority (HTA). I have served in this role since May 2015. From 2012 to 2015, I was the President and CEO of the Hawaii Lodging and Tourism Association, a private organization of Hawaii tourism industry leaders, which represents over 700 lodging properties and businesses across the State.

2. The HTA was established in 1998 as the lead state agency for Hawaii's tourism industry. The HTA is the state agency charged with the research, development, and fostering of tourism in Hawai'i. HTA's mission is to strategically manage Hawai'i tourism in a sustainable manner consistent with economic goals, cultural values, preservation of natural resources, community desires, and visitor industry needs.

3. The Tourism Special Fund was also established in 1998. It is a set percentage of the transient accommodations tax collections that is assessed on hotels, vacation rentals, and other accommodations. It is used by the HTA to market, develop, and support Hawaii's tourism economy.

4. Among its responsibilities, HTA is charged with:

    a. setting tourism policy and direction from a statewide perspective;

    b. developing and implementing the State's tourism marketing plan and efforts;

    c. supporting programs and initiatives that enhance and showcase Hawaii's diverse peoples, places, and cultures of the islands, in order to deliver an incomparable visitor experience, including supporting Native Hawaiian culture and community, signature events and festivals, and preservation and proper use of Hawaii's striking natural resources;

    d. managing programs and activities to sustain a healthy tourism industry for the State;

    e. coordinating tourism-related research, planning, promotional and outreach activities with the public and private sectors; and

    f. encouraging distribution of visitors across all of the Hawaiian Islands to balance capacity.

5. HTA maintains data regarding visitor arrivals and total visitor spending for various regions around the world.

6. The data maintained by our agency shows the following for the last five years:

	2012	2013	2014	2015	2016
Total Visitor Expenditures (in Million $)	$14,364.8	$14,520.5	$14,973.3	$15,110.9	$15,745.7
Total arrivals (by air and cruise ships)	8,028,743	8,174,461	8,320,785	8,679,564	8,941,394
Arrivals by Air	7,867,143	8,003,474	8,196,342	8,563,018	8,832,598
Arrivals by cruise ship	161,600	170,987	124,443	116,546	108,796

The total visitor expenditures reported in this chart from 2012-2015 includes supplemental business expenditures. For 2016, the data is preliminary and the supplemental business expenditures have been estimated.

7. To translate, Hawaii's tourism industry brought well over $14 billion into the State during 2012 to 2014. In 2015 and 2016, it brought in over $15 billion. Tourism is the leading economic driver in the State.

8. As this data shows, airline travel is far and away the preferred method to travel to Hawai'i. In 2016, for example, a total of 8,941,394 people arrived in the islands. Only 108,796 of this total (1.2%) arrived by cruise ship.

9. Our data also shows that there is a steady flow of visitors from the Middle East and Africa. The data maintained by our agency shows the following for the last five years:

Visitor Arrivals	2012	2013	2014	2015	2016
Middle East	3,565	3,182	5,784	6,804	5,451
Africa	1,345	1,111	1,877	2,090	1,725

This data reflects visitor arrivals, in surveys taken for air arrivals. The 2016 data is preliminary.

10. As our data is maintained, the region Middle East includes Iran, Iraq, Syria, and Yemen.

11. As our data is maintained, the region Africa includes Libya, Somalia, and Sudan.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 2 of February, 2017, in Honolulu, Hawaii.

George Szigeti

George Szigeti

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I

STATE OF HAWAI‘I, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No.

DECLARATION OF ROSS HIGASHI

EXHIBIT G

DECLARATION OF ROSS HIGASHI

I, ROSS M. HIGASHI ("Declarant"), declare based upon my personal knowledge and belief, the following:

1. Declarant is employed as the Deputy Director for the Airports Division, Department of Transportation, State of Hawaii, and has served in this capacity since December, 2014.

2. Declarant's duties as the Deputy Director include the responsibility for the management of the statewide airport system that is owned and operated by the State of Hawaii ("State"). There are fifteen state airports including the Honolulu International Airport ("HNL") and Kona International Airport ("KOA").

3. HNL and KOA qualify as "international airports" which are airports that have customs and immigration facilities to process passengers traveling from other countries to the United States.

4. To acquire international airport status for HNL and KOA, the State was required to obtain the approval of the federal Department of Homeland Security, U.S. Customs and Border Protection ("CBP"). Part of the approval process included providing a facility for use by the CBP to process passengers arriving on international flights.

5. The CBP mandates the requirements of the facility which is sometimes referred to as the "International Arrival Building." If the CBP requirements are not met, the airport may not be used as a port of entry into the United States for international flights (i.e., the airport could not be used to accommodate international flights).

6. HNL and KOA each have an International Arrival Building that meets the strict CBP requirements.

7. The State provides CBP, at no cost to CBP, with an area inside the International Arrival Building to screen international passengers and luggage.

I, Ross Higashi, do declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawaii, February 2, 2017.

ROSS HIGASHI

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

STATE OF HAWAI'I, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No.

DECLARATION OF ISMAIL ELSHIKH, PhD

EXHIBIT H

DECLARATION OF ISMAIL ELSHIKH, PhD

I, Ismail Elshikh, PhD declare the following:

1. I am an American citizen of Egyptian descent, and a resident of Hawai'i. I have been a resident of Hawai'i for over a decade. My wife, Dana, who is of Syrian descent, and my five children are also American citizens and residents of Hawai'i. I am proud to be an American citizen, and consider the United States to be my home country. Because of my allegiance to America, and my deep belief in the American ideals of democracy and equality, I am deeply saddened by the passage of the Executive Order barring nationals from seven Muslim countries from entering the United States.

2. I am the Imam of the Muslim Association of Hawai'i. As Imam, I am a leader within the local Hawai'i Islamic community. I believe strongly in religious equality, and that individuals of different faiths should be allowed to exercise their religious beliefs, free from government suppression, and in a way that does not harm others. The members of my Mosque consider Hawai'i to be home. They are integrated into local society and culture. They have friends and family within and outside of the local Islamic community.

3. My five children are 11, 9, 7, 5 and almost 2 years of age. They have all been United States citizens, and Hawai'i residents, since birth. All of my children were born at Kaiser Hospital in Honolulu, Hawai'i. My older children attend

school in Honolulu, and they have many friends from all walks of life. They are aware of the travel ban, and are deeply saddened by the message it conveys – that a broad travel-ban is "needed" to prevent people from certain Muslim countries from entering the United States. They are deeply affected by the knowledge that the United States – their own country – would discriminate against individuals who are of the same ethnicity as them, including members of their own family, and who hold the same religious beliefs. They do not fully understand why this is happening, but they feel hurt, confused, and sad.

4. The travel ban also has a direct personal effect on my children because it creates additional obstacles to their grandmother's plan to visit them in Hawai‘i. My wife's mother is a Syrian national, living in Syria. She has been making concrete plans to visit my family for many years. It is not easy for Syrian nationals, like my wife's mother, to obtain visitor travel documentation from the American government permitting entry into the United States. My wife filed a I130 Petition for Alien Relative, on behalf of her mother, with the United States government in September 2015. The Petition was approved in February 2016, and my wife's mother was eagerly anticipating the completion of the rest of her visa application process.

5. My mother-in-law has been looking forward to visiting my family for years. She last visited Hawai‘i in 2005, when she stayed for one month. She has

not yet met two of my five children. Only my oldest child remembers meeting her grandmother.

6. President Trump's issuance of the Executive Order banning Syrian nationals from entering the United States has directly impacted my family by complicating my mother-in-law's ability to visit Hawai'i to see, spend time with, and get to know her grandchildren. This is devastating to my wife and children. I believe that it is also devastating to my mother-in-law.

7. As an Imam, I work with many members of the Hawai'i Islamic community. Many members of my Mosque are upset about the travel ban, and some are very fearful. All feel that the travel ban targets Muslim citizens because of their religious views and national origin. The travel ban has a very real and direct impact upon their lives. Although many members of my Mosque consider Hawai'i to be home, many have family and friends still living in the countries affected by the travel ban. While the travel ban remains in effect, these individuals live in forced separation from those family members and friends.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Honolulu, Hawai'i, February 2, 2017.

ISMAIL ELSHIKH, PhD