DOUGLAS S. CHIN (Bar No. 6465)
Attorney General of the State of Hawai‘i
DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI‘I
425 Queen Street
Honolulu, HI 96813
Telephone: (808) 586-1500
Fax: (808) 586-1239
Attorneys for Plaintiff, State of Hawai‘i

NEAL K. KATYAL*
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: (202) 637-5600
Fax: (202) 637-5910
**Admitted Pro Hac Vice*

Attorneys for Plaintiffs, State of Hawai‘i and Ismail Elshikh

(See Next Page For Additional Counsel)

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

STATE OF HAWAI‘I and ISMAIL ELSHIKH,

Plaintiffs,

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. 1:17-cv-00050-DKW-KSC

MEMORANDUM IN SUPPORT OF MOTION TO CONVERT TEMPORARY RESTRAINING ORDER TO A PRELIMINARY INJUNCTION

ADDITIONAL COUNSEL

CLYDE J. WADSWORTH (Bar No. 8495)
Solicitor General of the State of Hawai‘i
DEIRDRE MARIE-IHA (Bar No. 7923)
DONNA H. KALAMA (Bar No. 6051)
KIMBERLY T. GUIDRY (Bar No. 7813)
ROBERT T. NAKATSUJI (Bar No. 6743)
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
Email: deirdre.marie-iha@hawaii.gov

Attorneys for Plaintiff, State of Hawai‘i

COLLEEN ROH SINZDAK*
MITCHELL P. REICH*
ELIZABETH HAGERTY*
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*
ALEXANDER B. BOWERMAN*
HOGAN LOVELLS US LLP
1835 Market St., 29th Floor
Philadelphia, PA 19103
Telephone: (267) 675-4600
Fax: (267) 675-4601

**Admitted Pro Hac Vice*

Attorneys for Plaintiffs, State of Hawai‘i and Ismail Elshikh

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

On January 27, 2017, President Trump carried out his repeated promises to implement a "Muslim ban" by issuing an order that categorically barred nationals of seven Muslim-majority countries, and all refugees, from entering the United States. After that order was swiftly enjoined, the President made several "technical" fixes designed to "avoid * * * litigation" while achieving "the same basic policy outcome." The litigation the President was presumably trying to avoid was the Ninth Circuit's decision in *Washington v. Trump*, 847 F.3d 1151 (Feb. 9, 2017), and Judge Brinkema's decision in *Aziz* v. *Trump*, -- F. Supp. 3d --, 2017 WL 580855 (E.D. Va. Feb. 13, 2017), each of which found that the Order was likely unconstitutional.

This Court saw through the subterfuge. After extensive briefing and a lengthy hearing, it enjoined Defendants from "enforcing or implementing Sections 2 and 6 of the [revised] Executive Order across the Nation." (Dkt. 219 ("Op."), at 42.). The Court expressly found that "Plaintiffs have met their burden of establishing a strong likelihood of success on their Establishment Clause claim, that irreparable injury is likely to result if [emergency] relief is not issued, and that the balance of the equities and public interest counsel in favor of granting the requested relief." *Id.* at 2. Later that day, President Trump himself acknowledged that his second Order was simply a "watered down version of the first order."

Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak,'* TIME, Mar. 16, 2017, Katyal Decl. Ex. A, at 7.

The same findings that led the Court to issue a TRO warrant the issuance of a preliminary injunction. As this Court explained, the standards for issuing a preliminary injunction and a TRO are "substantially identical." *Id.* at 27. Defendants can point to no changed circumstances in the last six days that would warrant revisiting this Court's thorough and well-reasoned opinion. To the contrary, the President's statements since the TRO was issued reinforce that the Executive Order's primary purpose is to "suspend[] the entry of Muslims." *Id.* at 36. Further, to the extent the Government wishes to narrow the scope of the Court's injunction, those arguments are just as meritless as they were when the Court rejected the Government's request to "clarify" the TRO two days ago.

It is already nearly a week since the Court announced its intention to set an expedited schedule to determine whether its TRO should be extended. *Id.* at 43. Despite its repeated attempts to relitigate issues this Court has already resolved, the Government has claimed that it has an interest in speedy resolution of this matter. Consistent with that professed interest, Plaintiffs respectfully request that the Court convert its TRO into a preliminary injunction.

BACKGROUND

A. The Executive Order

As detailed at length in Plaintiffs' complaint and this Court's opinion, President Trump made it plain both before and after his election that he intended to "suspend[] the entry of Muslims" into the United States. Op. at 36; *see id.* at 10-12 (quoting Second Am. Compl. ("SAC") ¶¶ 48-51, 58-60, 74); *id.* at 33-36 & n.14 (quoting SAC ¶¶ 38, 41-42, 44-45, 59, 74). One week after his election, President Trump sought to make good on that promise by issuing the first Executive Order. SAC ¶¶ 2, 49. That Order banned entry into the United States of nationals from seven Muslim-majority countries for 90 days and halted admissions of all refugees for 120 days, with a carve-out structured to benefit Christians in Muslim-majority countries.

On February 3, 2017, the District Court for the Western District of Washington entered "a nationwide preliminary injunction" enjoining President Trump and his Administration from enforcing the January 27 Executive Order. Op. at 3. On February 9, 2017, the Ninth Circuit rejected the Government's request for a stay, affirming the district court's determination that injunctive relief was warranted. *Washington*, 847 F.3d at 1161.

With the first Order enjoined, the Trump Administration began to work on a revised Order. SAC ¶ 71. But in the words of President Trump's Senior Advisor,

Stephen Miller—appearing in a television interview on February 21, 2017—the revised Order would "have the same basic policy outcome" as the original one, and any changes would address "very technical issues that were brought up by the court." *Id.* ¶ 74.

The President issued the revised Executive Order on March 6, 2017. Op. at 1. Consistent with Mr. Miller's indication, its substance is largely the same as the first. Under Section 2, the new Order imposes yet another sweeping ban on the entry to the United States of nationals from Muslim-majority countries for 90 days—now reaching six countries rather than seven. Order § 2(c). Under Section 6, the new Order also suspends the U.S. Refugee Admissions Program for a period of 120 days. *Id.* § 6(a). Sections 2 and 6 also contain provisions for enlarging and expanding those bans—establishing processes both for the President to "prohibit the entry" of *additional* "categories of foreign nationals," *id.* § 2(e), *see id.* § 2(a)-(b), (d)-(g), and to limit and control the admission of refugees going forward, *id.* § 6(b)-(d).

B. The Plaintiffs' Suit And This Court's TRO

The State of Hawai'i filed the original complaint in this action, and a motion for a TRO, on February 3, 2017. (Dkt. 1.) After the District Court for the Western District of Washington entered its nationwide injunction, this Court temporarily stayed the proceedings in this case. (Dkt. 27.) On February 13, 2017, the Court

temporarily lifted the stay and granted the State leave to file a First Amended Complaint, adding Dr. Ismail Elshikh as a plaintiff. (Dkt. 36.) On March 7, 2017, the Court again lifted the stay, permitting Plaintiffs to file a Second Amended Complaint challenging the revised Executive Over. (Dkt. 59.)

The following day, Plaintiffs filed their Second Amended Complaint and a new Motion for TRO. (Dkt. 64-65.) Plaintiffs argued that the revised Executive Order was illegal and unconstitutional for reasons similar to the first Order—among other reasons, it violated the Establishment Clause, it violated the Immigration and Nationality Act, and it deprived individuals of their rights under the Due Process Clause. Plaintiffs also demonstrated that they would suffer irreparable harm in the absence of injunctive relief, and that the Government would not be prejudiced if the implementation of the revised Order were delayed. Plaintiffs requested that the Court issue a nationwide TRO enjoining Defendants from "enforcing or implementing Sections 2 and 6 of the Executive Order" in their entirety. Op. at 2 (quoting Dkt. 65-1, at 4).

Following a hearing on March 15, 2017, this Court entered a TRO enjoining Defendants from "enforcing or implementing Sections 2 and 6 of the Executive Order across the Nation." *Id.* at 42. The Court held that both the State of Hawai‘i and Dr. Elshikh had standing to pursue their claims, and that those claims were ripe. *Id.* at 15-27. The Court further concluded that Plaintiffs had "met th[e]

burden" to justify issuance of a TRO. *Id.* at 28. It explained that Plaintiffs had established a "strong likelihood of success on the merits of their Establishment Clause claim" because "[a]ny reasonable, objective observer would conclude * * * that the stated secular purpose of the Executive Order is, at the very least, 'secondary to a religious objective' of temporarily suspending the entry of Muslims." Op. at 2, 36 (quoting *McCreary Cty.* v. *Am Civil Liberties Union of Ky.*, 545 U.S. 844, 864 (2005)). Furthermore, the Court concluded that Dr. Elshikh had established irreparable harm from the Establishment Clause violation, because "irreparable harm may be *presumed* with the finding of a violation of the First Amendment." *Id.* at 40. The Court also found that the balance of the equities weighed in favor of granting an injunction. *Id.* at 41-42.

Hours after this Court issued its TRO, President Trump attended a rally in Nashville, Tennessee. Responding to the news that this Court had temporarily enjoined the revised Order, President Trump decried the ruling as "an unprecedented judicial overreach" that "makes us look weak." Katyal Decl. Ex. A, at 7. He added:

> The order he blocked was a watered down version of the first order that was also blocked by another judge and should have never been blocked to start with. * * * Remember this. I wasn't thrilled, but the lawyers all said, oh, let's tailor it. This is a watered down version of the first one. This is a watered down version. And let me tell you something, I think we ought to go back to the first one and go all the way, which is what I wanted to do in the first place.

Id. at 7-8. Later that night, President Trump told a television interviewer that it was "very hard" to assimilate Muslims into Western culture. Chris Cillizza, *Donald Trump's explanation of his wire-tapping tweets will shock and amaze you*, WASHINGTON POST, Mar. 16, 2017, Katyal Decl. Ex. B, at 8.

C. The Present Motion

In its March 15 order, the Court stated that "[p]ursuant to Federal Rule of Civil Procedure 65(b)(2), this Court intends to set an expedited hearing to determine whether this Temporary Restraining Order should be extended." Op. at 43. Accordingly, the Court ordered the parties to "submit a stipulated briefing and hearing schedule for the Court's approval forthwith." *Id.*

Plaintiffs promptly asked the Government if it would agree to stipulate that the TRO should be converted to a preliminary injunction. The Government declined the request. Instead, on March 17, 2017, it filed a "Motion for Clarification of TRO" requesting that the TRO be narrowed to Section 2(c) alone. (Dkt. 227). The Court swiftly denied that motion, explaining that the Government "ask[ed] the Court to make a distinction that the Federal Defendants' previous briefs and arguments never did," and that "[a]s important, there is nothing unclear about the scope of the Court's order." (Dkt. 229). The Court reiterated its request for a stipulated briefing and hearing schedule, and asked the parties to "advise the Court whether a

stipulated path has been reached regarding proceedings before this Court concerning a possible extension of the Court's TRO." (Dkt. 230).

Plaintiffs once again asked the Government if it would stipulate to entry of a preliminary injunction, or a briefing and hearing schedule. The Government again informed Plaintiffs that it intended to oppose entry of a preliminary injunction unless the injunction was limited to Section 2(c). Accordingly, on March 20, the parties agreed to a stipulated briefing and hearing schedule on Plaintiffs' motion to convert the TRO to a preliminary injunction. (Dkt. 235). The Court issued a briefing schedule order shortly thereafter. (Dkt. 236).

ARGUMENT

As both this Court and the Ninth Circuit recently explained, the standards for issuing a TRO and a preliminary injunction are "substantially identical." Op. at 27 (quoting *Stuhlbarg Int'l Sales Co., Inc.* v. *John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001)); *see Washington*, 847 F.3d at 1159 n.3 (same). Either form of preliminary relief is proper if a plaintiff carries his burden of demonstrating "[1] that he is likely to succeed on the merits, [2] that he likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter* v. *Natural*

Resources Def. Council, Inc., 555 U.S. 7, 20 (2008); *see* Op. at 27-28 (reciting same standard for issuing TRO).

"Plaintiffs have met this burden here." Op. at 28. As the Court explained in detail in its opinion granting a TRO, "Plaintiffs have met their burden of establishing a strong likelihood of success on their Establishment Clause claim, that irreparable injury is likely to result if the requested relief is not issued, and that the balance of the equities and public interest counsel in favor of granting the requested relief." *Id.* at 2. Accordingly, no further analysis is necessary to determine that the Court should convert its TRO into a preliminary injunction. The Government's only apparent argument to the contrary—that the injunction should be narrowed to some subset of Sections 2 and 6—has already been rejected by this Court, and is meritless in any event.

A. The Court Has Already Concluded That Plaintiffs Satisfy The Preliminary Injunction Factors.

This Court has already held that Plaintiffs satisfy each of the grounds for issuance of a TRO and a preliminary injunction. Those holdings remain correct, and indeed have grown only stronger in the intervening days. A preliminary injunction should issue.

First, as the Court recently held, Plaintiffs can establish "a strong likelihood of success on the merits of their Establishment Clause claim." Op. at 2. The "plainly-worded statements" of the President and his aides "in the months leading

up to and contemporaneous with the signing of the Executive Order * * * betray the Executive Order's stated secular purpose" and make clear that any such purpose is, "at the very least, 'secondary to a religious objective' of temporarily suspending the entry of Muslims." Op. at 35-36 (quoting *McCreary*, 545 U.S. at 864). The Government's contention that the Order's ostensibly "religiously neutral text" is sufficient to exempt the Order from scrutiny is "palpabl[y]" "illogic[al]." *Id.* at 30. And as the Court rightly held, "the actions taken during the interval between revoked Executive Order No. 13,769 and the new Executive Order" are not " 'genuine changes in constitutionally significant conditions' " that would cleanse the discriminatory "taint" associated with the first Order. *Id.* at 38-39 (quoting *McCreary*, 545 U.S. at 874).

Developments since the Court issued its opinion have only borne out and reinforced these conclusions. Within hours of the Court's order, Judge Chuang in the District of Maryland likewise concluded that the "explicit, direct statements of President Trump's animus towards Muslims and intention to impose a ban on Muslims entering the United States * * * present a convincing case that the First Executive Order was issued to accomplish, as nearly as possible, President Trump's promised Muslim ban." Memorandum Opinion at 29, *International Refugee Assistance Project* ("*IRAP*") v. *Trump*, No. 17-0361 (D. Md. Mar. 15, 2017). Furthermore, Judge Chuang explained—again echoing this Court—that

"the religious purpose has been, and remains, primary," even in "the Second Executive Order." *Id.* at 36. That makes three courts that have squarely held that the primary purpose of President's Trump's orders was to effectuate an unconstitutional Muslim ban. *See Aziz*, 2017 WL 580855, at *7-*9; *see also Washington*, 847 F.3d at 1168 (expressing "significant * * * questions" whether the first Order violated the Establishment Clause). There is no reason whatever for the Court to reconsider that amply well-supported holding.

That is particularly so because, since the Court issued its injunction, President Trump *himself* has confirmed that any changes made between the first Order and the second were pretextual. He described the second order as merely a "watered down version of the first," Katyal Decl. Ex. A, at 7, and reiterated his sentiments that it is "hard" to assimilate Muslims in the United States, Katyal Decl. Ex. B., at 8. Any "reasonable, objective observer" hearing or reading these remarks would conclude that the national security findings in the revised Order were simply a smokescreen for the same plan of discrimination so readily apparent in the first draft. Op. at 36. If Plaintiffs' likelihood of success was strong last week, it is only stronger today.[1]

[1] For reasons discussed at length in their memorandum in support of a TRO, the Order is also unlawful because it violates the Immigration and Nationality Act and the Due Process Clause. Dkt. 65-1, at 24-40; *see* Op. at 29 n.11.

Second, Dr. Elshikh can still easily make a showing "of direct, concrete injuries to the exercise of his Establishment Clause rights." *Id.* at 40. As the Court rightly found, these harms are irreparable because "irreparable harm may be *presumed* with the finding of a violation of the First Amendment." *Id.* The District of Maryland agreed: It found that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *IRAP* Order at 38 (quoting *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976)).

The State, too, will suffer irreparable injury if an injunction is not granted. This Court held that Hawai'i had standing to challenge the Order because its economy would "suffer a loss of revenue due to a decline in tourism" and its universities would "suffer monetary damages and intangible harms"—including harms caused by the loss of foreign nationals who might otherwise "study[] or teach[] at the University." *Id.* at 18, 21; *see also id.* at 21 n.9 (declining to reach question whether the State also suffered an Establishment Clause injury). Those harms will remain if an injunction is not entered. Indeed, because the universities are now in the midst of admissions season, the Order's bar on entry by certain foreign nationals would inflict a particularly severe and immediate harm that could not later be undone. *See* Stephanie Saul, *Amid 'Trump Effect' Fear, 40% of Colleges See Dip in Foreign Applicants*, N.Y. TIMES, Mar. 16, 2017, Katyal Decl.

Ex. C (describing severe decline in college applications, particularly from the Middle East, following issuance of the Executive Order).

Third, the balance of the equities and the public interest continue to "Weigh in Favor of Granting Emergency Relief." Op. at 41. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (internal quotation marks omitted). Meanwhile, the Government's "national security motivations" have grown only more "questionable." *Id.* at 42. As noted above, President Trump himself tipped his hand that the revised Order's national security findings are a charade. And the Government's plodding pace since the Court issued the TRO reveals that there is no urgency to implementing this unconstitutional Order. Rather than rushing to the Ninth Circuit—as it did the last time its Executive Order was subject to a nationwide injunction—the Government has resisted at every turn Plaintiffs' efforts to expedite these proceedings. First it filed a meritless motion to "clarify" the Court's order. Then, instead of agreeing to Plaintiffs' offer to simply convert the TRO into a preliminary injunction, it demanded a new round of briefing to try to convince the Court to accept the argument it just rejected. It is the Government's prerogative, of course, to try to take as many bites at the apple as it wishes. But it cannot maintain that this delay of its own making—on top of more than a month of delay in issuing and implementing the revised Order—is causing it irreparable harm.

In sum, every reason this Court offered for entering a TRO remains, and has grown stronger, in the days since that injunction was issued. This Court should accordingly convert that TRO into a preliminary injunction granting the same scope of relief. Every other District Court confronted with a similar case has done the same: The District of Maryland immediately entered a preliminary injunction on the same day as this Court issued its order, *IRAP* Order at 3, 43; Judge Brinkema did the same in *Aziz*, *see* 2017 WL 580855, at *1; and the Ninth Circuit explained that the Western District of Washington's order in *Washington* v. *Trump* was, in effect, a "preliminary injunction," 847 F.3d at 1158; *see* Op. at 3 (explaining that the Western District of Washington "entered a nationwide preliminary injunction).

Indeed, if there were any doubt whether this is the proper course, the Ninth Circuit's decision in *Washington* settles it. In that case, the Ninth Circuit had little difficulty concluding that the District Court's nationwide injunction, although denominated a TRO, should in fact be considered a preliminary injunction; indeed, the Government *itself* apparently took that view by filing an immediate appeal challenging that order. *See* 847 F.3d at 1158 (explaining that "[a] TRO is not ordinarily appealable" unless "it possesses the qualities of a preliminary injunction" (internal quotation marks omitted)). The Ninth Circuit further held that the preliminary injunction was proper, and declined to issue the Government's

requested stay. *Id.* at 1156. This Court's TRO was issued after substantially more briefing than the District Court order in *Washington*, and on the basis of a considerably more detailed written opinion. There is no reason it would not be appropriate to enter a preliminary injunction in this case, as well.

B. The Government's Argument In Support Of Narrowing The Injunction Is Meritless.

The Government has not identified any changed circumstance that could merit alteration of the injunction the Court just issued. Instead, the Government has indicated that it wishes to try—once again—to convince this Court to narrow the injunction to some subset of Sections 2 and 6. That request is meritless.

For one thing, the Government pressed the same argument *four days ago* in its "Motion for Clarification of TRO," and this Court unequivocally rejected it, explaining that this motion "ask[ed] the Court to make a distinction that the Federal Defendants' previous briefs and arguments never did." (Dkt. 229). The Court was right then, and it should follow the same course now. In the extensive briefing preceding issuance of a TRO, the Government had full and fair notice that Plaintiffs sought a nationwide injunction of "Sections 2 and 6" in their entirety. Op. at 2 (quoting Dkt 65-1, at 4). The Government never once suggested that those sections should be finely parsed, or that an injunction should cover only one subsection and not another. Nor was that a result of a failure to consider and

address the proper scope of an injunction; the Government devoted several pages of its memorandum in opposition, and a substantial portion of its oral argument before this Court, to arguing (wrongly) that "[t]he emergency relief plaintiffs request" was "overbroad" because it sought facial relief and a nationwide injunction. (Dkt. 145, at 52-54). Having lost on those arguments, the Government should not be permitted to sandbag Plaintiffs and this Court by coming up with new complaints that it could, and should, have raised earlier.

In any event, as Plaintiffs explained in their opposition to the Government's Motion for Clarification, there is no valid reason for this Court to narrow its injunction to cover only parts of Sections 2 and 6. The Order as a whole, and Sections 2 and 6 in particular, embodies a policy motivated by religious animus. Allowing any part of one or both of these sections to stand perpetuates the perception that the Executive may make policy predicated on hostility to a particular faith and stigmatizes Muslim citizens like Dr. Elshikh. This Court properly held that such a result is expressly foreclosed by the Establishment Clause.

The Government's argument that only some parts of Sections 2 and 6 should be enjoined under the Establishment Clause flies in the face of Supreme Court precedent. In *Church of Lukumi Babalu Aye v. City of Hialeh*, 508 U.S. 520 (1993), the Supreme Court held that even when parts of a challenged policy appear

well-tailored to a secular purpose, they must nonetheless be "invalidated" where it is clear that the policy as a whole has "as [its] object the suppression of religion." *Id.* at 540. As discussed below, that does not mean that every element of Sections 2 and 6 would be unconstitutional if it were enacted outside the context of a discriminatory ban. As Justice Kennedy explained in *Lukumi*, a court "need not decide whether" apparently neutral policies might "survive constitutional scrutiny if [they] existed separately." *Id.* The Court's order merely reflects the commonsense principle that the enjoined policies certainly cannot withstand that scrutiny as part of a policy motivated by religious animus.

Declining to enjoin Section 6 and part of Section 2 would also be contrary to the basic command that the "usual function of a preliminary injunction is to preserve the status quo *ante litem*." *Tanner Motor Livery, Ltd.* v. *Avis, Inc.*, 316 F.2d 804, 808 (9th Cir. 1963). That status quo is an immigration system unfettered by the provisions of Sections 2 and 6.

The facts of this case also make it particularly illogical to enjoin only parts of the ban. As the Government itself acknowledges, the different components of Sections 2 and 6 are inextricably linked. In its words, while "Section 2(c) contains the 90-day suspension-of-entry provision * * * [t]he remainder of Section 2 sets forth a process by which the President will make an *additional determination* about whether any restrictions on entry are necessary for certain foreign nationals or

categories of foreign nationals." (Dkt. 227-1, at 3) (emphasis added). Put differently, the remainder of Section 2 is designed to help the President extend his discriminatory ban on entry to additional countries and for additional periods of time. Since the Court found a high likelihood that the ban was motivated by discriminatory animus, Op. at 36, the provisions for extending that ban are surely infected by the same animus, and inflict the same Establishment Clause harms.

Likewise, all of the provisions of Section 6 are components of an integrated process for "suspend[ing]" and "review[ing]" refugee admission rules. (Dkt. 227-1, at 4). As noted, the Court found a high likelihood that the President was changing refugee admissions rules to effectuate a Muslim ban. Op. at 36. Every piece of that integrated process is an outgrowth of the same poisonous root, and was properly barred.

Further, the factual record Plaintiffs have developed in this case amply supports this Court's finding that Plaintiffs are likely to succeed on the merits of their claim that *all* of the Order—including the refugee provisions in Section 6—was motivated by discriminatory animus towards Muslims. As Plaintiffs' Complaint documented, President Trump's repeated pledges throughout the presidential campaign to curb the admission of refugees were integrally interlinked with his rhetoric about the threat of Muslims. Months before he even came up with his proposal for "a total and complete shutdown of Muslims entering the

United States" in December 2015, SAC ¶ 38, President Trump was decrying the admission of Muslim refugees. On July 11, 2015, he claimed (falsely) that Christian refugees were being prevented from coming to the United States, while "[i]f you are Islamic * * * it's hard to believe, you can come in so easily." *Id.* ¶ 36. In September 2015, President Trump referred to the Syrian refugees the Obama Administration had accepted for 2016 as "a 200,000-man army" that "could be ISIS," and vowed, "if I win, they're going back!" *Id.* ¶ 37. In July 2016 he said: "[U]nder the Clinton plan, you'd be admitting hundreds of thousands of refugees from the Middle East with no system to vet them, or to prevent the radicalization of the children and their children. Not only their children, by the way, they're trying to take over our children and convince them how wonderful ISIS is and how wonderful Islam is and we don't know what's happening." *See id.* ¶ 43 n.19 (linking to July 2016 speech).

As Plaintiffs' Complaint also demonstrated, President Trump's first Executive Order included a refugee provision not only crafted to effectuate his promise to keep Muslims refugees out of the country—but that was discriminatory on its *face*. Section 5 of the January 27 Order suspended the U.S. Refugee Admissions Program for 120 days, but included a carve-out for refugees who were "religious minorit[ies]" in their home countries. *Id.* ¶ 56. Section 5 directed the Secretaries of State and Homeland Security, after USRAP admissions resumed, to

"prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." *Id.* ¶ 57. In an interview with the Christian Broadcasting Network on January 27, 2017, President Trump outright admitted that the first Order was intended to create a preference for the admission of Christian refugees. *Id.* ¶ 58.

The new Executive Order attempts to sanitize the prior Order's refugee provision in order to "be responsive to a lot of very technical issues that were brought up by the court." *Id.* ¶ 74(a). Thus, while the new Order still suspends URSAP admissions for 120 days under Section 6, it no longer contains an explicit carve-out during those 120 days or a mandated preference thereafter for the admission of Christians. *See id.* ¶ 81. But these technical fixes do not eliminate the religious animus that motivated the refugee provisions of the first Order and were apparent on its face or that motivated the revised one. As President Trump said *himself* at a rally after this Court issued the TRO, the revised Order is just "a watered-down version of the first one." Katyal Decl. Ex. A, at 7. And as he said later that night on television, he still holds the view that it is "very hard" for Muslims to assimilate into Western culture. Katyal Decl. Ex. B, at 8.

Finally, the notion that the Court's Order would preclude Executive Branch consultation or interfere with Executive prerogatives is meritless. The Court's

Order merely prevents Executive branch action under the auspices of an illegal Executive Order. The Government could engage in appropriate consultations and an appropriate review of the immigration system as a whole independent of this Order; it simply cannot do so as part and parcel of effectuating the President's promise to implement a Muslim ban. *See Lukumi*, 508 U.S. at 540.

CONCLUSION

For the foregoing reasons, the Court should convert the TRO into a preliminary injunction prohibiting Defendants from enforcing or implementing Sections 2 and 6 of the Executive Order across the Nation.

DATED: Washington, D.C., March 21, 2017.

Respectfully submitted,

/s/ Neal K. Katyal

DOUGLAS S. CHIN (Bar No. 6465)
Attorney General of the State of Hawai'i
CLYDE J. WADSWORTH (Bar No. 8495)
Solicitor General of the State of Hawai'i
DEIRDRE MARIE-IHA (Bar No. 7923)
DONNA H. KALAMA (Bar No. 6051)
KIMBERLY T. GUIDRY (Bar No. 7813)
ROBERT T. NAKATSUJI (Bar No. 6743)
Deputy Attorneys General
DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI'I

Attorneys for Plaintiff, State of Hawai'i

NEAL K. KATYAL*
COLLEEN ROH SINZDAK*
MITCHELL P. REICH*
ELIZABETH HAGERTY*
THOMAS P. SCHMIDT*
SARA SOLOW*
ALEXANDER B. BOWERMAN*
HOGAN LOVELLS US LLP

**Admitted Pro Hac Vice*

Attorneys for Plaintiffs, State of Hawai'i and Ismail Elshikh