State of Hawaii v. Trump Doc. 382

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

STATE OF HAWAII, ISMAIL ELSHIKH, JOHN DOES 1 & 2, and MUSLIM ASSOCIATION OF HAWAII, INC.,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; ELAINE DUKE, in her official capacity as Acting 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.

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER; CERTIFICATE OF SERVICE

Civil Action No. 1:17-cv-00050-DKW-KSC

Dockets.Justia.com

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

STATUTES:

REGULATIONS AND EXECUTIVE MATERIALS:

OTHER AUTHORITIES:

INTRODUCTION

It has been eight months since the Ninth Circuit informed the President that his claim to "unreviewable" authority over immigration policy "runs contrary to the fundamental structure of our constitutional democracy." *Washington* v. *Trump*, 847 F.3d 1151, 1161 (9th Cir. 2017) (per curiam). Yet the Government has once again returned to this Court to claim an immigration power immune from legislative, judicial, and even constitutional restrictions. The Government's brief repeatedly rejects statutory limits on that power; flatly ignores binding judicial precedent that forecloses its arguments; and seeks to evade the constitutional boundaries this Court is entrusted to uphold.

Thus, while Congress enacted Section 1152(a) to bar nationality-based restrictions on the issuance of immigrant visas, and the Ninth Circuit held that the provision forecloses nationality-based bans on entry, such bans are at the core of EO-3. Similarly, Congress limited the President's powers under Sections 1182(f) and 1185(a); the Ninth Circuit explained how those limits apply to executive orders; yet EO-3 again transgresses them. Moreover, EO-3 continues to violate the Constitution itself, acknowledging on its face that the new proclamation is the direct descendant of EO-2, an order this Court held was enacted for the primary purpose of excluding Muslims.

"[I]mmigration, even for the President, is not a one-person show." *Hawaii* v. *Trump*, 859 F.3d 741, 755 (9th Cir. 2017) (per curiam). Because the President cannot be permitted to flout the dictates of Congress, the Judiciary, and the Constitution, EO-3 should be enjoined before it takes effect.

ARGUMENT

A. Plaintiffs Are Likely To Succeed On The Merits Of Their Claims.

1. The Order Is Reviewable.

a. The Government begins by arguing (at 12-15) that Plaintiffs' statutory claims are unreviewable. The Ninth Circuit rejected precisely the same argument in *Hawaii*. *See* 859 F.3d at 768-769. Likewise, although the Government pressed this argument at length in *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993),[1] not a single Justice agreed, and all considered the plaintiffs' claims on the merits. The Government's argument can be rejected for that reason alone.

It is also unpersuasive on its own terms. This Court has equitable power to enjoin "violations of federal law by federal officials." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *see Chamber of Commerce of U.S.* v. *Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (Silberman, J.). And the Administrative Procedure Act ("APA") empowers courts to "set aside agency

[1] *See* U.S. Br. 13-18, *Sale*, 509 U.S. 155 (No. 92-344); Oral Arg. Tr., *Sale*, 509 U.S. 155 (No. 92-344), 1993 WL 754941, at *16-22.

action" at the behest of an "aggrieved" person. 5 U.S.C. §§ 702, 706(2). The Government offers two principal reasons why these two well-trod avenues of review are unavailable here. Neither is compelling.

First, the Government argues (at 12-13 and 15 n.2) that review is precluded by the doctrine of consular nonreviewability. As the Ninth Circuit has twice explained, that doctrine is applicable only to "an individual consular officer's decision to grant or deny a visa," *Hawaii*, 859 F.3d at 768, not to broader Executive "policymaking." *Washington*, 847 F.3d at 1162.

Second, the Government contends that judicial review is unavailable under the APA because the President is not an "agency" under that statute. But "injunctive relief against executive officials like" Cabinet Secretaries is certainly "within the courts' power," and Plaintiffs' injuries can be redressed that way. *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-803 (1992); *see Hawaii*, 859 F.3d at 788. Furthermore, the Court's equitable power extends to the President and to actions taken at his direction. *See Chamber of Commerce*, 74 F.3d at 1327-28.

b. The Government also asserts (at 15-18) that Plaintiffs' constitutional claims are unreviewable. The Ninth Circuit has rejected that argument, too, *Washington*, 847 F.3d at 1163-64, and it is meritless in any event. The Government does not dispute that the Court may review constitutional challenges to exclusion decisions where plaintiffs have asserted a violation of their "*own*

constitutional rights." Opp. 15-16. Plaintiffs' Establishment Clause challenge matches that description. The Establishment Clause "deem[s] religious establishment antithetical to the freedom *of all*," *Lee* v. *Weisman*, 505 U.S. 577, 591 (1992) (emphasis added), and protects every citizen from the threat of "political tyranny and subversion of civil authority," *McGowan* v. *Maryland*, 366 U.S. 420, 430 & n.7 (1961). It also "protect[s] States * * * from the imposition of an established religion by the Federal Government." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring). Accordingly, so long as Plaintiffs allege that the Federal Government has taken an action that establishes a disfavored religion and that confers Article III standing, they assert a violation of their *own* right to be free from federal establishments. *See McGowan*, 366 U.S. at 430-431. Plaintiffs easily clear that bar here.

c. Finally, the Government argues (at 14) that review of EO-3 is premature. The Ninth Circuit already rejected that argument, *Hawaii*, 859 F.3d at 767-768, and for good reason. The "impact" of EO-3 upon Plaintiffs "is sufficiently direct and immediate as to render the issue appropriate for judicial review." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 152 (1967).

2. EO-3 Violates the Immigration and Nationality Act.

As the Ninth Circuit held, the INA precludes nationality-based bans on immigration and prohibits any sweeping policy of exclusion that is predicated on

insufficient findings or that otherwise exceeds the limits of the President's delegated powers. EO-3 flouts these statutory limits, and the Government's brief barely attempts to square the President's latest travel ban with either the statutes or the binding Ninth Circuit precedent interpreting them.[2]

a. EO-3 violates the INA's prohibition on nationality-based discrimination.

The Ninth Circuit held that 8 U.S.C. § 1152(a) prohibits "nationality-based discrimination in the issuance of immigrant visas" and "in the admission of aliens" more generally. *Hawaii*, 859 F.3d at 778. In reaching that holding, it rejected the assertion that the President could "circumvent" Section 1152's clear prohibition by deeming an entire nationality "inadmissible under [8 U.S.C.] § 1182," or by discriminating at the point of "entry" rather than in visa issuance. *Id.* at 777. It further explained that any conflict between the President's "broad authority to exclude aliens" and Section 1152's "specific" bar on nationality discrimination must be resolved in favor of Section 1152, particularly given that Section 1152 identifies exceptions and Section 1182(f) is not among them. *Id.* at 778. Finally,

[2] The Government may be hoping that the Supreme Court will vacate the Ninth Circuit's opinion in *Hawaii* v. *Trump* on mootness grounds, as it did in *Trump* v. *International Refugee Assistance Project*, No. 17-1351 (U.S. Oct. 10, 2017). Of course, the Supreme Court has not vacated the Ninth Circuit decision. Moreover, even if the Government's hopes are realized, "a vacated opinion still carries informational and perhaps even persuasive or precedential value." *DHX, Inc.* v. *Allianz AGF MAT, Ltd.*, 425 F.3d 1169, 1176 (9th Cir. 2005) (Beezer, J., concurring) (collecting cases).

the Ninth Circuit refuted the Government's claim that the President had imposed nationality-based restrictions in the past, observing that the Government's three examples—the executive order at issue in *Sale*, President Carter's Iran order, and President Reagan's Cuba proclamation—were all readily distinguishable. *Id.* at 779.

The Government ignores both the Ninth Circuit's holding and its entirely sound rationale, asking this Court to defy binding precedent without bothering to explain why the Government believes the Ninth Circuit got it wrong. For example, the Government contends that the President *may* discriminate on the basis of nationality in deeming aliens inadmissible under 8 U.S.C. §§ 1182(f) and 1185(a), Opp. 29, and *may* engage in nationality discrimination at the point of "entry," Opp. 30 n.8. But the Government does not explain how this reading—which deprives Section 1152 of any real force—could be correct, given that courts may not read statutes in a way that renders them "nullit[ies]." *Dada* v. *Mukasey*, 554 U.S. 1, 16 (2008).

The Government also claims that Sections 1182(f) and 1185(a) should be viewed as "specific" provisions that trump the "general" rule of Section 1152(a). Again, however, this position conflicts with the Ninth Circuit's square holding. And again the Government does not explain why a general right to exclude is more specific than a particular limit on nationality-based exclusions, or why the court

should view Sections 1182(f) and 1185(a) as exceptions to Section 1152(a) when neither provision appears on the explicit list of exceptions within Section 1152(a) itself.

The Government even reasserts (at 29-30) the same historical examples that the Ninth Circuit already found inapposite, claiming that the executive order in *Sale*, as well as the Iran and Cuba orders, "confirm[]" that nationality-based discrimination is permissible. But the Government does not even begin to contend with the facts that the order in *Sale* "made no nationality-based distinctions," the Iran order "did not ban Iranian immigrants outright," and the Cuba order was "in response" to Cuba's reneging on a specific treaty. *Hawaii*, 859 F.3d at 779. Nor does it acknowledge that neither the Iran nor the Cuba order was upheld by any court.

Moreover, the Iran and Cuba orders were both issued in exigent circumstances. *Id*. The Iran order came in the midst of a hostage crisis involving the U.S. embassy, *see* Exec. Order No. 12,172 (1979). The Cuba order came after lesser sanctions had failed and it became obvious that the Cuban government was using the visa process to "traffick[] in human beings" by extorting funds from visa applicants. 86 U.S. Dept. of State Bull. No. 2116, Cuba: New Migration and Embargo Measures 86-87 (Nov. 1986). As the D.C. Circuit has held, Section 1152(a)'s prohibition on "discrimination" does not necessarily foreclose

nationality-based restrictions that are narrowly tailored to address a genuine exigency. *Legal Assistance for Vietnamese Asylum Seekers* v. *Dep't of State*, 45 F.3d 469, 473 (D.C. Cir. 1995). An ongoing hostage crisis and the discovery of dramatic exploitation of the visa process might qualify, and the same is true with respect to the "urgent crisis (e.g., the brink of war with a particular country)" that the Government fears.[3] Opp. 32. But the President points to no comparable exigency that would justify the challenged provisions of EO-3, relying instead on a unilateral desire to revise vetting procedures.

In short, the Government has offered no convincing reason why it should be permitted to evade Section 1152(a)'s explicit prohibition on nationality-based discrimination in the issuance of immigrant visas. Indeed, it has offered no reason why it should be permitted to engage in nationality-based discrimination with respect to the issuance of *any* kind of visa. Section 1152(a) embodies Congress' desire "to abolish the 'national origins system'" for entry to the United States, the immigration laws have long been understood to preclude nationality-based distinctions for immigrants and nonimmigrants alike, and our constitutional system strongly disfavors such invidious discrimination. Mem. 16-17. EO-3's entry bans should therefore be enjoined in their entirety.

[3] The Government's fears in this respect are particularly ill-founded, as Plaintiffs explicitly do not challenge the restrictions on North Korea for the very reason that the President might legitimately claim an exigency with respect to that country.

b. EO-3 violates Sections 1182(f) and 1185(a).

EO-3 may also be enjoined for the independent reason that it exceeds the President's authority under Sections 1182(f) and 1185(a).

i. EO-3's findings do not reasonably "support" its nationality-based bans.

a. The Ninth Circuit has already concluded that an order issued under Sections 1182(f) and 1185(a) must contain "findings" that "support the conclusion that entry * * * would be harmful to the national interest." *Hawaii*, 859 F.3d at 770 & n.10. And it has invalidated an order where its findings did not meet that requirement. *Id.*

Nonetheless, the Government argues that EO-3's findings are "not subject to review." Opp. 20. Even if that contention were not flatly contrary to the Ninth Circuit's holding, it would still be meritless. The Government relies (at 20) on *Webster* v. *Doe*, 486 U.S. 592 (1988), but the statute at issue in that case differed from Section 1182(f) in a critical respect: It permitted the CIA Director to terminate employees whenever he "*deem[ed]* [it] necessary or advisable." 486 U.S. at 600. In Section 1182(f), Congress made the deliberate choice to use the word "find" rather than "deem" precisely so as to avoid writing the President such a blank check. Mem. 19.

The Government also observes (at 20) that prior orders have not included "detailed" findings. That misses the point. The question is not the elaborateness

of an order's findings, but whether they actually "support" the exclusions ordered. *Hawaii*, 859 F.3d at 770. Every past order the Government cites excluded aliens because they were found to have engaged in some self-evidently harmful conduct, such as supporting "subversive activities" against the United States or its allies,[4] committing severe violations of international law,[5] or attempting to enter the country "illegally."[6] Those findings, while brief, plainly supported the exclusion of the culpable aliens.

Furthermore, the Government asserts that Section 1185(a) permits the President to exclude aliens without "any predicate findings." Opp. 19. That cannot be right. Reading Section 1185(a) in this way would nullify the "essential precondition" contained in Section 1182(f), the provision that "specifically provides for the President's authority to suspend entry." *Hawaii*, 859 F.3d at 755, 770 n.10. No prior President has construed Section 1185(a) as an independent grant of authority to impose broad restrictions on entry without articulating some "rationale" for the exclusion. Opp. 20-21.

b. EO-3 does not make any finding sufficient to support its sweeping restrictions. As Plaintiffs explained, there is no rational connection between the

[4] Proc. 5887 (1988); *see* Proc. 5829 (1988).
[5] Proc. 8342 (2009) (human trafficking); Proc. 6958 (1996) (sheltering international terrorists).
[6] Exec. Order No. 12,807 (1992); *see generally* Proc. 8693 (2011) (excluding aliens falling into all three groups).

problem the order identifies—that several countries ostensibly lack adequate identity-management and information-sharing protocols—and the solution it adopts: a near-complete ban on entry by all nationals of those countries. That ban is unnecessary in light of existing vetting requirements, designed in a manner that contradicts its stated purpose, and vastly overinclusive. Mem. 19-21; *see* Decl. of Former National Security Officials (Ex. M).

The Government's brief offers no coherent response to these objections. The Government asserts that the Order "expressly contains * * * a finding" that "current screening processes are inadequate." Opp. 25. But the only finding the Government points to is the statement that the targeted countries "have inadequate information-sharing practices." *Id.* (emphasis omitted). That finding simply does not show why "th[e] individualized adjudication process is flawed." *Hawaii*, 859 F.3d at 773. If immigration officers lack adequate information to adjudicate an alien's status, then "[a]s the law stands" they must exclude that alien for failing to "meet th[e] burden" of showing he is "not inadmissible." *Id.*

The Government defends the poor fit between EO-3's purpose and its scope by asserting that it is "perfectly rational to determine that [immigrants] pose greater risks" than nonimmigrants. Opp. 26 n.6. That response, however, does nothing to justify the order's arbitrary distinctions *among* non-immigrants. *See* Mem. 20-21. And if the Government truly "needed" more information to

determine whether the covered aliens were terrorists, it would not admit them even temporarily.

The Government further claims that EO-3 is not overinclusive because a country's identity-management practices "would apply to all of a foreign government's nationals." Opp. 25. But the Government does not say, and neither does the order, that countries are likely to have useful threat information about nationals who left a country as infants or lack "significant ties" to their home country. *Hawaii*, 859 F.3d at 773. Common sense strongly suggests otherwise.

Finally, the Government justifies EO-3 on the ground that it "place[s] pressure on foreign governments" to adopt policies the President favors. Opp. 22-23. Again, that rationale simply identifies a foreign policy goal the alien's exclusion is thought to advance. Section 1182(f), however, mandates a finding that the alien's "entry" would be "*detrimental*" to U.S. interests. Allowing the President to invoke Section 1182(f) for this purpose would render it practically "unlimited," *Hawaii*, 859 F.3d at 770—allowing him to exclude all Canadians because Canada will not agree to favorable trade terms or all Chinese immigrants because China grants generous steel subsidies. The Ninth Circuit rightly made clear the President cannot seize control of the Nation's immigration system on such flimsy justifications. *See id.* at 771.

ii. EO-3 exceeds the substantive limits on the President's exclusion power.

The Government also fails to rebut Plaintiffs' argument that EO-3 exceeds the longstanding limits on the President's authority under Sections 1182(f) and 1185(a).

a. For nearly a century, Presidents have observed two limits on the exclusion authority granted by Sections 1182(f) and 1185(a) and their predecessors: They have excluded only (1) aliens akin to subversives, war criminals, and the statutorily inadmissible, and (2) aliens who would undermine congressional policy during an exigency in which it is impracticable for Congress to act. Mem. 24-27.

The Government asserts (at 27) that "these limitations find no basis in the statutes' text." That is incorrect. Congress enacted these limits by borrowing the phrase "class[es] of aliens * * * detrimental to the interests of the United States" nearly verbatim from the statutes, proclamations, and regulations that had consistently been interpreted in this manner. Mem. 26. *Haig* v. *Agee*, 453 U.S. 280 (1981), confirms the point: In that case—whose construction of Section 1185(b) the Government cites with approval, *see* Opp. 19—the Court held that Congress necessarily "adopted the longstanding administrative construction" of a statute when it enacted text "identical in pertinent part" to the earlier provision. *Haig*, 453 U.S. at 297-298. The same is true for Section 1182(f). *See, e.g.*, *Zemel* v. *Rusk*, 381 U.S. 1, 17-18 (1965).

The Government fails to identify any order since 1952 that has deviated from these limits. President Reagan issued his Cuba order after determining that Cuba had evaded his prior attempts to punish its treaty non-compliance, and had engaged in dramatic exploitation of the immigration process. *See supra* p. 7. The order thus did not respond to an event 15 months earlier; it addressed a dynamic diplomatic dispute that Congress could not plausibly manage on its own. Meanwhile, President Carter's Iran order did not itself exclude any aliens, did not rely on Section 1182(f), and was issued within weeks of the seizure of the U.S. embassy in Iran—as clear an exigency as can be imagined. Exec. Order No. 12,172 (1979). The other orders the Government cites fell well within the President's power to exclude aliens who subvert the United States or its partners abroad, engage in serious violations of international law, or are statutorily inadmissible.[7]

Finally, the Government is wrong that Plaintiffs' construction would contravene the "typical[]" balance of authority in foreign affairs. Opp. 28. To the contrary, it would preserve the President's discretion precisely when the

[7] *See* Exec. Order No. 13,662 (2014) (excluding aliens subverting Ukrainian government); Proc. 7524 (2002) (excluding aliens undermining democratic institutions in Zimbabwe); Proc. 6730 (1994) (excluding aliens impeding Liberia's transition to democracy).

Government agrees he needs it: in responding to "ever-changing circumstances" in which it is necessary "to act quickly and flexibly." *Id.*

b. Rather than accept the well-established limits on the President's power, the Government asks the Court to read Section 1182(f) as a grant of virtually absolute "discretion" to the President. Opp. 19-20. It contends that the President has unreviewable authority to determine "whether," "when," "for how long," "on what basis," "on what terms," and "who[m]" to exclude from the United States. U.S. Br. 39-40, *Trump* v. *Hawaii*, No. 16-1540 (U.S. Aug. 10, 2017).

The text does not support this reading: Courts do not read immigration statutes to confer "unbridled discretion." Mem. 22 (quoting *Kent* v. *Dulles*, 357 U.S. 116, 127-128 (1958)). Rather, as the Supreme Court explained in *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 538 (1950)—the Government's favored case—immigration provisions written "in broad terms * * * *derive much meaningful content* from the purpose of the Act, its factual background and the statutory context in which they appear." *Id.* at 543 (emphasis added). The Government offers no reason for departing from that longstanding approach here. *See* Mem. 23-24.[8]

[8] Even outside the immigration context, the Supreme Court has held that "[i]t is a mistaken assumption" that a statute directing the Executive to act in "the 'public interest'" leaves it "without any standard to guide [its] determinations." *New York Cent. Sec. Corp.* v. *United States*, 287 U.S. 12, 24 (1932). This type of language

Moreover, the Government's reading would upend the statutory scheme. It would permit the President to suspend the immigration laws at will: He could, if he wished, end all family-based immigration or restore the national-origins quota system. *Cf.* 8 U.S.C. §§ 1152, 1153(a)-(b). Congress surely did not authorize the President to "transform the [INA's] carefully described limits * * * into mere suggestions." *Gonzales* v. *Oregon*, 546 U.S. 243, 260-261 (2006). Indeed, the Government's reading raises grave constitutional concerns, as it would give the President a power of staggering breadth, without any "intelligible principle" to guide its exercise. *Hawaii*, 859 F.3d at 770.

The Government claims (at 26) that this wholesale delegation is permissible because, in dicta in *Knauff*, Justice Minton stated that the immigration power "is inherent in the executive power" over foreign affairs. 338 U.S. at 542. Both the Supreme Court and the Ninth Circuit, however, have since made clear that immigration statutes cannot "grant the Executive totally unrestricted freedom of choice," and have construed such statutes narrowly to avoid rendering them "invalid delegation[s]." *Zemel*, 381 U.S. at 17-18; *see Hawaii*, 859 F.3d at 770

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gains content from "[t]he purpose of the Act," "the context of the provision in question," and the manner in which the Executive "exercise[d] * * * the authority conferred." *Id.* at 24-25; *see Gulf States Utils. Co.* v. *Fed. Power Comm'n*, 411 U.S. 747, 756 (1973).

(expressing concern that, if "unlimited," Section 1182(f) would be a "forbidden delegation of legislative power").

c. EO-3 exceeds the established limits on the President's exclusion power. The Government does not claim that EO-3 excludes aliens akin to subversives, violators of international law, or the statutorily inadmissible. Mem. 28. Nor does it claim EO-3 responds to an exigency. *Id.* That is enough by itself to render the order invalid.

What is more, EO-3 thwarts the policies of the immigration laws. Mem. 28-29. The Government claims (at 27-28) that Congress's detailed system for identifying and vetting potential terrorists merely "set[s] the *minimum* requirements for an alien to gain entry," and that the President may "*add[]*" to that scheme. But the law's terrorism-related provisions strike a careful balance, specifying when and on what grounds the Executive may exclude aliens. *Hawaii*, 859 F.3d at 781-782. By treating the law's "detailed" requirements as "superfluous" and replacing them with the President's own set of indefinite rules, the President has acted contrary to "the expressed will of Congress." *Id.*

3. EO-3 Violates the Establishment Clause.

On its face and in its essence, EO-3 is the latest outgrowth of a policy initiative intended to make good on the President's campaign promise to prevent Muslim immigration. Because that purpose plainly violates the Establishment

Clause and the Constitution's limits on religious discrimination, Plaintiffs are likely to succeed on the merits of their constitutional challenge.

As with the prior iterations, the Government's primary defense is the assertion that *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), requires the Court to shut its eyes to the President's unconstitutional purpose. But *Washington* v. *Trump* flatly held that *Mandel* does not apply to the review of "the President's *promulgation* of sweeping immigration policy." 847 F.3d at 1162; *see also In re Reyes*, 910 F.2d 611, 612-613 (9th Cir. 1990) (reviewing Executive Order regarding immigration without any mention of *Mandel*). Contrary to the Government's claim (at 32), the Ninth Circuit did not "reserve consideration" of *Mandel*'s application in the Establishment Clause context; the only thing it "reserve[d]" was the application of the appropriate, *non-Mandel* Establishment Clause standard to EO-1. *Washington*, 847 F.3d at 1167-68.

In any event, *Mandel* demands deference only in the face of a "facially legitimate and bona fide" rationale. 408 U.S. at 769. The Government's stated rationale for EO-3 is not "bona fide" because—as this Court has already held—there is ample evidence that the President instituted the policy from which EO-3 emerged for the primary purpose of excluding Muslims from the United States.

That same fact is fatal to the Government's attempt to defend EO-3 on the merits. The Government relies heavily on the elaborate process through which

EO-3 was developed, but that process was dictated by EO-2, an order enacted primarily for the *unconstitutional* purpose of banning Muslims. Perhaps recognizing the difficulty, the Government suggests that the President has "repudiated" this prior unconstitutional policy. But the President has never once done so. Instead, the Government is left holding the bag, relying on a single speech in which he offered some general praise for Islam. That is not a "repudiat[ion]" of the President's stated goal of preventing Muslim immigration, and it certainly is not a repudiation of EO-2 itself. Indeed, just as in *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844, 867-868 (2005), the prior unconstitutional policy remains on the books. And, far from rejecting it, the President has called for a "much tougher version," Third Amended Compl. ¶ 86, and suggested that EO-3 *is* that harsher iteration, *id.* ¶¶ 87, 94. This Court enjoined EO-2; the same treatment is appropriate for its "tougher" successor.

B. The Remaining TRO Factors Are Satisfied.

EO-3 will inflict numerous irreparable harms on Plaintiffs. Mem. 6-10, 34. The Government does not contest most of these harms. Instead, it asserts only that delays in entry are not irreparable because they are too "speculative." Opp. 38. That is plainly wrong. As soon as EO-3 goes into effect, it will "prolong[]" family separation and "constrain[]" the University of Hawaii. *Hawaii*, 859 F.3d at 782.

The balance of the equities and the public interest also favor Plaintiffs. The Government asserts (at 39) that "[t]he Court should not interfere with" the President's national-security and foreign-policy judgments. But the Ninth Circuit has rejected that argument before. *Washington*, 847 F.3d at 1168. The Government also does not explain how the vetting process designed by Congress is inadequate, nor does it identify an exigency that compels EO-3's travel bans.

C. A Nationwide Injunction Is Appropriate.

The Government argues (at 39) that injunctive relief must "be limited to redressing a plaintiff's own cognizable injuries." That flies in the face of this Court's and the Ninth Circuit's determination that a nationwide injunction of EO-2 was proper. *See Hawaii*, 859 F.3d at 787-788. The Government does not attempt to distinguish these circumstances: Like EO-2, EO-3 violates the immigration laws and the Establishment Clause and is invalid in all its applications. Moreover, awarding the piecemeal relief the Government proposes would irrationally fragment immigration policy. Mem. 35-36. Accordingly, only a nationwide injunction can adequately cure the harms inflicted by EO-3.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their requested TRO.

DATED: Washington, DC, October 15, 2017.

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.5(e), I hereby certify that the foregoing Reply in Support of Plaintiffs' Motion for Temporary Restraining Order is in Times New Roman, 14-point font and contains 4,491 words, exclusive of case caption, table of contents, table of authorities, and identifications of counsel, as reported by the word processing system used to produce the document. This word count is in compliance with the limitation set forth in Local Rule 7.5(b).

Respectfully submitted,

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