

No. 17-1351

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself; HIAS, INC., on behalf of itself and its clients; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; JOHN DOES #1 & 3; JANE DOE #2,
Plaintiffs – Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; DANIEL R. COATS, in his official capacity as Director of National Intelligence,
Defendants – Appellants.

On Appeal from the United States District Court
for the District of Maryland, Southern Division
(8:17-cv-00361-TDC)

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INTRODUCTION

The district court's order in this case is extraordinary. The court entered a nationwide preliminary injunction against an Executive Order issued by the President of the United States, pursuant to express statutory authority, that temporarily suspends the entry of aliens from six countries of substantial terrorism-related concern. The court acknowledged that, consistent with the Executive's constitutional authority over foreign affairs and national security, Sections 1182(f) and 1185(a) of Title 8 authorize the President to suspend or restrict entry of any class of aliens when in the national interest. For the past 30 years, every President has invoked that power to protect the Nation by suspending entry of categories of aliens. Here, after consulting with the Attorney General and the Secretaries of State and Homeland Security, the President issued Executive Order No. 13,780 (2017) (Order), Section 2(c) of which suspends the entry of certain foreign nationals from Iran, Sudan, Syria, Libya, Somalia, and Yemen for 90 days, while the new Administration reviews the Nation's screening and vetting procedures to ensure that they adequately detect terrorists.

The district court did not dispute that the President's national-security determination provides "a facially legitimate and bona fide reason" for Section 2(c). *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). The court simply declined to apply *Mandel*, holding instead that Section 2(c) likely violates the Establishment Clause

of the First Amendment. The court did so, however, not because the Order refers to, or distinguishes on the basis of, religion: the Order applies to all nationals of the listed countries, without regard to their religion. Nor did the court enjoin the President's action because the Order's focus on a handful of Muslim-majority countries is unprecedented: in 2015 and 2016, Congress and the Executive excluded individuals with certain connections to these six countries (as well as Iraq) from travel under the Visa Waiver Program because of heightened terrorism concerns, thereby requiring additional review before admitting them to our country. Here, the President determined in the interest of national security to take an additional step and place a temporary pause on entry of aliens from these same countries, subject to case-by-case waivers, while vetting procedures are reviewed.

The district court enjoined the facially neutral Order on the rationale "that the travel ban on citizens from the designated countries is President Trump's fulfillment of his campaign promise to ban Muslims from entering the United States." Appendix (A.) 628. The court largely based its decision on campaign statements made by then-candidate Donald Trump while running for public office. That is unprecedented. Even in the domestic setting, courts judge the legitimacy of a law by what it says and does, and occasionally by the official context that surrounds it—not by what supposedly lies in the hearts of its drafters. The decision below goes even further: it enjoins an action by the President of the United States because of

his statements as a private citizen—before he swore an oath to support and defend the Constitution, formed his Administration, assumed the responsibilities of governance, and consulted with Executive officials responsible for legal, national-security, foreign-relations, and immigration matters.

The court should have focused on official acts, not perceived subjective motivations. The Order replaces former Executive Order No. 13,769 (2017) (Revoked Order). After the Ninth Circuit declined to stay a nationwide injunction against the Revoked Order, the President decided to issue a new Order, in part to address that court's concerns. The new Order does not apply to lawful permanent residents or foreign nationals in the United States, but only to certain aliens outside the United States who lack a valid visa—individuals who “ha[ve] no constitutional rights regarding” their admission. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Even as to them, the Order includes a comprehensive waiver process to mitigate any undue hardship. And it contains no preference for refugees who are religious minorities. The Order thus represents the President's good-faith effort to accommodate courts' concerns while simultaneously fulfilling his constitutional duty to protect the Nation.

To be sure, the Order has been the subject of heated political debate. But the precedent set by this case will long transcend this Order, this President, and this constitutional moment. The decision below openly second-guesses and enjoins the

President's national-security judgment—even though the plaintiffs' claims are not justiciable (Part I), their claims are not likely to succeed on the merits (Part II), only the government faces imminent and irreparable injury from its inability to effectuate the Order (Part III), and plaintiffs are plainly not entitled to a nationwide injunction that extends beyond any individual harms they have shown (Part IV). In cases that spark such intense disagreement, it is critical to adhere to foundational principles concerning justiciability, statutory and constitutional interpretation, and the scope of injunctive relief. Applying those principles here, the injunction below should be reversed.

STATEMENT OF JURISDICTION

The district court's jurisdiction was invoked under 28 U.S.C. §§ 1331 and 1343. A.43. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). The district court entered its order granting a preliminary injunction on March 16, 2017. A.647. Defendants filed a timely notice of appeal on March 17, 2017. A.650.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in entering a nationwide preliminary injunction barring enforcement of Section 2(c) of the Order.

STATEMENT OF THE CASE

A. Statutory Background

The Immigration and Nationality Act (INA or Act), 8 U.S.C. §§ 1101 *et seq.*, governs admission of aliens into the United States. Admission normally requires a valid immigrant or nonimmigrant visa, absent an exception to the general rule. *Id.* §§ 1181, 1182(a)(7)(A)(i), (B)(i)(II), 1203. The process of obtaining a visa typically includes an in-person interview and results in a decision by a State Department consular officer. *Id.* §§ 1201(a)(1), 1202(h), 1204; 22 C.F.R. § 42.62. Although a visa often is necessary for admission, it does not guarantee admission; the alien still must be admissible upon arriving at a port of entry. 8 U.S.C. §§ 1201(h), 1225(a).

Congress has created a Visa Waiver Program enabling nationals of approved countries to seek temporary admission for tourism or certain business purposes without a visa. 8 U.S.C. §§ 1182(a)(7)(B)(iv), 1187. In 2015, Congress excluded from travel under the Program aliens who are dual nationals of or had recently visited Iraq or Syria, where “[t]he Islamic State of Iraq and the Levant (ISIL) * * * maintain[s] a formidable force,” and nationals of and recent visitors to countries designated by the Secretary of State as state sponsors of terrorism (currently Iran, Sudan, and Syria).¹ *Id.* § 1187(a)(12)(A)(i)-(ii). Congress authorized the

¹ U.S. Dep’t of State, *Country Reports on Terrorism 2015*, at 6, 299-302 (June 2016), <https://www.state.gov/documents/organization/258249.pdf>.

Department of Homeland Security (DHS) to designate additional countries of concern, considering whether a country is a “safe haven for terrorists,” “whether a foreign terrorist organization has a significant presence” in the country, and “whether the presence of an alien in the country * * * increases the likelihood that the alien is a credible threat to” U.S. national security. *Id.* § 1187(a)(12)(D)(i)-(ii). Applying those criteria, in February 2016, DHS excluded recent visitors to Libya, Somalia, and Yemen from travel under the Program.²

Separately, the U.S. Refugee Admissions Program (Refugee Program) allows aliens who fear persecution on account of race, religion, nationality, or other specified grounds to seek admission. 8 U.S.C. §§ 1101(a)(42), 1157. Refugees are screened for eligibility and admissibility abroad; if approved, they may be admitted without a visa. *Id.* §§ 1157(c)(1), 1181(c). Congress expressly authorized the President to determine the maximum number of refugees to be admitted each fiscal year. *Id.* § 1157(a)(2)-(3).

Although Congress created these various avenues to seek admission, it accorded the Executive broad discretion to suspend or restrict admission of aliens. Section 1182(f) provides:

² DHS, *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016), <https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program>.

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may * * * for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f). In addition, Section 1185(a)(1) grants the President broad general authority to adopt “reasonable rules, regulations, and orders” governing entry of aliens, “subject to such limitations and exceptions as [he] may prescribe.” *Id.* § 1185(a)(1).

B. The Revoked Order

On January 27, 2017, the President issued the Revoked Order. It directed the Secretaries of Homeland Security and State to assess current screening procedures to determine whether they were sufficient to detect individuals who were seeking to enter this country to do it harm. Revoked Order § 3(a)-(b). While that review was ongoing, the Revoked Order suspended for 90 days entry of foreign nationals of the seven countries already identified as posing heightened terrorism-related concerns in the context of the Visa Waiver Program. *Id.* § 3(c). It authorized the Secretaries to make case-by-case exceptions to the suspension. *Id.* § 3(g). It similarly directed a review of the Refugee Program, and, pending that review, suspended entry under the Program for 120 days, subject to case-by-case waivers. *Id.* § 5(a). It also suspended admission of Syrian refugees indefinitely and directed agencies to

prioritize refugee claims premised on religious-based persecution if the religion was “a minority religion in the individual’s country of nationality.” *Id.* § 5(b)-(c).

C. Litigation Challenging the Revoked Order

The Revoked Order was challenged in multiple courts. On February 3, 2017, a district court in Washington enjoined enforcement nationwide of Sections 3(c), 5(a)-(c), and (e). *Washington v. Trump*, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). On February 9, following accelerated briefing and argument, a Ninth Circuit panel declined to stay the Washington district court’s injunction pending appeal. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam). Although acknowledging that the injunction may have been “overbroad,” the court declined to narrow it, concluding that “[t]he political branches are far better equipped” to do so. *Id.* at 1166-67.

D. The Order

Responding to the Ninth Circuit’s invitation, on March 6—in accordance with the joint recommendation of the Attorney General and Secretary of Homeland Security—the President issued the Order.³ The Order, which took effect on March 16, 2017, and replaces the Revoked Order, adopts significantly revised provisions, in part to address the Ninth Circuit’s concerns. As the Washington district court that

³ See Joint Ltr. to President (Mar. 6, 2017), https://www.dhs.gov/sites/default/files/publications/17_0306_S1_DHS-DOJ-POTUS-letter_0.pdf.

had enjoined the Revoked Order noted, the new Order differs in “substantial” respects from the Revoked Order. *Washington v. Trump*, 2017 WL 1045950, at *3 (W.D. Wash. Mar. 16, 2017) (holding that injunction against Revoked Order does not extend to new Order).

1. Temporary entry suspension for six countries

At issue here is Section 2(c) of the Order, which temporarily suspends entry of nationals from six countries—Iran, Libya, Somalia, Sudan, Syria, and Yemen. The suspension’s explicit purpose is to enable the President—based on the recommendation of the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence—to assess whether current screening and vetting procedures are adequate to detect terrorists seeking to infiltrate the Nation. Order § 1(f). As the Order explains, each of the designated countries “is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones,” which is why Congress and the Executive previously designated them. *Id.* § 1(b)(i), (d). The Order details the circumstances of each country that both give rise to “heightened risks” of terrorism and diminish those foreign governments’ “willingness or ability to share

or validate important information about individuals seeking to travel to the United States” to screen them properly. Order § 1(d)-(e).⁴

The Order “suspend[s] for 90 days” the “entry into the United States of nationals of” those six countries. Order § 2(c). Addressing concerns the Ninth Circuit raised, however, the Order clarifies that the suspension applies only to aliens who (1) are outside the United States on the Order’s effective date, (2) do not have a valid visa on that date, and (3) did not have a valid visa on the effective date of the Revoked Order (January 27, 2017). *Id.* § 3(a). It excludes other categories of aliens, some of which had concerned the Ninth Circuit, including (among others) any lawful permanent resident and any foreign national admitted to or paroled into the United States or granted asylum or refugee status. *See id.* § 3(b).

The Order also contains a detailed waiver provision, which permits consular officials to grant case-by-case waivers where denying entry “would cause undue hardship” and “entry would not pose a threat to national security and would be in the national interest.” Order § 3(c). The waiver provision enumerates illustrative circumstances for which waivers could be appropriate, including:

⁴ Although the Revoked Order also extended the entry suspension to Iraq, the new Order omits Iraq from the suspension because of “the close cooperative relationship between” the U.S. and Iraqi governments, and the fact that, since the Revoked Order, “the Iraqi government has expressly undertaken steps” to supply the information necessary to help identify possible threats. Order § 1(g); *see id.* § 4.

- individuals who seek entry “to visit or reside with a close family member (e.g., a spouse, child, or parent) who is a [U.S.] citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa”;
- individuals who were previously “admitted to the United States for a continuous period of work, study, or other long-term activity” but are currently outside the country and seeking to reenter; and
- individuals who seek entry for “significant business or professional obligations.”

Id. Requests for waivers can be made during the visa-issuance process, and will be acted on by a consular officer “as part of [that] process.” *Id.*; see DHS, *Q&A: Protecting the Nation from Foreign Terrorist Entry to the United States* (Mar. 6, 2017); U.S. Dep’t of State, *Executive Order on Visas* (Mar. 22, 2017) (State Guidance).⁵

2. Temporary refugee suspension and cap

Other provisions of the Order, not at issue here, suspend adjudication of applications under the Refugee Program for 120 days, subject to case-by-case waivers, and limit to 50,000 the number of refugees admitted in fiscal year 2017. Order § 6(a)-(c). Unlike the Revoked Order, the Order does not prioritize refugee claims by religious minorities.

⁵ <https://www.dhs.gov/news/2017/03/06/qa-protecting-nation-foreign-terrorist-entry-united-states>; <https://travel.state.gov/content/travel/en/news/important-announcement.html>.

E. District Court Injunction

On February 7, 2017, plaintiffs filed this action, challenging provisions of the Revoked Order relating to refugees. On March 10, after the new Order was issued, plaintiffs filed their operative complaint and moved to “enjoin[] [the Order] in its entirety.” D. Ct. Doc. 95 (Mot.), at 1; J.A.258.

Plaintiffs are three organizations and six individuals. As relevant here, they challenge the Order under the INA and the Establishment Clause. J.A.254-58. Two organizations—the International Refugee Assistance Project (IRAP) and HIAS, Inc.—principally provide services to refugees in the resettlement process; they allege that the temporary suspension of the Refugee Program will harm their ability to provide services to refugees and in turn decrease their funding. J.A.210-13, 235-43. The third organization, the Middle East Studies Association (MESA), alleges that the temporary entry suspension will prevent its members abroad from traveling to the United States for conferences, deter U.S. members from conducting work abroad, and prevent foreign scholars from attending MESA’s annual meeting in the United States. J.A.213, 243-45.

The individual plaintiffs are U.S. citizens or lawful permanent residents who claim that the Order will prevent or delay foreign-national family members from entering the United States. Four plaintiffs—John Doe #1, Jane Doe #2, John Doe #3, and Paul Harrison—allege that Section 2(c) would prevent family members from

obtaining visas. J.A.213-14, 245-52. The remaining two individuals—Muhammed Meteab and Ibrahim Mohomed—claim that family members would be denied or delayed admission as refugees. J.A.214, 249-50, 252.

After expedited briefing and argument, the district court entered a nationwide preliminary injunction barring enforcement of Section 2(c), but not other challenged provisions. J.A.814-15. The court held that three individual plaintiffs have standing to challenge Section 2(c) under 8 U.S.C. § 1152(a), which prohibits discrimination on the basis of nationality in the issuance of immigrant visas. J.A.781-85. The court also held that at least three individual plaintiffs—all Muslim lawful permanent residents—have standing to assert Establishment Clause claims. J.A.785-87. Those plaintiffs, the court noted, allege “stress” and “anxiety” resulting from the Order, and two allege that their foreign spouses will be denied entry under Section 2(c). *Id.*

The district court further held that the plaintiffs are likely to succeed at least in part on their statutory and Establishment Clause claims. As to the statute, the court recognized that 8 U.S.C. § 1182(f) authorizes the President to suspend entry of “any class of aliens,” including based on nationality. J.A.788-90. The court acknowledged that the Order’s 90-day suspension on entry for nationals of six countries does not itself conflict with 8 U.S.C. § 1152(a), which regulates only the issuance of immigrant visas. J.A.789-90. The court held, however, that implementing Section 2(c) “would have the specific effect of halting the issuance of

visas” to persons from the six countries. J.A.790. And it concluded that neither Section 1182(f) nor 8 U.S.C. § 1185(a) empowers the President to bar issuance of immigrant visas based on nationality. J.A.790-93.

As to the Establishment Clause, the district court rejected defendants’ argument that the Order should be upheld because it is based on a “facially legitimate and bona fide reason” under *Mandel*, 408 U.S. at 770. The court deemed *Mandel* inapplicable to “the ‘promulgation of sweeping immigration policy’ at the ‘highest levels of the political branches.’” J.A.806 (quoting *Washington*, 847 F.3d at 1162). Although the court acknowledged that the Order “is facially neutral in terms of religion,” it relied principally on statements made by then-candidate Donald Trump and his aides to conclude that the Revoked Order was motivated by “animus towards Muslims” and that the President “intended to effectuate a partial Muslim ban.” J.A.797-800.

The court also held that the balancing of harms favors the plaintiffs, reasoning that a violation of the Establishment Clause necessarily imposes irreparable injury and that the government would not suffer harm from a nationwide injunction. J.A.807-11. The court declined to stay its ruling pending appeal. J.A.814.

F. Subsequent Decisions

Meanwhile, the Ninth Circuit in *Washington*, acting *sua sponte*, denied rehearing en banc over the dissent of five judges, who issued three separate opinions.

Amended Order, *Washington v. Trump*, No. 17-35105 (9th Cir. Mar. 17, 2017). Judge Bybee explained that *Mandel* provides the governing “test for judging executive and congressional action [for] aliens who are outside our borders and seeking admission.” *Id.*, slip op. at 11 (Bybee, J., dissenting from denial of rehearing en banc) (*Washington Bybee Dissent*). Judge Kozinski opined that using campaign and other unofficial statements made outside the process of “crafting an official policy” to establish “unconstitutional motives” is improper, unprecedented, “unworkable,” and would produce “absurd result[s].” *Id.*, slip op. at 5-7 (Kozinski, J., dissenting from denial of rehearing en banc) (*Washington Kozinski Dissent*).

On March 24, another district court in this Circuit denied a preliminary injunction against the Order. *Sarsour v. Trump*, No. 17-120 (E.D. Va. Mar. 24, 2017). The court concluded as relevant here that plaintiffs were not likely to succeed on the merits of their statutory and Establishment Clause challenges to the Order, and that the balance of equities weighed against injunctive relief. *Id.* at 10-32.

SUMMARY OF ARGUMENT

I. The district court’s preliminary injunction should be vacated because plaintiffs’ claims are not justiciable. The individual plaintiffs’ claims are speculative and not ripe. None of them has established a concrete, imminent injury traceable to Section 2(c) of the Order. The district court correctly declined to find that any of

the organizational plaintiffs faces such injury. In any event, plaintiffs' claims are foreclosed by the doctrine of consular nonreviewability.

II. The injunction also should be vacated because plaintiffs' claims are not likely to succeed on the merits. The district court held that plaintiffs are likely to prevail in showing that implementation of Section 2(c) exceeds the President's statutory authority, but two separate statutes, 8 U.S.C. §§ 1182(f) and 1185(a), authorize his action. The court concluded that another statute, 8 U.S.C. § 1152(a)(1)(A), prohibits exercising that authority to deny immigrant visas based on nationality. That interpretation is incorrect. Even on its own terms, the court's interpretation cannot support its broad injunction. And it would senselessly require issuance of visas to individuals under Section 1152(a)(1)(A), only for them to be denied entry upon their physical arrival at the Nation's borders.

The district court further incorrectly held that plaintiffs' Establishment Clause claim is likely to succeed. This Court may not overturn the Executive's exclusion of aliens if it is based on a "facially legitimate and bona fide reason." *Mandel*, 408 U.S. at 770. Section 2(c) easily clears that threshold: as the district court recognized, the Order "is facially neutral in terms of religion." J.A.800. The court erred in declining to apply *Mandel*'s standard. In any event, plaintiffs' claims fail even under domestic Establishment Clause precedents. The court held that Section 2(c) is likely unconstitutional not based on what it says or does, but based on an

assertedly improper motive inferred primarily from campaign statements. The Supreme Court has rejected that approach: only the official purpose of government action counts, and here Section 2(c) is religion-neutral.

III. The balance of equities weighs strongly against an injunction. Plaintiffs have not demonstrated any constitutionally cognizable injury, much less that they will suffer irreparable harm without an injunction while Section 2(c)'s temporary pause would be in effect. By contrast, an injunction would impose substantial, irreparable harm on the government and the public by blocking a national-security measure that the President deems necessary—a predictive judgment that merits the highest degree of deference.

IV. At the very least, the district court's nationwide injunction is overbroad in multiple respects. It improperly attempts to enjoin the President himself, which Supreme Court precedent forbids. It enjoins Section 2(c) on its face, even though that provision has many manifestly constitutional applications. And it violates Article III and well-settled equitable principles by granting sweeping, nationwide relief that is far broader than necessary to redress plaintiffs' purported injuries.

STANDARD OF REVIEW

This Court “review[s] the grant of a preliminary injunction for abuse of discretion.” *United Transp. Union v. S.C. Pub. Ry. Comm’n*, 130 F.3d 627, 631 (4th Cir. 1997). “A district court abuses its discretion when it misapprehends or

misapplies the applicable law.” *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 235 (4th Cir. 2014). “[T]he court will vacate an injunction if it is broader in scope than that necessary to provide complete relief to the plaintiff or if an injunction does not carefully address only the circumstances of the case.” *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 128 (4th Cir. 2011).

ARGUMENT

I. Plaintiffs’ Challenge To Section 2(c) Of The Order Is Not Justiciable

Plaintiffs’ claims fail to satisfy the bedrock requirements of Article III standing and ripeness. Moreover, their claims are foreclosed by the well-established doctrine of consular nonreviewability. Accordingly, this Court should reverse the preliminary injunction, wholly apart from the merits.

A. Plaintiffs’ Claims Do Not Satisfy Standing And Ripeness Requirements

None of the plaintiffs has demonstrated that Section 2(c) of the Order causes an “imminent,” “concrete and particularized” injury, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992), that is “legally and judicially cognizable,” *Raines v. Byrd*, 521 U.S. 811, 819 (1997). At a minimum, plaintiffs’ claimed injuries are not ripe because they rest on “contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300 (1988).

1. The individual plaintiffs whose relatives seek visas allege only speculative, non-imminent injuries

The district court held that three individual plaintiffs (Does #1-3) whose relatives are seeking immigrant visas are injured by Section 2(c) because the anticipated “delay or denial of the issuance of [those] visas” will cause “continued separation from their family members.” J.A.781-82. The court’s rationale is wrong for two independent reasons.⁶

First, plaintiffs failed to carry their burden of showing imminent, “certainly impending” injury. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013). Section 2(c) merely imposes a 90-day suspension of entry for certain nationals of six countries. Nothing in it suspends consideration of visa applications; indeed, its waiver process is integrated into the existing visa-adjudication procedure. Plaintiffs offer nothing to substantiate their fear that this short pause will delay the issuance of their relatives’ visas. Doe #2’s petition sponsoring her sister’s visa has not yet been granted, J.A.318-19, and even if it is granted, there is a multi-year backlog for immigrant visas for U.S. citizens’ siblings.⁷ Likewise, Doe #1’s wife did not have

⁶ A fourth plaintiff, Harrison, also sought a visa for his fiancé, but his claim now appears to be moot, as defendants informed the district court. J.A.711-12, 715. We are informed by the State Department that the fiancé’s visa was issued on March 15, 2017, and subsequently collected.

⁷ U.S. Dep’t of State, *Visa Bulletin* (March 2017), https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_March2017.pdf (F-4 visa numbers currently available for petitions filed before February 2004).

her visa interview scheduled before the Revoked Order took effect, and had already been waiting roughly six weeks, making it similarly speculative whether the 90-day pause will affect her. *See* J.A.305. Doe #3's wife allegedly completed her visa interview in May 2016 and was told that administrative processing would take two or three months, but ten months later (in March 2017) she still had not been approved. J.A.309. If her visa has not already been denied, *cf.* 22 C.F.R. § 42.81(a) (“consular officer must either issue or refuse the visa” once application is executed before him), it is at least uncertain whether or how the 90-day pause would affect her. Accordingly, none of the plaintiffs has established an “imminent” risk of delay. *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017).

Second, plaintiffs' claim that Section 2(c) will prevent their relatives from ultimately receiving visas is also speculative. The Order provides that “[c]ase-by-case waivers could be appropriate” for “close family member[s]” of a “United States citizen” or “lawful permanent resident.” Order § 3(c)(iv). Unless and until plaintiffs' relatives request and are denied waivers, plaintiffs' asserted injuries are not ripe, because they assume “contingent future events that * * * may not occur at all.” *Zhenli Ye Gon v. Holt*, 774 F.3d 207, 221 (4th Cir. 2014). Any suit must await final agency action on a request for a visa and waiver.

2. The waiver process does not cause any cognizable injury

The district court further held that “the waiver process” itself would injure these three plaintiffs. J.A.785. Neither of the court’s bases for that holding withstands scrutiny.

First, the court reasoned that the waiver process “presents an additional hurdle that would delay reunification.” J.A.785. There is no record basis for that speculation. Plaintiffs’ relatives may each seek a waiver during their visa interviews with consular officers. *See* Order § 3(c); State Guidance, *supra*. Plaintiffs offered no evidence that the visa process would be delayed by further inquiries a consular officer makes. *See* Order § 3(c)(iv). Nor could they, because they rushed to court without allowing the State Department to process waiver requests when the Order was to take effect. Moreover, any delay would be immaterial unless these plaintiffs’ relatives would otherwise have received their visa during the 90-day suspension, which plaintiffs have not shown.

Second, the court reasoned that the waiver process “is illegal whether or not it might have been surmounted.” J.A.785. But the Supreme Court “has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.” *Allen v. Wright*, 468 U.S. 737, 754 (1984). Here, plaintiffs themselves are not subject to the Order, and accordingly they have no “judicially cognizable” injury. *Id.* Contrary to the

district court's suggestion (J.A.785), *Jackson v. Okaloosa County*, 21 F.3d 1531 (11th Cir. 1994), does not hold otherwise. There, the denial of equal treatment to minority residents regarding public housing was itself a legally cognizable injury. *See id.* at 1537-41; *Ne. Fla. Chapter, Associated Gen. Contractors v. Jacksonville*, 508 U.S. 656, 666 (1993). Section 2(c), in contrast, does not operate against plaintiffs themselves and does not deny them equal treatment based on their nationality or religion. They therefore have not suffered “any personal injury” based on non-discriminatory treatment. *Valley Forge Christian College v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86 (1982).

At most, plaintiffs are attempting to vindicate “the legal rights or interests of third parties,” which courts generally do not allow, *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004), even for Establishment Clause claims. *See Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 606 (4th Cir. 2012) (mother and child lacked standing to challenge school policy awarding academic credit for private religious instruction, because they were not “the targets or victims of * * * alleged religious intolerance” given that the child had not been “pressured or encouraged to attend the course”); *In re Navy Chaplaincy*, 534 F.3d 756, 764-65 (D.C. Cir. 2008) (plaintiffs lacked standing to “complain[] about employment discrimination suffered by other[] [co-religionists], not by the plaintiff himself”). Such a rationale for standing is especially improper here because plaintiffs’ foreign relatives—the actual subjects of

the alleged discriminatory treatment—do not possess Establishment Clause rights, *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *DKT Mem'l Fund v. Agency for Int'l Dev.*, 887 F.2d 275, 285 (D.C. Cir. 1989), or any constitutional rights regarding entry into this country, *see Mandel*, 408 U.S. at 762. Nor does the INA afford third parties any judicially cognizable interest in the issuance or denial of a visa to an alien abroad. *Infra* pp. 26-27.

3. Plaintiffs' claimed stress is not an Article III injury

The district court also held that at least three individual plaintiffs—Doe #1, Doe #3, and Meteab—are injured by “stress” caused by their perception that Section 2(c) reflects “anti-Muslim” government policy. J.A.785-86. The Supreme Court has squarely held, however, that “the psychological consequence presumably produced by observation of conduct with which one disagrees * * * is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.” *Valley Forge*, 454 U.S. at 485-86. Likewise in *Moss*, this Court held that the plaintiffs “lack[ed] standing to challenge the School District’s released time policy” based merely on their “abstract knowledge” of the policy and their perception that it was “offensive” and reflected “intolerance.” 683 F.3d at 606.

To be sure, a plaintiff can sometimes suffer personal intangible injuries to his “spiritual, value-laden beliefs” from alleged Establishment Clause violations. *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997). For instance, *Suhre*

reaffirmed that plaintiffs who are exposed to “unwelcome direct contact with a religious display that appears to be endorsed by the state” have standing because they are either “subjected to unwelcome religious exercises” or “forced to assume special burdens to avoid them.” *Id.* But Section 2(c) itself does not expose plaintiffs personally to any religious display, message, or practice; it says nothing about religion.

Nor can Plaintiffs evade Article III by “re-characteriz[ing]” their challenge to “government *action*” that “allegedly violates the Establishment Clause” as a challenge to “a governmental *message* [concerning] religion.” *Navy Chaplaincy*, 534 F.3d at 764. That approach would “eviscerate well-settled standing limitations” and would “allow anyone who becomes aware of a government action that allegedly violates the Establishment Clause to sue over it on the ground that they are offended by the allegedly unconstitutional ‘message’ communicated by that action.” *Id.*; *see Allen*, 468 U.S. at 755 (“[S]tigmatizing injury * * * accords a basis for standing only to those persons who are personally denied equal treatment.”) (quotation marks omitted). The district court’s logic would mean that Section 2(c) could be challenged by any Muslim in this country.

The district court tried to limit its mental-distress holding by emphasizing that the plaintiffs also “have family members” who are subject to Section 2(c). J.A.787. But plaintiffs cannot transform non-cognizable mental distress about Section 2(c)

into cognizable injury by pointing to an effect on their foreign-national relatives. The allegedly discriminatory treatment of those third parties does not violate plaintiffs' own Establishment Clause rights. *Supra* pp. 22-23.

4. None of the remaining plaintiffs has standing

The district court correctly did not suggest that any of the other individual plaintiffs or any of the organizational plaintiffs has standing. The other individuals (Metiab and Mohomed) and two of the organizations (IRAP and HIAS) asserted standing based on the Order's provisions regarding refugees, but the district court did not enjoin those portions, and they are not at issue here. J.A.264, 273, 313-14, 321.⁸ The third organizational plaintiff, MESA, claims that Section 2(c) will inhibit members from attending its annual meeting, J.A.298, but the meeting is scheduled for November 2017—long after Section 2(c)'s 90-day suspension. *MESA, 2017 Annual Meeting*, <http://www.mesana.org/annual-meeting/index.html>. MESA conclusorily asserts that one foreign member will be prevented from traveling to the United States during the suspension, but it does not allege that this member has any “concrete plans” to do so. *Lujan*, 504 U.S. at 564.

⁸ To the extent IRAP and HIAS provide services to visa applicants, neither alleges, much less shows, that Section 2(c) will affect any particular client. Any such claims would be speculative and unripe like those of the individual plaintiffs.

B. Consular Nonreviewability Principles Bar Plaintiffs' Claims

Consular nonreviewability also bars plaintiffs' claims. "[T]he power to expel or exclude aliens" is "a fundamental sovereign attribute exercised by the Government's political departments" and thus "largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). "[T]he doctrine of consular nonreviewability," which long predated the INA, provides that the "decision to issue or withhold a visa," or to revoke one, "is not subject to judicial review * * * unless Congress says otherwise." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999); *see id.* at 1158-60 (citing authorities). Far from saying otherwise, Congress has reaffirmed the doctrine: it has expressly forbidden "judicial review" of visa revocation (subject to narrow exceptions), 8 U.S.C. § 1201(i), and it has not authorized any judicial review of visa denial, *see, e.g.*, 6 U.S.C. § 236(b)(1), (c)(1), (f); 8 U.S.C. § 1104(a)(1).

Without acknowledging this well-established body of law, the district court cited a handful of cases in which courts reviewed claims by a U.S. citizen challenging the denial of an alien's visa. J.A.782-83. These cases at most recognize that limited review may be available to a U.S. citizen alleging that his own constitutional rights have been violated by the denial of an alien's visa. *See, e.g., Saavedra Bruno*, 197 F.3d at 1163-64 (distinguishing *Mandel* and *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by equally divided Court*, 484 U.S. 1

(1987) (per curiam), on these grounds); *see also Kerry v. Din*, 135 S. Ct. 2128 (2015) (distinguishable on same grounds); *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008) (same). Even that limited review is not available here, because plaintiffs raise only (i) a statutory claim and (ii) a constitutional claim that the Order discriminates against others—*i.e.*, non-resident visa applicants, who have no First Amendment rights.⁹

II. Plaintiffs Are Not Likely To Succeed On The Merits

Even if plaintiffs' challenges to Section 2(c) are justiciable, the district court erred in concluding that plaintiffs are likely to prevail on their claims that Section 2(c) exceeds the President's statutory authority and violates the Establishment Clause. Neither claim withstands scrutiny.

A. The Order Is A Valid Exercise Of The President's Statutory Authority

The Order is a valid exercise of the President's broad statutory authority to "suspend" "the entry of any aliens or of any class of aliens" (Section 1182(f)) and to

⁹ Although the district court cited two cases that reviewed U.S. citizens' statutory claims concerning aliens' visa denials, the first one engaged in no analysis of the reviewability question, *Allende v. Shultz*, 845 F.2d 1111, 1114 nn.4-5 (1st Cir. 1988), and the second was vacated on other grounds after the government successfully petitioned for certiorari on the reviewability question, *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 45 F.3d 469 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996) (per curiam).

prescribe “reasonable rules, regulations, and orders,” as well as “limitations and exceptions,” regarding entry (Section 1185(a)(1)). The district court correctly held that Section 1182(f) authorizes the Order’s suspension of the entry of certain nationals of six countries and properly rejected the bulk of plaintiffs’ statutory arguments. The court concluded, however, that a different statute, 8 U.S.C. § 1152(a)(1)(A), prevents the government from implementing that suspension through the denial of immigrant visas. That interpretation is incorrect, and in any event cannot support the court’s grant of injunctive relief.

1. The Order falls squarely within the President’s broad authority under Sections 1182(f) and 1185(a)

“[T]he power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of [the] government.” *Mandel*, 408 U.S. at 765. Because the power to decide whether and on what terms aliens may enter the country is integral to the President’s conduct of the Nation’s foreign affairs and protection of national security, Congress has granted the President expansive authority in this area—including in two statutory provisions the Order expressly invokes, Sections 1182(f) and 1185(a). Order § 2(c).

First, Section 1182(f) provides that, “[w]henver the President finds that the entry of any aliens or of any class of aliens into the United States would be

detrimental to the interests of the United States, he may * * * for such period as he shall deem necessary, suspend the entry of all aliens or [of] any class of aliens as immigrants or nonimmigrants,” or “impose on the entry of aliens any restrictions he may deem to be appropriate.” “The President’s sweeping proclamation power” under Section 1182(f) “provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the [inadmissibility] categories in [S]ection 1182(a).” *Abourezk*, 785 F.2d at 1049 n.2. Every President over the last thirty years has invoked that authority to suspend or restrict entry of classes of aliens, including in some instances based on nationality.¹⁰

Second, Section 1185(a) broadly authorizes the President to prescribe “reasonable rules, regulations, and orders,” as well as “limitations and exceptions,” governing the entry of aliens. Section 1185(a) is the latest in a line of statutory grants of authority tracing back nearly a century. *See* Pub. L. No. 65-154, § 1(a), 40 Stat. 559 (1918). That authority was previously limited to times of war or declared

¹⁰ *See, e.g.*, Proclamation 5517 (1986) (Reagan; Cuban nationals as immigrants); Proclamation 5829 (1988) (Reagan; certain Panamanian nationals); Proclamation 5887 (1988) (Reagan; Nicaraguan government officers and employees); Exec. Order No. 12,807 (1992) (George H.W. Bush; undocumented aliens traveling by sea, upheld in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993)); Proclamation 6958 (1996) (Clinton; Sudanese government officials and armed forces); Proclamation 8342 (2009) (George W. Bush; government officials who impeded antihuman-trafficking efforts); Proclamation 8693 (2011) (Obama; aliens subject to U.N. Security Council travel bans).

national emergency, but Congress removed that limitation in 1978. Pub. L. No. 95-426, § 707(a), 92 Stat. 963, 992-93 (1978). Thus, beyond the President's power to suspend entry of particular classes of aliens when in the national interest, Congress accorded him additional authority to establish rules, limitations, and exceptions governing entry and departure of aliens more broadly.

Those provisions amply encompass the Order's 90-day suspension of entry of certain aliens from six countries that the President—in consultation with the Attorney General and the Secretaries of State and Homeland Security—concluded require special precautions during a review of existing screening and vetting protocols. That temporary measure is a paradigmatic exercise of the President's authority to “suspend the entry” of “any class of aliens” he finds may be “detrimental to the interests of the United States,” 8 U.S.C. § 1182(f), and to prescribe “limitations” on entry, *id.* § 1185(a)(1). The district court thus correctly rejected plaintiffs' claim that the Order's suspension on entry exceeds the President's statutory authority. J.A.793-94.

2. Section 1152(a)(1)(A) does not require issuance of visas to aliens denied entry under the Order, and cannot justify the injunction in any event

a. Although the district court recognized the President's statutory authority to suspend the entry of the aliens covered by the Order, the court held that Section 1152(a)(1)(A) prevents the government from implementing that suspension

by denying immigrant visas. There is no reason to issue a visa to an alien whose entry is barred by a valid invocation of the President's Section 1182(f) authority—and nothing in Section 1152(a)(1)(A) compels such a fruitless exercise.

Section 1152(a)(1)(A) provides that, with certain exceptions, “no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa” based on characteristics including “nationality.” Immigrant visas are issued to persons seeking admission to the United States for lawful permanent residence. 8 U.S.C. §§ 1101(a)(15), (20), 1201(a)(1)(A). Those seeking admission for other purposes, such as business or tourism, typically receive nonimmigrant visas. *Id.* §§ 1101(a)(15), 1201(a)(1)(B). Section 1152(a)(1)(A) was enacted in 1965, when Congress abolished the country's prior system of nationality-based immigration quotas and replaced it with uniform, per-country percentage limits. Pub. L. No. 89-236, §§ 1-2, 79 Stat. 911, 911-12. Section 1152(a)(1)(A) makes clear that the per-country limits are the only restrictions on the number of immigrant visas issued to nationals of any country.

The district court correctly recognized that, because the two provisions “address different activities handled by different government officials,” Section 1152(a)(1)(A)'s prohibition on nationality discrimination in allocating immigrant visas does not disable the President from drawing nationality-based distinctions in exercising his Section 1182(f) authority to suspend “entry.” J.A.789-90. The court

also recognized that Section 1152(a)(1)(A) is limited to *immigrant* visas and thus is irrelevant to the large majority of the aliens affected by the Order, who seek admission as *nonimmigrants*. J.A.793.¹¹ But the court held that Section 1152(a)(1)(A) requires that covered aliens seeking admission as immigrants be issued visas and then be denied entry upon physical arrival at the Nation's borders. J.A.790-91. That conclusion is mistaken for two reasons.

First, Section 1152(a)(1)(A) does not compel the issuance of a visa to an alien who is validly barred from entering the country. Visas are issued by consular officers, and a visa allows an alien to “obtain transportation to the United States” and seek admission at a port of entry. 1 Charles Gordon et al., *Immigration Law and Procedure* § 8.04[1] (2016). A visa does not entitle the alien to be admitted if, upon arrival, “he is found to be inadmissible.” 8 U.S.C. § 1201(h). It would be pointless to issue a visa to an alien who the consular officer already knows is barred from entering the country. Congress thus directed that a visa may not be issued if the applicant “is ineligible to receive a visa * * * under [S]ection 1182.” *Id.* § 1201(g).

¹¹ Over the last two fiscal years, approximately 70% of visas issued to nationals of the six countries covered by the Order were nonimmigrant visas. See U.S. Dep't of State, *Report of the Visa Office 2016*, Tbl. III, XVIII <https://travel.state.gov/content/visas/en/law-and-policy/statistics/annualreports/report-of-the-visa-office-2016.html>; U.S. Dep't of State, *Report of the Visa Office 2015*, Tbl. III, XVIII <https://travel.state.gov/content/visas/en/law-and-policy/statistics/annualreports/report-of-the-visa-office-2015.html>.

The State Department has accordingly long treated aliens covered by exercises of the President's Section 1182(f) authority as ineligible for visas. *See* U.S. Dep't of State, 9 *Foreign Affairs Manual* 302.14-3(B) (2016). Thus, when an alien subject to the Order is denied an immigrant visa, he is not suffering discrimination on the basis of nationality of the sort prohibited by Section 1152(a)(1)(A); instead, he is being denied a visa because he has been validly barred from entering the country.

Second, Congress specifically provided that Section 1152(a)(1)(A) does not “limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or where such applications will be processed.” 8 U.S.C. § 1152(a)(1)(B). The implementation of Section 2(c)'s temporary pause on entry falls squarely within that exception for rules governing immigrant-visa “procedures.” The suspension's central purpose is to facilitate a review of existing procedures “for the screening and vetting of foreign nationals” in the visa process. Order § 2(c). The district court concluded that the exception for “procedures” does not cover “temporal adjustments” like the suspension. J.A.792. But it cited no authority for that cramped understanding of “procedures.” In fact, that term readily encompasses matters of timing—including, as courts have held in other contexts, a temporary suspension of administrative proceedings. *See, e.g., Neighborhood TV Co. v. FCC*, 742 F.2d 629, 638 (D.C. Cir. 1984) (agency's temporary freeze on category of applications was a rule of “procedure” under

Administrative Procedure Act (APA)); *Buckeye Cablevision, Inc. v. United States*, 438 F.2d 948, 953 (6th Cir. 1971) (same). Section 1152(a)(1)(B) therefore authorizes temporarily suspending the issuance of immigrant visas to aliens covered by the Order.¹²

b. Even if the district court's interpretation of Section 1152(a)(1)(A) were correct, it would not justify injunctive relief, much less enjoining Section 2(c) wholesale. That interpretation cannot support any injunctive relief regarding applicants for nonimmigrant visas, to whom Section 1152(a)(1)(A) by its terms does not apply. Even as to aliens seeking immigrant visas, on the district court's reading, Section 1152(a)(1)(A) does not entitle those affected aliens to *enter*. The district court's statutory interpretation thus provides no basis for barring enforcement of Section 2(c)'s entry suspension as to all aliens, including those seeking nonimmigrant visas.

At most, the district court's interpretation of Section 1152(a)(1)(A) would require that aliens who otherwise qualify for immigrant visas be issued such visas, so that they could travel to this country only to be denied entry upon arrival. That

¹² The district court also deemed Section 1152(a)(1)(B)'s exception inapplicable because it "applies to the Secretary of State," not the President. J.A.792. But the President's Order does not, by its terms, bar the issuance of visas; instead, it invokes his authority to suspend "entry." Order § 2(c). The State Department would implement that suspension by declining to issue visas to aliens who are covered by the Order and who are not found eligible for a waiver.

would make no sense, and an injunction requiring it would be contrary to equitable principles and do nothing to redress plaintiffs' asserted injuries, all of which stem from the denial of entry to the affected aliens. J.A.781-87. The district court appeared to recognize that point: its analysis of the other injunction factors focused solely on plaintiffs' Establishment Clause claims. J.A.807-09. Its statutory analysis thus cannot support the injunction it imposed.

B. The Order Does Not Discriminate On The Basis Of Religion

The district court also held that plaintiffs are likely to succeed on their claim that Section 2(c) violates the Establishment Clause. J.A.794-807. The court erred at the outset by applying the wrong legal standard. It should have analyzed and upheld the Order's temporary suspension under *Mandel* because it is based on a facially legitimate, bona fide reason. *See* 408 U.S. at 770. In any event, the court's analysis is equally untenable under domestic Establishment Clause precedent.

1. Plaintiffs' constitutional claim fails under *Mandel* because the Order rests on a facially legitimate, bona fide reason

The Supreme Court has made clear that “[w]hen the Executive exercises” its authority to exclude aliens from the country “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 by balancing its justification against the” asserted constitutional rights of U.S. citizens. *Mandel*, 408 U.S. at 770. This rule reflects the Constitution's

allocation of power over immigration matters, which is “to be exercised exclusively by the political branches of the government.” *Id.* at 765. Control of the borders is “vital and intricately interwoven with” matters at the heartland of the President’s inherent authority, including “the conduct of foreign relations” and “the war power.” *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). Immigration matters therefore “are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.” *Id.* at 589; *see United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

Mandel’s rule governs plaintiffs’ claims that the Executive’s decision suspending entry of aliens violates plaintiffs’ asserted constitutional rights. *Mandel* itself rejected a claim that the Executive’s exclusion of an alien violated the First Amendment rights of U.S. citizens who sought to “hear[] and meet[] with” the alien. 408 U.S. at 760, 763-70. Because the Attorney General had a “facially legitimate and bona fide” reason for denying the waiver—that the alien had violated the conditions of prior visas—the Court declined to “look behind the exercise of that discretion” or “test it by balancing its justification against the [plaintiffs’] First Amendment interests.” *Id.* at 769-70. And *Fiallo* applied that same rule to reject a claim that an Act of Congress unconstitutionally discriminated against certain aliens based on their sex and the legitimacy of their children. 430 U.S. at 792-96. Courts of appeals have applied the same standard to reject claims that immigration policies

unlawfully discriminated on the basis of “religion, ethnicity, gender, and race.” *Rajah v. Mukasey*, 544 F.3d 427, 438 (2d Cir. 2008); *Washington Bybee Dissent* 16-18 (collecting cases).

Mandel's rule compels rejection of plaintiffs' claims. The Order's entry suspension is expressly premised on a facially legitimate, bona fide purpose: protecting national security. The President determined that a review of the Nation's screening and vetting procedures is necessary, and that a temporary pause in entry from six countries of concern is important to “prevent infiltration by foreign terrorists” and “reduce investigative burdens” while the review is ongoing. Order § 2(c). The six countries were chosen because they present heightened risks, which the Order explains; Congress or the Executive had previously identified each as presenting terrorism-related concerns. The risk of continued entry from those countries during the review was, in the President's judgment, “unacceptably high.” *Id.* § 1(f).

Plaintiffs urged the district court to reject the Order's “proffered reason” because it was “given in bad faith.” Mot. 29. But when “[t]he Executive * * * deem[s] nationals of a particular country a special threat,” “a court would be ill equipped to determine the[] authenticity and utterly unable to assess the[] adequacy” of that determination. *Reno v. Am.-Arab Anti-Discrimination Comm. (AAADC)*, 525 U.S. 471, 491 (1999). *Mandel* itself thus declined to “look behind” a facially

legitimate, bona fide reason in search of ulterior motives. 408 U.S. at 770. At the very most, separate opinions in one Supreme Court case have suggested that a court may question a consular officer's stated reason for denying a visa upon "an affirmative showing of bad faith on the part of the consular officer," and even then only where denial of the alien's visa is alleged to violate a U.S. citizen's fundamental rights. *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment); *id.* at 2141-47 (Breyer, J., dissenting). That circumstance is far removed from plaintiffs' broadside challenge to a formal national-security determination by the President of the United States, pursuant to express statutory authority and in accordance with the recommendations of the Attorney General and the Secretary of Homeland Security.

In any event, plaintiffs have not established that the Order's stated purpose was given in bad faith. To the contrary, the President's actions in response to concerns raised by courts regarding the Revoked Order—and taken after consultation with the Executive officers responsible for legal, foreign-relations, national-security, and immigration matters—demonstrate *good faith*. As the Order explains, the Revoked Order had two provisions addressing religion that were aimed at aiding victims of religious persecution. Order § 1(b)(iv). When the Ninth Circuit and other courts expressed concern that the provisions might draw improper religious distinctions, the President removed them to make clear that national

security, not religion, is the Order's focus. That accommodation of courts' concerns is the exact opposite of bad faith.

2. The district court erred by declining to apply *Mandel*

The district court declined to apply *Mandel*'s rule. J.A.806. The court asserted that “[t]he *Mandel* test” is “most typically applied when a court is asked to review an executive officer’s decision to deny a visa,” and “does not apply to the promulgation of sweeping immigration policy at the highest levels of the political branches.” *Id.* The court instead evaluated the Order under Establishment Clause case law addressing wholly distinct, domestic issues. That is mistaken for at least three reasons.

First, the district court’s assertion that immigration-policy decisions made “at the highest levels” of government deserve less deference than those by lesser officials is both foreclosed by controlling precedent and profoundly contrary to the constitutional structure. *Mandel* upheld a decision by the Attorney General. 408 U.S. at 759, 769-70. And both *Fiallo*, 430 U.S. at 794-95, and *Johnson v. Whitehead*, 647 F.3d 120, 127 (4th Cir. 2011), applied *Mandel* to uphold immigration-policy decisions made by Congress. More fundamentally, the district court’s position that courts “cannot look behind the decision of a consular officer, but can examine the decision of the President[,] stands the separation of powers on its head” and “cannot withstand the gentlest inquiry.” *Washington* Bybee Dissent

13. “The President’s unique status under the Constitution distinguishes him from other executive officials,” and his singular “constitutional responsibilities and status” call for added “judicial deference and restraint.” *Nixon v. Fitzgerald*, 457 U.S. 731, 750, 753 (1982). And in few areas is the President’s authority greater than in matters involving foreign relations and national security. *See, e.g., Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414-15 (2003); *Knauff*, 338 U.S. at 542; *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). The President’s power in this area “is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015).

In short, the President’s “unique constitutional position” and “respect for the separation of powers” compel even greater solicitude for policy decisions made by the President himself than those made by his subordinates. *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992). For example, unlike agencies’ actions, the President’s policy decisions are not reviewable under the APA, and courts generally “ha[ve] no jurisdiction * * * to enjoin the President in the performance of his official duties.” *Id.* at 800-03 (plurality op.) (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867)); *id.* at 823-28 (Scalia, J., concurring in part and concurring in the judgment). For similar reasons, a sitting President is absolutely immune from suits for damages “based on [his] official acts,” *Fitzgerald*, 457 U.S.

at 754, and from criminal prosecution, *see A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 222-23 (2000). And “[p]residential communications” are subject to a “presumptive privilege,” which is “fundamental to the operation of Government and inextricably rooted in the separation of powers.” *United States v. Nixon*, 418 U.S. 683, 708 (1974). The fact that the Order was issued by the President means that it should be afforded greater, not lesser, deference than the decision of a consular officer.

Second, the district court’s assertion that *Mandel* does not apply to broad policy decisions, and governs only review of decisions regarding “individual aliens,” also lacks merit. J.A.806. Both the Supreme Court and this Court have applied *Mandel*’s test to immigration policies adopted by Congress, which are inherently categorical and not specific to any particular alien. *See Fiallo*, 430 U.S. at 794-95; *Johnson*, 647 F.3d at 127. Moreover, withholding deference when the political branches make broad policy decisions—and according it only when they make individualized, alien-specific determinations—would be senseless. “[T]he promulgation of broad policy is precisely what we expect the political branches to do; Presidents rarely, if ever, trouble themselves with decisions to admit or exclude individual visa-seekers.” *Washington* Bybee Dissent 13. It is in prescribing general policies where the political branches’ expertise and constitutional prerogatives are at their zenith.

Third, the Establishment Clause precedents that the district court applied in disregard of *Mandel*—addressing domestic questions involving local religious displays, school subsidies, and the like—have no proper application to foreign-policy, national-security, and immigration judgments of the President. The district court offered no justification for exporting *McCreary County v. ACLU*, 545 U.S. 844 (2005), and *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to this context. The “unreasoned assumption that courts should simply plop Establishment Clause cases from the domestic context over to the foreign affairs context ignores the realities of our world.” *Washington Bybee Dissent* 8 n.6. Indeed, the court’s reasoning would appear to extend to “every foreign policy decision made by the political branches, including our dealings with various theocracies across the globe.” *Washington Kozinski Dissent* 3 n.2. This Court should reject such extensive “intrusion of the judicial power into foreign affairs” committed to the political branches. *Id.*

3. The entry suspension complies with the Establishment Clause

a. The Order’s text and purpose are religion-neutral

The district court’s conclusion that the Order likely violates the Establishment Clause fails even on its own terms. “The touchstone” of Establishment Clause analysis is that the “First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.” *McCreary*, 545 U.S.

at 860. Section 2(c) fully comports with that principle. The district court did not suggest that the Order draws any “explicit and deliberate distinctions” based on religion. *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982). To the contrary, the court acknowledged that the “Order is facially neutral in terms of religion.” J.A.800. The only provisions in the Revoked Order touching on religion—provisions addressing the Refugee Program that were intended to assist victims of religious persecution—were removed.

The entry suspension also was not adopted “with the ostensible and predominant purpose of advancing religion.” *McCreary*, 545 U.S. at 860. Its explicit, religion-neutral objective is to address the risk that potential terrorists might exploit possible weaknesses in the Nation’s screening and vetting procedures while the review of those procedures is underway. *Supra* pp. 9-10. That express “secular purpose” for a facially neutral policy cannot properly be deemed a “sham” or “merely secondary to a religious objective.” *McCreary*, 545 U.S. at 864. In judging the government’s true “object,” the Supreme Court has looked to the law’s “operation,” because “the effect of a law in its real operation is strong evidence of its object.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993). Here, the suspension’s “operation” confirms its stated purpose. As the Order itself explains, it applies to six countries based on risk, not religion; and in those six countries, the suspension applies irrespective of any alien’s religion.

The district court noted that each of the six countries “has a predominantly Muslim population.” J.A.773. But that fact does not establish that the suspension’s object is to single out Islam. Those countries were previously identified by Congress and the Executive for reasons that Plaintiffs do not contend were religiously motivated: each “is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones.” Order § 1(d). In addition, those countries represent a small fraction of the world’s 50 Muslim-majority nations and approximately 10% of the global Muslim population.¹³ And the suspension covers *every* national of those countries, including many non-Muslim individuals, if they meet the Order’s criteria. Moreover, to regard the dominant religion of a foreign country as evidence of an Establishment Clause violation could intrude on “every foreign policy decision made by the political branches.” *Washington Kozinski* Dissent 3 n.2. Such measures often address particular nations with a dominant religion. *See Washington Bybee* Dissent 16-18 (collecting cases rejecting challenges to National Security Entry-Exit Registration System, which applied to certain nationals of 24 Muslim-majority nations and North Korea).

¹³ Pew-Templeton Global Religious Futures Project, *Muslim Population by Country* (2010), <http://www.globalreligiousfutures.org/religions/muslims>.

b. The Order cannot be enjoined based on campaign statements and other unofficial comments

The district court nevertheless held plaintiffs were likely to succeed on their Establishment Clause challenge based on extrinsic evidence that, in the court's view, suggests that the Order was motivated by religious animus. Specifically, the court reasoned that statements by the President—nearly all before assuming office, while still a private citizen and political candidate—and informal remarks of his aides imply that the entry suspension is intended to target Muslims based on their religion. J.A.795-803. The court's reliance on such statements in the face of a religion-neutral Order is wrong for at least three reasons.

i. Under the Constitution's structure and its separation of powers, courts evaluating a presidential policy directive should not second-guess the President's stated purpose by looking beyond the policy's text and operation. The "presumption of regularity" that attaches to all federal officials' actions, *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926), applies with the utmost force to the President himself. Indeed, that presumption applies to subordinate Executive officials precisely "because they are designated * * * as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'" *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting U.S. Const. art. II, § 3).

Moreover, *Mandel*'s justifications for accepting the Executive's facially legitimate, bona fide judgments regarding the exclusion of aliens equally counsel crediting the text and operation of the President's Order. Probing the President's grounds for immigration policies would thrust "ill equipped" courts into the untenable position of evaluating the "adequacy" and "authenticity" of the Executive's reasons underlying its foreign-affairs and national-security judgments. *AAADC*, 525 U.S. at 491. Such a rule also would invite impermissible intrusion on privileged internal Executive Branch deliberations, *see Nixon*, 418 U.S. at 708, and potentially litigant-driven discovery that would disrupt the President's execution of the laws, *see Fitzgerald*, 457 U.S. at 749-50. Indeed, the plaintiffs in *Washington* have notified the government that they want nearly a year of discovery, including up to 30 depositions of White House staff and Cabinet-level officials. This Court should reject a rule that permits probing the Chief Executive's subjective views in this intrusive fashion.

ii. Even in the domestic context, courts evaluate whether official action has an improper religious purpose by looking at "the 'text, legislative history, and implementation of the statute,' or comparable official act," not through "judicial psychoanalysis of a drafter's heart of hearts," *McCreary*, 545 U.S. at 862-63. Searching for governmental purpose outside the operative terms of governmental action and official pronouncements is fraught with practical "pitfalls" and "hazards"

that would make courts' task "extremely difficult." *Palmer v. Thompson*, 403 U.S. 217, 224 (1971). And it makes no sense in the Establishment Clause context, because it is only an "official objective" of favoring or disfavoring religion gleaned from "readily discoverable fact" that implicates the Clause. *McCreary*, 545 U.S. at 862; *see Salazar v. Buono*, 559 U.S. 700, 715 (2010) (plurality op.) (rejecting finding that Congress' stated purpose for land-transfer statute was "illicit" because the court "took insufficient account of the context in which the statute was enacted and the reasons for its passage").

Despite acknowledging this important limitation on Establishment Clause analysis, the district court did not apply it. Instead, it effectively misread *McCreary* to allow inquiry into "the veiled psyche" of the President and his advisors. 545 U.S. at 863; *see* J.A.795-96. *McCreary* involved display of the Ten Commandments, which have explicitly religious content. Even then, *McCreary*'s analysis centered on the text of the resolutions the counties serially adopted authorizing the displays, objective features of those displays, and materials that government actors deliberately made part of the official record, such as testimony of the county executive's pastor. 545 U.S. at 868-74. The religious purpose of the original Ten Commandments display was readily evident at the outset from the very nature of the resolution authorizing it. *Id.* at 868-69. The counties' second resolution compounded the problem, making the religious aim even more explicit. *Id.* at 870.

The counties' third and final display was created "without a new resolution or repeal of the old one," the display itself still displayed a "sectarian spirit," and it "quoted more of the purely religious language of the Commandments than the first two had done." *Id.* at 870, 872.

McCreary thus held that the final display's "purpose * * * need[ed] to be understood in light of context," and the context of the counties' prior official actions made their objective clear. 545 U.S. at 874. Even then, the Court disclaimed any holding that "the Counties' past actions forever taint any effort on their part to deal with the subject matter." *Id.* at 873-74. Moreover, the Court expressly described its previous cases as resting on analysis of objective facts directly related to the law at issue: "In each case, the government's action was held unconstitutional only because openly available data"—a law's text or obvious effects, the policy it replaced, official public statements of the law's purpose, or "comparable official act[s]"—"supported a commonsense conclusion that a religious objective permeated the government's action." *Id.* at 862-63; *see Lukumi*, 508 U.S. at 534-35 (gleaning impermissible purpose from ordinances' "text" and "operation"). The Order, in contrast, conveys no religious message and was revised to eliminate any misperception of religious purpose. And it reflects the considered views of the Secretary of State, the Secretary of Homeland Security, and the Attorney General,

whose motives have not been impugned. Official context thus confirms that it is religion-neutral.

iii. Even if courts could look beyond official acts and statements to identify governmental purpose, they should not rely (as the district court did here) on statements by political candidates made as private citizens before assuming office. Statements by private persons cannot reveal “the government’s ostensible object.” *McCreary*, 545 U.S. at 860. This Court and others have accordingly (and correctly) declined to rely on private communications that “cannot be attributed to any government actor” to impute an improper purpose to government action. *Glassman v. Arlington County*, 628 F.3d 140, 147 (4th Cir. 2010); *see Modrovich v. Allegheny County*, 385 F.3d 397, 411-12 (3d Cir. 2004); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1031 (10th Cir. 2008).

Using comments by political candidates to question the stated purpose of later official action is particularly problematic. Statements of what candidates might attempt to achieve if elected, which are often simplified and imprecise, are not “official act[s].” *McCreary*, 545 U.S. at 862. They are made without the benefit of advice from an as-yet-unformed Administration, and they cannot bind elected officials who later conclude that a different course is warranted. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002); *see also Washington Kozinski Dissent* 4-5. Permitting campaign statements to contradict official pronouncements

of the government's objectives would inevitably "chill political debate during campaigns." *Phelps v. Hamilton*, 59 F.3d 1058, 1068 (10th Cir. 1995) (declining to rely on campaign statements).

It also would encourage scrutiny of the past religion-related statements of all manner of government officials. Throughout American history, politicians have invoked religious doctrines and texts on the campaign trail in support of positions on a host of issues. If a candidate's religiously related campaign statements could form the basis of an Establishment Clause challenge to a facially neutral law, numerous important laws could be subject to colorable Establishment Clause challenges. And it would suggest that it is somehow improper for elected representatives to base their support for legislation in part on religious beliefs.

The district court reasoned that the fact that statements were made "during a campaign does not wipe them from the 'reasonable memory' of a 'reasonable observer.'" J.A.802. That observation misses the point. The problem with campaign statements is not that they may be forgotten, but that they do not prove anything about the official objective underlying subsequent action. Attempting to assess what campaign statements reveal about the motivation for later action would "mire [courts] in a swamp of unworkable litigation," forcing them to wrestle with intractable questions, including the level of generality at which a statement must be made, by whom, and how long after its utterance the statement remains probative.

Washington Kozinski Dissent 5. That approach would inevitably devolve into the “judicial psychoanalysis” of a candidate’s “heart of hearts” that *McCreary* repudiated. 545 U.S. at 862.

This case illustrates these difficulties. Virtually all of the President’s statements on which the district court relied were made before he assumed office—before he took the prescribed oath to “preserve, protect and defend the Constitution,” U.S. Const. art. II, § 1, cl. 8. Taking that oath marks a profound transition from private life to the Nation’s highest public office, and manifests the singular responsibility and independent authority to protect the welfare of the Nation that the Constitution necessarily reposes in the Office of the President. Virtually all of the statements also preceded the President’s formation of a new Administration, including Cabinet-level officials who recommended adopting the Order. And they predated the President’s decision—made after courts expressed concern regarding the Revoked Order—to avoid further litigation and instead to adopt the new, revised Order in response to courts’ concerns. As another district court in this Circuit recently held, “the substantive revisions reflected in [the Order] have reduced the probative value of the President’s [past] statements” and undercut plaintiffs’ argument that “the predominate purpose of [the Order] is to discriminate against Muslims based on their religion.” *Sarsour*, slip op. at 24.

This case thus differs starkly from the district court’s only authority for its reliance on campaign materials, *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003). *Glassroth* did not involve a facially neutral policy, but an explicitly religious display—a massive Ten Commandments monument—erected in the state supreme court’s rotunda at the direction of the chief justice. *Id.* at 1284-85. The chief justice not only campaigned as the “Ten Commandments Judge,” but made the monument’s religious purpose explicit after assuming office in his speech at its unveiling and “conce[ded]” its religious message again in his court testimony. *Id.* at 1284-85, 1297. Here, the Order does not convey a religious message, it no longer contains any reference to religion, and its secular, national-security purpose is set forth at length in the Order.

If the Court considers “informal statements” at all, it should reject “open season on anything a politician or his staff may have said,” and instead should “[l]imit[] the evidentiary universe to activities undertaken while crafting [the] official policy” at issue. *Washington Kozinski Dissent* 6. Here, none of the statements the district court canvasses was part of the Executive’s process of developing the Order. Most were made long before even the Revoked Order that the Order replaced. None refers to Section 2(c)’s 90-day entry suspension, and none in substance corresponds to that policy: a short, temporary suspension of entry of nationals from specific countries previously identified by Congress and the

Executive as presenting special concerns bears no resemblance to a “Muslim ban.” J.A.799. None of the statements at issue therefore provides a reliable basis for disregarding the Order’s stated secular objective.

III. The Balance Of Equities Weighs Strongly Against Enjoining The Order

The remaining factors independently render the district court’s preliminary injunction improper. Plaintiffs were required but failed to “demonstrate that irreparable injury is *likely* in the absence of an injunction” during the short period the suspension is in effect. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The closest plaintiffs come to alleging concrete harm is their claim that the Order will prevent their foreign-national family members from entering the United States during the temporary suspension of entry. Even if that asserted harm to plaintiffs constitutes a cognizable Article III injury, *but see supra* pp. 18-25, mere delay in entry alone does not amount to *irreparable* harm. Moreover, unless and until the family members meet the otherwise-applicable visa requirements and seek and are denied a waiver, even those claimed harms are too “remote” and “speculative” to merit injunctive relief. *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991).

The district court in fact did not find that the Order will cause any of the plaintiffs any concrete irreparable injury. It reasoned instead that plaintiffs’ alleged “loss of First Amendment freedoms” standing alone “constitutes irreparable injury.”

J.A.807 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). As the district court acknowledged, however, although this Court has applied that principle in “cases involving the freedom of speech and expression,” it has not extended it to claims under the Establishment Clause. J.A.808. In any event, that principle has no application here: the First Amendment does not confer any constitutional rights on the only persons subject to the Order—aliens abroad—and the Order does not affect the plaintiffs’ own First Amendment rights. *Supra* pp. 22-23.

On the other side of the scales, the injunction causes direct, irreparable injury to the government and public interest. “[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); accord *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); see, e.g., *O Centro Espirita Beneficiente Uniao de Vegetal v. Ashcroft*, 314 F.3d 463, 467 (10th Cir. 2002). *A fortiori*, the same principle applies to a national-security judgment of the President made pursuant to express statutory authorization. “[N]o governmental interest is more compelling than the security of the Nation,” *Haig v. Agee*, 453 U.S. 280, 307 (1981); see *United States v. Abu Ali*, 528 F.3d 210, 240 (4th Cir. 2008), and “the President has unique responsibility” in this area, *Sale*, 509 U.S. at 188.

The district court discounted the harm its injunction poses to the governmental and public interest based on its own view that the Order is not “necessary” to “maintain[]” national security. J.A.809. But the Supreme Court has made clear that the political branches’ “[p]redictive judgment[s]” on matters of foreign policy and national security are entitled to the greatest possible deference. *Dep’t of the Navy v. Egan*, 484 U.S. 518, 529 (1988). Courts should not second-guess the Executive’s determination that “a preventive measure” in this area is necessary to address a particular risk. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010); see *AAADC*, 525 U.S. at 491.

IV. The District Court’s Nationwide Injunction Is Improper

As explained in defendants’ stay motion, even if some injunctive relief were appropriate, the nationwide injunction that the district court entered is improper for at least three reasons. *First*, the injunction violates the 150-year-old rule that federal courts cannot issue an injunction that runs against the President himself. *Johnson*, 71 U.S. (4 Wall.) at 501. *Second*, the district court could not validly enjoin Section 2(c) on the premise that it is facially unlawful because plaintiffs have not carried their burden of showing that “no set of circumstances exists under which the [Order] would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987). The Order is clearly lawful as applied to some aliens—for example, aliens abroad with no significant connection to the country or to a U.S. citizen or resident.

Third, the district court's injunction barring enforcement of the Order as to all persons violates the well-settled rule that injunctive relief must be limited to addressing the individual plaintiffs' own injuries caused by violation of their own rights. Article III requires that "[t]he remedy" a plaintiff may seek, including injunctive relief, "be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis v. Casey*, 518 U.S. 343, 357 (1996). Bedrock principles of equity independently impose the same rule that injunctive relief should not be broader "than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994).

The injunction here contravenes that rule. The district court identified three individual plaintiffs who it said were harmed by Section 2(c) because their foreign-national family members may be unable to enter the country on visas. J.A.781-87. Those putative injuries would be fully redressed by enjoining the Order's application to those plaintiffs' family members. The injunction barring enforcement of Section 2(c) as to *any* foreign national thus is "far broader than necessary to provide [plaintiffs] complete relief." *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 436 (4th Cir. 2003). At a minimum, the injunction thus should be narrowed to apply only to these plaintiffs' relatives. *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 392-94 (4th Cir. 2001) (vacating injunction that barred FEC from "enforcing its regulation against any party" nationwide on

constitutional grounds, because that scope was unnecessary to provide plaintiffs complete relief and interfered with other courts' ability to address same issues).

CONCLUSION

For these reasons, the district court's preliminary injunction should be vacated. At a minimum, the case should be remanded with instructions to narrow the preliminary injunction to apply only to the plaintiffs whom this Court holds have standing.

Respectfully submitted,

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MARCH 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-volume limitations of Rule 32(a)(7)(B). The brief contains 12,973 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Sharon Swingle
Sharon Swingle

No. 17-1351

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself; HIAS, INC., on behalf of itself and its clients; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; JOHN DOES #1 & 3; JANE DOE #2,

Plaintiffs – Appellees,

v.

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

Defendants – Appellants.

On Appeal from the United States District Court
for the District of Maryland (8:17-cv-00361-TDC)

**MOTION OF DEFENDANTS-APPELLANTS FOR
A STAY PENDING EXPEDITED APPEAL**

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INTRODUCTION

The decision below is extraordinary: it enjoins nationwide an action taken by the President of the United States at the height of his powers. Consistent with his constitutional and express statutory authority, the President issued Executive Order No. 13,780 (Mar. 6, 2017). Section 2(c) of that Order temporarily suspends the entry of foreign nationals from six countries that present heightened terrorism-related risks (Iran, Syria, Sudan, Libya, Somalia, and Yemen), subject to case-by-case waivers for undue hardship. Section 2(c) explicitly rests on the President's broad constitutional and statutory authority over the fields of national security, foreign relations, and immigration. Although Section 2(c) is facially neutral with respect to religion, the district court nevertheless enjoined it under the Establishment Clause, based primarily on campaign statements by the President and comments by his advisors.

All of the traditional factors point in favor of a stay of that injunction pending expedited appeal. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The balance of harms tips sharply in favor of a stay: barring effectuation of the President's judgment that Section 2(c) is warranted to protect the Nation's safety threatens the interests of the government and the public (which merge here, *Nken v. Holder*, 556 U.S. 418, 435 (2009)). By contrast, plaintiffs have not identified any meaningful injury that they personally would incur if the Order's 90-day suspension

of entry for certain foreign nationals from six countries goes into effect, let alone any substantial injury if the Order is merely allowed to take effect during the brief period of an expedited appeal. The government also has a strong likelihood of success on the merits of plaintiffs' statutory and constitutional challenges.

Accordingly, this Court should stay the district court's injunction in its entirety pending final disposition of the appeal of that injunction's validity and scope. At a minimum, however, a partial stay is appropriate because the district court's nationwide injunction is vastly overbroad and sweeps far beyond any arguable harm to plaintiffs. Article III and principles of equity require more tailored relief: implementation of Section 2(c) should not be blocked across the entire country, based on the putative injuries of only a few individual plaintiffs (who seek the admission of aliens abroad, who themselves lack any constitutional or statutory right to entry). For those reasons, the government respectfully requests that this Court enter a stay pending this expedited appeal.

ARGUMENT

I. The Balance Of Harms Weighs Strongly In Favor Of A Stay

A. The District Court's Injunction Imposes Serious, Irreparable Harm On The Government And The Public

A district court has set aside the President's considered judgment of how to protect the Nation. It did so notwithstanding that the President's action was authorized by Act of Congress; was informed by the advice of the Cabinet officials

responsible for legal, national security, and immigration matters; and drew on earlier steps by Congress and the Executive designating the countries at issue based on substantial terrorism concerns.

1. Consistent with the President's broad constitutional authority over foreign affairs and national security, Congress expressly authorized the President to restrict or suspend entry of any class of aliens whenever he finds that such entry would be detrimental to the interests of the country. 8 U.S.C. §§ 1182(f), 1185(a). The President exercised that authority here, in consultation with the Secretary of Homeland Security and the Attorney General, to address a national-security risk. In light of evidence that "some of those who have entered the United States through our immigration system have proved to be threats to our national security," the President determined that it was necessary to conduct an immediate review of the adequacy of the Nation's screening and vetting procedures to detect terrorists. Order §§ 1(h), 2(a)-(b).

To facilitate that important review, the President ordered a temporary pause on entry of nationals from six countries that had previously been "identified as presenting heightened concerns about terrorism and travel to the United States" by Congress or the Executive in the context of the Visa Waiver Program. Order §§ 1(a), (b)(i), (d)-(f), 2(c). Congress created that Program to enable nationals of participating countries to seek temporary admission for tourism or certain business

purposes without a visa. 8 U.S.C. §§ 1182(a)(7)(B)(iv), 1187. But Congress later excluded individuals with connections to particular countries from travel under the Program. *Id.* § 1187(a)(12). In 2015, Congress excluded from travel under the Program individuals who are dual nationals of or recent visitors to Iraq and Syria (where “[t]he Islamic State of Iraq and the Levant (ISIL) * * * maintain[s] a formidable force”) or countries designated by the Secretary of State as state sponsors of terrorism (currently Iran, Sudan, and Syria).¹ *Id.* § 1187(a)(12)(A)(i)-(ii). Congress also authorized the Department of Homeland Security (DHS) to designate additional countries of concern, such as those that are “safe haven[s] for terrorists” or have a “significant presence” of “foreign terrorist organization[s],” *id.* § 1187(a)(12)(D)(i)-(ii), and in February 2016 DHS excluded recent visitors to Libya, Somalia, and Yemen from travel under the Program.²

Drawing on these earlier designations by Congress and the Executive, the Order imposed a 90-day suspension of entry of nationals from six of those countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen. Order §§ 2(c), 3(a)-(c). As the Order explains, each presents “heightened concerns about terrorism and travel to the United States,” because each one “is a state sponsor of terrorism, has been

¹ <https://www.state.gov/documents/organization/258249.pdf>.

² <https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program>.

significantly compromised by terrorist organizations, or contains active conflict zones.” *Id.* § 1(b)(i), (d)-(e). The Order details specific concerns regarding each country that may increase the risk that terrorist operatives or sympathizers from those nations will travel to the United States and may “diminish[] the foreign government’s willingness or ability” to provide information necessary to detect potential threats. *Id.* § 1(d)-(e).

The President found that continued entry from those countries while the review is ongoing posed an “unacceptably high” “risk” of “erroneously permitting entry” of foreign nationals seeking to do this Nation harm. Order § 1(f). The Order therefore imposes “a temporary pause on the entry of nationals from [those countries]” in order to facilitate a re-assessment of “current screening and vetting procedures.” *Id.* §§ 1(f), 2(a)-(b). But this temporary suspension does not apply, for example, to lawful permanent residents of the U.S. or aliens who are inside the country on the Order’s effective date. *Id.* § 3(a)(i), (b)(i). In addition, it expressly provides for case-by-case waivers, permitting aliens who otherwise would be subject to the suspension to enter if a consular officer concludes that “denying [the alien] entry during the suspension period would cause undue hardship” and “entry would not pose a threat to national security and would be in the national interest.” *Id.* § 3(c). The Order includes a nonexhaustive list of examples where waivers may be appropriate. *Id.*

2. The district court's injunction barring any enforcement of Section 2(c) undermines the President's constitutional and statutory duty to protect the national interest and national security. "[N]o governmental interest is more compelling than the security of the Nation," and "the Government's interest in combatting terrorism is an urgent objective of the highest order." *Haig v. Agee*, 453 U.S. 280, 307 (1981); *Holder v. Humanitarian Law Project (HLP)*, 561 U.S. 1, 28 (2010). The President's assessment of threats to that interest deserves the greatest deference. *See HLP*, 561 U.S. at 33-34; *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). And that is particularly true for Section 2(c) because it reflects the President's "[p]redictive judgment[]" regarding a specific national-security risk. *See Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988). When the Executive adopts "a preventive measure * * * in the context of international affairs and national security," the government "is not required to conclusively link all the pieces in the puzzle before [courts] grant weight to its empirical conclusions." *HLP*, 561 U.S. at 35. By forbidding implementation of Section 2(c) nationwide, the injunction undermines the President's constitutional and statutory responsibility to safeguard the Nation's security and intrudes on the political branches' constitutional prerogatives.

The injunction also causes irreparable injury by invalidating an action taken at the height of the President's authority. *See Washington v. Trump*, No. 17-35105,

slip op. at 1-3 (9th Cir. Mar. 17, 2017) (Bybee, J., dissenting from the denial of rehearing *en banc*) (*Washington Bybee Dissent*). “[T]he President has unique responsibility” over “foreign and military affairs.” *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993). Rules “concerning the admissibility of aliens” also “implement[] an inherent executive power.” *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). And because “the President act[ed] pursuant to an express * * * authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

The district court’s injunction overriding the President’s judgment thus necessarily imposes irreparable harm. Even a single State “suffers a form of irreparable injury” “[a]ny time [it] is enjoined by a court from effectuating statutes enacted by representatives of its people.” *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *see, e.g., O Centro Espirita Beneficente Uniao de Vegetal v. Ashcroft*, 314 F.3d 463, 467 (10th Cir. 2002). *A fortiori*, the injunction against the Order here imposes irreparable

injury on the President and the public given “the singular importance of [his] duties” to the entire Nation. *Nixon v. Fitzgerald*, 457 U.S. 731, 751 (1982).

3. The district court acknowledged that it “should afford deference to national security and foreign policy judgments of the Executive Branch,” and disavowed any intention to “second-guess the conclusion that national security interests would be served by the” entry suspension. Op. 35. Yet the court proceeded to do just that. The court opined that defendants “ha[d] not shown, or even asserted, that national security cannot be maintained without an unprecedented six-country travel ban,” and the Order itself “does not explain specifically why this extraordinary, unprecedented action is the necessary response to the existing risks.” Op. 36-37, 40. To the contrary, the Order sets forth in detail the facts and considerations underlying the President’s risk assessment. Order § 1(d)-(f), (h)-(i). The district court’s conclusion that the Order’s stated reasons are insufficient is at bottom a disagreement with the President’s predictive national-security judgment.

The district court also expressed doubt that the Order’s suspension was actually needed because this measure “has not been deemed necessary at any other time in recent history.” Op. 40. But the President was entitled to weigh those risks himself and to strike a different balance than his predecessors. *Washington Bybee Dissent* 21 (“The President’s actions might have been more aggressive than those of his predecessors, but that was his prerogative.”). Congress and the previous

Administration decided to exclude from travel under the Visa Waiver Program certain aliens with ties to six countries designated because of heightened terrorism concerns. The current Administration has decided to go further and temporarily suspend the entry of nationals of those countries (subject to case-by-case waivers) while the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, reviews the Nation's current vetting procedures. The President is entitled to make his own assessment as to the adequacy of vetting procedures and what level of national-security risk is acceptable.

4. The harm caused by the injunction to the government and public interest amply justifies a stay. Courts have vacated injunctions on appeal in light of similar concerns. *See, e.g., Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 204-07 (4th Cir. 2005) (invoking separation of powers concerns in vacating preliminary injunction whose scope impinged on national security interests); *Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1978) (per curiam) (vacating preliminary injunction that directed action by the Secretary of State in foreign affairs, which "deeply intrude[d] into the core concerns of the executive branch"). More generally, courts and Justices have repeatedly granted stays of injunctions to prevent a significant breach of inter-branch comity. *See, e.g., INS v. Legalization Assistance Project*, 510 U.S. 1301, 1305-06 (1993) (O'Connor, J., in chambers) (staying injunction because it likely was "not merely an erroneous adjudication of a lawsuit

between private litigants, but an improper intrusion by a federal court into the workings of a coordinate branch of the Government”); *Schweiker v. McClure*, 452 U.S. 1301, 1303 (1981) (Rehnquist, J., in chambers); *Comm. on the Judiciary of the U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam). The district court’s injunction similarly should be stayed pending appeal.

B. A Brief Stay Pending An Expedited Appeal Would Not Impose Any Substantial Harm On These Plaintiffs

By contrast, plaintiffs face no substantial harm if the district court’s injunction is stayed. Indeed, the plaintiffs have identified no immediate injury that is likely to occur during the 90-day period of the suspension under Section 2(c), much less during the shorter period of the stay.

1. As for the three organizational plaintiffs, the district court did not identify any of them that would suffer even a cognizable Article III injury—let alone substantial harm—as a result of Section 2(c). *See* Op. 12-18 (addressing standing of individual plaintiffs only). On that score, the court was correct. Two of the organizational plaintiffs—the International Refugee Assistance Project (IRAP) and HIAS, Inc.—have asserted claims regarding other provisions of the Order addressing refugees, but the district court declined to enjoin those provisions, Op. 40-41, and they are not at issue in this appeal. The third organization, the Middle East Studies

Association (MESA), alleged that some unspecified members might be prevented by Section 2(c) from traveling to the United States to attend MESA's annual meeting. But that meeting is not scheduled until November 2017, well after Section 2(c)'s 90-day suspension expires in early June.³ MESA further alleged that one of its members has plans to travel to the United States at some other unspecified future time, but it has not shown with specificity that this member has any "concrete plans" to do so during the suspension. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

2. As for the six individual plaintiffs, they too will suffer no concrete, substantial harm if the district court's injunction is stayed. Like IRAP and HIAS, two of the individual plaintiffs, Muhammed Meteab and Ibrahim Mohamed, challenge the Order's provisions addressing refugees and claim that those provisions will prevent their family members from being admitted as refugees. Again, because the district court enjoined only Section 2(c)'s entry suspension, not the refugee provisions, staying the injunction will not affect these two plaintiffs.

The remaining four plaintiffs assert that Section 2(c) will injure them by preventing or delaying entry of their foreign-national relatives seeking visas. But none of those plaintiffs has shown any imminent, substantial harm during the

³ <http://www.mesana.org/annual-meeting/index.html>.

90-day pause on entry. One of the plaintiffs, Paul Harrison, seeks entry of his Iranian fiancé. As defendants informed the district court, however, his claim appears to be moot. D. Ct. Doc. 151, 3/16/17 Tr. 30-31, 34. We are informed by the State Department that the fiancé's visa was issued on March 15, 2017, and subsequently collected. In short, the district court properly did not find that Harrison has standing, much less imminent injury.

The other three plaintiffs who assert that Section 2(c) will deny visas to their foreign relatives—the wives of John Doe #1 and John Doe #3, and the sister of Jane Doe #2—do not have any substantial injury because any possible harm lacks imminence and is speculative. Although Section 2(c) imposes a 90-day suspension of entry for certain nationals of six countries, it does not suspend consideration of visa applications. And it is far from certain that any of the relatives otherwise would be found eligible for and receive a visa during this appeal's pendency—facts plaintiffs should have been required to show in order to obtain injunctive relief. D. Ct. Dkt. 95-4 ¶¶5-6; 95-5 ¶5; 95-7 ¶10. Plus, to the extent any of their visa adjudications is imminent, the waiver process could well provide the very relief they seek. The Order specifically contemplates the possibility of waivers for “close family member[s].” Order § 3(c)(iv). The waiver process is integrated into the visa-adjudication procedure, and plaintiffs have not shown that it will cause any material delay. A preliminary injunction to redress imminent harm is unnecessary—and thus

staying the district court's injunction pending appeal is especially appropriate— unless and until those plaintiffs' relatives are found eligible for a visa but denied a waiver.

3. The district court did not actually identify any concrete injury Section 2(c) would cause to any of these plaintiffs. It reasoned instead that Establishment Clause violations are *per se* irreparable injury. Op. 38-39. But that principle does not excuse the predicate requirement that a plaintiff must identify a constitutionally cognizable injury that he himself is likely to suffer, not one inflicted upon a third party. The cases recognizing that an asserted constitutional violation supports irreparable harm have thus emphasized that a plaintiff must still first identify a specific injury to himself to establish standing. *See In re Navy Chaplaincy*, 534 F.3d 756, 763 (D.C. Cir. 2008) (“[T]he allegation of an Establishment Clause violation is sufficient to satisfy the irreparable harm prong of the preliminary injunction standard” only if “a party has standing to allege such a violation.”) (emphasis omitted).

Here, the only individuals who are subject to Section 2(c)'s suspension of entry—aliens outside of, and with no substantial connections to, the United States— cannot claim any rights under the Establishment Clause, *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *DKT Memorial Fund v. Agency for Int'l Dev.*, 887 F.2d 275, 285 (D.C. Cir. 1989), or any constitutional rights regarding

entry into this country, *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). And the individual plaintiffs themselves are not being deprived of any Establishment Clause rights, because they are not subject to the Order. *See Navy Chaplaincy*, 534 F.3d at 764 (a plaintiff “complaining about * * * discrimination suffered by other[] [co-religionists], not by the plaintiff himself,” lacks standing); *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 606 (4th Cir. 2012) (mother and child lacked standing to challenge school policy awarding academic credit for religious instruction, because they were “seeking to vindicate, not their own rights, but the rights of others”).

Plaintiffs attempted below to transform their abstract Establishment Clause objection into concrete harm by alleging “stigmatizing injuries” based on asserted “anti-Muslim animus underlying” the Order. Op. 11. But an “‘abstract stigmatic injury’ resulting” from the perception that government action “turns [religious adherents] into political outsiders * * * is insufficient to confer standing.” *Newdow v. Lefevre*, 598 F.3d 638, 643 (9th Cir. 2010) (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)). The Supreme Court has made clear that “stigmatizing injury” from alleged discrimination confers standing only on “those persons who are personally denied equal treatment” by the challenged discriminatory conduct. *Allen*, 468 U.S. at 755; *see Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86 (1982) (“[Plaintiffs] fail to identify any personal

injury suffered by them * * * other than the psychological consequence presumably produced by observation of conduct with which one disagrees.”).

As this Court likewise has explained, those who are not themselves “targets or victims” of the challenged policy cannot claim injury based on “the bare fact of disagreement with [the] policy, even passionate disagreement premised on Establishment Clause principles.” *Moss*, 683 F.3d at 605-06; *see Navy Chaplaincy*, 534 F.3d at 764-65. Plaintiffs suffer no cognizable injury at all, much less substantial injury sufficient to preclude a stay, from mere “abstract knowledge” of an allegedly unconstitutional policy or from supposedly being made to “feel like * * * outsider[s],” where they were not themselves “the targets or victims of this alleged religious intolerance.” *Moss*, 683 F.3d at 606.

II. The Government Is Likely To Prevail On The Merits

A stay also is appropriate because defendants are likely to succeed on their appeal of the district court’s injunction. For the reasons discussed above and in the government’s opening brief, the district court erred in finding plaintiffs’ claim justiciable. The district court further erred in holding that plaintiffs were likely to prevail on two grounds: first, that Section 2(c) exceeds the President’s statutory authority; and second, that Section 2(c) violates the Establishment Clause. As explained more fully in defendants’ opening brief, neither ground withstands scrutiny.

First, Section 2(c) falls squarely within the President’s statutory authority. Two separate statutes, 8 U.S.C. §§ 1182(f) and 1185(a), grant the President broad power that encompasses the suspension. The district court actually agreed that Section 1182(f) permits the President to restrict entry of aliens based on nationality, but concluded that another statute, *id.* § 1152(a)(1)(A), prohibits the President from denying immigrant visas based on nationality. Op. 24. The court’s interpretation would require aliens who otherwise qualify for immigrant visas to be issued such visas, only to be denied admission upon physical arrival. Congress did not require that senseless result. Section 1152(a)(1)(A) does not prohibit consular officers from taking account of the fact that an alien requesting a visa is validly barred from entering the country under Section 1182(f). *See* 8 U.S.C. § 1201(g). And Congress has made clear that Section 1152(a)(1)(A) does not apply at all to Executive action addressing the “procedures for the processing of immigrant visa applications or the locations where such applications will be processed,” *id.* § 1152(a)(1)(B), which encompasses Section 2(c)’s temporary pause on entry. In any event, even if the district court were correct that Section 1152(a)(1)(A) prohibits denying immigrant visas to aliens because they are covered by Section 2(c), it could not support enjoining the suspension of their entry under Section 2(c).

Second, plaintiffs are not likely to succeed in challenging Section 2(c) under the Establishment Clause. The Supreme Court has forbidden second-guessing the

Executive's exercise of his broad statutory authority regarding exclusion of aliens so long as it is based on a facially legitimate, bona fide reason. *Mandel*, 408 U.S. at 770. Section 2(c) of the Order easily clears that threshold: it is expressly aimed at protecting national security, and it does so by adopting special safeguards for foreign nationals of six countries that Congress and the Executive previously identified as posing heightened concerns.

The district court declined to apply *Mandel*'s settled standard, opting instead for Establishment Clause case law addressing far-removed issues such as local religious displays. Op. 37-38. The district court's failure to apply directly applicable, dispositive Supreme Court precedent renders its conclusion untenable. Moreover, plaintiffs' Establishment Clause claims fail even under the inapposite precedent the district court applied. The court held that Section 2(c)'s entry suspension is likely unconstitutional based not on anything the Order says or does—Section 2(c) is neutral with respect to religion—but on an improper motive the court inferred primarily from campaign and similar statements. That analysis is directly contrary to Supreme Court case law, which makes clear that only the official purpose of government acts, not inferences drawn from campaign-trail comments, counts for Establishment Clause purposes. *McCreary County v. ACLU*, 545 U.S. 844, 860-64 (2005). As *McCreary* instructed, courts must evaluate whether official action has an improper religious purpose based on the “the ‘text, legislative history, and

implementation of the statute,’ or comparable official act,” not through “judicial psychoanalysis of a drafter’s heart of hearts.” *Id.* at 862 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). In all events, the earlier statements concerning a “Muslim ban” bear no resemblance to Section 2(c) of the Order, which briefly suspends entry (subject to exceptions and waivers) by nationals from six countries that were previously identified by Congress and the Executive as presenting heightened terrorism concerns and that contain approximately 10% of the global Muslim population.

III. The Nationwide Injunction Is Improper

Even if some injunctive relief were appropriate, a stay pending appeal nevertheless is warranted because the injunction the court entered is fatally overbroad for at least three reasons. The injunction should be stayed in its entirety until this Court can definitively resolve its validity and scope. At a minimum, the Court should stay the injunction in part for reaching beyond proper bounds.

A. The injunction impermissibly purports to enjoin the President himself. It has been settled for 150 years that federal courts generally “ha[ve] no jurisdiction * * * to enjoin the President in the performance of his official duties.” *Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867)). Any injunction here must be confined to run only against federal agencies and officials charged with implementing Section 2(c).

B. The district court enjoined Section 2(c) on its face, but plaintiffs have fallen far short of carrying their burden of “establish[ing] that no set of circumstances exists under which the [Order] would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987). For example, the Order is clearly lawful as applied to foreign nationals with no immediate relatives in the country and no other significant connection to it; as noted, such aliens abroad have no First Amendment rights themselves, and no person in the U.S. can claim that exclusion of such aliens violates the person’s own cognizable rights. The district court offered no justification for enjoining the Order’s application to persons as to whom it is indisputably valid.

C. The injunction’s broad sweep—enjoining the Order’s application to any person, nationwide—violates the well-settled rule that injunctive relief must be limited to redressing the plaintiff’s own cognizable injuries. That rule is required by both the Constitution and traditional principles of equity.

Article III demands that “[t]he remedy” sought must “be limited to the inadequacy that produced the injury in fact that the plaintiff has established.” *Lewis v. Casey*, 518 U.S. 343, 357 (1996). “The actual-injury requirement would hardly serve [its] purpose * * * —of preventing courts from undertaking tasks assigned to the political branches—if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to

remedy *all* inadequacies in that administration.” *Id.*; see *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983).

Bedrock principles governing equitable remedies independently support the same requirement that injunctions be no broader than “necessary to provide complete relief to the plaintiffs.” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). This Court has repeatedly set aside injunctions that were “broader in scope than that ‘necessary to provide complete relief to the plaintiff’ and * * * did not carefully address only the circumstances of the case.” *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 436 (4th Cir. 2003); see *Va. Soc’y for Human Life, Inc. v. FEC*, 263 F.3d 379, 392-94 (4th Cir. 2001); *Ga.-Pac. Consumer Prods. LP v. von Drehle Corp.*, 781 F.3d 710, 715-17 (4th Cir. 2015). That principle applies with even greater force to a preliminary injunction, an equitable tool designed merely to “preserve the relative positions of the parties until a trial on the merits can be held.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); see *Consolidation Coal Co. v. Disabled Miners of S. W. Va.*, 442 F.2d 1261, 1267 (4th Cir. 1971).

The district court’s categorical, nationwide injunction is irreconcilable with the fundamental rule limiting injunctions to redressing plaintiffs’ injuries. The district court identified only three individual plaintiffs who supposedly have standing because their foreign-national family members may be unable to enter the

country on non-refugee visas. Op. 12-18. Those claimed injuries, if cognizable at all, would be fully redressed by an injunction regarding those plaintiffs' specific family members. None of the plaintiffs can claim any "personal stake" in any relief beyond their own relatives. *Lyons*, 461 U.S. at 101-02; *see Valley Forge*, 454 U.S. at 485-86. The district court's injunction barring enforcement of Section 2(c) as to any foreign national—even those with no ties to persons in the U.S.—thus "is far broader" than "necessary to provide [plaintiffs] complete relief." *Kentuckians for the Commonwealth*, 317 F.3d at 436.

None of the district court's justifications for enjoining Section 2(c) nationwide survives scrutiny. The court asserted that the "Individual Plaintiffs and clients of the Organizational Plaintiffs are located in different parts of the United States." Op. 41. But an injunction addressing the individual plaintiffs' relatives would fully resolve their purported injuries regardless of where they live. And none of the organizational plaintiffs has standing, because none of them identified any members with standing. The court also stated that "an Establishment Clause violation has impacts beyond the personal interests of individual parties." *Id.* The relevant question, however, is not the extent of the Order's "impacts." What matters is the extent of relief necessary to redress injuries to the plaintiffs in this case. *Kentuckians for the Commonwealth*, 317 F.3d at 436. That an allegedly unconstitutional policy affects others not before the Court is no basis to enjoin the policy nationwide. *See Va. Soc'y*, 263 F.3d at 393

(holding that “district court abused its discretion by issuing a nationwide injunction” against the FEC because that scope was unnecessary to provide plaintiffs complete relief and “ha[d] the effect” of interfering with other courts’ ability to address same issues).

Finally, the district court asserted that the importance of “uniform immigration law” compelled nationwide relief. Op. 42. That is incorrect. Properly limiting any injunctive relief to the individual plaintiffs before the Court would pose no genuine threat to uniformity. To the contrary, proper respect for uniformity requires leaving the Order’s nationwide policy in place, with individualized exceptions for particular plaintiffs who have established irreparable injury from a likely violation of their own constitutional rights. The Order’s express severability clause compels the same conclusion. *See* Order § 15(a) (providing that if “the application of any provision [of the Order] to any person or circumstance[] is held to be invalid, * * * the application of [the Order’s] other provisions to any other persons or circumstances shall not be affected”). Such appropriately tailored relief would pose significantly less interference with federal immigration policy than enjoining the President’s directive nationwide based on the injuries of only a few individual plaintiffs.

CONCLUSION

For these reasons, defendants respectfully request that the Court stay the district court's preliminary injunction pending final disposition of the appeal. At a minimum, if the Court were to conclude that certain plaintiffs have made the requisite showing of cognizable and irreparable injury, the Court should grant a partial stay of the injunction insofar as it extends beyond such plaintiffs.

Respectfully submitted,

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MARCH 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-volume limitations of Fed. R. App. P. 27(d)(2)(A). This motion contains 5,162 words, excluding the parts of the motion excluded by Fed. R. App. P. 27(d)(2) and 32(f).

/s/ Sharon Swingle
Sharon Swingle

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2017, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Sharon Swingle
Sharon Swingle

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

STATE OF HAWAI‘I and ISMAIL
ELSHIKH,

Plaintiffs,

vs.

DONALD J. TRUMP, *et al.*,

Defendants.

CV. NO. 17-00050 DKW-KSC

**ORDER GRANTING MOTION TO
CONVERT TEMPORARY
RESTRAINING ORDER TO A
PRELIMINARY INJUNCTION**

INTRODUCTION

On March 15, 2017, the Court temporarily enjoined Sections 2 and 6 of Executive Order No. 13,780, entitled, “Protecting the Nation from Foreign Terrorist Entry into the United States,” 82 Fed. Reg. 13209 (Mar. 6, 2017). *See* Order Granting Mot. for TRO, ECF No. 219 [hereinafter TRO]. Plaintiffs State of Hawai‘i and Ismail Elshikh, Ph.D., now move to convert the TRO to a preliminary injunction. *See* Pls.’ Mot. to Convert TRO to Prelim. Inj., ECF No. 238 [hereinafter Motion].

Upon consideration of the parties’ submissions, and following a hearing on March 29, 2017, the Court concludes that, on the record before it, Plaintiffs have met

their burden of establishing a strong likelihood of success on the merits of their Establishment Clause claim, that irreparable injury is likely 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. Accordingly, Plaintiffs' Motion (ECF No. 238) is GRANTED.

BACKGROUND

The Court briefly recounts the factual and procedural background relevant to Plaintiffs' Motion. A fuller recitation of the facts is set forth in the Court's TRO. *See* TRO 3–14, ECF No. 219.

I. The President's Executive Orders

A. Executive Order No. 13,769

On January 27, 2017, the President of the United States issued Executive Order No. 13,769 entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 8977 (Jan. 27, 2017).¹ On March 6, 2017, the

¹On February 3, 2017, the State filed its complaint and an initial motion for TRO, which sought to enjoin Sections 3(c), 5(a)–(c), and 5(e) of Executive Order No. 13,769. Pls.' Mot. for TRO, Feb. 3, 2017, ECF No. 2. The Court stayed the case (*see* ECF Nos. 27 & 32) after the United States District Court for the Western District of Washington entered a nationwide preliminary injunction enjoining the Government from enforcing the same provisions of Executive Order No. 13,769 targeted by the State. *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). On February 4, 2017, the Government filed an emergency motion in the United States Court of Appeals for the Ninth Circuit seeking a stay of the *Washington* TRO, pending appeal. That emergency motion was denied on February 9, 2017. *See Washington v. Trump*, 847 F.3d 1151 (9th Cir.) (per curium), *denying reconsideration en banc*, --- F.3d ---, 2017

President issued another Executive Order, No. 13,780, identically entitled, “Protecting the Nation from Foreign Terrorist Entry into the United States” (the “Executive Order”), 82 Fed. Reg. 13209. Like its predecessor, the Executive Order restricts the entry of foreign nationals from specified countries and suspends the United States refugee program for specified periods of time.

B. Executive Order No. 13,780

Section 1 of the Executive Order declares that its purpose is to “protect [United States] citizens from terrorist attacks, including those committed by foreign nationals.” By its terms, the Executive Order also represents a response to the Ninth Circuit’s per curiam decision in *Washington v. Trump*, 847 F.3d 1151. According to the Government, it “clarifies and narrows the scope of Executive action regarding immigration, extinguishes the need for emergent consideration, and eliminates the potential constitutional concerns identified by the Ninth Circuit.” Notice of Filing of Executive Order 4–5, ECF No. 56.

Section 2 suspends from “entry into the United States” for a period of 90 days, certain nationals of six countries referred to in Section 217(a)(12) of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*: Iran, Libya, Somalia,

WL 992527 (9th Cir. 2017). On March 8, 2017, the Ninth Circuit granted the Government’s unopposed motion to voluntarily dismiss the appeal. *See* Order, Case No. 17-35105 (9th Cir. Mar. 8, 2017), ECF No. 187.

Sudan, Syria, and Yemen. 8 U.S.C. § 1187(a)(12); Exec. Order § 2(c). The suspension of entry applies to nationals of these six countries who (1) are outside the United States on the new Executive Order's effective date of March 16, 2017; (2) do not have a valid visa on that date; and (3) did not have a valid visa as of 5:00 p.m. Eastern Standard Time on January 27, 2017 (the date of Executive Order No. 13,769). Exec. Order § 3(a). The 90-day suspension does not apply to: (1) lawful permanent residents; (2) any foreign national admitted to or paroled into the United States on or after the Executive Order's effective date (March 16, 2017); (3) any individual who has a document other than a visa, valid on the effective date of the Executive Order or issued anytime thereafter, that permits travel to the United States, such as an advance parole document; (4) any dual national traveling on a passport not issued by one of the six listed countries; (5) any foreign national traveling on a diplomatic-type or other specified visa; and (6) any foreign national who has been granted asylum, any refugee already admitted to the United States, or any individual granted withholding of removal, advance parole, or protection under the Convention Against Torture. *See* Exec. Order § 3(b). Under Section 3(c)'s waiver provision, foreign nationals of the six countries who are subject to the suspension of entry may nonetheless seek entry on a case-by-case basis.

Section 6 of the Executive Order suspends the U.S. Refugee Admissions Program for 120 days. The suspension applies both to travel into the United States and to decisions on applications for refugee status. *See* Exec. Order § 6(a). It excludes refugee applicants who were formally scheduled for transit by the Department of State before the March 16, 2017 effective date. Like the 90-day suspension, the 120-day suspension includes a waiver provision that allows the Secretaries of State and Homeland Security to admit refugee applicants on a case-by-case basis. *See* Exec. Order § 6(c). Unlike Executive Order No. 13,769, the new Executive Order does not expressly refer to an individual's status as a "religious minority" or refer to any particular religion, and it does not include a Syria-specific ban on refugees.

II. Plaintiffs' Claims

Plaintiffs filed a Second Amended Complaint for Declaratory and Injunctive Relief ("SAC") on March 8, 2017 (ECF No. 64) simultaneous with their Motion for TRO (ECF No. 65). The State asserts that the Executive Order inflicts constitutional and statutory injuries upon its residents, employers, and educational institutions, while Dr. Elshikh alleges injuries on behalf of himself, his family, and members of his Mosque. SAC ¶ 1.

According to Plaintiffs, the Executive Order results in “their having to live in a country and in a State where there is the perception that the Government has established a disfavored religion.” SAC ¶ 5. Plaintiffs assert that by singling out nationals from the six predominantly Muslim countries, the Executive Order causes harm by stigmatizing not only immigrants and refugees, but also Muslim citizens of the United States. Plaintiffs point to public statements by the President and his advisors regarding the implementation of a “Muslim ban,” which Plaintiffs contend is the tacit and illegitimate motivation underlying the Executive Order. *See* SAC ¶¶ 35–60. Plaintiffs argue that, in light of these and similar statements “where the President himself has repeatedly and publicly espoused an improper motive for his actions, the President’s action must be invalidated.” Pls.’ Mem. in Supp. of Mot. for TRO 2, ECF No. 65-1. Plaintiffs additionally present evidence that they contend undermines the purported national security rationale for the Executive Order and demonstrates the Administration’s pretextual justification for the Executive Order. *E.g.*, SAC ¶ 61 (citing Draft DHS Report, SAC, Ex. 10, ECF No. 64-10).

III. March 15, 2017 TRO

The Court’s nationwide TRO (ECF No. 219) temporarily enjoined Sections 2 and 6 of the Executive Order, based on the Court’s preliminary finding that Plaintiffs

demonstrated a sufficient likelihood of succeeding on their claim that the Executive Order violates the Establishment Clause. *See* TRO 41–42. The Court concluded, based upon the showing of constitutional injury and irreparable harm, the balance of equities, and public interest, that Plaintiffs met their burden in seeking a TRO, and directed the parties to submit a stipulated briefing and preliminary injunction hearing schedule. *See* TRO 42–43.

On March 21, 2017, Plaintiffs filed the instant Motion (ECF No. 238) seeking to convert the TRO to a preliminary injunction prohibiting Defendants from enforcing and implementing Sections 2 and 6 of the Executive Order until the matter is fully decided on the merits. They argue that both of these sections are unlawful in all of their applications and that both provisions are motivated by anti-Muslim animus. Defendants oppose the Motion. *See* Govt. Mem. in Opp’n to Mot. to Convert TRO to Prelim. Inj., ECF No. 251. After full briefing and notice to the parties, the Court held a hearing on the Motion on March 29, 2017.

DISCUSSION

The Court’s TRO details why Plaintiffs are entitled to preliminary injunctive relief. *See* TRO 15–43. The Court reaffirms and incorporates those findings and conclusions here, and addresses the parties’ additional arguments on Plaintiffs’ Motion to Convert.

I. Plaintiffs Have Demonstrated Standing At This Preliminary Phase

The Court previously found that Plaintiffs satisfied Article III standing requirements at this preliminary stage of the litigation. *See* TRO 15–21 (State), 22–25 (Dr. Elshikh). The Court renews that conclusion here.

A. Article III Standing

Article III, Section 2 of the Constitution permits federal courts to consider only “cases” and “controversies.” *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). “[T]o satisfy Article III’s standing requirements, a plaintiff must show (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

“At this very preliminary stage of the litigation, the [Plaintiffs] may rely on the allegations in their Complaint and whatever other evidence they submitted in support of their TRO motion to meet their burden.” *Washington*, 847 F.3d at 1159 (citing *Lujan*, 504 U.S. at 561). “With these allegations and evidence, the [Plaintiffs] must make a ‘clear showing of each element of standing.’” *Id.* (quoting

Townley v. Miller, 722 F.3d 1128, 1133 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 907 (2014)). On the record presented at this preliminary stage of the proceedings, Plaintiffs meet the threshold Article III standing requirements.

B. The State Has Standing

For the reasons stated in the TRO, the State has standing based upon injuries to its proprietary interests. *See* TRO 16–21.²

The State sufficiently identified monetary and intangible injuries to the University of Hawaii. *See, e.g.*, Suppl. Decl. of Risa E. Dickson, Mot. for TRO, Ex. D-1, ECF No. 66-6; Original Dickson Decl., Mot. for TRO, Ex. D-2, ECF No. 66-7. The Court previously found these types of injuries to be nearly indistinguishable from those found sufficient to confer standing according to the Ninth Circuit’s *Washington* decision. *See* 847 F.3d at 1161 (“The necessary connection can be drawn in at most two logical steps: (1) the Executive Order prevents nationals of seven countries from entering Washington and Minnesota; (2) as a result, some of these people will not enter state universities, some will not join those universities as faculty, some will be prevented from performing research, and some will not be

²The Court once again does not reach the State’s alternative standing theory based on protecting the interests of its citizens as *parens patriae*. *See Washington*, 847 F.3d at 1168 n.5 (“The States have asserted other proprietary interests and also presented an alternative standing theory based on their ability to advance the interests of their citizens as *parens patriae*. Because we conclude that the States’ proprietary interests as operators of their public universities are sufficient to support standing, we need not reach those arguments.”).

permitted to return if they leave. And we have no difficulty concluding that the States' injuries would be redressed if they could obtain the relief they ask for: a declaration that the Executive Order violates the Constitution and an injunction barring its enforcement.”). The State also presented evidence of injury to its tourism industry. *See, e.g.*, SAC ¶ 100; Suppl. Decl. of Luis P. Salaveria, Mot. for TRO, Ex. C-1, ECF No. 66-4; Suppl. Decl. of George Szigeti, ¶¶ 5–8, Mot. for TRO, Ex. B-1, ECF No. 66-2.

For purposes of the instant Motion, the Court concludes that the State has preliminarily demonstrated that: (1) its universities will suffer monetary damages and intangible harms; (2) the State's economy is likely to suffer a loss of revenue due to a decline in tourism; (3) such harms can be sufficiently linked to the Executive Order; and (4) the State would not suffer the harms to its proprietary interests in the absence of implementation of the Executive Order. *See* TRO 21. These preliminary findings apply to each of the challenged Sections of the Executive Order. Accordingly, at this early stage of the litigation, the State has satisfied the requirements of Article III standing.

C. Dr. Elshikh Has Standing

Dr. Elshikh likewise has met his preliminary burden to establish standing to assert an Establishment Clause violation. *See* TRO 22–25. “The standing

question, in plain English, is whether adherents to a religion have standing to challenge an official condemnation by their government of their religious views[.] Their ‘personal stake’ assures the ‘concrete adverseness’ required.” *See Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d 1043, 1048–49 (9th Cir. 2010) (en banc). Dr. Elshikh attests that the effects of the Executive Order are “devastating to me, my wife and children.” Elshikh Decl. ¶ 6, Mot. for TRO, Ex. A, ECF No. 66-1; *see also id.* ¶¶ 1, 3 (“I am deeply saddened by the message that both [Executive Orders] convey—that a broad travel-ban is ‘needed’ to prevent people from certain Muslim countries from entering the United States.”); SAC ¶ 90 (“Muslims in the Hawai‘i Islamic community feel that the new Executive Order targets Muslim citizens because of their religious views and national origin. Dr. Elshikh believes that, as a result of the new Executive Order, he and members of the Mosque will not be able to associate as freely with those of other faiths.”). The alleged injuries are sufficiently personal, concrete, particularized, and actual to confer standing in the Establishment Clause context. *E.g.*, SAC ¶¶ 88–90; Elshikh Decl. ¶¶ 1, 3. These injuries have already occurred and will continue to occur if the Executive Order is implemented and enforced; the injuries are neither contingent nor speculative.

The final two aspects of Article III standing—causation and redressability—are also satisfied with respect to each of the Executive Order’s challenged Sections. Dr. Elshikh’s injuries are traceable to the new Executive Order and, if Plaintiffs prevail, a decision enjoining portions of the Executive Order would redress that injury. *See Catholic League*, 624 F.3d at 1053. At this preliminary stage of the litigation, Dr. Elshikh has accordingly carried his burden to establish standing under Article III.

The Court turns to the factors for granting preliminary injunctive relief.

II. Legal Standard: Preliminary Injunctive Relief

The underlying purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm. *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 439 (1974); *see also Reno Air Racing Ass’n v. McCord*, 452 F.3d 1126, 1130–31 (9th Cir. 2006).

The Court applies the same standard for issuing a preliminary injunction as it did when considering Plaintiffs’ Motion for TRO. *See Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A “plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the

balance of equities tips in his favor, and that an injunction is in the public interest.”

Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (citation omitted).

The Court, in its discretion, may convert a temporary restraining order into a preliminary injunction. *See, e.g., ABX Air, Inc. v. Int’l Bhd. of Teamsters*, No. 1:16-CV-1096, 2016 WL 7117388, at *5 (S.D. Ohio Dec. 7, 2016) (granting motion to convert TRO into a preliminary injunction because “Defendants fail to allege any material fact suggesting that, if a hearing were held, this Court would reach a different outcome”; “[n]othing has occurred to alter the analysis in the Court’s original TRO, and since this Court has already complied with the requirements for the issuance of a preliminary injunction, it can simply convert the nature of its existing Order.”); *Productive People, LLC v. Ives Design*, No. CV-09-1080-PHX-GMS, 2009 WL 1749751, at *3 (D. Ariz. June 18, 2009) (“Because Defendants have given the Court no reason to alter the conclusions provided in its previous Order [granting a TRO], and because ‘[t]he standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction,’ the Court will enter a preliminary injunction.” (quoting *Brown Jordan Int’l, Inc. v. Mind’s Eye Interiors, Inc.*, 236 F. Supp. 2d 1152, 1154 (D. Haw. 2002))). Here, the parties were afforded notice, a full-briefing on the

merits, and a hearing both prior to entry of the original TRO and prior to consideration of the instant Motion.

For the reasons that follow and as set forth more fully in the Court's TRO, Plaintiffs have met their burden here.

III. Analysis of Factors: Likelihood of Success on the Merits

The Court's prior finding that Plaintiffs sufficiently established a likelihood of success on the merits of their Count I claim that the Executive Order violates the Establishment Clause remains undisturbed. *See* TRO 30–40.³

A. Establishment Clause

Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971), provides the benchmark for evaluating whether governmental action is consistent with or at odds with the Establishment Clause. According to *Lemon*, government action (1) must have a primary secular purpose, (2) may not have the principal effect of advancing or inhibiting religion, and (3) may not foster excessive entanglement with religion. *Id.* “Failure to satisfy any one of the three prongs of the *Lemon* test is sufficient to invalidate the challenged law or practice.” *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1076–77 (9th Cir. 2010).

³The Court again expresses no view on Plaintiffs' additional statutory or constitutional claims.

The Court determined in its TRO that the preliminary evidence demonstrates the Executive Order's failure to satisfy *Lemon's* first test. See TRO 33–36. The Court will not repeat that discussion here. As no *new* evidence contradicting the purpose identified by the Court has been submitted by the parties since the issuance of the March 15, 2017 TRO, there is no reason to disturb the Court's prior determination.

Instead, the Federal Defendants take a different tack. They once more urge the Court not to look beyond the four corners of the Executive Order. According to the Government, the Court must afford the President deference in the national security context and should not “‘look behind the exercise of [the President’s] discretion’ taken ‘on the basis of a facially legitimate and bona fide reason.’” Govt. Mem. in Opp’n to Mot. for TRO 42–43 (quoting *Kliendienst v. Mandel*, 408 U.S. 753, 770 (1972)), ECF No. 145. No binding authority, however, has decreed that Establishment Clause jurisprudence ends at the Executive’s door. In fact, *every court* that has considered whether to apply the Establishment Clause to either the Executive Order or its predecessor (regardless of the ultimate outcome) has done so.⁴ Significantly, this Court is constrained by the binding precedent and guidance

⁴See *Sarsour v. Trump*, No. 1:17-cv-00120 AJT-IDD, 2017 WL 1113305, at *11 (E.D. Va. Mar. 27, 2017) (“[T]he Court rejects the Defendants’ position that since President Trump has offered a legitimate, rational, and non-discriminatory purpose stated in EO-2, this Court must confine its

offered in *Washington*. There, citing *Lemon*, the Ninth Circuit clearly indicated that the Executive Order is subject to the very type of secular purpose review conducted by this Court in considering the TRO. *Washington*, 847 F.3d at 1167–68; *id.* at 1162 (stating that *Mandel* does not apply to the “promulgation of sweeping immigration policy” at the “highest levels of the political branches”).

The Federal Defendants’ arguments, advanced from the very inception of this action, make sense from this perspective—where the “historical context and ‘the specific sequence of events leading up to’” the adoption of the challenged Executive Order are as full of religious animus, invective, and obvious pretext as is the record here, it is no wonder that the Government urges the Court to altogether ignore that history and context. *See McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). The Court, however, declines to do so. *Washington*, 847

analysis of the constitutional validity of EO-2 to the four corners of the Order.”) (citations omitted); *Int’l Refugee Assistance Project v. Trump*, No. TDC-17-0361, 2017 WL 1018235, at *16 (D. Md. Mar. 16, 2017) (“Defendants argue that because the Establishment Clause claim implicates Congress’s plenary power over immigration as delegated to the President, the Court need only consider whether the Government has offered a ‘facially legitimate and bona fide reason’ for its action. *Mandel*, 408 U.S. at 777 [A]lthough ‘[t]he Executive has broad discretion over the admission and exclusion of aliens,’ that discretion ‘may not transgress constitutional limitations,’ and it is ‘the duty of the courts’ to ‘say where those statutory and constitutional boundaries lie.’ *Abourezk v. Reagan*], 785 F.2d [1043,] 1061 [(D.C. Cir. 1986)].”); *Aziz v. Trump*, No. 1:17-CV-116 LMB-TCB, 2017 WL 580855, at *8 (E.D. Va. Feb. 13, 2017) (“Moreover, even if *Mandel*[, 408 U.S. at 770,] did apply, it requires that the proffered executive reason be ‘bona fide.’ As the Second and Ninth Circuits have persuasively held, if the proffered ‘facially legitimate’ reason has been given in ‘bad faith,’ it is not ‘bona fide.’ *Am. Academy of Religion v. Napolitano*, 573 F.3d 115, 126 (2d Cir. 2009); *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008). That leaves the Court in the same position as in an ordinary secular purpose case: determining whether the proffered reason for the EO is the real reason.”)).

F.3d at 1167 (“It is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims.”). The Court will not crawl into a corner, pull the shutters closed, and pretend it has not seen what it has.⁵ The Supreme Court and this Circuit both dictate otherwise, and that is the law this Court is bound to follow.

B. Future Executive Action

The Court’s preliminary determination does not foreclose future Executive action. The Court recognizes that it is not the case that the Administration’s past conduct must forever taint any effort by it to address the security concerns of the nation. *See* TRO 38–39. Based upon the preliminary record available, however, one cannot conclude that the actions taken during the interval between revoked Executive Order No. 13,769 and the new Executive Order represent “*genuine* changes in constitutionally significant conditions.” *McCreary*, 545 U.S. at 874 (emphasis added).

The Government emphasizes that “the Executive Branch revised the new Executive Order to avoid any Establishment Clause concerns,” and, in particular,

⁵*See Int’l Refugee Assistance Project*, 2017 WL 1018235, at *14 (“Defendants have cited no authority concluding that a court assessing purpose under the Establishment Clause may consider only statements made by government employees at the time that they were government employees. Simply because a decisionmaker made the statements during a campaign does not wipe them from the ‘reasonable memory’ of a ‘reasonable observer.’” (quoting *McCreary*, 545 U.S. at 866)).

removed the preference for religious minorities provided in Executive Order No. 13,769. Mem. in Opp'n 21, ECF No. 251. These efforts, however, appear to be precisely what Plaintiffs characterize them to be: efforts to “sanitize [Executive Order No. 13,769’s] refugee provision in order to ‘be responsive to a lot of very technical issues that were brought up by the court.’” Mem. in Supp. of Mot. to Convert TRO to Prelim. Inj. 20, ECF No. 238-1 [hereinafter PI Mem.] (quoting SAC ¶ 74(a)). Plaintiffs also direct the Court to the President’s March 15, 2017 description of the Executive Order as “a watered-down version of the first one.” PI Mem. 20 (citing Katyal Decl. 7, Ex. A, ECF No. 239-1). “[A]n implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense.” *McCreary*, 545 U.S. at 874.

IV. Analysis of Factors: Irreparable Harm

Irreparable harm may be *presumed* with the finding of a violation of the First Amendment. See *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))). Because Dr. Elshikh is likely to succeed on the merits of his Establishment Clause claim, the Court finds that the second factor of the *Winter* test is satisfied—that Dr. Elshikh is likely to suffer irreparable, ongoing, and significant

injury in the absence of a preliminary injunction. *See* TRO 40 (citing SAC ¶¶ 88–90; Elshikh Decl. ¶¶ 1, 3).

V. Analysis of Factors: Balance of Equities And Public Interest

The final step in determining whether to grant Plaintiffs’ Motion is to assess the balance of equities and examine the general public interests that will be affected. The Court acknowledges Defendants’ position that the Executive Order is intended “to protect the Nation from terrorist activities by foreign nationals admitted to the United States[.]” Exec. Order, preamble. National security is unquestionably of vital importance to the public interest. The same is true with respect to affording appropriate deference to the President’s constitutional and statutory responsibilities to set immigration policy and provide for the national defense. Upon careful consideration of the totality of the circumstances, however, the Court reaffirms its prior finding that the balance of equities and public interest weigh in favor of maintaining the status quo. As discussed above and in the TRO, Plaintiffs have shown a strong likelihood of succeeding on their claim that the Executive Order violates First Amendment rights under the Constitution. *See* TRO 41–42; *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (“[I]t is *always* in the public interest to prevent the violation of a party’s constitutional rights.” (emphasis added) (citing *Elrod*, 427 U.S. at 373)).

VI. Scope of Preliminary Injunction: Sections 2 And 6

Having considered the constitutional injuries and harms discussed above, the balance of equities, and public interest, the Court hereby grants Plaintiffs' request to convert the existing TRO into a preliminary injunction. The requested nationwide relief is appropriate in light of the likelihood of success on Plaintiffs' Establishment Clause claim. *See, e.g., Texas v. U.S.*, 809 F.3d 134, 188 (5th Cir. 2015) (“[Because] the Constitution vests [district courts] with ‘the judicial Power of the United States’ . . . , [i]t is not beyond the power of the court, in appropriate circumstances, to issue a nationwide injunction.” (citing U.S. Const. art. III, § 1)), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016); *see also Washington*, 847 F.3d at 1167 (“Moreover, even if limiting the geographic scope of the injunction would be desirable, the Government has not proposed a workable alternative form of the TRO that accounts for the nation’s multiple ports of entry and interconnected transit system and that would protect the proprietary interests of the States at issue here while nevertheless applying only within the States’ borders.”).

The Government insists that the Court, at minimum, limit any preliminary injunction to Section 2(c) of the Executive Order. It makes little sense to do so. That is because the entirety of the Executive Order runs afoul of the Establishment Clause where “openly available data support[] a commonsense conclusion that a

religious objective permeated the government’s action,” and not merely the promulgation of Section 2(c). *McCreary*, 545 U.S. at 863; see SAC ¶¶ 36–38, 58, 107; TRO 16, 24–25, 42. Put another way, the historical context and evidence relied on by the Court, highlighted by the comments of the Executive and his surrogates, does not parse between Section 2 and Section 6, nor does it do so between subsections within Section 2. Accordingly, there is no basis to narrow the Court’s ruling in the manner requested by the Federal Defendants.⁶ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 539–40 (1993) (“[It would be] implausible to suggest that [Section 2(c)] but not the [other Sections] had as [its] object the suppression of [or discrimination against a] religion. . . . We need not decide whether the Ordinance 87–72 could survive constitutional scrutiny if it existed separately; it must be invalidated because it functions, with the rest of the enactments in question, to suppress Santeria religious worship.”).

⁶Plaintiffs further note that the Executive Order “bans refugees at a time when the publicized refugee crisis is focused on Muslim-majority nations.” Reply in Supp. of Mot. to Convert TRO to Prelim. Inj. 14. Indeed, according to Pew Research Center analysis of data from the State Department’s Refugee Processing Center, a total of 38,901 Muslim refugees entered the United States in fiscal year 2016, accounting for nearly half of the almost 85,000 refugees who entered the country during that period. See Br. of Chicago, Los Angeles, New York, Philadelphia, & Other Major Cities & Counties as Amici Curiae in Supp. of Pls.’ Mot. to Convert TRO to Prelim. Inj. 12, ECF No. 271-1 (citing Phillip Connor, *U.S. Admits Record Number of Muslim Refugees in 2016*, Pew Research Center (Oct. 5, 2016), <http://www.pewresearch.org/fact-tank/2016/10/05/u-s-admits-record-number-of-muslim-refugees-in-2016>). “That means the U.S. has admitted the highest number of Muslim refugees of any year since date of self-reported religious affiliations first became publicly available in 2002.” *Id.*

The Court is cognizant of the difficult position in which this ruling might place government employees performing what the Federal Defendants refer to as “inward-facing” tasks of the Executive Order. Any confusion, however, is due in part to the Government’s failure to provide a workable framework for narrowing the scope of the enjoined conduct by specifically identifying those portions of the Executive Order that are in conflict with what it merely argues are “internal governmental communications and activities, most if not all of which could take place in the absence of the Executive Order but the status of which is now, at the very least, unclear in view of the current TRO.” Mem. in Opp’n 29. The Court simply cannot discern, on the present record, a method for determining which enjoined provisions of the Executive Order are causing the alleged confusion asserted by the Government. *See, e.g.*, Mem. in Opp’n 28 (“[A]n internal review of procedures obviously can take place independently of the 90-day suspension-of-entry provision (though doing so would place additional burdens on the Executive Branch, which is one of the several reasons for the 90-day suspension (citing Exec. Order No. 13,780, § 2(c)). Without more, “even if the [preliminary injunction] might be overbroad in some respects, it is not our role to try, in effect, to rewrite the Executive Order.” *Washington*, 847 F.3d at 1167.

CONCLUSION

Based on the foregoing, Plaintiffs' Motion to Convert Temporary Restraining Order to A Preliminary Injunction is hereby GRANTED.

PRELIMINARY INJUNCTION

It is hereby ADJUDGED, ORDERED, and DECREED that:

Defendants and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them, are hereby enjoined from enforcing or implementing Sections 2 and 6 of the Executive Order across the Nation. Enforcement of these provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

No security bond is required under Federal Rule of Civil Procedure 65(c).

The Court declines to stay this ruling or hold it in abeyance should an appeal of this order be filed.

IT IS SO ORDERED.

Dated: March 29, 2017 at Honolulu, Hawai'i.




Derrick K. Watson
United States District Judge

State of Hawaii, et al. v. Trump, et al.; Civ. No. 17-00050 DKW-KSC; **ORDER GRANTING MOTION TO CONVERT TEMPORARY RESTRAINING ORDER TO A PRELIMINARY INJUNCTION**