

The Honorable James L. Robart

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

STATE OF WASHINGTON and
STATE OF MINNESOTA,

Plaintiffs,

v.

DONALD TRUMP, in his official capacity as
President of the United States; U.S.
DEPARTMENT OF HOMELAND
SECURITY; JOHN F. KELLY, in his official
capacity as Secretary of the Department of
Homeland Security; REX W. TILLERSON, in
his official capacity as Secretary of State; and
the UNITED STATES OF AMERICA,

Defendants.

No. 2:17-cv-00141 (JLR)

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' EMERGENCY
MOTION TO ENFORCE
PRELIMINARY INJUNCTION**

Noted For Consideration:
March 14, 2017

TABLE OF CONTENTS

1

2 INTRODUCTION 1

3 I. The Court’s Prior Order, By Its Own Terms, Does Not Apply to the New

4 Executive Order..... 1

5 II. Judicial Relief Entered As To an Old Policy Does Not Extend to a New

6 Policy..... 5

7 III. The Policies in the New Executive Order are Substantially Different Than

8 Those in the Old Executive Order. 6

9 IV. The New Executive Order Is Lawful..... 11

10 CONCLUSION 13

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION

1
2 Plaintiffs, the States of Washington and Minnesota, assert that this Court’s existing
3 preliminary injunction—prohibiting the enforcement of five particular sections of Executive
4 Order No. 13,769—should be read as extending to the Government’s new Executive Order,
5 which was developed and promulgated following the Ninth Circuit’s invitation for the Executive
6 Branch to revise the prior Executive Order. *See Washington v. Trump*, 847 F.3d 1151, 1167 (9th
7 Cir. 2017). Plaintiffs are wrong: this Court’s order, by its plain terms, does not apply to the New
8 Executive Order. And courts routinely hold that relief granted as to prior policies does not extend
9 to new policies that are substantially different.
10

11 Here, the New Executive Order is undoubtedly substantially different, because it
12 addresses *all* of the claims Plaintiffs raised in support of their motion for a temporary restraining
13 order, as well as the concerns expressed by the Ninth Circuit. Thus, the Court’s injunctive order
14 does not, and should not, apply to the New Executive Order. Finally, to the extent there is even
15 any doubt, the Court’s prior order should not be construed as enjoining the New Executive Order
16 given that the New Executive Order is a lawful exercise of the President’s congressionally
17 delegated authority.
18
19

I. THE COURT’S PRIOR ORDER, BY ITS OWN TERMS, DOES NOT APPLY TO THE NEW EXECUTIVE ORDER.

20 Plaintiffs accuse the Government of seeking to evade this Court’s injunction by issuing
21 the New Executive Order. *See* Emergency Mot. to Enforce Prelim. Inj. (“Pls.’ Mot.”), at 1, ECF
22 No. 119. Remarkably, however, Plaintiffs nowhere acknowledge the actual *text* of the Court’s
23 prior order, which is of course the starting point for determining its scope. *Cf. Travelers Indem.*
24 *Co. v. Bailey*, 557 U.S. 137, 150–51 (2009) (“[A] court should enforce a court order, a public
25
26
27
28

1 governmental act, according to its unambiguous terms.”); Fed. R. Civ. P. 65(d)(1) (“Every order
2 granting an injunction and every restraining order must . . . state its terms specifically[.]”).

3 The Court’s injunctive order expressly applied only to Executive Order No. 13,769. The
4 order defined the phrase “Executive Order” as referring to “the Executive Order of January 27,
5 2017, entitled ‘Protecting the Nation from Foreign Terrorist Entry into the United States[.]’”
6 ECF No. 52, at 2. The prohibitions on the Government’s conduct were then expressly framed
7 with reference to that particular Executive Order. *See id.* at 5 (“Federal Defendants . . . are
8 hereby ENJOINED and RESTRAINED from . . . [e]nforcing Section 3(c) of *the Executive*
9 *Order[.]*” (emphasis added)). The plain terms of the injunction thus prohibited only actions taken
10 pursuant to that particular Executive Order, and the Government has complied fully with that
11 prohibition. But the Court’s injunction did not prohibit actions taken pursuant to other sources
12 of authority, including any revised or replacement Executive Orders.

13 Notably, the Court’s injunction did not purport to restrain any underlying activities or
14 conduct. For example, the order did not state that the Government must continue processing
15 refugee admissions, or that the Government cannot impose any type of temporary suspension on
16 the entry of foreign nationals. Rather, the Court only enjoined those actions insofar as they were
17 taken pursuant to particular sections of Executive Order No. 13,769. That stands in contrast to
18 other injunctive orders entered by courts, which did purport to regulate the Government’s primary
19 conduct. *See, e.g.*, Decision & Order at 2, *Darweesh v. Trump*, No. 17-cv-480 (AMD) (E.D.N.Y.
20 Jan. 28, 2017), ECF No. 8 (enjoining Government officials “from, in any manner or by any
21 means, removing individuals with refugee applications approved . . . as part of the U.S. Refugee
22 Admissions Program, holders of valid immigrant and non-immigrant visas, and other individuals
23
24
25
26
27
28

1 from Iraq, Syria, Iran, Sudan, Libya, Somalia, and Yemen legally authorized to enter the United
2 States”).

3 Plaintiffs are wrong, therefore, to frame the issue as “[w]hen a court orders a defendant
4 to stop certain conduct, the defendant cannot proceed by stopping only some of the enjoined
5 conduct.” Pls.’ Mot. at 6. Defendants do not dispute that a partial violation of an injunction is
6 still a violation. But Plaintiffs’ framing simply begs the question by assuming that the New
7 Executive Order’s provisions do, in fact, qualify as “enjoined conduct” under the terms of this
8 Court’s injunction. The scope of that injunction is the very issue that Plaintiffs ask this Court to
9 decide. And based on its plain terms, that injunction prohibits only enforcement of certain
10 sections of a particular Executive Order. The injunction does not prohibit any underlying
11 conduct, nor does it prevent the Government from developing and enforcing a substantially
12 different Executive Order. *Cf. Pratt v. Rowland*, 917 F.2d 566 (9th Cir. 1990) (table) (holding
13 that an injunction requiring state to transfer inmate out of a prison did not restrict the state’s
14 ability to transfer the inmate to that prison again in the future).

15 Plaintiffs’ motion argues that the scope of the Court’s order must be interpreted not only
16 by its “strict letter,” but also according to “the spirit of the injunction[.]” Pls.’ Mot. at 6 (quoting
17 *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y*, 774 F.3d 935, 949 (9th Cir.
18 2014)). As an initial matter, that gets the law exactly backwards when it comes to interpreting
19 injunctions affecting Government policies. *See Clark v. Coye*, 60 F.3d 600, 604 (9th Cir. 1995)
20 (holding that the district court abused its discretion in concluding that its prior injunction applied
21 to a new state program, because “[w]hen the Department is expected to conform its behavior to
22 the injunction . . . , that injunction must be clear enough on its face to give the Department notice
23 that the behavior is forbidden”).

1 In any event, the “spirit” of the injunction here only confirms that this Court’s injunction
2 does not extend to the subsequently issued New Executive Order. The Ninth Circuit expressly
3 invited the “political branches . . . to make appropriate distinctions” and revise the scope of the
4 Executive Order. *Washington*, 847 F.3d at 1167. That invitation is wholly inconsistent with
5 Plaintiffs’ argument that, even after the Executive Branch substantially revised the Executive
6 Order, the Government nonetheless remains enjoined from enforcing the New Executive Order.
7 Moreover, this Court likewise made clear that its injunction was addressing only a “narrow
8 question” about “whether it is appropriate to enter a TRO against *certain actions* taken by the
9 Executive *in the context of this specific lawsuit*.” ECF No. 52, at 7 (emphases added). Plainly
10 the Court’s injunction does not extend to the future Executive Order, which did not yet exist,
11 much less was it part of “this specific lawsuit” at that time. *Id.*

14 Finally, the injunction’s narrow scope is further confirmed by Plaintiffs’ own actions and
15 this Court’s Order of March 10, 2017. *See* ECF No. 117. After reviewing Defendants’ Notice
16 of Filing of Executive Order (ECF No. 108) and Plaintiffs’ Responses to that Notice (ECF
17 Nos. 113, 114), the Court issued an order “declin[ing] to resolve the apparent dispute between
18 the parties concerning the applicability of the court’s injunctive order to the New Executive Order
19 until such time as an amended complaint that addresses the New Executive Order is properly
20 before the court.” ECF No. 117, at 3. Plaintiffs thereafter sought leave to file a Second Amended
21 Complaint challenging the New Executive Order. *See* ECF No. 118.

23 These events wholly undermine Plaintiffs’ theory that the Court’s injunction applies to
24 the New Executive Order. As this Court already noted, up until yesterday Plaintiffs had not even
25 filed a Complaint challenging the New Executive Order. *See* ECF No. 117, at 3. *A fortiori*, then,
26 the Court’s prior injunction cannot apply to the New Executive Order that did not yet exist and
27
28

1 was not yet being challenged in “this specific lawsuit.” ECF No. 52, at 7; *see also John B. Hull,*
2 *Inc. v. Waterbury Petrol. Prods., Inc.*, 588 F.2d 24, 30 (2d Cir. 1978) (“A decree cannot enjoin
3 conduct about which there has been no complaint[.]” (modifications omitted) (quoting *United*
4 *States v. Spectro Foods Corp.*, 544 F.2d 1175, 1180 (3d Cir. 1976)); *PBM Prods., LLC v. Mead*
5 *Johnson & Co.*, 639 F.3d 111, 128 (4th Cir. 2011) (an injunction may “address only the
6 circumstances of the case”). By its plain terms, therefore, this Court’s prior injunction does not
7 and cannot extend to the New Executive Order.

9 **II. JUDICIAL RELIEF ENTERED AS TO AN OLD POLICY DOES NOT EXTEND TO A NEW**
10 **POLICY.**

11 The limited scope of this Court’s injunction is consistent with well-established case law
12 holding that judicial relief entered as to an old government policy does not carry over to a new,
13 substantially revised version of that policy. *See, e.g., Fusari v. Steinberg*, 419 U.S. 379 (1975);
14 *Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412 (1972).

15 Plaintiffs seek to discount these cases through strained interpretations of them. With
16 respect to *Fusari*, Plaintiffs assert that “[t]he case is an example of appellate restraint” in which
17 the Supreme Court “declined to rule in the first instance” on a recently revised statutory scheme.
18 Pls.’ Mot. at 11. But the Supreme Court did not simply remand the case to the district court for
19 additional proceedings regarding the new scheme; it also *vacated* the district court’s judgment as
20 to the old scheme. *See Fusari*, 419 U.S. at 390. Thus, the case squarely holds that when a new
21 policy is enacted, judicial relief as to the old policy is no longer effective.

22 Similarly, the Court in *Diffenderfer* held that a judgment entered as to an old policy must
23 be vacated once the policy challenged in the complaint has been replaced. *See* 404 U.S. at 414-
24 15 (“The only relief sought in the complaint was a declaratory judgment that the now repealed
25 [statute] is unconstitutional as applied to a church parking lot . . . and an injunction against its
26
27
28

1 application to said lot. This relief is, of course, inappropriate now that the statute has been
2 repealed.”). The Court vacated the judgment as to the old policy, notwithstanding the plaintiffs’
3 potential desire to challenge the new policy through an amended complaint. *See id.* at 415.
4 Again, that holding is directly applicable here. At the time this Court issued its injunction,
5 Plaintiffs’ operative complaint challenged only Executive Order No. 13,769. But that Executive
6 Order is being revoked and replaced as of 12:01 a.m., eastern daylight time on March 16, 2017.
7 Although Plaintiffs here seek to challenge the New Executive Order through their Second
8 Amended Complaint, the Court’s prior relief as to the Old Executive Order does not apply to the
9 New Executive Order. *See id.* (“[W]e vacate the judgment of the District Court and remand the
10 case to the District Court with leave to the appellants to amend their pleadings.”).

11
12
13 In short, Plaintiffs’ attempts to undermine these two cases are unpersuasive. These cases
14 (and others) make clear that judicial relief entered against a prior policy does not apply to a new,
15 substantially revised policy. *See also, e.g., Chem. Producers & Distributors Ass’n v. Helliker*,
16 463 F.3d 871, 875 (9th Cir. 2006) (“Where the law has been ‘sufficiently altered so as to present
17 a substantially different controversy from the one the District Court originally decided,’ there is
18 ‘no basis for concluding that the challenged conduct is being repeated.’” (modifications omitted)
19 (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508
20 U.S. 656, 662 n.3 (1993))). Here, as discussed below, the New Executive Order undoubtedly
21 raises a distinct set of issues from the claims Plaintiffs sought to bring against the Old Executive
22 Order.
23

24
25 **III. THE POLICIES IN THE NEW EXECUTIVE ORDER ARE SUBSTANTIALLY DIFFERENT THAN
THOSE IN THE OLD EXECUTIVE ORDER.**

26 Far from merely “renumbering the polic[ies] enjoined” in the Old Executive Order, Pls.’
27 Mot. at 8, the New Executive Order explicitly revokes the Old Executive Order and replaces it
28

1 with substantially revised policies. The changes made in the New Executive Order address *all*
2 of the specific claims raised by Plaintiffs in their earlier effort to enjoin the Old Executive Order,
3 as well as the concerns expressed by the Ninth Circuit in declining to stay this Court's injunction.
4 Because the New Executive Order is substantially different than the Old Executive Order, the
5 Court's injunction does not extend to the New Executive Order and Defendants should not be
6 prohibited from enforcing it on its effective date as planned.
7

8 In seeking a temporary restraining order against enforcement of the Old Executive Order,
9 Plaintiffs challenged four discrete aspects of that Executive Order. *See* ECF No. 19-1. With
10 respect to the 90-day suspension of entry for foreign nationals of the seven designated countries,
11 Plaintiffs claimed, first, that the provision unlawfully discriminated against "green-card holders
12 currently residing in the United States on the basis of national origin," *id.* at 6, and, second, that
13 the provision violated the due process rights of "legal permanent residents," "visaholders," and
14 individuals seeking asylum, *id.* at 14-18. With respect to the Old Executive Order's refugee
15 provisions, Plaintiffs claimed, first, that the Old Executive Order impermissibly "single[d] out
16 refugees from Syria for differential treatment," *id.* at 7, and, second, that it discriminated based
17 on religion by prioritizing religious-persecution claims where "the religion of the individual is a
18 minority religion in the individual's country of nationality," *id.* at 7; *see id.* 12-13.
19

20
21 Plaintiffs reiterated the scope of these same claims in the Ninth Circuit. *See* States' Resp.
22 to Emergency Mot. Under Circuit Rule 27-3 for Admin. Stay & Mot. for Stay Pending Appeal
23 ("Pls.' Appellate Br."), *Washington v. Trump*, No. 17-35105, ECF No. 28-1 (9th Cir. Feb. 6,
24 2017). Plaintiffs invoked the due process rights of "lawful permanent residents" and
25 "visaholders" in challenging the 90-day suspension of entry. *Id.* at 14-16; *id.* at 10 ("This case .
26 . . involves longtime residents who are here and have constitutional rights."); *see also*
27 . . involves longtime residents who are here and have constitutional rights."); *see also*
28

1 *Washington*, 847 F.3d at 1165 (summarizing plaintiffs’ due process arguments as relating solely
2 to “lawful permanent residents,” “non-immigrant visaholders,” and “refugees seeking asylum”).
3 And, in challenging the Old Executive Order’s refugee provisions, Plaintiffs attacked the
4 instruction to prioritize religious-persecution claims of refugees that practice minority religions.
5 Pls.’ Appellate Br. at 20; *see id.* at 18 (“The Order’s refugee provisions explicitly distinguish
6 between members of religious faiths,” “favor[ing] Christian refugees at the expense of
7 Muslims.”); *see also Washington*, 847 F.3d at 1167-68 (noting that Plaintiffs’ challenge to
8 “sections 5(b) and 5(e) of the [Old Executive] Order,” which related to prioritizing religious-
9 persecution claims of refugees that practice minority religions, “present[ed] significant
10 constitutional questions”).
11
12

13 Responding to the Ninth Circuit’s invitation to “rewrite the Executive Order” to “make
14 appropriate distinctions,” *id.* at 1167—and at the joint urging of the Attorney General and
15 Secretary of Homeland Security¹—the President issued the New Executive Order. The New
16 Executive Order contains substantially revised policies that address all of the claims Plaintiffs
17 raised in support of their motion for a temporary restraining order, as well as the concerns
18 expressed by the Ninth Circuit. The New Executive Order’s 90-day suspension of entry does not
19 apply to individuals whose alleged due process rights Plaintiffs previously asserted: lawful
20 permanent residents, visaholders, and foreign nationals who are in the United States on the
21 effective date of the New Executive Order. Order § 3(a)-(b). And the New Executive Order
22 makes clear that it does not “limit the ability of an individual to seek asylum.” *Id.* § 12(e). The
23 New Executive Order also omits the refugee-related provisions of the Old Executive Order that
24
25
26

27 ¹ Joint Ltr. to President (Mar. 6, 2017),
28 [https://www.dhs.gov/sites/default/files/publications/17_0306_S1_DHS-DOJ-POTUS-
letter_0.pdf](https://www.dhs.gov/sites/default/files/publications/17_0306_S1_DHS-DOJ-POTUS-letter_0.pdf).

1 Plaintiffs claimed were problematic. The New Executive Order does not contain a Syria-specific
2 refugee provision, and it no longer instructs agencies to prioritize the religious-persecution claims
3 of refugees practicing minority religions.²
4

5 Plaintiffs attempt to make much of the Ninth Circuit’s statement that Plaintiffs “have
6 *potential* claims regarding *possible* due process rights of . . . [visa] applicants who have a
7 relationship with a U.S. resident or an institution that might have rights of its own to assert.”
8 Pls.’ Mot. at 8-9 (emphasis added). Even assuming United States residents or institutions had
9 due process rights in another’s visa application, *but see Kerry v. Din*, 135 S. Ct. 2128, 2131
10 (2015) (plurality opinion) (“There is no such constitutional right.”); *Santos v. Lynch*, 2016 WL
11 3549366, at *3-4 (E.D. Cal. June 29, 2016) (refusing to extend *Din* to relationship between parent
12 and adult child); *L.H. v. Kerry*, No. 14-06212, slip op. at 3-4 (C.D. Cal. Jan. 26, 2017) (same for
13 daughter, son-in-law, and grandson), the New Executive Order addresses this concern by
14 providing a waiver process that is more robust and specific than that provided in the Old
15 Executive Order, that is integrated into the visa application process, and that provides whatever
16 process is due, *see* Order § 3(c).
17
18

19 The New Executive Order specifies that consular officers (and the U.S. Customs and
20 Border Protection Commissioner) may grant case-by-case waivers where denying entry “would
21 cause undue hardship” and “entry would not pose a threat to national security and would be in
22 the national interest.” *Id.* To guide consular officers’ exercise of discretion, the New Executive
23 Order provides a nonexhaustive list of circumstances where a waiver could be considered. *Id.*
24

25
26 ² The New Executive Order contains additional substantive changes as well. Among other
27 things, it removes Iraq from the list of countries whose nationals are covered by the 90-day
28 suspension on entry, and it provides a detailed explanation of the risks it seeks to address. *See*
generally Defs.’ Notice of Filing of Executive Order, ECF No. 108.

1 This list expands significantly on the Old Executive Order’s waiver provisions. Finally, the New
2 Executive Order makes clear that requests for waivers will be processed “as part of the visa
3 issuance process,” *id.*, such that “[a]n individual who wishes to apply for a waiver should apply
4 for a visa and disclose during the visa interview any information that might qualify the individual
5 for a waiver,” U.S. Dep’t of State, Executive Order on Visas (Mar. 6, 2017),
6 <https://travel.state.gov/content/travel/en/news/important-announcement.html>.
7

8 Thus, contrary to Plaintiffs’ assertion, the waiver provisions in the New Order are not
9 “materially identical” to those in the Old Executive Order. Pls.’ Mot. at 10. Indeed, the changes
10 made in the New Executive Order eliminate the only potential shortcomings the Ninth Circuit
11 identified in the Old Executive Order’s waiver provisions. *See Washington*, 847 F.3d at 1169
12 (stating that the government had not explained how those provisions “would function in
13 practice,” including “who would make th[e] determination, and when”). And the new waiver
14 provisions provide more than ample process for the “*potential* claims regarding *possible* due
15 process rights of . . . [visa] applicants” about whom Plaintiffs have expressed concern—*i.e.*, those
16 with a “relationship with a U.S. resident or an institution.” *Washington*, 847 F.3d at 1166
17 (emphasis added); *see also* Pls. Mot. at 7.
18
19

20 In short, the policy changes in the New Executive Order are far from “minor.” Pls.’ Mot.
21 at 8. They instead reflect substantial modifications that address *all* of the particular challenges
22 Plaintiffs brought when seeking expedited relief against the Old Executive Order. *Cf. White v.*
23 *Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000) (holding that prior claim for injunctive relief was moot
24 once defendant agency issued a new policy that “addresses all of the objectionable measures that
25 [government] officials took against the plaintiffs in this case”). At the very least, the New
26 Executive Order’s revisions reflect that “the law has been ‘sufficiently altered so as to present a
27
28

1 substantially different controversy from the one the District Court originally decided[.]”
2 *Helliker*, 463 F.3d at 875. This Court’s injunction, therefore, does not prevent Defendants from
3 enforcing the New Executive Order beginning on its effective date.
4

5 **IV. THE NEW EXECUTIVE ORDER IS LAWFUL.**

6 In any event, the Court’s injunction should not be extended to the New Executive Order
7 because the New Executive Order is entirely lawful.

8 First, the New Executive Order does not violate the Due Process Clause. The only
9 persons subject to the New Executive Order are foreign nationals outside the United States with
10 no visa or other authorization to enter this country. Order § 3(a)-(b). The Supreme Court “has
11 long held that an alien seeking initial admission to the United States requests a privilege and has
12 no constitutional rights regarding his application.” *Landon*, 459 U.S. at 32; *see Mandel*, 408 U.S.
13 at 762. Such aliens thus have no due-process rights regarding their potential entry. *Angov v.*
14 *Lynch*, 788 F.3d 893, 898 (9th Cir. 2015) (as amended).

15
16 As explained above, the Ninth Circuit noted that U.S. citizens who have an interest in the
17 ability of aliens about to enter the United States have “*potential* claims regarding *possible* due
18 process rights.” *Washington*, 847 F.3d at 1166 (emphasis added). Even if the Due Process Clause
19 applied to such persons, however, their claims would fail. Due process does not require notice
20 or individualized hearings where, as here, the government acts through categorical judgments
21 rather than individual adjudications. *See Bi Metallic Inv. Co. v. State Bd. of Equalization*, 239
22 U.S. 441, 446 (1915); *Yassini v. Crosland*, 618 F.2d 1356, 1363 (9th Cir. 1980). Furthermore,
23 even if some individualized process were required, the New Executive Order’s substantially
24 revised waiver provisions provide more process than the Constitution may require and is similar
25 to the process provided in *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972).
26
27
28

1 Second, the New Executive Order does not discriminate on the basis of religion. As noted
2 above, the only provision of the Old Executive Order that Plaintiffs challenged on religious
3 discrimination grounds (*i.e.*, the instruction to prioritize religious-persecution claims of refugees
4 that practice minority religions) has been removed. And, even if Plaintiffs raise a different or
5 broader challenge to the New Executive Order, *see* ECF No. 118, it would fail. The New
6 Executive Order does not convey any religious message; indeed, it does not reference religion at
7 all. The New Executive Order's 120-day suspension of certain aspects of the Refugee Program
8 applies to all refugees, and its 90-day suspension of entry applies to six countries that Congress
9 and the prior Administration determined posed special risks to the United States. *See* Order §§ 2,
10 3, 6. Importantly, the provisions apply to all refugees and nationals of the relevant countries,
11 regardless of their religion. *See id.*

14 Although the populations of the six countries to which the suspension of entry applies are
15 majority Muslim, that fact does not establish that the suspension's object is to single out Islam.
16 The six countries covered were previously selected by Congress and the Executive through a
17 process that Plaintiffs have never contended was religiously motivated. In addition, those
18 countries represent only a small fraction of the world's 50 Muslim-majority nations, and are
19 home to less than 9% of the global Muslim population.³ Even as to these individuals, the
20 suspension has numerous exceptions and is subject to a comprehensive waiver provision.
21 Finally, the suspension covers every national of those countries, including millions of non-
22 Muslim individuals in those countries, if they meet the New Executive Order's criteria.

27 _____
28 ³ *See* Pew-Templeton Global Religious Futures Project, Muslim Population by Country (2010),
<http://www.globalreligiousfutures.org/religions/muslims>.

1 Plaintiffs try to impugn the New Executive Order using campaign statements. *See* ECF
2 No. 118-1, ¶¶ 141-153. But the Supreme Court has made clear that official action like that
3 challenged here must be adjudged by its “text, legislative history, and implementation of the
4 statute or comparable official act[ion],” not through “judicial psychoanalysis of a drafter’s heart
5 of hearts.” *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) (quoting *Santa Fe Indep.*
6 *Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). Political candidates are not government actors, and
7 statements of what they might attempt to achieve if elected, which are often simplified and
8 imprecise, are not “official act[s].” *Id.*

9
10 In any event, even if such extrinsic evidence could be considered, none of it demonstrates
11 that *this* New Executive Order—adopted after the President took office, and specifically
12 addressing the concerns of the Ninth Circuit—was driven by religious animus. The New
13 Executive Order responds to concerns about the Old Executive Order’s aims by removing the
14 provisions that purportedly drew religious distinctions—erasing any doubt that national security,
15 not religion, is the focus. The New Executive Order also reflects the considered views of the
16 Secretary of State, the Secretary of Homeland Security, and the Attorney General, who
17 announced the New Executive Order and whose motives have not been impugned. Finally, it
18 responds to the concerns expressed by the Judicial Branch in the Ninth Circuit ruling. In short,
19 the President’s efforts to accommodate courts’ concerns while simultaneously fulfilling his
20 constitutional duty to protect the Nation only confirms that the New Executive Order’s intention
21 most emphatically is not to discriminate along religious lines.

22 CONCLUSION

23
24 For these reasons, the Court should deny Plaintiffs’ emergency motion to enforce the
25 preliminary injunction.
26
27
28

1 DATED: March 14, 2017

Respectfully submitted,

2 CHAD A. READLER
3 Acting Assistant Attorney General

4 JENNIFER D. RICKETTS
5 Director, Federal Programs Branch

6 JOHN R. TYLER
7 Assistant Director, Federal Programs Branch

8 /s/ Michelle R. Bennett

MICHELLE R. BENNETT

DANIEL SCHWEI

9 ARJUN GARG

10 BRAD P. ROSENBERG

Trial Attorneys

11 U.S. Department of Justice

12 Civil Division, Federal Programs Branch

20 Massachusetts Avenue, NW

13 Washington, DC 20530

14 Tel: (202) 305-8902

Fax: (202) 616-8470

15 Email: michelle.bennett@usdoj.gov

arjun.garg@usdoj.gov

16 *Attorneys for Defendants*

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2017, I electronically filed the foregoing Opposition to Plaintiffs' Emergency Motion to Enforce Preliminary Injunction using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: March 14, 2017

/s/ Michelle R. Bennett
MICHELLE R. BENNETT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28