THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON; STATE OF CALIFORNIA; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; STATE OF NEW YORK; and STATE OF OREGON,

Plaintiffs,

v.

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

CIVIL ACTION NO. 2:17-cv-00141-JLR

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

Note on Motion Calendar:
October 26, 2017

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I. INTRODUCTION

Defendants continue to claim that President Trump's immigration orders, now including EO3, are "not reviewable." This Court and the Ninth Circuit have already rejected that argument, "which runs contrary to the fundamental structure of our constitutional democracy." *Washington v. Trump*, 847 F.3d 1151, 1161 (9th Cir. 2017) (per curiam). The truth is that this Court has authority to review the States' claims, and the States are likely to prevail on those claims.

The States also meet the other injunctive relief factors. Defendants' primary counter-argument is that the States face no irreparable injury because EO3 has already been enjoined. But they cite no authority for that flawed argument. A "court's power to grant injunctive relief survives discontinuance of the illegal conduct," so long as "there exists some cognizable danger of recurrent violation." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Defendants are actively attempting to continue their unlawful conduct by appealing the recently issued injunctions as to EO3. Given Defendants' pending appeals, the States face a cognizable danger of EO3 being inflicted on them again, and the States should have the opportunity to present their unique harms to the appellate courts soon to consider EO3. The Court should enjoin EO3.

II. ARGUMENT

A. Other Injunctions Are No Bar to This Court Acting

Although Defendants have not moved to stay these proceedings, they claim in passing that "the Court need not even address" any of the issues in the States' motion because "[t]he relevant provisions of [EO3] have already been enjoined nationwide." ECF 205 at 2. If that argument were truly dispositive, it is difficult to fathom why Defendants offer no citations to support it and devote only a sentence to it outside of their introduction. ECF 205 at 23. It is also difficult to fathom why Defendants never raised that argument in the Fourth Circuit when they appealed the injunction entered by the district court in Maryland as to EO2, an injunction that was entered *after* the district court in Hawai'i had already enjoined EO2. *See* Br. For Appellants, *IRAP v. Trump*, No. 17-1351 (4th Cir. 2017), ECF 36 (never mentioning the Hawai'i injunction).

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In any event, Defendants' halfhearted argument is wrong. Courts retain the power to enter injunctive relief, whether preliminary or permanent, even if the conduct challenged has stopped. *See, e.g., SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975) ("[A]ppellate courts have repeatedly cautioned that cessation of illegal activity does not ipso facto justify the denial of an injunction."). As Wright and Miller explain, a contrary rule would lead to the absurd result that entry of a TRO would bar later entry of a preliminary injunction. 11A Charles Alan Wright et al., *Fed. Prac. & Proc. Civ.* § 2948, Westlaw (3d ed. & Suppl. Apr. 2017) (*Grounds for Granting or Denying a Preliminary Injunction*: "If preliminary relief is granted, defendant, by complying, would effect a change in the current situation. Nonetheless, this fact alone should not bar relief."). That is not the law. Instead, to go forward with injunctive relief where the conduct has ceased, "[t]he necessary determination is that there exists some cognizable danger of recurrent violation." *W.T. Grant Co.*, 345 U.S. at 633.

Courts have considered several factors in assessing the danger of recurrent violation. Relevant here, "[a] defendant's persistence in claiming that (and acting as if) his conduct is blameless is an important factor in deciding whether future violations are sufficiently likely to warrant an injunction." *FEC v. Furgatch*, 869 F.2d 1256, 1262 (9th Cir. 1989). Similarly relevant are a defendant's ongoing attacks on prior decisions holding his actions unlawful. *See id.* Courts are also much more willing to enter injunctive relief when public interests are implicated. *See, e.g.*, *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937).

All of these factors support the Court entering an injunction here. Significant public interests are implicated, and Defendants have already appealed the orders enjoining EO3, calling them "dangerously flawed."[1] Indeed, even after EO3 was enjoined, Attorney General Sessions

[1] White House Statement Regarding Court Action Affecting the President's Proclamation Regarding Travel to the United States by Nationals of Certain Countries, (Oct. 17, 2017), https://www.whitehouse.gov/the-press-office/2017/10/17/statement-regarding-court-action-affecting-presidents-proclamation.

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testified to Congress that: "It is a lawful and necessary order that we are proud to defend," and that: "We're confident that we will prevail as time goes by in the Supreme Court."[2]

Given Defendants' commitment to defend EO3 all the way to the Supreme Court, the States face a risk that Defendants will implement again the enjoined provisions of EO3 if the States cannot put their harms before the appellate courts. As the States have explained, those harms differ from the harms presented in other cases. ECF 200. The States represent 83 million residents, including hundreds of thousands from the countries covered by EO3, many of whom now face indefinite separation from loved ones. ECF 198 ¶¶ 17, 25, 51, 71, 84, 101-03, 120. The States also have thousands of students and staff from the listed countries at their colleges and universities, many of whom are now considering leaving because of EO3, harming the States' educational institutions. *Id.* at ¶¶ 35-38, 42-46, 53-57, 75-77, 91, 94, 105-08, 111-12, 122-27. These harms are relevant to several aspects of appellate consideration of EO3, including standing, irreparable injury, and the balance of equities. The States should have an opportunity to present these harms so that we can avoid the "cognizable danger" that we will otherwise have to face implementation of EO3 again.

In sum, the Court should decide this motion. The Court should treat it as one for preliminary injunction, given the extensive briefing and identical standard. ECF 200. Defendants offer no contrary argument, and agreed to convert the TRO entered in Hawai'i to a preliminary injunction. *Hawai'i v. Trump*, No. CV 17-00050 DKW-KSC (D. Haw. Oct. 20, 2017), ECF 389.

B. The Court Has Authority to Review and Enjoin EO3

Defendants' primary argument is that the States' claims are "not reviewable." ECF 205 at 7-10. This Court has already rejected this argument, as has the Ninth Circuit, twice (as well as every other court to consider the argument). The Court should reject it again.

[2] Jaweed Kaleem, *Federal Judges in Hawaii and Maryland Block Trump's New Travel Ban*, L.A. Times (Oct. 18, 2017), http://www.latimes.com/nation/la-na-travel-ban-hawaii-20171017-story.html.

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Defendants first invoke the "consular nonreviewability" doctrine. ECF 205 at 7. But the Ninth Circuit already held that this doctrine was no bar to challenging "the President's *promulgation* of sweeping immigration policy." *Washington*, 847 F.3d at 1162. The Fourth and Ninth Circuits reached the same conclusion as to EO2,[3] as have the district courts in Maryland and Hawai'i as to EO3.[4] Even the primary case cited by Defendants, *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1163 (D.C. Cir. 1999), held that the doctrine is "inapplicable to . . . 'claims by United States citizens rather than by aliens . . . and statutory claims that are accompanied by constitutional ones'" (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1051 n.6 (D.C. Cir. 1986)). Here, the States bring claims on behalf of all their residents, including many citizens from the listed countries who are now separated from their loved ones, and the States' statutory claims "are accompanied by constitutional ones." In short, consular nonreviewability is no bar.

Defendants next argue that there is no "final agency action" to review under the APA and that "the APA does not apply" to EO3 because it is committed to agency discretion by law. ECF 205 at 8. These arguments are irrelevant because the States' motion raises no APA claim.

More relevant, but also incorrect, is Defendants' argument that the States have no judicially enforceable rights under the INA, an argument again made without any citation to authority. ECF 205 at 8. The Ninth Circuit rejected this argument in *Hawai'i*, explaining that the "INA leaves no doubt that the State's interests in student- and employment-based visa petitions for its students and faculty are related to the basic purposes of the INA." *Hawai'i*, 859 F.3d at 766; *see also Hawai'i*, 2017 WL 4639560, at *7 (same).

Finally, Defendants argue that the States lack standing to assert the constitutional rights of students and faculty, and cannot assert those rights as parens patriae on behalf of their people.

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[3] *Hawai'i v. Trump*, 859 F.3d 741, 768 (9th Cir. 2017), *vacated as moot by Trump v. Hawai'i*, __ S. Ct. __, No. 16-1540, 2017 WL 4782860 (U.S. Oct. 24, 2017); *IRAP v. Trump*, 857 F.3d 554, 587 (4th Cir. 2017) (en banc), *vacated as moot by Trump v. IRAP*, __ S. Ct. __, No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017). As detailed below, the *Hawai'i* and *IRAP* opinions remain persuasive authority.

[4] *Hawai'i v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 4639560, at *8 (D. Haw. Oct. 17, 2017); *IRAP v. Trump*, No. CV TDC-17-0361, 2017 WL 4674314, at *17 (D. Md. Oct. 17, 2017).

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ECF 205 at 9-10. This Court already rejected these arguments. ECF 52 at 4-5. The Ninth Circuit likewise held that "as the operators of state universities, the States may assert not only their own rights to the extent affected by the Executive Order but may also assert the rights of their students and faculty members." *Washington*, 847 F.3d at 1160. The Court explicitly noted the States' authority to raise the Establishment Clause rights of students and faculty as well as their rights against discrimination. *Id.* at 1160 & n.4. Defendants' argument is meritless.

C. The States Are Likely to Succeed on their INA Claims

Defendants argue that EO3 is authorized by 8 U.S.C. §§ 1182(f) and 1185(a)(1), which they construe as granting unlimited presidential authority to suspend the entry of aliens. Not so. This Court should follow the other courts that have considered the INA claims—and the Ninth Circuit's reasoning in *Hawai'i*—and conclude that EO3 violates multiple provisions of the INA.

1. The *Hawai'i* opinion is highly persuasive authority

Although the Supreme Court has vacated the *Hawai'i* opinion as moot, *Trump v. Hawai'i*, __ S. Ct. __, No. 16-1540, 2017 WL 4782860 (U.S. Oct. 24, 2017), the Ninth Circuit has made clear that such opinions are "still persuasive authority," *Orhorhaghe v. INS*, 38 F.3d 488, 493 n.4 (9th Cir. 1994); *United States v. Joelson*, 7 F.3d 174, 178 n.1 (9th Cir. 1993) (same). The opinion is well reasoned and thorough, and serves as substantial persuasive authority on the States' INA claims. Indeed, both district courts to have reviewed EO3 so far have reached the same conclusion as the *Hawai'i* court.[5] This Court should do the same.

2. EO3 discriminates on the basis of nationality in violation of section 1152(a)

Congress has declared that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's . . . nationality." 8 U.S.C. § 1152(a)(1). Congress "could not have used 'more explicit language' in 'unambiguously directing that no nationality-based discrimination shall occur.'" *Hawai'i*, 859 F.3d at 777 (quoting *Legal Assistance for*

[5] *Hawai'i*, 2017 WL 4639560, at *9-13 (finding plaintiffs likely to succeed on their INA claims); *IRAP*, 2017 WL 4674314, at *18-28 (same).

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Vietnamese Asylum Seekers v. Dep't of State, 45 F.3d 469, 473 (D.C. Cir. 1995)). Defendants' sole argument to the contrary is unsupported by history and carries troubling implications.

Defendants argue that the President may comply with § 1152's clear non-discrimination command by first "limit[ing] the universe of individuals eligible to receive visas," and then foregoing nationality-based discrimination "*within* that universe of eligible individuals." ECF 205 at 16 (emphasis in original). The disturbing implications of this argument are obvious. A president could exclude all immigrants from Asia or Africa as long as he did not engage in nationality-based discrimination among Europeans he permits to come. This interpretation ignores the language, context, and purpose of § 1152, which was enacted to abolish the "national origins system" that had been implemented to "maintain, to some degree, the ethnic composition of the American people." H. Rep. No. 89-745, at 9 (1965). Returning us to an era of nationality-based discrimination would profoundly conflict with Congressional intent. *See id.* at 11.

Defendants' argument that historical practice "confirms" the President's authority to discriminate based on nationality is similarly misplaced. ECF 205 at 16. Defendants repeatedly suggest that EO3 is no different from executive orders and proclamations by Presidents Carter, Reagan, and Bush. *Id.* at 3-4, 13, 17. But as the Ninth Circuit already explained, those orders did not suspend a class of aliens based on national origin. *Hawai'i*, 859 F.3d at 779 (observing that Carter's executive orders "did not ban Iranian immigrants outright," that Reagan's executive order on Cubans included a mix of exemptions, and that the Bush executive order at issue in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), "made no nationality-based distinctions").

In fact, any meaningful analysis of the Iran and Cuba executive orders readily distinguishes them from EO3. Although both orders suspended the entry of aliens from a specific country, each was triggered by a specific, urgent foreign policy dispute. Exec. Order No. 12,172, 44 Fed. Reg. 67947; Exec. Order No. 12,206, 45 Fed. Reg. 24,101; Proclamation No. 5,517, 51 Fed. Reg. 30,470. More importantly, none of the Iran or Cuba orders remotely approached the scope or breadth of EO3. The Iran orders, for example, subjected Iranians to more stringent

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immigrant rules and regulations, but did not ban their entry entirely. 44 Fed. Reg. 67947; 45 Fed. Reg. 24,101. Likewise, the Cuba order included open-ended exemptions for categories of immigrants including immediate relatives—an exemption notably absent under EO3. As the D.C. Circuit has held, § 1152 does not foreclose nationality-based restrictions that are appropriately tailored to address a "compelling" exigency or "national emergency." *Vietnamese Asylum Seekers*, 45 F.3d at 473. No such emergency exists here, and EO3 does not purport to be an exercise of the President's war powers. Like EO1 and EO2, EO3 combines several otherwise unprecedented ingredients: a vast sweep, untethered to any emergency, which creates a direct conflict with Congress's non-discrimination policy. EO3 violates § 1152.

3. Section 1182(f) does not allow the President to rewrite immigration law or impose vast immigration suspensions without supported findings

The Ninth Circuit reviewed § 1182(f) and held that EO2 contained insufficient findings to support the suspension of 180 million people. *Hawai'i*, 859 F.3d at 769-74. In an effort to save EO3 from the same fate, Defendants argue that it contains (1) more "detail," (2) a finding of "inadequate" document sharing practices that "necessarily turn[s] on nationality," and (3) a conclusion that "entry restrictions" are an effective "foreign-policy tool." ECF 205 at 12-14.

None of these rationales works. To be sure, EO3 is longer than its predecessors, but compliance with § 1182(f) is not measured by word count. If an immigration ban as broad as EO3 can be justified, it can only be upon "sufficient finding[s]" to "support the conclusion" that "that entry of *all* nationals from the . . . designated countries . . . would be harmful to the national interest." *Hawai'i*, 859 F.3d at 770 (emphasis added). EO3 contains no such findings, and again offers general country conditions as a substitute. Simply put, Congress did not authorize the President to use generalized country conditions to support an exclusion of this breadth.

Defendants' justification of EO3 as a foreign-policy tool also fails. Congress has already spoken to the security concerns EO3 purports to address, and has not authorized the President to use sweeping suspension orders to "place pressure on foreign governments" to comply with these

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policy goals. ECF 205 at 12, 15. It is Congress that sets immigration policy, *Arizona v. United States*, 567 U.S. 387, 409 (2012), and the INA includes detailed provisions to pursue Congress's objectives around, among other things, "security," "terrorist activities," "foreign policy," and "documentation requirements," 8 U.S.C. § 1182(a). *See Hawai'i*, 859 F.3d at 774 (recounting "Congress's considered view on similar security concerns that the Order seeks to address").

EO3 usurps congressional authority by replacing the INA's statutory framework with an immigration policy of the President's choosing. The Court should enjoin it on that basis.[6] If sweeping exclusions under § 1182(f) could be implemented to maximize presidential policy leverage, the possibilities would be limitless. Mexicans could be suspended to force their government to fund a border wall, or nationals of NATO countries could be suspended until the President is satisfied with their governments' financial contributions. This cannot be the law.

4. Section 1185(a)(1) is not an independent grant of unlimited authority

Finally, Defendants claim that 8 U.S.C. § 1185(a)(1) grants the President authority "to restrict entry to the United States" without "any predicate findings whatsoever." ECF 205 at 2.

Section 1185 does no such thing. *See Hawai'i*, 859 F.3d at 770 n.10. Congress cannot have created a detailed immigration scheme—including § 1182(a)'s admissibility rules, § 1182(f)'s provision allowing the President to suspend entry where supported by proper findings, and § 1152(a)'s non-discrimination provision—only to undo its own work with a sweeping grant of permission to suspend anyone (or everyone) whenever the President sees fit. *Cf. Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973) ("[A]ll parts of a statute, if at all possible, are to be given effect."); *see also Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (courts are suspicious when an Executive official "claims to discover in a long-extant statute an unheralded power" of "vast economic and political

[6] Defendants complain that the States' asserted conflict between EO3 and many INA provisions is a "free-form challenge" that is not "cognizable." ECF 205 at 18. But courts have the power to review whether executive orders comply with "statutory provisions that confer authority on the President to suspend the entry of [aliens]." *Sale*, 509 U.S. at 172. And that is exactly what courts have done with prior versions of the ban.

significance") (internal quotation marks omitted). Section 1185(a) imposes at least the same constraints as § 1182(f), and the President has exceeded his authority under both.

D. The States Are Likely to Succeed on their Constitutional Claims

Defendants contend that because EO3 excludes aliens, this Court cannot "'look behind the exercise of that discretion, nor test it by balancing its justification'" against the constitutional rights of the States' residents. ECF 205 at 19 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)). *Washington v. Trump* rejected this argument, holding that "*promulgation* of sweeping immigration policy" is "plainly not subject to the *Mandel* standard." 847 F.3d at 1162-63.

Even if *Mandel* applied, the Court would need to test EO3's constitutionality, because Defendants cannot show that the stated reasons for EO3 are facially legitimate and bona fide. Defendants assert that if they "identify a factual basis . . . that is the end of the analysis." ECF 205 at 20 n.11. Not so. Where there is an affirmative showing of bad faith, *Mandel* recognizes that courts may evaluate the challenged action. *IRAP*, 857 F.3d at 590. The en banc Fourth Circuit found an affirmative showing of bad faith as to EO2, a finding that the Maryland district court just made again as to EO3, based on, among other things, "President Trump's statements during his presidential campaign calling for a 'Muslim ban'; his statements that he would fulfill his campaign promise of a Muslim ban by focusing on territories rather than religion; EO–1, adopted without agency consultation, which targeted only majority-Muslim countries and contained preferences for religious minorities within those countries; [] statements of President Trump and his advisors that EO–2 had the same policy goals as EO–1," the close link between EO1, EO2, and EO3, and the continuing "misalignment between the stated national security goals of the ban and the means implemented to achieve them." *IRAP*, 2017 WL 4674314, at *28, *29. If this Court finds that *Mandel* applies, it should reach the same conclusion here.[7]

1. EO3's anti-Muslim purpose violates the Establishment Clause

[7] Defendants contend that the Fourth Circuit's interpretation of *Mandel* was rejected by the Supreme Court. ECF 205 at 20 (citing *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693 (2017)). In reality, the *Sessions* case does not even cite *Mandel*, let alone discuss its standard, and there was no allegation of bad faith in that case.

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When examining an Establishment Clause claim, "purpose matters." *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844, 866 n.14 (2005). If one purpose of EO3 was to disfavor Islam, EO3 must fall. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

In evaluating EO3, the Court must act as an "objective observer," and consider its text and history. *McCreary*, 545 U.S. at 862. It cannot "turn a blind eye to the context in which [the] policy arose." *Id.* at 866 (alteration in original). Here, the President made a series of inflammatory statements about Muslims during his campaign, issued EO1 to keep his "campaign promises," and then issued EO2 only after EO1 was invalidated. ECF 198 ¶¶ 135-47, 171-75. He and his advisers described EO2 as pursuing the "same basic policy" as EO1, and EO2, by its own terms, led to EO3. *Id.* ¶¶ 173-74. EO3 is not a kinder, gentler version of the immigration ban; it converts it into a permanent ban on immigration from six Muslim-majority countries. And throughout this process, the President has made clear that his purpose has not changed and that he preferred EO1. *Id.* ¶ 194 ("The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to S.C."). Just last month, he said that "the travel ban into the United States should be far larger, tougher and more specific-but stupidly, that would not be politically correct!" *IRAP*, 2017 WL 4674314, at *7.

Defendants claim that adding North Korea and Venezuela to the ban remedies any improper purpose. These modifications are window dressing. North Korea does not permit its residents to travel to the United States. *See* ECF 198 ¶ 204. Adding Venezuela is similarly trivial, because only a small class of individuals seeking tourist visas are impacted. EO3 § (f)(ii).

Courts have repeatedly rejected similarly transparent efforts to hide an impermissible purpose. *See, e.g., McCreary*, 545 U.S. at 874. An Establishment Clause violation cannot be cured by an eve-of-litigation resolution "proclaiming a secular purpose." *Books v. City of Elkhart, Indiana*, 235 F.3d 292, 304 (7th Cir. 2000). Given the context, an objective observer would conclude that EO3's purpose is to disfavor Muslims. "[A]n implausible claim that

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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.

Defendants contend that modifying the immigration ban on the eve of a Supreme Court hearing makes the ban comparable to the Sunday closure laws upheld in *McGowan v. Maryland*, 366 U.S. 420 (1961). But the statutes at issue there had been changed to make them less religious over the course of two centuries. *Id.* at 446 (noting that first amendments to reduce religious nature of statute occurred in 1723). Changes that Defendants have made over the course of a few months in response to court rulings bear no resemblance to *McGowan*.

In sum, EO3's minimal adjustments have not divorced it from the anti-Muslim purpose of the first ban. The States are likely to prevail on their Establishment Clause claim.

2. EO3 violates Equal Protection

As detailed above, President Trump's original intent to discriminate against Muslims remains at least a "motivating factor" for EO3, rendering it invalid. *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015). And despite the small changes in the countries covered by EO3, the fact remains that its "sheer breadth is so discontinuous with the reasons offered" that it "seems inexplicable by anything but animus toward the class it affects." *Romer v. Evans*, 517 U.S. 620, 632 (1996). Like EO 9066 during World War II, EO3 impacts every immigrant—including children and the elderly—from the targeted Muslim-majority countries, regardless of whether they pose a threat. And it targets these countries even though their nationals "have committed no terrorist attacks on U.S. soil in the last forty years," while ignoring entry from volatile "non-Muslim majority countries." ECF 194-18. It is motivated by animus, not reason.

E. A Nationwide Injunction is Appropriate as to All Challenged Parts of EO3

Contrary to Defendants' assertion that injunctive relief should be limited, a nationwide injunction is appropriate as to all challenged portions of EO3 and as to all individuals.

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This Court asked how the Supreme Court's assessment of the equities in *Trump v. IRAP*, 137 S. Ct. 2080 (2017), should affect the Court's analysis here. ECF 197 at 5-6. Defendants' position appears to be that this Court should issue an even narrower injunction. That is untenable.

Instead, for two reasons the Court should decline to impose the "bona fide relationship" test from *IRAP*. First, Defendants never even argue for that standard, and the Court should not impose a rule no party has requested. Second, EO3 is substantially more harmful to the States and their residents than EO2 because its restrictions are *indefinite*. While limiting relief to those with an existing "bona fide relationship" may have been justifiable as to an order that lasted just 90 days, it makes little sense here when EO3 will indefinitely and unlawfully deter people from forming "bona fide relationships" with State institutions and businesses that would benefit the States. For example, the States' educational institutions have seen significant declines in international applications,[8] and the immigration ban is exacerbating States' challenges in recruiting medical professionals to fill critical shortages.[9] These irreparable harms will persist if this Court enjoins EO3 only as to those who already have a relationship with a U.S. person or entity.

Because a narrow injunction would not protect against these harms, and because Defendants offer no evidence that any concrete harm would occur if EO3 were enjoined more broadly, the balance of equities favors enjoining all challenged portions of EO3 as to all foreign nationals from the affected countries. *See IRAP*, 137 S. Ct. at 2087-89.

III. CONCLUSION

As this Court said in enjoining EO1, the Court's role is to "ensur[e] that the actions taken by the other two branches comport with our country's laws." ECF 52 at 7. The States ask this Court to fulfill that role again and to enjoin the parts of EO3 challenged here.

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[8] *See, e.g.*, ECF 194-39 (3d Decl. of R. Branon) ¶ 4 (international applications down 21.6%); ECF 194-40 (5th Decl. of A. Chaudhry) ¶ 11 ("significant decline" in international applications); ECF 194-69 (2d Decl. of D. Galvan) p. 4 (same); ECF 202-6 (Decl. of S. Capalbo) ¶ 16 (same); ECF 202-5 (Decl. of J. Camp) ¶ 6 (same).

[9] *See, e.g.*, ECF 194-66 (2d. Decl. of M. Overbeck) ¶¶ 3-5; ECF 118-32 (Decl. of R. Fullerton) ¶¶ 5-13; ECF 202-14 (2d Decl. of E. Scherzer) ¶¶ 9-13, 18; ECF 202-15 (3d Decl. of E. Scherzer) ¶¶ 11-12, 14-18.

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DATED this 26th day of October, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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