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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

STATE OF WASHINGTON and)	C17-00141-JLR
STATE OF MINNESOTA,)	
)	SEATTLE, WASHINGTON
Plaintiffs,)	
)	February 3, 2017
v.)	
)	MOTION FOR
DONALD TRUMP, in his)	TEMPORARY
official capacity as)	RESTRAINING ORDER
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; TOM SHANNON, in)	
his official capacity as)	
Acting Secretary of State;)	
and the UNITED STATES OF)	
AMERICA,)	
)	
Defendants.)	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES L. ROBERT
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:	Noah Purcell Colleen Melody Assistant Attorneys General Office of the Attorney General 800 Fifth Avenue, Suite 2000 Seattle, WA 98104
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1 THE CLERK: Case No. C17-141, State of Washington
2 versus Donald J. Trump. Counsel, please make your
3 appearances for the record.

4 MR. PURCELL: Noah Purcell for the State of
5 Washington, Your Honor.

6 MS. MELODY: I'm Colleen Melody, also for the state.

7 MR. CAMPION: I'm Jacob Campion, I'm an Assistant
8 Attorney General for the State of Minnesota.

9 THE COURT: Welcome.

10 MS. BENNETT: Good afternoon, Your Honor, Michelle
11 Bennett from the Department of Justice for the defendants.
12 And with me is my colleague, also from the Department of
13 Justice, John Tyler.

14 THE COURT: Thank you. Counsel, welcome.

15 A couple of housekeeping matters to attend to. We are
16 scheduled to conduct this hearing between 2:30 and 4 o'clock.
17 I'm going to have some very brief housekeeping matters at the
18 start, of which I've already used eight of my ten allotted
19 minutes. The state will go next. I will tell you that I've
20 given, in effect, 30 minutes to each side. If the state
21 wishes, they can reserve some of their time for rebuttal.
22 They're going first. The federal government is going second.

23 Your prepared remarks, which I'm sure are all very
24 thoughtful and quite helpful, are going to get swallowed by
25 questions, because I have questions that are essential to our

1 resolution of this case and I need to get those answered. So
2 be prepared for pretty much an interruption from the start.

3 And at around 3:45, having followed the direct
4 presentations, and rebuttal if the state has time left,
5 you're going to hear from the court. It's my intention to
6 orally rule from the bench but in very conclusory terms. And
7 we will get a written order to follow, so that if you want to
8 have the Ninth Circuit grade my homework, you'll have
9 something that you can get on file there promptly.

10 So, that will be the order of the day. And I'm going to
11 hear from the state first, please.

12 Mr. Purcell, why don't we do one other item. Technically
13 the motion that's before me started off as Docket 3, which
14 was exclusively the State of Washington, and is now Docket
15 19, which is both the states of Washington and Minnesota.
16 We've also had a series of requests to file amicus briefs,
17 and I intend to grant those. So I'm granting Docket 26, the
18 ACLU; Docket 42, the Service Employees Union; Docket 45,
19 amicus filed by the Amicus Law Professors. Sounds like the
20 Three Amigos. Let's see, Docket 46, I may have mentioned, is
21 the Washington State Labor Council. And, finally, Docket 48,
22 which is the amicus, Americans United For Separation of
23 Church and State. Those motions are granted.

24 Please note that it's not a motion for intervention, it's
25 simply authorization to file the amicus brief in this

1 particular question.

2 Mr. Purcell.

3 MR. PURCELL: Thank you, Your Honor. Good afternoon.

4 In the weeks since President Trump signed the Executive
5 Order at issue here, six federal judges around the country
6 have enjoined or stayed parts of it in response to action by
7 particular plaintiffs, finding a likelihood of success on the
8 merits of the challenges. The states of Washington and
9 Minnesota are asking you to do the same here today and to
10 enjoin the parts of the order that we challenge.

11 The order is illegal and is causing serious immediate
12 harms to our states, to our state institutions, and to our
13 people, and enjoining the order is overwhelmingly in the
14 public interest. So, you're familiar, of course, with the
15 standard for a temporary restraining order, I won't waste
16 your time.

17 THE COURT: You can dispense with that.

18 MR. PURCELL: I want to first address the likelihood
19 of success on the merits, including the threshold issues that
20 the government has raised, including standing, deference to
21 national security interests, and the facial versus as-applied
22 nature of the challenge.

23 THE COURT: Well, let me try and derail you here.

24 MR. PURCELL: Sure.

25 THE COURT: I'd like to take this in terms of equal

1 protection first.

2 MR. PURCELL: Okay.

3 THE COURT: And, in particular, how does the equal
4 protection claim apply to all of the order, which is the
5 120-day-part found in paragraph or Section 5A. How does this
6 ban discriminate in any way, or violate equal protection,
7 when it's an across-the-board ban?

8 MR. PURCELL: You're talking about as to refugees?
9 So, our claim about refugees is primarily that it is
10 religiously motivated discrimination, and that the order is,
11 in large part, motivated by religious animus. So that
12 doesn't require us to show that everyone harmed by the order
13 is of a particular faith, it just requires us to show that
14 part of the motivation for issuing the order was religious
15 discrimination.

16 THE COURT: Then I'm going to try to put words in
17 your mouth. Are you telling me, then, that you are not
18 making an equal protection challenge to the refugee ban?

19 MR. PURCELL: I would say, Your Honor, that we have a
20 -- I would say the focus there is on the religious
21 discrimination aspect.

22 THE COURT: We're going to get there next.

23 MR. PURCELL: Okay. Would you like me to address
24 that further?

25 THE COURT: No. Let's move on to my second question

1 on equal protection, then.

2 MR. PURCELL: Okay.

3 THE COURT: Do refugees or visa holders that have
4 never physically entered the country have equal protection
5 rights under the constitution?

6 MR. PURCELL: Your Honor, that is not the focus of
7 our claim. I think the answer is probably no. But they do
8 have rights to some constitutional protections. And
9 certainly their friends and family who are here -- and we're
10 just talking about refugees now, not aliens, for example, who
11 might have been sponsored by a university or something like
12 that to come here.

13 THE COURT: Right.

14 MR. PURCELL: Our claim is that -- our claim is
15 primarily focused on the people who are here or have been
16 here and left, their families, their employers and the
17 institutions here.

18 THE COURT: All right. Has any court ever set aside
19 an immigration law or regulation on equal protection grounds
20 based on rational review? I understand it's not the
21 centerpiece, but you've pled it and so you're going to get
22 questioned about it.

23 MR. PURCELL: We did plead it, and that's just fine,
24 Your Honor. I was planning to start this morning with due
25 process -- or this afternoon -- but equal protection is just

1 fine.

2 I am not aware of an immigration order being set aside on
3 equal protection grounds. On the other hand, I'm not aware
4 of any Executive Order quite like this one, that there's so
5 much evidence, before there's even been any discovery, that
6 it was motivated by animus, religiously targeted, and just
7 utterly divorced from the stated purposes of the order. And
8 I'm happy to talk about that more in terms of -- the
9 government is asking for an extraordinary level of deference
10 here, essentially saying that you can't really look at what
11 were the real motives for the order; you can't test its
12 legality. And we just think that's wrong, legally and
13 factually.

14 And if you'll spare me for just a minute, indulge me for
15 just a minute and let me -- there's three -- there's a legal
16 point and a factual point. The legal point is courts often
17 review executive action that has to do with national security
18 for constitutional violations. If you look at cases like
19 *Hamdi*, *Hamdan*, *Boumediene*, the Supreme Court routinely
20 reviews -- you know, those were cases involving enemy
21 combatants being held offshore. Here we have a case that
22 largely involves people who have been here, long-time
23 residents who still live here and have lost rights. And
24 we're asking the court to review that claim.

25 They also suggest, Your Honor, at page 21 to 22 of their

1 brief, based on a case called *Kleindienst* and *Kerry v. Din*,
2 that you can't sort of look behind the stated purposes of the
3 order. They say that if the President gives a facially
4 legitimate and bona fide reason for excluding an alien, the
5 court will not look behind that reason.

6 But there's two fundamental problems with that argument,
7 Your Honor. First of all, those cases dealt with the
8 President's power to exclude aliens who were not here, had
9 not been here, and had no right to come back. That is not
10 this case, where we have a case involving people who have
11 been here, have rights to remain here and rights to return.

12 And in Justice Kennedy and Alito's concurring opinion in
13 that *Kerry v. Din* case, which is a controlling opinion, they
14 held that they would look behind stated motives, even for
15 exclusion of someone who had never been here, if the
16 plaintiff plausibly alleged with sufficient particularity an
17 affirmative showing of bad faith. And that's at 2141 of the
18 *Din* opinion. And the Ninth Circuit endorsed that standard in
19 the *Cardenas* opinion, 826 F.3d, 1164.

20 THE COURT: Well, let me stop because we'll keep in
21 this area.

22 MR. PURCELL: Okay.

23 THE COURT: Do you not see some distinction between
24 election campaign statements and then subsequently an
25 election and then an Executive Order which is issued with

1 comment at the time the Executive Order is issued? It seems
2 to me that it's a bit of a reach to say: The President is
3 clearly anti-Muslim or anti-Islam, based on what he said in
4 New Hampshire in June.

5 MR. PURCELL: Well, Your Honor, it might go to the
6 weight to give the evidence, I suppose. But I don't think
7 it's sort of off the table, especially given that we're only
8 a week into -- well, two weeks now, I suppose, but the order
9 was issued a week after the campaign -- well, after the
10 President took office.

11 THE COURT: Inauguration.

12 MR. PURCELL: After the inauguration, I'm sorry. So
13 it's not as though those are completely irrelevant. And
14 moreover -- and, again, this is before any discovery -- we
15 have the President's advisor saying on national television
16 that, you know, the President asked him to come up with a
17 Muslim ban -- this was after the election -- asked him to
18 come up with a Muslim ban in a way that would make it legal.
19 And that that's what they did.

20 THE COURT: Does the Executive Order mention the word
21 "Islamic" or "Muslim?" Let's stay on religious grounds.

22 MR. PURCELL: No, it does not, Your Honor. It does
23 not. But when we're arguing about religiously motivated
24 targeting, again, the burden is not to prove that it affects
25 every single person of the Islamic faith. The burden is to

1 prove that a desire to discriminate based on religion was one
2 motivating factor in the adoption of the order.

3 And, again, we're at the pleading stage, four days after
4 having filed our complaint, no discovery, and there's already
5 an overwhelming amount of evidence to suggest that that's the
6 case, that it was, at least in part, motivated by religion.

7 Going back briefly just to the national security. Part of
8 the evidence of that, Your Honor, is that the tie to the
9 stated purpose of national security is so tenuous here. I
10 mean, the President apparently had not decided whether the
11 order applied to lawful permanent residents before it was
12 issued. And there's 500,000, roughly 500,000 lawful
13 permanent residents from these seven listed countries in the
14 United States. Either those people are an enormous threat to
15 our safety or they're not. And they've changed their mind
16 about that five times since Friday. You know, first they
17 said that it did apply to them, and many of those people were
18 excluded from returning to the country. Then the Department
19 of Homeland Security reiterated that it applied to them.
20 Then the Secretary said that it didn't. And then -- this is
21 all in our complaint, by the way -- and then the White House
22 spokesperson said it did not. And then the White House
23 counsel has now issued authoritative guidance, whatever that
24 means, that although there could have been reasonable
25 confusion about what the order meant, it wasn't meant to

1 cover those people.

2 So the point is, if they were an enormous security risk,
3 you would think that they would have made up their mind about
4 that before issuing the order.

5 And the second point, Your Honor --

6 THE COURT: Well, before we leave that one.

7 MR. PURCELL: Yeah.

8 THE COURT: What do you say to the argument that the
9 seven countries that were designated -- and I'll quote the
10 language -- have been designated as, "Countries the
11 government of which has repeatedly provided support for acts
12 of international terrorism under 8 U.S.C. 1187." Wouldn't
13 that provide a rational basis for the Executive Order?

14 MR. PURCELL: Your Honor, that would provide a cover,
15 in our view, for -- that was maybe one motivating factor.
16 But when you look at the standard of proving a religious
17 discrimination claim, again, you can't just accept at face
18 value the stated purposes. Especially where again, before
19 there's even been any discovery, there's so much evidence
20 that it was not targeted at the concerns stated. I mean, the
21 order applies to infants, it applies to senior citizens, it
22 applies to students and faculty at our state universities who
23 have never been accused of any wrongdoing.

24 The main point I guess I'm getting at here is that the
25 idea that you just can't review, can't review the real

1 reasons for this order, or even ask whether there are real
2 reasons beyond what is stated, is just not supported by the
3 case law. So we're asking you to -- the main point is, the
4 government is saying you cannot look behind the stated
5 reasons, and we're saying that you can. The case law doesn't
6 support that argument that they're making.

7 THE COURT: Would you agree with me that it is only
8 Section 5 that mentions religion?

9 MR. PURCELL: It's only Section 5 that mentions
10 religion. We would say it's not only Section 5 that is, in
11 part, motivated by religion.

12 THE COURT: And the part of that is this resumption
13 of the refugee program after, I think it's 90 days for that
14 provision. Then it says, minority -- "Practicers of a
15 minority religion in a country." Does your establishment
16 clause cause of action then extend beyond Section 5?

17 MR. PURCELL: I think our establishment clause claim
18 is focused on that section. But I think that both three and
19 five are motivated in part, our allegation is, by preferring
20 one religious view over another. The *Larson* case that's
21 cited in our brief makes clear that you don't need to have a
22 distinction between named religions on the face of the order
23 for it to be an establishment clause violation. In that case
24 it didn't name any religions. It just set standards for how
25 different religious groups would qualify for a tax exemption.

1 And the court said that, combined with the effects on the
2 religious groups, was enough.

3 Your Honor, I want to spend some time on our due process
4 claim.

5 THE COURT: We're going to get there.

6 MR. PURCELL: Okay. Excellent.

7 THE COURT: Trust me.

8 MR. PURCELL: Okay. And also standing. But if I
9 could turn to the due process claim.

10 THE COURT: Well, before you go there, let's finish
11 establishment.

12 MR. PURCELL: Okay.

13 THE COURT: 5(b) isn't implemented for, I think it's
14 100 days.

15 MR. PURCELL: Um-hum.

16 THE COURT: Why should I take this up at this time,
17 as opposed to, if you're coming back on a motion for
18 preliminary injunction, deal with it when it's somewhat more
19 concrete?

20 MR. PURCELL: Well, Your Honor, we're asking you to
21 temporarily restrain what we thought was a narrow subset of
22 the categories that we thought were motivated by these
23 unconstitutional -- that violated the constitution. If you
24 want to have further thought about whether -- so we're
25 suggesting that the action itself of banning the refugees,

1 and the Syrian refugees indefinitely, and the selection of
2 the countries, was partially religiously motivated. If you
3 want to wait to rule on whether 5(b) itself, and that
4 favoritism approach going forward is a constitutional
5 violation, I suppose that would be fine. We're not -- that
6 does not necessarily require immediate injunction. But that
7 is evidence, I think that provision is evidence, of the
8 religious underpinnings of the order.

9 THE COURT: All right. Why don't you move on to due
10 process, since I've used up a fair chunk of your time.

11 MR. PURCELL: So I think the most obvious way in
12 which the order violates the constitution is its violation of
13 the due process clause. The due process clause protects
14 everyone in this country, including immigrants. And a number
15 of cases make that clear.

16 THE COURT: So is it your position that refugees and
17 other aliens who are presently outside the country are
18 covered by due process?

19 MR. PURCELL: Your Honor, the Supreme Court has said
20 that aliens who are not in the country and have never been
21 here, the only process they're entitled to is what Congress
22 provides. So we're not -- again, they're not the focus of
23 our claim. The focus of our claim is on people who have been
24 here and have, overnight, lost the right to travel, lost the
25 right to visit their families, lost the right to go perform

1 research, lost the right to go speak at conferences around
2 the world. And also people who had lived here for a long
3 time and happened to be overseas at the time of this order,
4 which came with no warning whatsoever, and suddenly lost the
5 right to return to the United States.

6 So there's a series of cases, and we cited some of these
7 in our brief, Your Honor, but I'd like to -- given that
8 there's only been a short time since the government's filing,
9 I direct you to cases like *Landon v. Plasencia*, 459 U.S. 21.

10 THE COURT: You might want to slow down a little bit.

11 MR. PURCELL: Sorry. *Landon*, 459 U.S. 21, *Rosenberg*,
12 374 U.S. 449, that make very clear that people who have lived
13 here legally for some period of time and then leave
14 temporarily, are protected by the due process clause in
15 attempting to return, and cannot have their right to return
16 taken away without some sort of process.

17 And that's effectively what happened here to thousands of
18 people in Washington, including hundreds of students at our
19 state universities, and faculty. They just overnight, with
20 no process whatsoever, lost these important rights that they
21 had.

22 Now, the federal government --

23 THE COURT: A case from your list of cases is
24 *Katzenbach*, which the government cites extensively for the
25 proposition that you've lost that argument.

1 MR. PURCELL: Right.

2 THE COURT: How do you respond to that?

3 MR. PURCELL: Well, they're wrong, Your Honor, for a
4 number of reasons. First of all, so they say we can't cite
5 that case because we're a state. But our claim is not the
6 state as state, as we made clear in our standing brief, our
7 claim is the state as proprietor and the state as *parens*
8 *patriae* on behalf of the people of the state. So the state
9 as a proprietor, I think is the obvious way that that
10 argument of theirs is incorrect, Your Honor.

11 We are asserting the due process rights on behalf of the
12 people of the state who are harmed, and on behalf of the
13 state institutions that they attend. So, for example, the
14 University of Washington and Washington State University, as
15 well as our community colleges, are arms of the state. It's
16 very clear under state law they're arms of the state. We sue
17 on their behalf. And their students and faculty are being
18 denied due process rights pursuant to this order.

19 And if you look at cases like *Pierce v. Society of*
20 *Sisters*, 268 U.S. 510, and the cases cited in footnote three
21 of our standing brief, it's very clear that schools and
22 universities have standing to bring challenges based on harms
23 to their students. So that's the first way in which we have
24 standing to bring a due process claim.

25 Second, *Katzenbach*, of course, is before *Massachusetts v.*

1 EPA and before the significant change in *parens patriae*
2 standing that that case announced, as detailed in the amicus
3 brief of the law professors and as explained in
4 *Massachusetts v. EPA* itself. So the *Snapp* decision, the case
5 out of Puerto Rico cited in our briefing, makes it very clear
6 that states can bring *parens patriae* claims asserting
7 discrimination sort of causes of action. And then
8 *Massachusetts v. EPA* makes it very clear that the sort of
9 *Katzenbach-Mellon* limitations on state standing have been
10 scaled back, if not eliminated altogether.

11 THE COURT: What's your view of the Fifth Circuit
12 opinion in *United States v. Texas*?

13 MR. PURCELL: Well, it is a strong basis for standing
14 here as well. That was primarily an Administrative Procedure
15 Act claim. And we do have an Administrative Procedure Act
16 claim here. We didn't have space or time to brief it in our
17 temporary restraining order motion. And I should say there's
18 a number of claims actually, in our complaint, that we think
19 we're likely to prevail on, that we just didn't have time or
20 space to brief in the 48 hours and 24 pages of the temporary
21 restraining order motion.

22 And that's one of them, Your Honor. And that case makes
23 very clear that the harms to the state that we're suffering
24 here are sufficient to generate standing in a proprietary
25 capacity. There the state was arguing, essentially, added

1 driver's license costs that were sort of unspecified, the
2 exact amount. And here we have claimed, very clearly, lost
3 tax revenue, harms to our state universities in terms of
4 wasted money that was spent sponsoring people to come here
5 and teach and perform research, wasted money that was spent
6 buying tickets for people who will no longer be able to go
7 and speak or research at conferences, a wide range of
8 proprietary harms, Your Honor, that do suffice under *U.S. v.*
9 *Texas* to show standing.

10 THE COURT: Let's go to the INA claim, and then leave
11 you some time to actually talk to me. Do states have a right
12 of action under Section 8 U.S.C. 1152 (a)(1)(A)?

13 MR. PURCELL: Your Honor, I'm sorry, I honestly do
14 not have a good answer to that question. I think we can
15 assert -- we should be allowed to assert the rights of our
16 people here as *parens patriae* who are harmed by
17 discrimination, the nationality discrimination embodied in
18 this order. But the INA -- I think I would say our INA claim
19 primarily supplements our other claims by showing that this
20 action, the President's action here, is not endorsed by
21 Congress. It's not consistent with congressional directives.
22 It's actually contrary to what Congress has said about how
23 these sorts of decisions are supposed to be made, which
24 further undermines the federal government's argument to
25 deference to the President's decisionmaking in this context.

1 THE COURT: All right. You've got ten minutes. I
2 won't ask you any more questions.

3 MR. PURCELL: Your Honor, I'm perfectly happy to have
4 you ask me questions.

5 So I guess, first of all, I want to overall emphasize that
6 we have two distinct bases for standing here in terms of our
7 proprietary interests, the harms to the University of
8 Washington, Washington State University, our other state
9 colleges and universities, and then our *parens patriae* claim.
10 Those are real harms in both senses.

11 The federal government really has offered no meaningful
12 response to our claims of proprietary harm to the
13 universities. I know they've claimed that tax harms are
14 insufficient, in some of their pleading, but all the cases
15 they cite predate *Massachusetts v. EPA*, and they're
16 inconsistent with, for example, the Fifth Circuit's approach
17 in *U.S. v. Texas*. If the added cost of issuing driver's
18 licenses is sufficient to generate standing, there's no
19 reason why the lost revenue of losing visitors who would come
20 here and spend money should be insufficient to generate
21 standing. More revenue versus less revenue, it's two sides
22 of the same coin.

23 And as to the universities, the federal government claims
24 that these harms are "illusory" because most of the people we
25 allege who will be affected actually won't be. But there's

1 just no evidence to support that. So they say now -- again,
2 their position has changed five times. And I don't mean any
3 ill intent towards counsel. I know they don't have any
4 control over this. But the federal government's position
5 about what the Executive Order means has changed repeatedly
6 since the order was issued. And so now they say it protects
7 long-term lawful permanent residents or doesn't apply to
8 them. But that wasn't their initial position. And in any
9 event, we have hundreds of students and faculty at our
10 universities who are here on visas who -- again, overnight --
11 lost the right to travel for any number of purposes or to
12 return to the country.

13 The only other point I'd make, Your Honor, they make much
14 of the idea that this is a facial challenge, we can't show
15 that it's illegal in all applications. And that's incorrect,
16 Your Honor. The Ninth Circuit has repeatedly held that when
17 -- in analyzing whether something is a facial or as-applied
18 challenge, you look at whether it's a challenge to the
19 entirety of the action or to parts of it. And that's cases
20 like *Hoye v. Oakland*, 653 F.3d 835.

21 Here we're challenging only parts of the Executive Order.
22 It's very clear that this is an as-applied challenge to parts
23 of the order. We don't need to show it's unconstitutional in
24 every application. I apologize for citing so many cases,
25 Your Honor, in oral argument. I don't normally do that.

1 It's just that, of course, we had no opportunity to file a
2 response in only a short period of time from when they filed.

3 And the last thing I'd say, Your Honor, for now -- and
4 then I'd just like to reserve the remainder of my time -- is
5 that the establishment clause. The establishment clause, one
6 of the original purposes of it was to protect the states
7 against the federal government choosing a national religion
8 and imposing it on the states. So the idea that the state
9 would not have standing to challenge a national government --
10 well, the President, anyway, expressing a preference is just
11 -- it makes no sense.

12 And, again, you know, I can't cite you to a case where a
13 state sued the federal government over an establishment cause
14 violation, but I also can't cite you to an Executive Order
15 ever before quite like this one or the circumstances that we
16 are facing today.

17 So I'd like to reserve the remainder of my time and just
18 conclude by saying, the question is likelihood of success,
19 irreparable harm, and the balance of equities. We feel we've
20 shown a strong likelihood of success, as the other courts
21 have ruled. And we'd ask you to enjoin this order
22 temporarily. Thank you, Your Honor.

23 THE COURT: Ms. Bennett, are you arguing?

24 MS. BENNETT: Yes, Your Honor.

25 THE COURT: Thank you for coming. I thought your

1 brief was extremely well done. It was helpful.

2 MS. BENNETT: Thank you, Your Honor.

3 May it please the court. Your Honor, for some of the
4 reasons we mentioned we think we have very good reasons why
5 the state is not likely to prevail on the merits. But I'd
6 like to start with standing, which I think distinguishes this
7 case from some of the other cases that have been filed around
8 the country.

9 THE COURT: Well, let's concentrate on standing.
10 Tell me why you think that the Fifth Circuit is wrong, in
11 what seemed to be fairly marginal circumstances, and they
12 strongly come out, without hesitation or doubt, to find
13 standing?

14 MS. BENNETT: Well, Your Honor, we do disagree with
15 the Fifth Circuit's decision. Of course we also think that
16 case would be distinguishable. We disagree with the decision
17 because we do think it has to be a particularized impact on
18 the state. In *United States v. Texas*, the court found that
19 the state itself had injury. It wasn't an injury in its
20 *parens patriae* capacity. And it was basically that the --

21 THE COURT: Let me stop you. In the State of
22 Washington, and I can't speak to Minnesota, but both the
23 University of Washington and Washington State are considered
24 parts of the state government. And they've cited a litany of
25 direct consequences, damages to them. That's compared to,

1 what, the \$13.40 in Texas for issuing a driver's license?

2 MS. BENNETT: Well, Your Honor, in Texas it was a
3 monetary injury, right? Here the injuries that the state
4 talks about to its universities, in particular, are
5 reputational harm or that students won't come there, that it
6 will undermine their diversity. They don't cite any cases
7 that define lack of diversity at a university, or something
8 like that, even assuming they could prove that as an injury.

9 THE COURT: I don't think that's their argument. I
10 think they're talking about direct financial harm in their
11 declarations.

12 MS. BENNETT: I mean, I don't read them that way,
13 Your Honor. I didn't see any sort of calculations of
14 financial harm like there were in Texas. They talked about
15 faculty members that might not be able to teach; although
16 most of those were lawful permanent residents that actually
17 were not affected by the order. They talked about the
18 possibility of some students that might not be able to
19 travel. Most of it was very speculative. I didn't see --
20 the only place that I saw numbers of monetary losses was in
21 their allegations about lost tax revenue. And as we
22 explained in our brief, those are -- lots of courts have
23 recognized that sort of generalized grievances like that are
24 not cognizable injuries, analogizing it to the
25 taxpayer-standing context.

1 THE COURT: If I have a student who is admitted to
2 one of those two universities, who is in a country who is now
3 unable to come to the United States, enroll and pay tuition,
4 is that not a direct financial harm?

5 MS. BENNETT: Your Honor, we don't think it's a
6 direct financial harm to the state. We think it's -- I mean,
7 perhaps given the circumstances, and it would depend on the
8 circumstances, could be a harm to the individual. But the --

9 THE COURT: No, they're benefitting, they're not
10 paying that outrageous tuition. You know, it's the
11 University of Washington, part of the State of Washington, or
12 Washington State, part of the State of Washington, who are
13 not receiving these dollars from this student who, under the
14 Executive Order, can't get into the United States.

15 MS. BENNETT: Well, Your Honor, I mean, first of all,
16 I'll point out that I'm not sure they make those allegations
17 of a specific student. But I would also say that we think
18 that injury is too far down the chain of causation. That
19 it's an incidental impact. And if Your Honor were to find
20 standing in that circumstance, it's hard to imagine a federal
21 law or a federal action that wouldn't in some way down the
22 line have effect on states, which would essentially allow
23 states to sue to challenge any federal law if they could
24 point to a way in which some individual was affected by the
25 law because it applied to them, and then that individual, the

1 effect on that individual had some effect on the state. And
2 we think that that's too expansive of a definition of
3 standing.

4 THE COURT: Well, the odd couple of the Fifth Circuit
5 in their opinion in *United States v. Texas*, that seems to me
6 to, you know, basically follow the lines of what you just
7 said is improper.

8 MS. BENNETT: Well, Your Honor, as I said, we
9 respectfully disagree with the Fifth Circuit's decision and
10 note, of course, as Your Honor knows, that you're not bound
11 by that decision.

12 Plaintiffs haven't cited anything in the Ninth Circuit
13 that relies on that sort of injury. As we explained in the
14 briefs, some of the cases they cited, I believe the one
15 school case that they cite involved a bank that had
16 terminated its loan guarantee program with the school. So
17 that was a more direct effect on the school. Whereas here
18 the government is not regulating in any way the school. The
19 government's interactions are with individuals. And they
20 are, perhaps, down-the-line consequences on the state,
21 although we think many of those, if not all of them, are
22 speculative.

23 THE COURT: Let me move you off of standing, if you
24 would. Given the breadth of authority of the Executive in
25 the area of immigration, do you acknowledge any limitation on

1 his or her power?

2 MS. BENNETT: Your Honor, I don't think Your Honor
3 needs to answer that question to decide on this case.

4 THE COURT: No, but it seemed like a good question.

5 MS. BENNETT: I don't think it would be wise to sort
6 of opine on what the extent of the Executive's power is.
7 Here we have specific circumstances where the President has
8 issued this Executive Order. It was pursuant to authority
9 that Congress gave him in Section 212(f) of the INA that
10 specifically allows him to suspend the entry of certain
11 aliens or class of aliens when he finds that it would be
12 detrimental to the interests of the United States to allow
13 them in.

14 So here we have the President acting pursuant to power
15 that Congress gave him, which means, under the *Youngstown*
16 *Steel* seizure cases, he's acting at the apex of his power.

17 And the Executive Order, as Your Honor mentioned, is
18 tied -- the countries that it applies to -- is tied to
19 countries that Congress previously, for two of them,
20 explicitly designated as countries of concern, and that
21 Congress designated authority to the President to -- or,
22 sorry, to federal agencies, to designate other countries.

23 And under the prior administration, the remaining five
24 countries were designated as areas of concern. And so we
25 think in the context of, certainly in the context of this

1 case, the President is acting well within his -- the
2 authority that Congress has given him. And Your Honor need
3 not opine on what he may or may not be able to do beyond
4 that.

5 Your Honor, with respect to the plaintiffs' argument that
6 the President's authority is somehow limited by Section
7 1152(a)(1)(A) of the INA, as we explained in our briefing, we
8 don't read that as a limitation on the President's expansive
9 power under 212(f). As we noted in our briefs, there have
10 been other presidents that have exercised the power in 212(f)
11 in ways that distinguish between nationalities, as the
12 President has done here.

13 We also mentioned that these distinctions between
14 nationalities were made explicitly by Congress in 8 U.S.C.
15 1187. That's what the President has tied the Executive Order
16 to here. And so we don't understand 1152(a) as imposing a
17 limitation on the President's power.

18 If it did, as we pointed out in our brief, you can imagine
19 a situation where basically that provision would prevent the
20 President from suspending the entry of aliens from countries
21 that the United States has to be at war with. And we don't
22 think that's a fair reading of the statute. So we think that
23 212(f) applies in situations where the President has made the
24 determination that the entry of certain aliens would be
25 detrimental to the United States, and situations where

1 that -- when that determination has not been made, then the
2 other provision in 1152 applies to prevent these
3 discrimination -- to bar certain types of discrimination in
4 the issuance of immigrant visas.

5 THE COURT: I'd like to move you along to equal
6 protection if we can.

7 MS. BENNETT: Sure.

8 THE COURT: You strongly urge that strict scrutiny
9 doesn't apply. Can it ever apply in the immigration context,
10 in the government's view?

11 MS. BENNETT: Your Honor, again, I hesitate to opine
12 on whether it can ever apply as opposed to whether it applies
13 under the circumstances of this case. The courts have made
14 clear that distinctions based on nationality, which is what
15 this Executive Order does, in the immigration context, are
16 completely valid and legitimate and do not violate the
17 Constitution. And so in the context of this case, there's no
18 equal protection violation.

19 With respect to the argument of religious discrimination.
20 Again, it's a little bit confusing whether the -- exactly
21 what the state's religious discrimination claim is. We
22 understand it to be limited to Section 5 of the Executive
23 Order, which is about refugees. And in that context, for
24 reasons Your Honor mentioned, we think the claim is unripe.
25 But it also -- that provision doesn't discriminate against

1 religion.

2 THE COURT: Well, no. It may not discriminate, but
3 it favors one over another.

4 MS. BENNETT: It doesn't, Your Honor. It sets up a
5 system -- it doesn't even set up a system. It says, 120 days
6 from now, once the suspension of the refugee program is back
7 on track, that the executive branch, the Secretary of
8 Homeland Security and Secretary of State, are to make changes
9 to the extent permitted by law to the prioritized refugee
10 claims based on religious-based persecution where the
11 religion is a minority religion in that individual's country
12 of nationality.

13 And, Your Honor, that provision doesn't just apply to the
14 seven countries that are designated in Section 3 of the
15 order. It applies to all countries. So you can imagine
16 that, while it might be true that the seven countries are
17 majority of Muslims, there are other countries where Islam
18 would not be the majority religion. And in those contexts
19 the minority religion might be Islam.

20 THE COURT: But under the establishment cases, I
21 think you're arguing against your own position, aren't you?
22 What you're saying is, in any particular country we're going
23 to reward someone for belonging to a particular faith or
24 practicing a particular faith.

25 MS. BENNETT: Well, Your Honor, I don't think we're

1 saying that. The government has long prioritized or
2 permitted asylum claims or other types of claims in the
3 immigration context based on religious persecution. So the
4 government is not doing anything different than what it's
5 already done. It's not about the particular religion, it's
6 essentially accommodating religion, which the government has
7 always done.

8 But as Your Honor -- as we said before, this is something
9 that the President has directed executive agencies to look
10 into this matter going forward. And so until -- certainly
11 until 120 days passes, but we think even beyond that, because
12 until it's actually implemented we don't know what it's going
13 to look like, that there's no establishment-cause problem.

14 THE COURT: All right. I think I understand your
15 argument. Let's talk about Section 3. I'm going to do the
16 same thing, trying to leave you some time to just talk as
17 opposed to being interrupted.

18 The rationale for Section 3 is invoking 9/11. And my
19 question to you is: Have there been terrorist attacks in the
20 United States by refugees or other immigrants from the seven
21 countries listed, since 9/11?

22 MS. BENNETT: Your Honor, I don't know the specific
23 details of attacks or planned attacks. I think -- I will
24 point out, first of all, that the rationale for the order was
25 not only 9/11, it was to protect the United States from the

1 potential for terrorism.

2 I will also note that the seven countries that are listed
3 in the Executive Order are the same seven countries that were
4 already subject to other restrictions in obtaining visas that
5 Congress put in place, both by naming countries, Syria and
6 Iraq, and that the prior administration put in place by
7 designating them as places where terrorism is likely to
8 occur, or -- the specific factors are whether the presence in
9 a particular country increases the likelihood that an alien
10 is a credible threat to U.S. security or an area that is a
11 safe haven for terrorists.

12 THE COURT: Well, let me walk you back, then. You're
13 from the Department of Justice, if I understand correctly?

14 MS. BENNETT: Yes.

15 THE COURT: So you're aware of law enforcement. How
16 many arrests have there been of foreign nationals for those
17 seven countries since 9/11?

18 MS. BENNETT: Your Honor, I don't have that
19 information. I'm from the civil division if that helps get
20 me off the hook.

21 THE COURT: Let me tell you. The answer to that is
22 none, as best I can tell. So, I mean, you're here arguing on
23 behalf of someone that says: We have to protect the United
24 States from these individuals coming from these countries,
25 and there's no support for that.

1 MS. BENNETT: Your Honor, I think the point is that
2 because this is a question of foreign affairs, because this
3 is an area where Congress has delegated authority to the
4 President to make these determinations, it's the President
5 that gets to make the determinations. And the court doesn't
6 have authority to look behind those determinations. They're
7 essentially like determinations that are committed to agency
8 discretion.

9 And we do think that -- despite plaintiffs' claim -- that
10 *Kleindienst v. Mandel* is directly on point. And if the four
11 corners of the Executive Order offer a facially legitimate
12 and bona fide reason for it, which they do here, that the
13 court can't look behind that.

14 THE COURT: Well, counsel, I understand that from
15 your papers, and you very forcefully presented that argument.
16 But I'm also asked to look and determine if the Executive
17 Order is rationally based. And rationally based to me
18 implies that to some extent I have to find it grounded in
19 facts as opposed to fiction.

20 MS. BENNETT: Well, Your Honor, we actually don't
21 think you are supposed to look at whether it's rationally
22 based. We think that the standard is, again, facially
23 legitimate, and that there are some cases that say the court
24 would have to find it wholly irrational. And again, Your
25 Honor, I would point to the fact that Congress itself has

1 specifically designated two of these countries as areas of
2 concern with respect to terrorism. And the Obama
3 Administration, the executive branch, designated the
4 remaining five. And so it's not that this Executive Order
5 is, in that regard, saying anything new about these being
6 countries of concern as it regards terrorism.

7 THE COURT: Well, let's go back to something you were
8 starting to get around to when I interrupted you. You were
9 going to argue *Katzenbach*. Isn't that just classic dicta?

10 MS. BENNETT: Your Honor, I think to the extent
11 you're talking about that states --

12 THE COURT: I'm talking about the language you quote
13 in your brief.

14 MS. BENNETT: Well, I mean, we also, I think, cited
15 that case for the idea that states don't have *parens patriae*
16 standing. But for the idea that states don't have due
17 process rights, we cite other cases in our brief. I think
18 that it's a well-established -- the Fifth Amendment applies
19 to persons, and cases established that the state is not a
20 person in that regard. And so the state doesn't have due
21 process rights to assert.

22 THE COURT: Well then how do I reconcile that with
23 *Massachusetts v. EPA*?

24 MS. BENNETT: Your Honor, *Massachusetts v. EPA*, which
25 was a standing case. Right? So there the facts were very

1 specific. There you had two factors that the court found
2 relevant. One, you had an actual injury to the territorial
3 sovereignty of Massachusetts. The court talked about how
4 global warming actually affected the territory of
5 Massachusetts, its coastline, an area that was owned by the
6 state. And the second factor was that Congress had
7 explicitly given states and other parties a procedural right,
8 when someone petitioned the EPA to look into global warming
9 and the EPA denied that petition, then Congress created a
10 procedural mechanism for that person to challenge that
11 decision.

12 So the court said, in an area where the state has an
13 injury-in-fact, it's an injury to its territorial sovereignty
14 and these explicit procedural rights, that there's standing.
15 And neither one of those circumstances are present here.
16 Washington, of course, doesn't allege any injury to its
17 territorial sovereignty. It doesn't -- you know, its other
18 alleged injuries are sort of incidental.

19 THE COURT: Explain to me what you mean by the term
20 "territorial sovereignty."

21 MS. BENNETT: Injury to its territory. So it's
22 pollution of its rivers, for example, pollution of its
23 coastline, pollution of its land.

24 THE COURT: So the federal government can do whatever
25 it wanted to people who live here, and as long as the land is

1 not damaged, there's no harm or there's no cause of action?

2 MS. BENNETT: Well, Your Honor, I mean, I wouldn't
3 make a statement that broad. I think that the statement I
4 would make here is that when the federal government regulates
5 individuals, and there are sort of speculative downstream
6 effects that might affect the state in terms of lost revenue
7 and stuff like that, cases have said no, that that's not
8 sufficient. That it's not sufficiently direct as it was in
9 Massachusetts.

10 THE COURT: All right. Before I run out of all your
11 time also, what limits does 1152(a)(1)(A) place on the
12 Executive?

13 MS. BENNETT: Your Honor, we think -- so, in terms of
14 when, as I was trying to explain before, in terms of when the
15 President has made a determination under Section 212(f) of
16 the INA, that entry of certain aliens should be suspended
17 because it would be detrimental to the United States
18 otherwise, we think that that trumps the 1152(a).

19 THE COURT: Well, let's concentrate on that. You
20 argue this in your brief that the Executive can classify
21 aliens by origin of birth or nationality. And then there is
22 a statute that says the classic anti-discrimination language.
23 How do I reconcile those two concepts?

24 MS. BENNETT: Your Honor, so we think that the
25 1152(a) only applies when the President has not made that

1 designation. And I will -- to sort of play this out a little
2 more --

3 THE COURT: Stop there. Tell me what the authority
4 is for that argument. You make it in your briefing and you
5 don't give me any authority for it there; you just sort of
6 make the statement that, yes, that's our position. Help me
7 understand where it comes from.

8 MS. BENNETT: I think the first principle would be
9 that the court is supposed to attempt to reconcile competing
10 provisions of a statute. I think there's also, Your Honor, a
11 constitutional avoidance point. Here the President is acting
12 in an area of his Article II powers in foreign affairs. And
13 if the court were to find some sort of conflict between the
14 two, the court might run up against the constitutional
15 question of whether the President had authority to make
16 distinctions based on nationality.

17 THE COURT: Or that the Executive is running up
18 against the law that Congress has passed.

19 MS. BENNETT: Well, Your Honor, to the extent that
20 you're concerned about that, I would just note that Congress
21 itself, in the INA, makes those very same distinctions based
22 on nationality. In the provision that the President is
23 relying on here 11 -- 8 U.S.C. 1187, where it says that
24 different rules in terms of applying for visas apply to, and
25 it names two countries, Iraq and Syria, and then allows the

1 President to designate others.

2 We think that a reading that says that 1152 applies, no
3 matter what, would trump that provision or would suggest that
4 that provision was invalid.

5 THE COURT: I don't get a lot of chance to do
6 statutory interpretation. But let's concentrate on that for
7 a moment. As I understand it, 1152(a) was promulgated after
8 1182(f). Do you agree with that?

9 MS. BENNETT: Yes, Your Honor.

10 THE COURT: And didn't Congress then have to, by
11 statutory construction, Congress had to be aware of 1182(f)?

12 MS. BENNETT: Yes, Your Honor. That's right.

13 THE COURT: And in that particular provision it makes
14 a number of exceptions, but it does not except to 52.

15 MS. BENNETT: Because we don't think Congress thought
16 it applied. Again, this is a -- the 1152(a) is in a narrower
17 section of the statute that talks about creating a uniform
18 quota system for immigrant visas, for which people are going
19 to be allowed to come into this country. And we just think
20 that that's a narrower section of the statute and that the
21 President's broader authority -- again, Your Honor, I
22 hesitate to repeat this, but I think it's a good example. I
23 mean, Your Honor, if this provision of 1152 trumped 212(f),
24 then the President would essentially be prohibited from
25 restricting the entry of aliens to a country at which the

1 United States was at war. And we just don't think that
2 Congress could have meant that.

3 THE COURT: You've shaken those bones about as much
4 as you can get out of them.

5 Why shouldn't the court assume that Congress did not want
6 to except 1182(f) from the operation of 1151? I mean,
7 Justice Scalia has not been with us for a year, but it seems
8 that what you're running to now is, oh, all I have to do is
9 look at the legislative history and that must have been what
10 they meant.

11 MS. BENNETT: Well, I don't think Your Honor needs to
12 look at the legislative history. I think you can look at the
13 text and the structure of the statute, that this broader
14 power authorizing the President to suspend the entry of any
15 aliens, or any class of aliens, supersedes this other
16 provision that otherwise would apply in the absence of that.

17 I would also note, Your Honor, that we also make
18 additional arguments in our brief about the procedural
19 exemption to 1152(a) and its narrowness as well. But we
20 think 212(f) trumps that provision.

21 THE COURT: All right. You've got about six minutes
22 left, so I won't interrupt you either for a bit here.

23 MS. BENNETT: Okay, Your Honor. Thank you.

24 I'll just make a few more points. I think I covered
25 largely what I wanted to cover. But with respect to the

1 remaining two preliminary injunction factors, I would just
2 say that the state, we don't think they've established
3 standing and injury. But certainly even if Your Honor
4 disagrees, they haven't shown irreparable harm. As this
5 process has sort of shown, the Executive Order sets up a
6 case-by-case -- or sets up a system where there can be
7 case-by-case waivers of specific exemptions.

8 And so the idea that a state can come in and sort of sue
9 on behalf of all of its citizens without really sort of
10 playing out specific circumstances where it's been applied
11 unlawfully, we think that's not the proper avenue for a TR0.

12 Again, that certainly, perhaps, some of these individuals
13 could bring their own case and we'd have to look at the facts
14 of those cases. But as for this facial challenge, for Your
15 Honor to enjoin this restraining order, or frankly even parts
16 of it, even provisions of it, we think that's a facial
17 challenge and that Your Honor can't do that in light of the
18 fact that it is lawful in some of its applications.

19 And then we would just point to the balance of the
20 equities, Your Honor, and note again that in this regard the
21 President was acting pursuant to congressional authority, at
22 the height of his power, in the area of national security,
23 foreign affairs and immigration.

24 So we'd ask that Your Honor deny the TR0.

25 THE COURT: Thank you.

1 MS. BENNETT: Thank you.

2 THE COURT: Mr. Purcell, you have about six minutes.

3 MR. PURCELL: Thank you, Your Honor.

4 Just a few points. First, the federal government has
5 argued that the harms to UW and WSU and their students and
6 faculty are abstract. That just couldn't be further from the
7 case. They have students and faculty who are literally
8 stranded overseas, as they've stated in the declarations.
9 They have sponsored visas for people that are wasted because
10 they are not going to be able to come. They went to great
11 time and expense to do that.

12 This harm is much more direct and immediate than what was
13 happening in either *Massachusetts v. EPA* or *Texas v. United*
14 *States*. In *Texas v. United States* the immigration program
15 that was challenged hadn't even taken effect yet. No one had
16 even qualified for it yet. The harm was a ways down the
17 road. And the court there still granted a preliminary
18 injunction. Here there's literally people stuck overseas who
19 can't get back to their universities.

20 THE COURT: But the causes of action belong to them.
21 The state can't be exercising them on their behalf.

22 MR. PURCELL: The universities and their students are
23 harmed by those harms, Your Honor. It's the university that
24 spent the money to bring the people here who can no longer
25 come. It's the university that went to the time and trouble

1 of sponsoring those scholars to come. And they're harmed
2 immediately. So perhaps, yes, certainly, the people who are
3 stranded overseas may have their own claim, but that doesn't
4 mean that the state has no claim. *Massachusetts v. EPA* makes
5 that clear, Your Honor.

6 The federal government also talked about a Ninth Circuit
7 case not saying anything remotely like *Texas v. United*
8 *States*. We cited the *City of Sausalito* case on page two of
9 our standing brief, where the court found standing based on
10 aesthetic harms to a local government that were not
11 quantified in any sort of monetary way.

12 You also asked me, Your Honor, if the court had ever
13 blocked part of an immigration order based on the equal
14 protection clause and due process clause, and my co-counsel
15 very helpfully pointed out that, in fact, two courts have
16 blocked parts of this order based on the equal protection
17 clause and due process clause. And I can give you those
18 orders.

19 It's the *Darweesh* case out of the United States District,
20 Eastern District of New York. That order was entered on
21 January 28th -- sorry, that order was entered on January,
22 yes, 28th. And the -- I'm going to butcher this name --
23 *Tootkaboni* case, out of the District of Massachusetts, issued
24 on January 29th.

25 And both of those cases found that the petitioners had a

1 strong likelihood of success in establishing the violations
2 of the due process and the equal protection clause of the
3 United States Constitution. I don't have all the orders with
4 me, but at least those two have found it on this order.

5 The next thing I'd say, Your Honor, is that the
6 religious-based claims, the federal government is trying to
7 limit those only to the refugee portions of the order. Our
8 position is broader than that, Your Honor. We're saying part
9 three and part five were motivated, in part, by desire to
10 target a particular, unpopular religious group, Muslims, and
11 that that undermines the basis for both of those sections.

12 Your Honor helpfully pointed out that the *Katzenbach*
13 language is dicta. I'm sorry I didn't say that, but you're
14 absolutely right. And, frankly, the federal government's
15 position about the standard of review here is frightening. I
16 mean, they're basically saying that you can't review anything
17 about what the President does or says, as long as he says
18 it's for national security reasons. And that just can't be
19 the law.

20 And the last thing I'd say, Your Honor, is that we are
21 asking here for nationwide relief. We do have now two states
22 that are part of this case that are obviously some distance
23 apart. We also have people trying to come to Washington from
24 all over the world, through various places, and we believe
25 that nationwide relief is appropriate here for the same

1 reasons that it was in *United States v. Texas*.

2 So, Your Honor, in sum, the state is grievously harmed
3 here, both in its proprietary capacity and in its *parens*
4 *patriae* capacity. The declarations that are attached to our
5 briefing, the descriptions of people who have been harmed in
6 the amicus briefs, are heartbreaking. And it's not just harm
7 to people who are trying to come here who have never been
8 here. Again, that is not the focus of our claim. The focus
9 of our claim is the harm to people who have been here, in
10 many cases for many years, following the law, and you know,
11 traveled overseas without warning that this was going to
12 happen, or could no longer travel, and have lost fundamental
13 rights without any process at all in an order that was
14 motivated largely by religious animus.

15 So we're asking you to enter the temporary restraining
16 order that we're seeking here. Thank you, Your Honor.

17 THE COURT: Thank you, counsel. I think argument was
18 helpful.

19 The following oral opinion will constitute the informal
20 opinion of the court. It is a formal opinion for purposes of
21 ruling on this motion. But as I indicated to you, I intend
22 to do a formal written order. And hopefully we will have
23 that on file over the weekend, so that by the time the Ninth
24 Circuit opens on Monday you'll be in a position to be able to
25 seek review of it.

1 Before the court is plaintiffs State of Washington and
2 State of Minnesota's emergency motion for a temporary
3 restraining order. For the audience out there, lawyers refer
4 to those as TROs. And that's not initials that we like to
5 see.

6 The court has reviewed the motion, the complaint, the
7 amended complaint, the submissions of the parties, the
8 submissions of the amici, the relevant portions of the
9 record, and most importantly, the applicable law. And I do
10 very much appreciate the fact that counsel have come for oral
11 argument today on a very expedited basis; and have done a
12 nice job of submitting written materials to the court, which
13 are helpful, and also participating in oral argument.

14 I'm going to digress for a moment and remind people who
15 see this opinion and wonder what's going on. Fundamental to
16 the work of this court is a recognition that it is only one
17 of three branches, three equal branches of our government.
18 The role assigned to the court is not to create policy, and
19 it's not to judge the wisdom of any particular policy
20 promoted by the other two branches. That is the work of the
21 legislative and executive branches and the citizens who
22 ultimately, by exercising their rights to vote, exercise
23 democratic control over those branches.

24 The work of the judiciary is limited to ensuring that the
25 actions taken by those two branches comport with our laws,

1 and most importantly, our constitution.

2 There is a very narrow question before the court today
3 that is asked to be considered and that is whether it is
4 appropriate to enter a TRO against certain actions taken by
5 the Executive that are enumerated in this specific lawsuit.
6 Although that question is narrow, the court is mindful of the
7 considerable impact that its order may have on the parties
8 before it, the executive branch of our government, and the
9 country's citizens and residents.

10 I will not repeat the procedural background of this case.
11 It will be in the written order. I would instead note that
12 the motion was filed and that the federal defendants opposed
13 the state's motion.

14 Any question regarding lawsuits in federal court starts
15 with the issue of: Does the court have jurisdiction over the
16 federal defendants and the subject matter of the lawsuit? In
17 terms of notice to the federal defendants, that was certainly
18 accomplished, and indeed, the federal defendants have
19 appeared and argued before the court and defended their
20 position in this action. And since this is an attack based
21 on the constitution and federal law, I find that I do have
22 subject matter jurisdiction.

23 The standard for issuing a restraining order in this
24 circuit is the same as for issuing a preliminary injunction.
25 A temporary restraining order is, as the government has

1 noted, an extraordinary remedy that may only be awarded upon
2 a clear showing that the plaintiff is entitled to such
3 relief. A citation to the *Winter* case, which is well known
4 to the lawyers.

5 The legal standard for preliminary injunctive relief, and
6 hence for a temporary restraining order, is that the
7 plaintiff must be likely to succeed on the merits, that it
8 will suffer irreparable harm in the absence of preliminary
9 relief, that the balance of equities tips in their favor, and
10 finally, that the injunction is in the public interest.

11 The Ninth Circuit has an alternative test which it's used
12 from time to time and is well known to the parties and will
13 be in the written order.

14 It is an interesting question in regards to the standing
15 of the states to bring this action. I'm sure the one item
16 that all counsel would agree on is that the standing law is a
17 little murky. I find, however, that the state does have
18 standing in regards to this matter, and therefore they are
19 properly here. And I probed with both counsel my reasons for
20 finding that, which have to do with direct, immediate harm
21 going to the states, as institutions, in addition to harm to
22 their citizens, which they are not able to represent as
23 directly.

24 Therefore, turning to the merits. The court finds that
25 for purposes of the entry of the temporary restraining order,

1 that the state has met its burden of demonstrating that it
2 faces immediate and irreparable injury as a result of the
3 signing and implementation of the Executive Order.

4 I find that the state has satisfied the test that it is
5 likely to succeed on the merits of the claim, which would
6 entitle them to relief. I find that the balance of equities
7 favor the states. And lastly, I find that a temporary
8 restraining order is in the public interest.

9 If I were to apply the Ninth Circuit's alternative test, I
10 would find that the states have established a question, a
11 serious question going to the merits, and the balance of
12 equities tips sharply in their favor. As such, I find that
13 the court should and will grant the temporary restraining
14 order.

15 The scope of that order is as follows: Federal defendants
16 and all their respective officers, agents, servants,
17 employees, attorneys, and persons acting in concert or
18 participation with them are hereby enjoined and restrained
19 from:

20 (A) Enforcing Section 3(c) of the Executive Order;

21 (B) Enjoined and restrained from enforcing section 5(a)
22 of the Executive Order;

23 (C) Enjoined and restrained from enforcing Section 5(b)
24 of the Executive Order, or proceeding with any action that
25 prioritizes the refugee claims of certain religious

1 minorities;

2 (D) Enjoined and restrained from enforcing Section 5(c)
3 of the Executive Order, and lastly;

4 (E) Enjoined and restrained from enforcing Section 5(e)
5 of the Executive Order, to the extent Section 5(e) purports
6 to prioritize refugee claims of certain religious minorities.

7 This TR0 is granted on a nationwide basis and prohibits
8 enforcement of Sections 3(c), 5(a), 5(b), 5(c) and 5(e) of
9 the Executive Order at all United States borders and ports of
10 entry pending further orders from this court.

11 I considered the question of the government's request that
12 the order should be limited to Minnesota and Washington, but
13 I find that such partial implementation of the Executive
14 Order would undermine the constitutional imperative of a
15 uniform rule of naturalization and Congress's instruction
16 that immigration laws of the United States should be enforced
17 vigorously and uniformly. That's language is from *Texas v.*
18 *United States*, 809 F.3d, 134, 155, 5th Circuit 2015.

19 I find that no security bond is required under the Federal
20 Rules of Civil Procedure 65(c), and I direct that the parties
21 confer and get back to the court promptly -- today wouldn't
22 be too late, but by next week -- regarding a date for the
23 preliminary injunction hearing, the time for the motion for
24 the preliminary injunction, the time for the federal
25 defendants to file their opposition and for the states to

1 file their reply.

2 Once we know that, we'll promptly schedule a hearing on
3 the motion for preliminary injunction after we are in receipt
4 of the parties' briefing.

5 The court concludes that the circumstances that brought it
6 here today are such that we must intervene to fulfill the
7 judiciary's constitutional role in our tri-part government.
8 Therefore, the court concludes that entry of the
9 above-described TRO is necessary and the state's motion is
10 hereby granted.

11 Counsel, anything further at this time? Mr. Purcell?

12 MR. PURCELL: No, Your Honor.

13 THE COURT: Ms. Bennett?

14 MS. BENNETT: One more thing, Your Honor, as a
15 procedural matter the government would move Your Honor to
16 stay the TRO, for the same purposes that we opposed the TRO,
17 pending a decision of the ASG of whether to appeal, whether
18 to file an appeal.

19 THE COURT: I'm sorry, pending a decision by the...

20 MS. BENNETT: I'm sorry, the Acting Solicitor
21 General; I'm sorry, Your Honor, we use lots of acronyms. By
22 the Acting Solicitor General.

23 THE COURT: I understand the motion and I am going to
24 deny it.

25 MS. BENNETT: Thank you, Your Honor.

1 THE COURT: I will do everything I can to get you
2 prompt appellate review, which I think is the appropriate
3 case to take.

4 MS. BENNETT: Thank you, Your Honor.

5 THE COURT: We will be in recess. Thank you,
6 counsel.

7 (The proceedings recessed.)

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C E R T I F I C A T E

I, Debbie K. Zurn, RMR, CRR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

/s/ Debbie Zurn

DEBBIE ZURN
OFFICIAL COURT REPORTER