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 TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA,

Defendants.

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

MOTION FOR TEMPORARY RESTRAINING ORDER

Motion Noted: October 16, 2017

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

"[I]mmigration, even for the President, is not a one-person show." *Hawai'i v. Trump*, 859 F.3d 741, 755 (9th Cir. 2017) (per curiam). The Constitution grants *Congress*, not the President, control over immigration, and both the Constitution and many statutes limit the President's power to make discriminatory immigration policies. In recent months, this Court and many others have found that President Trump violated these rules in issuing two executive orders restricting immigration. Undeterred by these holdings, the President has issued a third immigration order ("EO3") that transforms what was supposedly a "temporary pause" on immigration into a permanent ban, suspending entry into the United States by hundreds of millions of people.

The new order features fresh window dressing, but the core policy remains the same. Like its predecessors, EO3 restricts immigration based on national origin. This violates the Immigration and Nationality Act ("INA"), as the Ninth Circuit has already held. *Hawai'i*, 859 F.3d at 779. Like its predecessors, EO3 continues to target Muslim-majority countries, a focus that, together with the President's history of demagoguery towards Islam, demonstrates that EO3 is again motivated by a discriminatory purpose and is irrational. And, like its predecessors, EO3 will inflict grievous harms on the States and their residents. There is one startling difference: this time, the ban is indefinite.

The States return to this Court to ask it to enforce again the constitutional guarantee that the President respect the rule of law and act within his authority. The States ask the Court to issue a temporary restraining order against enforcement of Sections 1(g) and 2 of EO3.

II. FACTUAL AND PROCEDURAL HISTORY

The State of Washington first filed this lawsuit challenging President Trump's issuance of Executive Order No. 13769 ("EO1") on January 30, 2017. ECF 1. On February 3, 2017, this Court granted the State's motion for a temporary restraining order ("TRO") and enjoined

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enforcement of several provisions of EO1. ECF 52. The Ninth Circuit denied Defendants' emergency motion for a stay of the injunction. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam). Defendants chose not to seek review by the Supreme Court.

On March 6, 2017, President Trump issued Executive Order No. 13780 ("EO2"), which revoked EO1. Two days later, Defendants withdrew their Ninth Circuit appeal in this case. ECF 111. Following the issuance of EO2, Washington, California, Maryland, Massachusetts, New York, and Oregon ("States")[1] filed an amended complaint challenging EO2. ECF 152. The States moved for a TRO to enjoin Sections 2(c) and 6(a) of EO2. ECF 148.

On March 15, 2017, in a separate suit against EO2, the district court in Hawai'i enjoined Sections 2 and 6 nationwide. *Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1140 (D. Haw. 2017). The next day, in a third lawsuit, the district court in Maryland issued a nationwide injunction against Section 2(c). *Int'l Refugee Assistance Project* ("*IRAP*") *v. Trump*, 241 F. Supp. 3d 539, 566 (D. Md. 2017). In light of the *Hawai'i* ruling, this Court stayed consideration of the States' motion for a TRO. ECF 164. The Court then granted Defendants' request for a stay of this case pending the Ninth Circuit's resolution of the *Hawai'i* appeal. ECF 175, 189.

The Ninth Circuit issued its opinion in *Hawai'i* on June 12, 2017, largely affirming the injunction. *Hawai'i v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam). Defendants petitioned the Supreme Court for a writ of certiorari, applied for a stay pending appeal, and requested that the *Hawai'i* case be consolidated with *IRAP*, where the Fourth Circuit had largely affirmed the injunction entered by the district court. *IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc). The Supreme Court granted certiorari, granted the stay application "to the extent the injunctions prevent enforcement of § 2(c) with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States," consolidated the two

[1] The Court had previously granted Oregon's motion to intervene on March 9, 2017. ECF 112.

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cases, and set the case for argument. *Trump v. IRAP*, 137 S. Ct. 2080, 2087 (2017). The parties in this case agreed that the stay should remain in place pending the outcome of the Supreme Court proceedings, but that any party could move to lift the stay if circumstances changed. ECF 192.

On June 28, 2017, Defendants began to enforce the non-enjoined parts of EO2 and published guidance interpreting the Supreme Court's definition of "bona fide relationship" to exclude many family members and most refugees. *See Hawai'i v. Trump*, __ F. Supp. 3d __, CV No. 17-00050 DKW-KSC, 2017 WL 2989048, at *5-6 (D. Haw. July 13, 2017) (summarizing guidance). Plaintiffs in the Hawai'i litigation successfully challenged Defendants' interpretation of "bona fide relationship," and the Ninth Circuit upheld the lower court's injunction preventing Defendants from enforcing EO2 against grandparents and other family members or refugees who have formal assurances from resettlement agencies or are in the U.S. Refugee Admissions Program. *Hawai'i v. Trump*, __ F.3d __, No. 17-16426, 2017 WL 3911055, at *14 (9th Cir. Sept. 7, 2017). The Supreme Court stayed the Ninth Circuit mandate with respect to refugees covered by a formal assurance. *Trump v. Hawai'i*, __ S. Ct. __, Nos. 17A275, 16-1540, 2017 WL 4014838, at *1 (U.S. Sept. 12, 2017).

On September 24, 2017, EO2 expired, and President Trump issued EO3, a Presidential Proclamation titled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats." 82 Fed. Reg. 45,161 (Sept. 27, 2017). EO3 again suspends immigration by more than 150 million people from six Muslim-majority countries, and applies "additional scrutiny" to immigrants from Iraq, another Muslim-majority country. EO3 §§ 1(g), 2(a)–(c), (e), (g)-(h)[2]; 3d Am. Compl. ¶¶ 5, 202. The order also suspends large classes of non-immigrants like students, businesspeople, and tourists.

[2] The order also suspends immigration from North Korea, EO3 § 2(d)(ii), but this affects a vanishingly small number of people. In 2015, for example, 55 immigrants were admitted from North Korea, compared to 13,114 immigrants from Iran. 3d Am. Compl. ¶ 204.

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EO3 §§ 2(a)-(h). The non-immigrant restrictions vary by country and by type of visa. *See* Ex. A (chart summarizing EO3 suspensions). EO3's restrictions contain no sunset date—they apply indefinitely. The new entry restrictions and limitations go into effect at 12:01 a.m. EST on October 18, 2017. EO3 § 7(b).

Following the issuance of EO3, the Supreme Court removed the *Hawai'i* and *IRAP* cases from the oral argument calendar and directed the parties to file letter briefs addressing whether, or to what extent, EO3 rendered the cases moot. *Trump v. Hawai'i*, __ S. Ct. __, No. 16-1540, 2017 WL 2734554, at *1 (U.S. Sept. 25, 2017). On October 10, 2017, the Supreme Court dismissed *IRAP* as moot and directed the Fourth Circuit to vacate its opinion, finding that there was no longer a live controversy because the only section of EO2 enjoined in *IRAP* had "expired by its own terms on September 24, 2017." *Trump v. IRAP*, __ S. Ct. __, No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017). The Court "express[ed] no view on the merits." *Id*

III. ARGUMENT

To obtain a temporary restraining order, the States must demonstrate their standing to challenge EO3 as well as 1) a likelihood of success on the merits; 2) that irreparable harm is likely in the absence of preliminary relief; 3) that the balance of equities tips in the States' favor; and 4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); Fed. R. Civ. P. 65(b)(1). A temporary restraining order "preserv[es] the status quo and prevent[s] irreparable harm" until a preliminary injunction hearing may be held. *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local 70*, 415 U.S. 423, 439 (1974). The States have standing and meet the burden to obtain temporary relief. The Court should enjoin EO3 to prevent its new provisions from taking effect until it rules on a preliminary injunction motion.

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A. The States Have Standing

The very same harms that prompted this Court and the Ninth Circuit to find state standing to challenge the prior two executive orders are triggered again by EO3. The States can establish standing based on two independent grounds: (1) harms to the States' proprietary interests, and (2) harms to the States' quasi-sovereign interests. This is especially clear given the standard applied at this early stage of the case. *See Hawai'i*, 859 F.3d at 762 ("'At this very preliminary stage of the litigation, [Plaintiffs] may rely on the allegations in their amended complaint and whatever other evidence they submitted in support of their [preliminary injunction] motion to meet their burden.'") (alterations in *Hawai'i*) (quoting *Washington*, 847 F.3d at 1159).

First, the States have standing based on injuries to their proprietary interests. As the Ninth Circuit repeatedly has confirmed, state standing may be grounded in a state's proprietary interests as an operator of a state university. *Hawai'i*, 859 F.3d at 765; *Washington*, 847 F.3d at 1161. Here, the States have alleged and offered extensive evidence that EO3 will significantly harm the States' public colleges and universities. Like its predecessors, EO3 constrains the States' ability to recruit, enroll, and retain talented students, which will result in lost tuition revenue. *See, e.g.*, ECF 194-40 (5th Decl. Chaudhry) ¶ 11 ("significant decline" in international applications); ECF 194-39 (3d Decl. Branon) ¶ 4 (same); *id.* at ¶ 6 (admitted students unable to obtain visas and have deferred enrollment); ECF 194-30 (2d Decl. Eaton) ¶ 5 (same); ECF 194-44 (Decl. Ehsani) ¶ 11 (PhD student at the University of Washington plans to leave program and return to Iran if EO3 goes into effect); ECF 194-54 (Decl. Nofallah) ¶ 8 (same); ECF 194-57 (Decl. Sheikhan) ¶ 7 (New York University PhD student will quit program and return to Iran due to EO3's travel restrictions). Similarly, EO3 hampers the States' ability to recruit, hire, and retain talented faculty members. *See, e.g.*, ECF 194-50 (Decl. Hajishirzi) ¶¶ 9-10 (two UW professors considering applying for jobs in Canada to avoid EO3); ECF 194-52 (Decl. Hosseinzadeh) ¶ 8 (Iranian post-doctoral researcher at UW

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considering leaving United States); ECF 194-40 (5th Decl. Chaudhry) ¶ 9 (two visiting scholars from targeted countries unable to join faculty at Washington State University); ECF 194-55 (4th Decl. Riedinger) ¶¶ 3-4 (concerns that visiting scholars in highly specialized fields may leave UW). EO3 will also restrict the ability of students and faculty members to travel abroad for research and scholarship, will impede their ability to collaborate with foreign scholars, and will directly harm research projects and academic programs. *See, e.g.*, ECF 194-44 (Decl. Ehsani) ¶ 8 (UW PhD student unable to travel for academic conferences); ECF 194-49 (Decl. Greenbaum) ¶¶ 4-6 (UW professor limited in ability to collaborate with Iranian scholars); ECF 194-40 (5th Decl. Chaudhry) ¶ 8 (critical research project on hold due to Iranian scholar's inability to come to WSU); ECF 194-57 (Decl. Sheikhan) ¶ 5 (NYU PhD student prevented from necessary travel for research in narrow field of computational geometry). The loss of tuition revenue, students, and talented staff establishes clear proprietary standing under the Ninth Circuit's holdings. *See Hawai'i*, 859 F.3d at 763-65; *Washington*, 847 F.3d at 1160-61 (holding that States' proprietary interests give them "standing to assert the rights of students, scholars, and faculty affected by the Executive Order").

The States' actionable proprietary interests extend beyond their colleges and universities. *See Hawai'i*, 859 F.3d at 763 ("'[L]ike other associations and private parties, a State is bound to have a variety of proprietary interests.'") (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)). The States have asserted injury to their economies, including the loss of tourism revenue and tax revenue. *See* ECF 194-60 (2d Decl. Oline) ¶¶ 10-15; 3d Am. Compl. ¶¶ 62-64, 70. This, too, establishes proprietary standing. *See City of Sausalito v. O'Neill*, 386 F.3d 1186, 1199 (9th Cir. 2004) (holding that lost property and sales tax revenues established standing); *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992) (injury to state from loss of specified tax revenues adequate to establish proprietary standing).

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Finally, the States have standing based on harms to their quasi-sovereign interests. The States have alleged and offered significant evidence that EO3 adversely affects thousands of the States' residents in the areas of employment, education, business, family relations, and freedom to travel. For example, EO3 will prevent the States' residents from receiving visits or reunifying with family members for an indefinite period of time. *See, e.g.*, ECF 194-23 (Decl. Bina) ¶¶ 4, 6; ECF 194-38 (Decl. Asheghabadi) ¶ 5; ECF 194-33 (Decl. Soroush) ¶¶ 9-11; ECF 194-29 (Decl. Khadem) ¶ 5; ECF 194-27 (Decl. Heravi) ¶ 8; ECF 194-65 (Decl. Fotouhiyehpour) ¶ 5; ECF 194-31 (Decl. Nouri) ¶ 6. Likewise, the States' interest in maintaining a robust healthcare system, including for underserved patients, is core to their quasi-sovereign interests. *See* ECF 118-32 (Decl. Fullerton) ¶¶ 5-7, 14-19; ECF 100 (Decl. Overbeck) ¶¶ 3-6. As this Court properly recognized, States have standing to address harms that "extend to the States by virtue of their roles as *parens patriae* of the residents living within their borders." ECF 52 at 4-5; *see also Snapp*, 458 U.S. at 607 (states may sue to protect "the health and well-being" of their residents, "both physical and economic"); *id.* at 609 (affirming the "state interest in securing residents from the harmful effects of discrimination").

B. Temporary Relief Is Warranted

1. The States Are Likely to Prevail on Their Claims

The States are likely to prevail on the merits in demonstrating that EO3 violates the INA, the Establishment Clause, and the equal protection guarantee. Pursuant to the Ninth Circuit's direction in *Hawai'i*, 859 F.3d at 761, the States begin with their statutory claims.

a. EO3 Violates Multiple Provisions of the INA

Section 2 of the new order works an indefinite suspension on the entry of immigrants from Chad, Iran, Libya, North Korea, Syria, Yemen, and Somalia. EO3 §§ 2(a)–(e), (g)–(h). The Ninth Circuit upheld an injunction against a nearly identical provision of EO2 because it violated multiple sections of the INA. *Hawai'i*, 859 F.3d at 774-79. The *Hawai'i* analysis

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controls review of EO3 and demonstrates that the States are highly likely to prevail on their INA claims.

(1) EO3's undisguised discrimination based on nationality violates 8 U.S.C. § 1152(a)

The new order indefinitely suspends immigration from seven countries. EO2 § 2(c) (Chad, Iran, Libya, North Korea, Syria, Yemen, Somalia). But the Ninth Circuit just upheld an injunction against EO2 because "in suspending the issuance of immigrant visas and denying entry based on nationality" the President violates 8 U.S.C. § 1152(a)(1)(A). *Hawai'i*, 859 F.3d at 779. EO3 repeats the same violation.

Section 1152(a)(1)(A) of the INA provides "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, *nationality*, place of birth, or place of residence." (Emphasis added.) Congress passed the INA provision "[c]ontemporaneous to enacting the Civil Rights Act of 1964 and the Voting Rights Act of 1965," in order to "eliminate the 'national origins system as the basis for the selection of immigrants to the United States.'" *Hawai'i*, 859 F.3d at 776 (quoting H.R. Rep. No. 89-745, at 8 (1965)). Although EO2, by its terms, restricted only the entry of aliens, the Ninth Circuit held that "[i]n prohibiting nationality-based discrimination in the issuance of immigrant visas, Congress also in effect prohibited nationality-based discrimination in the admission of aliens." *Id*. at 778.[3] In so holding, the Court rejected the government's proffered comparisons to previous executive orders that suspended immigrant entry, because previous orders "did not suspend classes of aliens on the basis of national origin, but instead on the basis of affiliation or culpable conduct." *Id*. at 778-79. The court concluded that "§ 1152(a)(1)(A)'s non-

[3] Defendants have since abandoned the argument that the President is free to discriminate based on nationality in the admission of aliens, even though the same discrimination by government officials who issue visas is prohibited. Br. for Petitioners at 51-52, *Trump v. IRAP*, 137 S. Ct. 2080 (2017) (conceding that "[t]he Department of State treats aliens covered by exercises of the President's Section 1182(f) authority as ineligible for visas").

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discrimination mandate cabins the President's authority under § 1182(f)" and that EO2 exceeded the President's authority. *Id.*

Hawai'i controls here. EO3 indefinitely suspends immigration from seven countries based on nationality. EO3 § 2(a)(ii) ("The entry into the United States of nationals of Chad, as immigrants . . . is hereby suspended."); *id.* §§ 2(b)(ii), 2(c)(ii), 2(d)(ii), 2(e)(ii), 2(g)(ii), 2(h)(ii) (same for Iran, Libya, North Korea, Syria, Yemen, and Somalia). EO3 thus "runs afoul" of the INA provision "that prohibit[s] nationality-based discrimination." *Hawai'i*, 859 F.3d at 756. The Court should enjoin the provisions of EO3 that suspend immigration based on national origin.

(2) EO3 contains insufficient findings to support suspension of entry under 8 U.S.C. § 1182(f)

EO3 suspends immigration from countries the President and Secretary of Homeland Security identified as having "inadequate identity-management protocols, information sharing practices, and risk factors." EO3 § 1(g). This is an insufficient basis to invoke 8 U.S.C. § 1182(f), because the findings (1) improperly use nationality as a proxy for dangerousness, and (2) are inconsistent with the restrictions the order actually imposes. The States are likely to prevail on their claim that the President exceeded his authority under 8 U.S.C. § 1182(f).

In EO2, the President relied on § 1182(f) to ban entry of nationals from six countries. *Hawai'i*, 859 F.3d at 771.[4] The order proffered "national security concerns," including "the risk that potential terrorists might exploit possible weaknesses in the Nation's screening and vetting procedures," as justifications for the expansive restrictions. *Id.* (citing EO2 § 2(c)). Specific country conditions included the existence of terrorist organizations within each

[4] Like the new order, EO2 also cited 8 U.S.C. § 1185(a) as a source of Presidential authority to bar the entry of immigrants. The Ninth Circuit held, and the government did not dispute, that § 1185(a) provides no "independent basis for the suspension of entry." *Hawai'i*, 859 F.3d at 770 n.10. Accordingly, the relevant inquiry turns on the scope of Presidential authority under 8 U.S.C. § 1182(f).

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country, an insufficient "willingness or ability to share or validate important information about individuals seeking to travel to the United States," and difficulty removing or deporting such nationals after entry. *Id.* The order found that admitting any national from the six countries risked admitting someone "who intends to commit terrorist acts or otherwise harm the national security of the United States." *Id.*

The Ninth Circuit held that EO2 failed to offer "a sufficient justification to suspend the entry of more than 180 million people on the basis of nationality." *Id.* at 774. An exercise of § 1182(f) authority "requires that the President's findings support the conclusion that entry of all nationals from the six designated countries . . . would be harmful to the national interest." *Id.* at 770 & n.11 (defining "detrimental" as "causing loss or damage, harmful, injurious, hurtful"). But EO2 "ma[de] no finding that nationality alone renders entry of this broad class of individuals a heightened security risk to the United States." *Id.* at 772 (citing *IRAP v. Trump*, 857 F.3d 554, 610 (4th Cir. 2017) (Keenan, J., concurring in part and in the judgment) ("[T]he Second Executive Order does not state that any *nationals* of the six identified countries, *by virtue of their nationality*, intend to commit terrorist acts in the United States or otherwise pose a detriment to the interests of the United States."); *see also IRAP*, 857 F.3d at 610 (the statute requires "more than vague uncertainty regarding whether [an alien's] entry might be detrimental to our national interests"). The court continued that "[t]he Order does not tie these nationals in any way to terrorist organizations within the six designated countries," find them "responsible for insecure country conditions," or provide "any link between an individual's nationality and their propensity to commit terrorism." *Hawai'i*, 859 F.3d at 772.

The Ninth Circuit went on to explain that EO2's findings related to "governments' ability to share information about nationals" were insufficient, because the order did not make a finding that "the current screening processes are inadequate." *Id.* at 773. "As the law stands, a visa applicant bears the burden of showing that the applicant is eligible to receive a visa . . . and is not inadmissible." *Id.* (citing 8 U.S.C. § 1361). "The Government already can exclude

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individuals who do not meet that burden," and findings based on country conditions offered an insufficient basis to conclude that "this individualized adjudication process is flawed such that permitting entry of an entire class of nationals is injurious to the interests of the United States." *Id*. at 773. The court held the President's findings insufficient to justify a ban of EO2's severity and breadth. *Id.* at 773-74.

The Ninth Circuit's analysis applies directly to EO3. Like its predecessor, EO3 lists findings about country conditions, including the presence of terrorist groups, inadequacy of information sharing about security threats, and deficiencies in foreign countries' identity-management protocols. EO3 §§ 1(h)–(i); 2(a)-(i). But EO3 makes no finding that the current screening processes used *by the United States* are inadequate, and the order nowhere states that our "individualized adjudication process is flawed such that permitting entry of an entire class of nationals is injurious to the interest of the United States." *Hawai'i*, 859 F.3d at 773. Instead, EO3 substitutes general country conditions for specific findings that nationality alone somehow makes each of the more than 150 million banned individuals "a heighted security risk to the United States." *Id.* at 772. This flaw is fatal. *Hawai'i*, 859 F.3d at 774 ("National security is not a 'talismanic incantation . . . .'") (quoting *United States v. Robel*, 389 U.S. 258, 263-64 (1967), and citing *Korematsu v. United States*, 323 U.S. 214, 235 (1944) (Murphy, J., dissenting) (rejecting "the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage" as inconsistent with "reason, logic or experience")).

Moreover, many of EO3's central features are unsupported by any credible evidence, undermining any claim that the new findings "support the conclusion" to categorically ban entry by millions of people. *Cf. Hawai'i*, 859 F.3d at 770. For example, although the order claims a purpose "to protect [U.S.] citizens from terrorist attacks," EO3 § 1(a), the ban "targets a list of countries whose nationals have committed no terrorist attacks on U.S. soil in the last forty years," ECF 194-18 (Decl. Nat'l Security Officials) ¶ 11. Indeed, the ban takes a country-

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based approach, despite this Administration's own conclusion that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity." ECF 118-2 at 25. And the ban does not explain its exclusion of "non-Muslim majority countries such as Belgium where there have been widely-documented problems with information sharing, and whose nationals have carried out terrorist attacks on Europe." ECF 194-18 (Decl. Nat'l Security Officials) ¶ 12.

Finally, internal inconsistencies profoundly undermine EO3's purported national-security rationale. For example, the order finds that Iraq fails the "baseline" security assessment, but then omits Iraq from the ban for policy reasons. EO3 § 1(g) (subjecting Iraq to "additional scrutiny" instead of the ban, citing diplomatic ties, positive working relationship, and "Iraq's commitment to combating the Islamic State"). Likewise, Section 1 of the order describes 47 countries that Administration officials identified as having an "inadequate" or "at risk" baseline performance, EO3 §§ 1(e)-(f), but does not explain how it whittled that number down to the eight countries named in the ban in Section 2. As a third example, the individualized country findings make no effort to explain why some visitors from the country are banned, while others are permitted to apply for visas using the ordinary vetting process. *See, e.g.*, EO3 § 2(c) (describing Libya as having "significant inadequacies in its identity-management protocols," and then banning all tourist and business visitors without mentioning students); *id.* § 2(g) (same for Yemen). An order grounded in these sorts of inconsistencies and unexplained findings cannot lawfully justify an exercise of § 1182(f) authority, particularly one as sweeping and unprecedented as this. *See Hawai'i*, 859 F.3d at 772-73 (proper exercise of § 1182(f) authority must "provide a rationale" and "bridge the gap" between the findings and ultimate restrictions).

In short, the States are likely to prevail on their claim that EO3 fails § 1182(f)'s "precondition of finding that entry of an alien or class of aliens *would be* detrimental to the interests of the United States." *Hawai'i*, 859 F.3d at 774.

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(3) Without authority, EO3 rewrites key INA provisions governing visas

In addition to wholesale suspension of immigration by certain nationals, EO3 works dramatic changes in the admission criteria for *non-immigrants* like students, businesspeople, and tourists. But it is Congress, not the President, that is constitutionally vested with the authority to make immigration law. U.S. Const. art. I, § 8, cl. 4; *Arizona v. United States*, 567 U.S. 387, 409 (2012) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress.") (quoting *Galvan v. Press*, 347 U.S. 522, 531 (1954)). Congress has already enacted comprehensive visa and admissibility rules that conflict with the terms of EO3. The States are likely to prevail on their claim that EO3 may not override the INA by redrafting the visa rules.

The INA contains detailed visa and admissibility procedures, including in circumstances related to terrorism and security. A visa applicant bears the burden of satisfying the government of his or her admissibility. 8 U.S.C. § 1361. The INA allows the Secretary of State and consular officials to tailor visa requirements by visa type and by the circumstances presented by an individual applicant. 8 U.S.C. §§ 1202(c)-(d). Additional visa statutes set out the terms of admissibility for individuals who have engaged in dangerous behavior or hail from countries presenting security concerns. *See, e.g.*, 8 U.S.C. § 1182(a)(2) (inadmissibility based on criminal conduct); 8 U.S.C. § 1182(a)(3)(B) (detailed inadmissibility provisions related to "terrorist activities"); 8 U.S.C. § 1187(a)(12) (vetting procedures applicable only to certain countries with security risks); 8 U.S.C. § 1202(h) (detailed provisions defining visa applicants for whom an in-person interview is required). In short, Congress has deliberately and meticulously crafted the visa application process.

EO3 is essentially a new piece of immigration legislation. The detailed line-drawing in the visa provisions cause it to read like the "extensive and complex" provisions of the INA. *Arizona*, 567 U.S. at 395. Under EO3, for example, nationals from Iraq and Somalia will

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receive "additional scrutiny" in the non-immigrant visa process, EO3 § 1(g), all Iranian visitors *except* certain student and exchange visitors are banned, *id.* § 2(h)(ii), a small group of Venezuelan business and tourist visitors are suspended, *id.* § 2(f)(ii), and *all* business and tourist visitors from Chad, Libya, and Yemen are banned, though students will be allowed, *id.* §§ 2(a)(ii), 2(c)(ii), 2(g)(ii).[5] The new order purports to create a discretionary "waiver" system, EO3 § 3(c), even though Congress already provides a detailed waiver scheme. *See, e.g.*, 8 U.S.C. §§ 1182(a)(9)(B)(v), 1182(d)(3), 1182(h). Finally, and tellingly, the justification provided for these provisions is a *policy* justification: to "mitigate security threats" while "encourag[ing] . . . improvements" to countries' "future cooperation" and "willingness to cooperate and play a substantial role in combatting terrorism." EO3 § 1(h)(3) (explaining reasons for "more tailored approach with respect to nonimmigrants").

EO3's visa criteria conflict squarely with the INA. The Ninth Circuit has recently warned that the President's power is "at its lowest ebb" when he seeks to override congressional policy related to the issuance of visas and the determination of admissibility. *Hawai'i*, 859 F.3d at 781-82 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)); *see also Kent v. Dulles*, 357 U.S. 116, 128 (1958) (the President does not enjoy "unbridled discretion" to alter immigration regulations). Although it did not need to reach the claim that EO2 violated the INA's visa provisions, the Ninth Circuit noted that "executive action should not render superfluous Congress's requirement[s]" related to admissibility. *Hawai'i*, 859 F.3d at 782 (citing *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (1986) ("The President's sweeping proclamation power thus provides a safeguard against the danger posed by any particular case or class of cases that *is not covered* by one of the categories in section 1182(a)."") (emphasis added)). EO3 unlawfully rewrites the visa rules, and

[5] It is no wonder that a reader needs a chart to understand the new order. *See* Ex. A (chart summarizing EO3 provisions).

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the States are likely to prevail on their claim that the President has usurped the role of Congress and violated the INA.

b. EO3 Violates the Establishment Clause

EO3 also violates the "clearest command of the Establishment Clause": "that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion."). EO3 targets six Muslim-majority countries for an irrational ban on immigration and travel. And it follows on repeated statements by President Trump and his top advisers making clear his desire to discriminate against Muslims entering the United States. Under controlling law, EO3 violates the Establishment Clause.

To begin with, precedent requires that the Court evaluate EO3 in context. President Trump's most recent immigration ban is the third in a series, and this history matters. For example, in *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844 (2005), the Supreme Court evaluated whether a courthouse display that included the Ten Commandments and a number of other texts violated the Establishment Clause. The Court took into account that the display initially included only the Ten Commandments, and was changed twice in response to litigation to include other texts, *id*. 868-73, holding that "the world is not made brand new every morning" and "reasonable observers have reasonable memories," so courts must not "turn a blind eye to the context in which the policy arose," *id.* at 866 (quotation marks omitted). By the same token here, EO3 is the third in a series of government policies, adopted after courts rejected the first two as unconstitutional. The Court should not treat it as if starting from scratch.

Looking to the history of these executive orders reveals a mountain of evidence indicating President Trump's antipathy towards Islam generally and Muslim immigrants specifically. During his campaign, President Trump called for "a total and complete shutdown

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of Muslims entering the United States." 3d Am. Compl. ¶ 136. He repeatedly refused to disavow this shocking statement, instead leaving it on his campaign website until months after taking office. *Id.* ¶¶ 136 n.7, 139. He and his advisers made countless other statements, both before and after he was elected, demonstrating his animus towards Muslims. *See, e.g.*, *IRAP*, 857 F.3d at 575-77 (recounting statements); *id.* at 591 (discussing "Trump's numerous campaign statements expressing animus towards the Islamic faith"). And he and his advisers made many statements demonstrating that these executive orders were intended to "keep [his] campaign promises." *Id.* at 577.

Because the Ninth Circuit has struck down President Trump's prior executive orders on other grounds, it has not yet addressed how courts should evaluate these facts under the Establishment Clause. The *en banc* Fourth Circuit, however, issued a detailed ruling holding that EO2 violated the Establishment Clause, and its analysis provides the best roadmap for the Court here. *See IRAP*, 857 F.3d 554. Though the Supreme Court subsequently directed the Fourth Circuit to vacate this opinion as moot, it retains persuasive force. *See, e.g.*, *Orhorhaghe v. I.N.S.*, 38 F.3d 488, 493 n.4 (9th Cir. 1994) (holding that opinion vacated as moot "is still persuasive authority"); *United States v. Joelson*, 7 F.3d 174, 178 n.1 (9th Cir. 1993) (same).

To begin with, the Court should apply the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See IRAP*, 857 F.3d at 591-93 (holding that *Lemon* applies). Under that test, Defendants must demonstrate that EO3 has "a secular legislative purpose," that "its principal or primary effect . . . neither advances nor inhibits religion," and that it does not "foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612 (internal quotation marks omitted). Defendants cannot meet any prong of the test.

First, EO3's purpose is not "secular" because President Trump's purpose in issuing it—as shown by his own statements—is to "disapprove of [Islam]." *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). The President's "statements, taken together, provide direct, specific evidence of what motivated both EO-1 and EO-2: President Trump's desire to exclude Muslims from the

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United States." *IRAP*, 857 F.3d at 595. Making the ban permanent does not transform its purpose. And while Defendants will no doubt argue that enhancing national security was EO3's primary purpose, the Fourth Circuit has already explained why that argument must fail: it "is belied by evidence in the record that President Trump issued the First Executive Order without consulting the relevant national security agencies"; "that those agencies only offered a national security rationale after EO-1 was enjoined"; that "internal reports from [the Department of Homeland Security] contradict this national security rationale"; that high ranking national security officials have explained that the order "serves 'no legitimate national security purpose'"; and other evidence that national security was a pretext, not the true purpose of these executive orders. *Id.* at 596. In short, this Court should reach the same conclusion as to EO3 that the Fourth Circuit reached as to EO1 and EO2: its primary purpose was not secular, so it fails *Lemon*'s first prong.

EO3 also violates *Lemon*'s second prong, which requires that the "principal or primary *effect* . . . be one that neither advances nor inhibits religion." *Lemon*, 403 U.S. at 612 (emphasis added). Governmental action violates this prong "if it is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1256 (9th Cir. 2007) (internal quotation marks omitted). The court analyzes this prong "from the point of view of a reasonable observer who is informed . . . [and] familiar with the history of the government practice at issue." *See id.* In light of the President's campaign statements, his statements about EO1 and EO2, the post-hoc nature of the national security rationales for these orders, and courts' findings about the illegality and discriminatory purpose of the prior orders, it is clear that an informed, reasonable observer would perceive EO3 as expressing the President's disfavor towards Islam. *See, e.g.*, *IRAP*, 857 F.3d at 601 ("[T]he reasonable observer would likely conclude that EO-2's primary purpose is to exclude persons from the United States on the basis of their religious beliefs.").

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As to the third prong, the Order "foster[s] 'an excessive governmental entanglement with religion" by favoring one religious group over another, which "engender[s] a risk of politicizing religion." *Larson*, 456 U.S. at 252-53. Selectively burdening those of the Muslim faith creates improper "entanglement with religion."

If past litigation is any guide, Defendants will offer three counterarguments. This Court should follow every other court to consider these arguments and reject them.

First, Defendants may argue that this Court is prohibited from meaningfully evaluating EO3's constitutionality under *Kliendienst v. Mandel*, 408 U.S. 753 (1972). But both the Ninth Circuit and the en banc Fourth Circuit have rejected that argument. *Washington*, 847 F.3d at 1162-63; *IRAP*, 857 F.3d at 588-93.

Second, Defendants may argue that EO1 and EO2 are irrelevant to consideration of EO3 because EO3 adds Chad, North Korea, and Venezuela to the list of targeted countries. But the Supreme Court has already made clear that Courts must look at the history of a policy in assessing its purpose, and adding elements to make a policy seem more secular does not eliminate the original, improper purpose. *See, e.g.*, *McCreary Cty.*, 545 U.S. at 866-73. Moreover, Chad is a Muslim-majority country, and the restrictions imposed on North Korea and Venezuela bear all the hallmarks of a pretextual sham. Immigration from North Korea to the United States is already virtually nonexistent and is restricted by separate sanctions orders not challenged here. *See* 3d Am. Compl. ¶ 204.[6] As to Venezuela, EO3 restricts only certain government officials and their families, and only then from obtaining certain tourist visas, not immigrant visas. EO3 § (f)(ii). In short, just as with EO1 and EO2, the only meaningful effect of EO3 is on those from Muslim-majority countries.

Finally, Defendants may argue that in reviewing EO3, this Court must limit itself to the four corners of that document. Again, however, both the Ninth and Fourth Circuits have

[6] *See* Exec. Order No. 13,810 §§ 1(a)(iv), 5, 82 Fed. Reg. 44,705, 44,705, 44,707 (Sept. 25, 2017) (sanctions against North Korea).

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already rejected that approach. *See, e.g.*, *Washington*, 847 F.3d at 1167 ("It is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims."); *IRAP*, 857 F.3d at 597 ("[T]he Supreme Court has explicitly stated that we review more than just the face of a challenged action.").

In short, the record and the case law demonstrate that EO3 violates the Establishment Clause, providing a separate basis to block it from taking effect.

c. EO3 Is Discriminatory and Irrational, Violating Equal Protection

EO3 also violates the Constitution's guarantee of equal protection in several ways.

First, EO3 violates equal protection because, as shown above, it was motivated, at least in part, by the President's intention to disfavor Muslims. *See, e.g.*, *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015) (holding that plaintiffs need not show that intent to discriminate "was the sole purpose of the challenged action, but only that it was a motivating factor"); *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 277 (1979) ("Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not."). Whether that discriminatory intent was motivated by the President's own beliefs or simply his desire to score political points with some portion of his base is irrelevant; either is impermissible. *See, e.g.*, *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581 (2d Cir. 2016) (decisionmaker responding to constituents' animus is also unlawful); *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 504 (9th Cir. 2016) ("The presence of community animus can support a finding of discriminatory motives by government officials, even if the officials do not personally hold such views.").

Second, "its sheer breadth is so discontinuous with the reasons offered for it that the [Order] seems inexplicable by anything but animus toward the class it affects." *Romer v. Evans*, 517 U.S. 620, 632 (1996). EO3 claims that its purpose is "to protect [U.S.] citizens from terrorist attacks," but it bans entry of immigrants from "a list of countries whose nationals

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have committed no terrorist attacks on U.S. soil in the last forty years," ECF 194-18 (Decl. Nat'l Security Officials) ¶ 11. It bans entry of immigrants from these countries even if they pose no plausible terrorist threat, such as grandparents seeking to visit their grandchildren, those who are disabled or gravely ill, and young children. *See Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 (9th Cir. 2013) ("The principle that overdiscrimination is prohibited undergirds all of constitutional and statutory anti-discrimination law."). The order makes nationality-based assumptions despite this Administration's own conclusion that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity." ECF 118-2 at 25. And the ban does not explain why it allows entry of some individuals from these countries (such as students from Iran and cultural exchange visitors from Libya) while categorically excluding others, or why it ignores similarly situated "non-Muslim majority countries." ECF 194-18 (Decl. Nat'l Security Officials) ¶ 12. In short, EO3 "is at once too narrow and too broad," and cannot withstand any level of scrutiny. *Romer*, 517 U.S. at 633. *See also, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) ("The Constitution's guarantee of equality must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot justify disparate treatment of that group.").

2. EO3 Will Cause Irreparable Harm to State Residents, Educational Institutions, Businesses, and Health Care Systems

The States will suffer irreparable harm in the absence of temporary relief.

The Ninth Circuit has now twice recognized the harms States face when Defendants abruptly suspend the entry of millions of immigrants and non-immigrants to the United States. In this very case, the Ninth Circuit determined that EO1 irreparably injured the States by "harm[ing] the States' university employees and students, separat[ing] families, and strand[ing] the States' residents abroad." *Washington*, 847 F.3d at 1169. In so holding, the Ninth Circuit rejected Defendants' argument that EO1's waiver provisions alleviated the States' harm, reasoning that it was wholly unclear how such waiver provisions would operate in practice. *Id.*

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After Defendants issued EO2, which excluded current residents and visaholders from its ambit and no longer stranded the States' residents abroad, the Ninth Circuit held that "prolonged separation from family members, constraints to recruiting and attracting students and faculty members to the [state university], [and] decreased tuition revenue" still constituted irreparable harm. *Hawai'i*, 859 F.3d at 783 (citing *Regents of Univ. of Cal. v. Am. Broad. Co., Inc.*, 747 F.2d 511, 520 (9th Cir. 1984) (recognizing intangible harms to include "impairment of [the university's] ongoing recruitment programs [and] the dissipation of alumni and community goodwill and support garnered over the years")).

The harms presented by EO3 are just as irreparable as those presented by EO1 and EO2.[7] EO3 will again result in our States' residents being separated from their families, often in heartbreaking situations—and, this time, indefinitely. *See, e.g.*, ECF 194-23 (Decl. Bina) ¶¶ 4, 6 (WA resident with rare form of cancer cannot travel and EO3 will prevent Iranian parents from coming to care for her); ECF 194-21 (Decl. Ayoubi) ¶ 10 (WA resident's wife unable to move to United States if EO3 is implemented); ECF 118-4 (Decl. Althaibani) ¶¶ 8-12 (NY resident prevented from living with husband).

EO3 will also irreparably harm our States' public universities and colleges. The States' public universities and colleges have hundreds of students and faculty members from the targeted countries. *See, e.g.*, ECF 194-40 (5th Decl. Chaudhry) ¶ 5 (140 students and 9 faculty members at WSU); ECF 194-43 (2d Decl. Eaton) ¶ 4 (105 graduate students at UW); ECF 194-51 (2d Decl. Heatwole) ¶¶ 4-5, 10 (180 students and 25 employees at University of Massachusetts); 3d Am. Compl. ¶¶ 53, 58 (529 students in the University of California system); *id.* ¶ 75 (University System of Maryland has employees from EO3 targeted countries).

[7] Indeed, harm is presumed where plaintiffs have shown a likelihood of success on their Establishment Clause claim. *See, e.g., Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006) (holding an Establishment Clause violation "is sufficient, without more, to satisfy the irreparable harm prong"); *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2d Cir. 1986) (same). Each version of the immigration ban has violated the Establishment Clause. 3d Am. Compl. ¶¶ 222-226.

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Like with the first two executive orders, the universities again risk losing current and future students from the targeted countries, along with the associated tuition revenue. *See, e.g.*, 3d Am. Compl. ¶ 53, 57 (California); *id.* ¶¶ 86, 94-95 (Massachusetts); *id.* ¶ 105 (New York); ECF 194-40 (5th Decl. Chaudhry) ¶ 11; ECF 194-39 (3d Decl. Branon) ¶¶ 4-6; ECF 194-43 (2d Decl. Eaton) ¶ 5; ECF 194-59 (Decl. Yoganarasimhan) ¶¶ 5-7; ECF 194-42 (Decl. Detwiler) ¶ 5; ECF 194-44 (Decl. Ehsani) ¶ 11; ECF 194-54 (Decl. Nofallah) ¶ 8. They also risk losing talented faculty members, as several faculty members have already indicated that they are considering positions in other countries to avoid indefinite separation from their families under EO3. *See, e.g.*, ECF 194-26 (Decl. Hajishirzi) ¶¶ 9-10; ECF 194-37 (Decl. Alaghi) ¶ 9; ECF 194-52 (Decl. Hosseinzadeh) ¶ 8. The departure of such faculty members, many of whom teach or conduct research in highly specialized fields and bring in substantial research grants to the universities, will irreparably injure the universities' reputations and educational programs. *See, e.g.*, ECF 194-55 (4th Decl. Riedinger) ¶¶ 3-4. These harms are not compensable by an award of damages. *See Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (defining irreparable harm as harm "for which there is no adequate legal remedy").

States' businesses will also suffer irreparable injuries. *See Rent-A-Center, Inc. v. Canyon Tel. & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) ("[I]ntangible injuries, such as damage to ongoing recruitment efforts and goodwill, qualify as irreparable harm."). The State of Washington's technology industry, for example, heavily relies on immigrants and nonimmigrants from the banned countries to serve as data scientists and software engineers. *See e.g.*, Ex. 194-33 (Decl. Soroush) ¶¶ 1-6 (Apple software engineer); Ex. 194-28 (Decl. Jazayeri) ¶ 2-6 (Facebook software engineer); Ex. 194-35 (Decl. Vaezi) (Microsoft data scientist) ¶¶ 2-6. Large companies, including Amazon, Expedia, and Starbucks, employ many people originally from the banned countries. *See, e.g.*, ECF 6 (Decl. Blackwell-Hawkins) ¶¶ 3,7; ECF 7 (Decl. Dzielak) ¶¶ 4, 18. Small businesses have also

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sustained cumulative, irreparable harm with each successive EO. *See, e.g.*, ECF 194-62 (2d. Decl. Zawaideh) ¶¶ 2-8; *see also* 3d Am. Comp. ¶¶ 74, 86, 113 (impacts to businesses in Maryland, Massachusetts, and New York). EO3 also will negatively impact the States' coffers by reducing tourism tax revenue. *See, e.g.*, ECF 194-60 (2d. Decl. Oline) ¶¶ 10-15; ECF 194-61 (2d. Decl. Soike) ¶¶ 2-14; 3d Am. Comp. ¶ 121 (economic injury to Oregon).

EO3 will also cause lasting harm to the States' health care systems. Physicians from the banned countries provide health care for our residents. ECF 194-64 (2d Decl. de Leon) ¶¶ 5-7; ECF 118-46 (Decl. Johnson) ¶ 11; ECF 194-66 (2d Decl. Overbeck) ¶ 6 (Oregon Health Authority); ECF 194-64 (2d Decl. Akhtari) ¶¶ 13, 18. Like its predecessors, the order will impede the States' efforts to recruit and retain providers of primary care, dental health, and mental health services, particularly in underserved areas of our States. *See* ECF 118-32 (Decl. Fullerton) ¶¶ 5-7, 14-19; ECF 118-43 (Decl. Akhtari) ¶¶ 14, 16-17; ECF 100 (Decl. Overbeck) ¶¶ 3-6. EO3 will negatively affect physicians who perform critical public health work. *See* ECF 194-67 (2d Decl. Parsian) ¶¶ 5-16 (cancer radiologist); ECF 194-68 (Decl. Zangeneh) ¶¶ 3-8 (HIV prevention research). Our medical schools, and particularly those that participate in the National Resident Matching Program, will be unable to offer residency to students from restricted or banned countries. *See* ECF 118-47 (Decl. Scherzer) ¶¶ 15-17 (New York); 3d Amend. Compl. ¶ 60 (California), *id.* ¶ 127 (Oregon). These harms, which undermine the depth and strength of our health care systems, will have lasting effects for the provision of healthcare in our States.

3. The Balance of Equities and Public Interest Strongly Favor Temporary Relief

The balance of equities and the public interest strongly weigh in favor of the States. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2013) (the balance of equities and public interest factors merge in cases against the government). The States have shown that EO3 will cause irreparable harm to their residents, educational institutions, economies,

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businesses, and health care systems. These injuries far outweigh any harm to Defendants that an injunction would cause. Defendants are not harmed by adhering to immigration procedures that have been in place for years. *See Washington*, 847 F.3d at 1168. Although national security interests are objectives of the highest order, they cannot justify the States' harms when the President has wielded his authority unlawfully. *Hawai'i*, 859 F.3d at 783; *IRAP*, 857 F.3d at 603 (national security is not a "silver bullet that defeats all other asserted injuries"). And Defendants are "'in no way harmed by issuance of a preliminary injunction which prevents [it] from enforcing restrictions likely to be found unconstitutional.'" *IRAP*, 857 F.3d at 603 (quoting *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d. 184, 191 (4th Cir. 2013)).

Moreover, it is in the public interest to "'curtail[] unlawful executive action.'" *Hawai'i*, 859 F.3d at 784 (quoting *Texas v. United States*, 809 F.3d, 134, 187 (5th Cir. 2015)). The public also "has an interest in free flow of travel, in avoiding separation of families, and in freedom from discrimination." *Washington*, 847 F.3d at 1169; *see also Hawai'i*, 859 F.3d at 784-85, *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005). Likewise, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks omitted); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[E]nforcement of an unconstitutional law is always contrary to the public interest."); *IRAP*, 857 F.3d at 604 ("[W]hen we protect the constitutional rights of the few, it inures to the benefit of all."). In short, in weighing the competing interests, the balance tips sharply in favor of preliminary relief.

IV. CONCLUSION

The law applies to everyone, including the President. In issuing EO3, the President has again exceeded his constitutional and statutory authority. This Court should enjoin implementation of Sections 1(g) and 2 of EO3 until such time as the Court can consider a motion for preliminary injunctive relief.

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/RESPECTFULLY SUBMITTED this 11th day of October, 2017.

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