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

STATE OF HAWAI‘I and ISMAIL ELSHIKH,

Plaintiffs,

v.

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

Defendants.

Civil Action No. 1:17-cv-00050-DKW-KSC

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER; CERTIFICATE OF WORD COUNT; CERTIFICATE OF SERVICE

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INTRODUCTION

The Government has a daunting task in this case: It must defend an Order that the *Executive itself* says is a clone of the prior unlawful Order but for a few "purely technical" changes. Faced with that steep climb, the Government embraces two tactics. Each is fruitless.

First, the Government trots out a bevy of legal theories on which Supreme Court and appellate precedent—including the Ninth Circuit's recent decision in *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017)—squarely slam the door. It says, for example, that Hawaii's harms are too "speculative" for standing, but it fails to mention that the Ninth Circuit rejected an identical argument last month. The Government says Dr. Elshikh's claims are not ripe because his mother-in-law could seek a waiver for entry, but it fails to mention it told the Ninth Circuit the opposite last month. The Government says there can be no due-process claim because the Order *categorically* bars entry from certain countries, but it fails to mention that *Washington* rejected that argument too. And on and on. The Government's claims, in short, do not bear scrutiny. Some may sound plausible, but all fall apart to the touch.

Second, the Government doubles down on the disturbing approach it attempted in the *Washington* case: It once again claims an unreviewable authority with respect to immigration and national security. But the Ninth Circuit

resoundingly rejected this assertion of unbridled power. This Court should do so again. The Judiciary, after all, has the power to say what the law is. And nowhere is that more important than in a situation like this, where another branch seeks to override the protections for religious freedom and diversity that form the core of our Constitution and our Nation.

In the end, much ink has been spilled but the situation is simple: The Court is faced with an Order that—in the words of the President and his advisers—"has the same basic policy outcome" as the original Order and was tweaked to "avoid * * * litigation." That original Order was a travesty; it flew in the face of this Nation's most basic values. That is exactly why the Ninth Circuit enjoined it. Nothing has changed. The Court should enjoin this version too. An injunction will merely return the Nation to a status quo that has existed for decades while the Court fully adjudicates this issue.

ARGUMENT

I. Plaintiffs Have A High Likelihood of Success On The Merits.

The Government misreads both the immigration statutes and Plaintiffs' brief. Far from "implicitly recogniz[ing]" that constitutional challenges have been "foreclose[d] by "the changes to the Order," (Opp. 2), Plaintiffs explained the doctrine of constitutional avoidance required deciding the weighty statutory

challenges first. But under either the Immigration and Nationality Act ("INA") or the Constitution, the Order is unlawful.

A. The Revised Order Violates the INA.

1. The revised Order discriminates based on nationality.

The President's new Order flatly violates the INA's longstanding prohibition on nationality-based discrimination. The Government's only defense is that the President is somehow exempt from that limit; but no court has ever accepted that contention, no prior President has acted on it, and basic principles of statutory construction refute it.

i. Section 1152(a)(1)(A) provides that "no person shall * * * be discriminated against in the issuance of an immigrant visa because of the person's * * * nationality." 8 U.S.C. § 1152(a)(1)(A). The Order provides that "nationals of * * * six countries" are presumptively ineligible for immigrant visas. Order § 2(c). If that is not "discriminat[ion] * * * because of * * * nationality," nothing is.

The Government effectively concedes as much. It makes an abortive suggestion that the Order might be about "the *procedures* for the *processing* of immigrant visa applications." Opp. 27. But the Order is not about procedure. It "suspend[s]" the issuance of visas or other immigration benefits to tens of millions of individuals. Order § 2(c). That is a substantive change.

ii. The Order also unlawfully discriminates on the basis of nationality in granting *non*-immigrant visas. For five decades, courts have held that Congress made nationality as well as race an "impermissible basis" for any admission or deportation decision. *Chadha* v. *INS*, 634 F.2d 408, 429 (9th Cir. 1980), *aff'd*, 462 U.S. 919 (1983) (quoting *Wong Wing Hang* v. *INS*, 360 F.2d 715, 719 (2d Cir. 1966)); *see Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 453 (S.D. Fla. 1980). Indeed, in *Olsen* v. *Albright*, 990 F. Supp. 31 (D.D.C. 1997), the Government *conceded* that it is not "permitted to engage in discrimination on the basis of race, ethnicity, or nationality" in issuing "nonimmigrant visas." *Id.* at 37-38.

Abandoning its longstanding approach, the Government now claims (at 26-27) that it is free to discriminate when issuing nonimmigrant visas. That cannot be. When exercising its discretion under the immigration laws, the Government must rely on factors "relevant" to the alien's "fitness to reside in this country." *Judulang* v. *Holder*, 565 U.S. 42, 53 (2011). To determine what Congress deems relevant, courts look to the "purposes of the immigration laws" and "the appropriate operation of the immigration system." *Id.* at 55; *see Scialabba v. Cuellar De Osorio*, 134 S. Ct. 2191, 2212-13 (2014) (plurality op.).

"Congress could not have intended" an alien's membership in a particular "race or group" "relevant" to his fitness to reside in the United States. *Chadha*,

634 F.2d at 429. The 1965 Immigration Act reflects the determination that such considerations are *irrelevant*. *See Olsen*, 990 F. Supp. at 37. President Kennedy urged Congress to dismantle the national origins system because "discriminat[ing]" in admission "on the basis of accident of birth" was "without basis in either logic or reason." 9 Trelles & Bailey, *Immigration Nationality Acts, Legislative Histories and Related Documents 1950–1978*, Doc. 66, at 2 (1979). Congress concurred. Br. of NAPABA 13-18 (Dkt. 140-1).

Congress reaffirmed that intention 27 years later in the International Covenant on Civil and Political Rights ("ICCPR"). 138 Cong. Rec. 8071 (1992). That treaty prohibits drawing "distinction[s]" on the basis of "national or social origin." ICCPR art 2.1. And according to the treaty's authoritative exponent, that requirement demands "nondiscrimination" with respect to "alien[s] [seeking] to enter or reside in the territory of a State party." U.N. Human Rights Comm., CCPR General Comment No. 15 ¶ 5 (1986); *see* Br. of International Law Scholars 6-9 (Dkt. 119). Courts must presume that Congress did not intend to authorize the Executive to violate this international obligation. *See Spector* v. *Norwegian Cruise Line Ltd.*, 545 U.S. 119, 144 (2005).

iii. Faced with the INA's clear prohibitions on nationality discrimination, the Government contends that Congress exempted the President from those bans

when it enacted sections 1182(f) and 1185(a)(1). This argument finds no footing in the statute's text, history, or context.

First, every applicable principle of textual interpretation refutes the Government. Congress's prohibition on nationality discrimination is later-in-time than sections 1182(f) and 1185(a)(1), both of which were enacted in their present form in 1952. Section 1152(a)(1)(A) is manifestly more specific than those highly general provisions, *and* it exempts four specific subsections from its reach, strongly indicating that no other exceptions were intended. Mem. 28.

The only textual argument the Government can muster is that "narrowing" the President's authority to engage in discrimination would effect an "implied repeal." Opp. 31. But sections 1182(f) and 1185(a) do not state that the President may discriminate on the basis of nationality. At most, they might have *implied* that the President had that authority prior to 1965. But as Justice Scalia explained, a statute "does not stand repealed" merely because its "implications * * * [are] altered by the implications of a later statute"; that is simply a part of the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988); *see FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.").

Second, the Government contends that prior Presidents have engaged in nationality-based discrimination when making entry decisions. Opp. 28-30. Even if true, that would be irrelevant; "past practice does not, by itself, create power." *Medellín* v. *Texas*, 552 U.S. 491, 532 (2008). But it is not true. Nearly all of the examples the Government cites involve mere administrative restrictions imposed on aliens after they had been admitted to the country. *See, e.g.*, *Narenji* v. *Civiletti*, 617 F.2d 745, 746 (D.C. Cir. 1979) (reporting requirements for Iranian students); *Rajah* v. *Mukasey*, 544 F.3d 427, 433-435 (2d Cir. 2008) (registration program for resident aliens). As the D.C. Circuit has explained, these regulations do not contravene Congress's clear prohibition on using nationality to exclude aliens from the United States altogether. *See Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 473 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996). Likewise, in *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), the Court approved an order by President Reagan that did not make any distinction based on nationality at all. *See id.* at 160 (prohibiting *any* unlawful entry by sea). And the series of orders the Government cites (at 28) involved restrictions on entry by members of foreign *governments*; none drew distinctions based merely on a person's nationality.

The only arguable example the Government can find is a 1986 order regarding Cuba. Opp. 28. That order, however, had a unique legal basis: It

enforced an immigration agreement that Cuba had violated. Proc. 5517 (1986); *see* Immigration Joint Communique, U.S.-Cuba, Dec. 14, 1984, T.I.A.S. No. 11,057, 1984 WL 161941. As the Supreme Court has recognized, the Constitution vests the President with "an array of political and diplomatic means * * * to enforce international obligations" that he does not otherwise possess under "domestic law." *Medellín*, 552 U.S. at 525. Even assuming that the 1986 order was lawful—and no court ever said it was—no international agreement even arguably gives the President the same power here.

Finally, the Government claims that prohibiting the President from discriminating on the basis of nationality would raise "constitutional questions" by affecting "the President's ability to conduct the Nation's foreign affairs and protect its security." Opp. 29-30. The Government fails to cite any case or constitutional provision to substantiate this concern. That is fatal to its argument: A constitutional problem must be "serious" to justify deviating from a statute's most natural reading, *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), and vague allusion to foreign affairs and national security cannot satisfy that burden.

In any event, reading the immigration laws as written would not disable the President from protecting the country in a grave exigency. Section 1182 permits the President to exclude potentially hostile aliens on numerous grounds other than

nationality—because they support a foreign adversary, for instance, or are members of a terrorist organization. *See, e.g.*, 8 U.S.C. § 1182(a)(3)(B)-(D). Other statutes go further, and give the President authority to regulate and remove "citizens * * * of [a] hostile nation or government" during a "declared war" or where "any invasion or predatory incursion is perpetrated, attempted, or threatened." 50 U.S.C. § 21. As the D.C. Circuit has recognized, section 1152(a)(1)(A) itself may authorize nationality-based classifications where the circumstances are "most compelling—perhaps a national emergency." *See Legal Assistance*, 45 F.3d at 473.

The Government, however, has not claimed—nor could it credibly claim—that any such exigency exists here. The President abandoned any defense of his original Order, waited more than a month to issue this new version, delayed release an additional five days to avoid stepping on a favorable news cycle, and halted implementation ten days after that. *See* Mem. 10-11; Order § 14. The Government has pointed to no recent changed circumstances that compelled the Order's issuance, and concedes that the President adopted the Order in response to "[t]he same concerns" that motivated Congress to make statutory amendments two years ago, U.S. Supp'l Br. 37, *Washington*, No. 17-35105 (9th Cir. Feb. 16, 2017), ECF No. 154; *see* Br. of T.A. 21, Ex. 5 (Dkt. 169-1) ("T.A. Br.").

There is nothing, then, that might exempt the President from the normal operation of the immigration laws. Those laws "unambiguously direct[] that no nationality-based discrimination shall occur." *Legal Assistance*, 45 F.3d at 473.

2. The revised Order exceeds the President's authority.

The revised Executive Order is also unlawful because it violates the restrictions Congress imposed on excluding aliens on terrorism-related grounds. In 8 U.S.C. § 1153(a)(3)(B)(i), Congress "established specific criteria" that must be satisfied before aliens may be excluded as terrorists. *Kerry* v. *Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring in the judgment). The Order ignores them all, and deems millions of aliens inadmissible as potential "foreign terrorists" for reasons Congress nowhere authorized. Order § 2(c). The President cannot circumvent or "swallow[]" the rules set by Congress in this way. *Abourezk* v. *Reagan*, 785 F.2d 1043, 1056 (D.C. Cir. 1986) (Ginsburg, J.); *see Allende* v. *Shultz*, 845 F.2d 1111, 1118 (1st Cir. 1988) (Bownes, J., joined by Breyer, J.) (same).

i. The Government insists (at 34) that section 1182(f) must be read literally to authorize the President to exclude "*any* class of aliens" the President chooses—even a class that guts the limits Congress imposed. That reading makes no sense. Section 1182(a) provides a detailed list of the "[c]lasses of aliens" Congress thought it detrimental for the President to admit. 8 U.S.C. § 1182(a). At

the end of that list, Congress included a catchall authorizing the President to identify "classes of aliens" whose entry *he* "finds * * * detrimental to the interests of the United States." *Id.* § 1182(f). By far the most natural reading of this provision is that it enables the President to *add* new classes Congress failed to identify—war criminals, say, or violators of U.S. sanctions. *See* Mem. 34. Congress did not bury in this residual subsection an authority for the President to wipe away the carefully calibrated restrictions it elsewhere imposed.

This reading comports with precedent and common sense. The Supreme Court has repeatedly instructed that where a catchall provision follows a list of specific authorities, it should be interpreted to supplement, not override, the limits in the preceding list. *See Republic of Iraq v. Beaty*, 556 U.S. 848, 860 (2009) ("a generally phrased residual clause * * * serves as a catchall for matters *not specifically contemplated*—known unknowns" (emphasis added)); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114 (2001) (reading "residual clause" so that it does not "subsume[]" the "specific categories which precede[] it"). The Ninth Circuit has done the same. *See United States v. Wenner*, 351 F.3d 969, 974 (9th Cir. 2003) (declining to read "catchall" in a way that "renders the limitation on [a prior] classification * * * superfluous").

ii. The Government caricatures this commonsense principle of statutory interpretation by claiming that it means that the President may not use section

1182(f) to "touch[] a topic already addressed in Section 1182(a)." Opp. 34. That is a straw man. The President is free to use section 1182(f) to exclude classes of aliens that present the same "general concern" as classes enumerated in section 1182(a). *Id.* That is what Presidents have done for decades—excluding aliens who are *already* subject to a bar on entry under section 1182(a), *see, e.g.*, Proc. 4865 (1981) (suspending entry of undocumented aliens), or who present concerns similar to such a class, *compare, e.g.*, 8 U.S.C. § 1182(a)(3)(E)(ii) (excluding aliens who "participated in genocide"), *with* Proc. 8697, § 1(b) (2011) (excluding aliens who engaged in *other* "serious violations of human rights"). By excluding these aliens, the President does not "subsume[]" any category Congress established, *Adams*, 532 U.S. at 114, or "render * * * superfluous" any of the limits it imposed, *Wenner*, 351 F.3d at 974.

What the President has done here is different. In section 1182(a)(3)(B), Congress set a specific burden of proof that must be satisfied before an alien is excluded as a potential terrorist: Among other things, there must be "reasonable ground to believe" that that alien "is likely to engage after entry in any terrorist activity." 8 U.S.C. § 1182(a)(3)(B)(i)(II). The President, however, has concluded that aliens present an unacceptable risk of terrorism merely if they are "[n]ationals from * * * countries" that "present heightened threats." Order § 1(a), (d). The President has not simply addressed the same "general concern" as the terrorism

bar. He has obviated that provision's criteria for excluding potential terrorists and replaced them with his own. There is no precedent for that practice, and Congress could not have intended to authorize it.

iii. The Government claims (at 32-33) that *Abourezk* and *Allende* support the President's attempt to circumvent the terrorism bar in this manner. No. In each of these cases, the courts held that the President could not use section 1182(a)(27)—a provision that permitted the exclusion of aliens who might "engage in activities * * * prejudicial to the public interest"—to bar all members of a Communist party from the United States; that interpretation, the courts explained, would impermissibly allow "the Executive * * * to evade" the specific limits Congress set in section 1182(a)(28), *Abourezk*, 785 F.2d at 1056-57, and "render [them] duplicative," *Allende*, 845 F.2d at 1118.

Seeking to avoid this clear repudiation of what it seeks to do here, the Government claims that *Abourezk* and *Allende* elsewhere "made clear" that section 1182(a)(28) "did *not* prevent the President from achieving the same result using Section 1182(f)'s 'sweeping proclamation power.'" Opp. 33. It would be more than passing strange if those courts *held* that the Executive may not take action under 1182(a) that renders congressional restrictions "superfluous," *Abourezk*, 785 F.2d at 1053, while stating in *dicta* that 1882(f) could be used for exactly that purpose. And in fact, they did not. The *Abourezk* court observed that 1182(f)

could be used to exclude a "class [of aliens] that is *not covered* by one of the categories in section 1182(a)." 785 F.2d at 1049 n.2 (emphasis added). Thus, the court hypothesized that the Executive could use 1182(f) to exclude a category not restricted in 1182(a) (Cuban government officials) even if it overlapped with a class of aliens (members of the Communist party) that the Executive could not categorically exclude. *Id.* The new category would not "nullify" Congress's restrictions on Executive power by barring the entry of aliens based purely on their communist affiliation. *Allende* is to the same effect. 845 F.2d at 1118 & n.13. The same cannot be said for the Order, which directly overrides Congress's instructions as to when an alien may be excluded based on the threat of terrorism.

B. The Revised Order Violates Due Process.

The Ninth Circuit upheld the injunction of the previous Executive Order because its due process flaws were obvious. The flaws are still present, and the Government's main tactic is to ignore the binding precedent.

First, the Government asserts (at 37) that Plaintiffs do not challenge the deprivation of due process for non-citizens. But Plaintiffs explicitly asserted the Due Process rights of refugees for the simple reason that the Ninth Circuit *held* that a State has a "viable due process claim[]" with respect to these persons. Mem. 32 (quoting *Washington*, 847 F.3d at 1166). The Government posits that the Court's

statements with respect to "refugees" refer only to asylum seekers, but the Ninth Circuit announced no such qualification.

Next, the Government attempts (at 38) to dispute the viability of due process claims asserted by "those in the United States regarding the entry of others." That position is directly refuted by the Ninth Circuit. 847 F.3d at 1166 ("U.S. residents and institutions" have "viable claims based on * * * due process rights.").

Equally unavailing is the Government's argument (at 39) that the Order already provides all of the process that is due because individualized hearings would be futile or because the Order authorizes case-by-case waivers. But these arguments would mean that the prior Order—which also announced a categorical rule and included a waiver provision—was constitutional, a result contrary to Ninth Circuit precedent. Adding more examples to the Order's discretionary waiver provision cannot alter its constitutionality.

In any event, the Government misses the point. Plaintiffs do not claim that Due Process requires "individualized hearings" where non-citizens can be told that the Order bars their entrance. Their claim is far more fundamental than that: "The touchstone of due process is protection of the individual against arbitrary action of government." *Meachum* v. *Fano*, 427 U.S. 215, 226 (1976). It is the height of arbitrariness to deprive an individual or an institution of a protected interest based

on a rationale that is neither "legitimate" nor "bona fide." *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring in the judgment).

Thus, *Din* made clear that in the immigration context, the Due Process inquiry begins and often ends with the question "whether the Government ha[s] provided a facially legitimate and *bona fide*" reason for denying a visa application. *Id.* An "affirmative showing of bad faith" allows a court to "look behind" the asserted rationale to determine whether the applicant has been denied an interest based on an arbitrary or improper motive. *Id.* at 2141; *see Kleindienst* v. *Mandel*, 408 U.S. 753 (1972).

The Order flunks that test. Each Plaintiff is a "U.S. resident[]" or "institution[]" whose rights are impermissibly affected by the Order's exclusion of non-citizens. 847 F.3d at 1166. Dr. Elshikh has a liberty interest in reuniting with his mother-in-law. *Din*, 135 S. Ct. at 2139. State universities have a "compelling" interest in "student body diversity" that is "grounded in the First Amendment." *Grutter* v. *Bollinger*, 539 U.S. 306, 329 (2003). The State has a sovereign interest, rooted in the Tenth Amendment, "in the continued enforceability of its own statutes" promoting diversity and equality. *Maine v. Taylor*, 477 U.S. 131, 137 (1986).[1] The Order's categorical exclusion of non-citizens from designated

[1] To be sure, *Congress* may infringe on a State's sovereign interests by passing laws that exclude certain classes of immigrants. But basic principles of

countries burdens these interests; Plaintiffs have made an "affirmative showing of bad faith"; and there is ample evidence that the asserted basis for the exclusion is not "legitimate and *bona fide*." Mem. 43-49.

The Government argues (at 39) that there is nonetheless no Due Process violation because its illegitimate rationale is asserted on a "categorical" basis. Again, that gets the Ninth Circuit's holding backwards. The Court of Appeals explained that judicial review should be *more* stringent in this context than in *Mandel* and *Din* because those cases involved "the application of a specifically enumerated congressional policy to particular facts" while this case involves "the President's *promulgation* of sweeping immigration policy." 847 F.3d at 1162-63. If the Order cannot survive the *Din* test that applies to an exclusion of a single alien, it certainly cannot survive any more rigorous test that applies to the irrational exclusion of *thousands* of non-citizens.

C. The Revised Order Violates the Establishment Clause.

The Government's Establishment Clause defense also blinkers reality. The Government acknowledges—as it must—that the inquiry is governed by *McCreary County* v. *ACLU*, 545 U.S. 844 (2005), and *Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520 (1993). But the Government contends that, under these

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federalism discourage a finding of preemption unless Congress's intentions are clear. *See Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991).

cases, the purpose of a policy should be determined by considering its text, operation, and effects, without reference to other extrinsic evidence. That is wrong.

The *Lukumi* Court looked not only to the text and operation of the challenged ordinances, but also to a wide swathe of extrinsic evidence of purpose. 508 U.S. at 542-543. That included the "historical background of the decision * * *, the specific series of events leading to the enactment[s]," "contemporaneous statements made by members of the decisionmaking body," and even the positive reactions of the public to the decisionmakers' religious attacks. *Id.*; *see also McCreary*, 545 U.S. at 862.

And, contrary to the Government's fallback position (at 43-46), neither case placed limits on the kind of extrinsic evidence that could be used. Rather, *McCreary* emphasized that courts may not "ignore perfectly probative evidence" of an improper religious motive. 545 U.S. at 865, 866. Nor does *Hamdan* v. *Rumsfeld*, 548 U.S. 558, 624 (2006) suggest any limitation; it remarked only that self-serving press statements could not justify an unlawful presidential action. Indeed, in the Establishment Clause context, any form of public pronouncement is particularly salient because the Clause prevents a "divisive announcement that in itself amounts to taking religious sides." *McCreary*, 545 U.S. at 863.

In any event, the President's statements since taking office are more than enough to reveal his improper purpose. *See* Mem. 5, 10; Br. of MacArthur Justice Center 27-28 (Dkt. 114-3) ("MacArthur Br."). To take just one example, the President has repeatedly indicated that he has met 100% of his campaign promises,[2] *all while maintaining the campaign website featuring his promise to enact a Muslim ban*, Press Release, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), https://goo.gl/D3OdJJ.

And even if one (improperly) disregards this highly probative evidence of purpose, the Government's purported secular purpose is still revealed as a sham. The Government refers repeatedly to a letter from the Attorney General and the Secretary of DHS, but that letter is dated March 6, the very day the revised Order was announced, and purports to *propose* the policy embodied in the Order, as if it is a new idea sprung straight from the heads of the Cabinet Officers. It is hard to imagine clearer evidence of pretext.

The Government also points to the face of the Order. But the policy covers *only* Muslim-majority countries, and uses terms negatively associated with Islam, such as "honor killings," and "violent ideologies." Order § 1. As the many amici before this Court explain, such loaded terms suggests an improper purpose. *Lukumi*, 508 U.S. at 534. Looking at the Order's operation is equally unavailing:

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2 *E.g.* Tara Golshan, *Full transcript: President Trump's CPAC speech*, Vox (Feb. 24, 2017, 11:47 ET), https://goo.gl/9RfYYV.

It reveals a gross mismatch between the Order's ostensible purpose and its implementation and effects. *See id.* at 540 ("overbroad" and "underinclusive" orders suggest improper purpose). For example, the Order's focus on nationality alone means that it bars entry by a Syrian national who has lived in Switzerland for decades, but not a Swiss national who has immigrated to Syria during its civil war. *See* T.A. Br. 19-21.

The Government defends these and other telling choices (at 42) by asserting that the policy cannot suggest religious animus because the designated countries represent only a fraction of Muslim-majority nations world-wide. By that logic, the President could repeatedly express a desire to ban Jews, enact a policy barring immigration from Israel, and then defend it by pointing out that there are many Jews residing elsewhere.

More broadly, the Government asserts (at 42-43) that, under *Mandel*, this court cannot look behind the government's assertion of a "facially legitimate and *bona fide*" national security rationale. But the Ninth Circuit explicitly rejected the contention that *Mandel* limits review in this manner. *Washington*, 847 F.3d at 1166. There is more than ample evidence of pretext and bad faith regardless; and—as another district court observed—concerns over judicial interference with national security do not apply when the Government makes it more than clear that the national security interest is simply a post-hoc rationalization for religious

discrimination. *Aziz v. Trump*, 2017 WL 580855, at *8 (E.D. Va. Feb. 13, 2017). Allowing the President to evade an Establishment Clause challenge through hollow appeals to nationality security will only invite further abuses. *See* MacArthur Br. 11-16.

That the Order does not impose restrictions on American citizens directly is of no moment. There are *two* religion clauses in the First Amendment because religious freedom depends both on the right to exercise one's faith *and* the certainty that the Government will not disfavor that faith or favor another. Without the latter condition, citizens may be coerced to abandon the exercise of their chosen religion, even if they cannot be commanded to do so. As Justice Jackson observed at the height of World War II, "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters. * * * The First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings." *W. Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 640–42 (1943).

II. Plaintiffs Have Standing and Will Suffer Irreparable Harm.

Despite assuring the Ninth Circuit that "a U.S. citizen with a connection to someone *seeking* entry" would have "a route to make a constitutional challenge," Oral Arg. 24:28-24:47, *Washington*, No. 17-35105 (9th Cir. Feb. 7, 2017), ECF No. 124, the Government—now presented with that very case—attempts to bar the

courthouse doors to Dr. Elshikh. And the Government insinuates (at 18-21) that Hawai‘i relies on injuries to "others," ignoring that Hawaii is asserting injuries to its own proprietary, sovereign, and quasi-sovereign interests. These arguments fail.

The Government's principal challenge rehashes an argument the Ninth Circuit rejected: that the harms to Hawaii's universities are too "speculative" to support standing because the State has not identified "any particular person" who will be denied entry by the Order. Binding precedent forecloses this claim. 847 F.3d at 1161.

The Government also repeatedly claims that Plaintiffs will not suffer immediate injury because it is possible that individuals blocked by the Order may obtain a waiver. That is wrong. "[T]he denial of equal treatment resulting from the imposition of the barrier" *itself* constitutes an injury in fact, even if it does not result in "ultimate inability to obtain the benefit." *Gratz v. Bollinger*, 539 U.S. 244 (2003). Injury occurs the moment the Order goes into effect. *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012) ("[W]e are unpersuaded by the Government's assertion that Plaintiffs' request for prospective relief is unripe because Plaintiffs did not request an exception"); *Neal v. Shimoda*, 131 F.3d 818, 825 n.4 (9th Cir. 1997) (similar).

The Declarations before this Court show a harm to Hawai‘i and Dr. Elshikh *now*. *See* Supp. Dec. of R. Dickson ¶¶ 7-8 (Dkt. 66-6) ("Dickson"); Dec. of Elshikh ¶¶ 3-6 (Dkt. 66-1). There is nothing speculative about it. The "University's ability to recruit and enroll students and graduate students" and its ability to "recruit and hire visiting faculty" is being "constrained" currently. Dickson ¶ 7. Indeed, in two days the medical "match" program will begin, and hiring season for faculty will soon commence. Br. of Illinois et al. 6, 14 (Dkt. 154-3) ("Illinois Br."). A University of Hawai‘i program in which the State has invested resources is being thwarted from "further growth." Dickson ¶ 8. And the Order will "preclude[e]" potential students, scholars and faculty members from even "*considering*" applying to the University, another immediate harm. *Id.*

Finally, the Government offers no response at all to Plaintiffs' contention that the Order's unconstitutional establishment of religion confers standing and inflicts irreparable harm. Mem. 46.

The Government's remaining challenges are unpersuasive. The Government argues that the new Order might inflict less injury to its tourism industry and tax revenues because it is "narrower in scope." Opp. 17. But the size of the harms is irrelevant. *Preminger v. Peake*, 552 F.3d 757, 763 (9th Cir. 2008) (even "an identifiable trifle is enough for standing"). And these economic harms are immediate. Compl. ¶¶ 100-102; Supp. Dec. of G. Szigeti ¶¶ 5-8 (Dkt. 66-2);

Illinois Br. 2, 16; *see also City of Sausalito* v. *O'Neill*, 386 F.3d 1186, 1198-99 (9th Cir. 2004) (threatened harm to a locality's "tourism industry" caused by federal executive action was an "Article III injury"). The Government (at 18) also belittles the harms to the State's sovereignty as "intangible" and "amorphous assertions about [Hawaii's] values." But Courts have had "no difficulty in recognizing" state standing "to protect [its] * * * sovereign interests" in suits challenging federal laws or policies. 13B Charles A. Wright et al., *Federal Practice & Procedure* § 3531.11.1 & n.5 (3d ed. 2008); *Texas* v. *United States*, 809 F.3d 134, 153 (5th Cir. 2015). And even a day of delay in a student's visa, or her present fear that once here she will be landlocked, can impose harm.

III. The Balance of Equities Favors Emergency Relief.

The balance of equities and the public interest also support granting Plaintiffs their requested emergency relief. The Government cannot credibly claim there is an urgent need to implement the Order given its own repeated delays. *See supra* at 9. Moreover, issuing an injunction will merely preserve the status quo that has existed for decades. Mem. 50. The Government tries to equate its litigating position with the public interest, Opp. 49, but that contention fails given Plaintiffs' likelihood of success on the merits. *See Melendres* v. *Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights"). The Government also asks for "the

greatest possible degree of judicial deference" towards its "[p]redictive judgment" that the Executive Order will promote the public interest by enhancing the nation's security. Opp. 50. But the Ninth Circuit has already rejected that argument. *Washington*, 847 F.3d at 1168.

IV. Facial, Nationwide Relief Is Appropriate.

The Government argues that facial relief is inappropriate because the Order is valid as applied to some people. Opp. 52. That is not true; every application of the Order is rendered invalid because it exceeds the limits in the INA and is motivated by anti-Muslim animus. Mem. 50. Moreover, the Ninth Circuit has facially invalidated administrative actions "on many occasions" without demanding a showing that "no set of circumstances exists under which the regulation would be valid." *Sierra Club* v. *Bosworth*, 510 F.3d 1016, 1023-24 (9th Cir. 2007). Even if the Order might be lawful in a particular case, it must be invalidated in its entirety if it fails to set forth elements or limitations the law requires. *See United States* v. *Lopez*, 514 U.S. 549, 561 (1995) (facially invalidating a statute because it "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that" each application complied with the Constitution). Likewise, the "mere passage * * * of a policy that has the purpose and perception of government establishment of religion" warrants facial relief. *Santa Fe Indep. School Dist.* v. *Doe*, 530 U.S. 290, 313-314 (2000).

That is particularly true here, where there is no sensible way for Plaintiffs to challenge or the Court to enjoin applications of the Order piecemeal. It is impossible for Hawai‘i to identify precisely which individuals may wish to travel to the State or enroll in its universities, and bring as-applied challenges solely on their behalf. Moreover, exempting from the Order only *some* individuals seeking *some* types of visas would introduce chaos and unfairness into what Congress intended to be an integrated and uniform immigration system. *See Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987) (provision must be enjoined in its entirety if "the balance of the [provision] is incapable of functioning independently"). It would be similarly inappropriate to limit the injunction's geographic scope. "[A] fragmented immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and policy." *Washington*, 847 F.3d at 1166. Moreover, "[t]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Califano v. Yamaski*, 442 U.S. 682, 702 (1979). *Aziz* is not to the contrary; there, the Eastern District of Virginia granted limited injunctive relief only because that is all the Commonwealth of Virginia asked for in its filings, and because the Ninth Circuit had already declined to stay a nationwide injunction. 2017 WL 580855, at *10. Here, Hawai‘i has no such protection, and has made clear the imperative for a nationwide injunction.

CONCLUSION

The Order should be enjoined.

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Respectfully submitted,

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