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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

John DOE 1, John DOE 2 Petitioner, v. Donald TRUMP; President of the United States of America; John F. Kelly, Secretary of the Department of Homeland Security; DEPARTMENT OF HOMELAND SECURITY; KEVIN K. MCALEENAN, Acting Commissioner of Customs and Border Protection; CUSTOMS AND BORDER PROTECTION; and the UNITED STATES OF AMERICA, Respondents.	Case No.: _____ Agency No. A **Emergency Motion for Stay of Removal**

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I INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 7(b)(1) Petitioners John Doe I and John Doe II file this ***emergency motion*** respectfully requesting that the Court immediately stay their removal from the United States during the pendency of their habeas petition. Petitioners are two unknown individuals currently who arrived at the Sea-Tac Airport, they were detained by agents from U.S. Customs and Protection ("CBP"). Upon information and belief, CBP has now denied them entry and ***scheduled them for a return flight at 5:00 p.m.***, without providing any opportunity to challenge the pending action, or to seek administrative or judicial review. This action is based solely pursuant to the Executive Order issued by President Trump, yesterday, on January 27, 2017.

The executive order is unlawful as applied to these individuals. Because Respondents are detaining Petitioners, and seeking to summarily remove them, due solely to the executive order, their actions violate the U.S. Constitution and the Immigration and Nationality Act. Respondents' actions violate Petitioners' Fifth Amendment procedural and substantive due process rights, and are ultra vires to the immigration statutes. Further, Respondents' actions detaining Petitioners, denying them entry, and seeking to summarily remove them without any opportunity to seek administrative or judicial review, is part of a widespread pattern applied to

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other immigrants arriving or returning to this Country after the issuance of the January 27, 2017 executive order.

The government has not agreed to a temporary stay for the Petitioners. Accordingly, only emergency relief will prevent Petitioners from being removed from the country at 5 p.m.

II. STATEMENT OF FACTS

Petitioners adopt the facts set forth in the habeas petition filed contemporaneously here with and the Declaration of Courtney Gregoire.

III. ARGUMENT

Adjudication of a motion for stay of removal requires that the Court consider four factors: (1) whether the stay applicant demonstrates a strong likelihood of success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Nken v. Holder, 556 U.S. 418, 434 (2009). With regard to the first factor, this Court has held that Nken "did not suggest that this factor requires a showing that the movant is 'more likely than not' to succeed on the merits." Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 37 (2d Cir. 2010). Rather, this ruling codified an earlier holding that a noncitizen may obtain a stay from this Court without demonstrating that the likelihood of ultimate success is greater than 50 percent. See Mohammed v. Reno, 309 F.3d

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95,102 (2d Cir. 2002). In Petitioners' case, all four factors counsel in favor of the granting of a stay.

I. Petitioner is Likely to Succeed on the Merits

Procedural Due Process Claims

First, the defendants acting pursuant to the Executive Order ("EO"), unlawfully denied their liberty interests under the due process clause of the Fifth Amendment. Petitioners are physically present in the United States. Due process requires that arriving immigrants be afforded those statutory rights granted by Congress and the principle that "[m]inimum due process rights attach to statutory rights." Dia v. Ashcroft, 353 F.3d 228, 239 (3d Cir.2003) (alteration in original) (quoting Marincas v. Lewis, 92 F.3d 195, 203 (3d Cir.1996)). See also Clark v. Martinez, 543U.S. 371 (2005) (demonstrating that immigrants who have not yet been admitted are not categorically excluded from these protections). Most importantly for the purposes of this appeal, Petitioners are being denied the right to judicial review by a court of appeals of final agency orders directing removal, 8 U.S.C. § 1252(a)(2)(B)(ii).

In Landon v. Plasencia the Supreme Court held that in evaluating immigrants' procedural due process rights when seeking admission to the United States that "the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural

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safeguards." Landon v. Plasencia, 459 U.S. 21, 34 (1982). Petitioners' interests in this case are weighty: they both stand to lose the right to live and work in "this land of freedom." Id.; see also Bridges v. Wixon, 326 U.S. 135, 154, (1945) (noting that individuals have a liberty interest in proper procedures being applied in deportation proceedings).

Additionally, because Petitioners have already been through substantial procedural screenings and approved for admission (through SIV and Follow to Join (FTJ) visa category F2A screenings), the government's interest "in efficient administration of the immigration laws" has already been satisfied. Landon v. Plasencia, 459, U.S. at 34. The liberty interests of petitioners and extreme risks of injury that will result from arbitrary deprivation of Petitioners' rights are therefore substantial and well-recognized by existing precedent, and their denial of admission without the ability to apply for asylum or withholding under CAT offends due process clause of the Fifth Amendment.

Equal Protection

Petitioners claim a violation of the equal protection component of the Due Process Clause of the Fifth Amendment, on the ground that the EO constitutes intentional discrimination by the federal government on the basis of religion and national origin. As the Second Circuit has explained, intentional discrimination by a government actor can be demonstrated in multiple ways:

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First, a law or policy is discriminatory on its face if it expressly classifies persons on the basis of race or gender. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213, 227-29 (1995). In addition, a law which is facially neutral violates equal protection if it is applied in a discriminatory fashion. See Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886). Lastly, a facially neutral statute violates equal protection if it was motivated by discriminatory animus and its application results in a discriminatory effect. See Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 264-65 (1977). Hayden v. County of Nassau, 180 F.3d 42, 48 (2d Cir. 1999).

Discrimination on the basis of religion is a violation of equal protection. See City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (citing religion as an "inherently suspect distinction"); see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring); McDaniel v. Paty, 435 U.S. 618, 644 (1978) ("In my view, the Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."). Similarly, "national origin . . . [is] so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). Therefore, a government action based on animus against, and that has a

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discriminatory effect on, Muslims or individuals from the countries in question violates the equal protection component of the Due Process Clause.

Petitioners allege that their rights under the equal protection component of the Due Process Clause will be violated by government action that will be applied in a discriminatory fashion. Applying a general law in a fashion that discriminates on the basis of a suspect classification violates the Due Process Clause. See Hayden v. County of Nassau, 180 F.3d 42, 48 (2d Cir. 1999); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886). President Trump made it clear while signing the EO that it will be applied particularly against Muslims and that Christians will be given preference. See Michael D. Shear & Helene Cooper, Trump Bars Refugees and Citizens of 7 Muslim Countries, N.Y. Times (Jan. 27, 2017), https://www.nytimes.com/2017/01/27/us/politics/trump-syrian-refugees.html ("[President Trump] ordered that Christians and others from minority religions be granted priority over Muslims."); Carol Morello, Trump Signs Order Temporarily Halting Admission of Refugees, Promises Priority for Christians, Wash. Post (Jan. 27, 2017), https://www.washingtonpost.com/world/national-security/trump-approves-extreme- vetting-of-refugees-promises-priority-for-christians/2017/01/27/007021a2-e4c7-11e6-a547-5fb9411d332c_story.html?utm_term=.c30584b100c2. It is clear from the President's public statements that the EO will be applied in a manner that disfavors individuals of one

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religious group, Islam, and favors individuals of other religious groups. This differential application will violate the equal protection component of the Due Process Clause.

Petitioners allege that their rights under the equal protection component of the Due Process Clause were violated by government action motivated by forbidden discriminatory animus against individuals from certain countries and Muslims and with a discriminatory effect against individuals from certain countries and Muslims. See Jana-Rock Const., Inc. v. N.Y. State Dep't of Econ. Dev., 438 F.3d 195, 204 (2d Cir. 2006) ("Government action . . . violates principles of equal protection 'if it was motivated by discriminatory animus and its application results in a discriminatory effect.'"); see also Hunter v. Underwood, 471 U.S. 222 (1985); Mhany Mgmt., Inc. v. Cty. of Nassau, 819 F.3d 581, 605-13 (2d Cir. 2016). "When there is a proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified." Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977). Petitioners challenging such facially neutral laws on equal protection grounds bear the burden of making out a "prima facie case of discriminatory purpose." To establish a prima facie case of discriminatory purpose, the Second Circuit has applied "the familiar Arlington Heights factors." Mhany Mgmt., Inc. v. Cty. of Nassau, 819 F.3d at 606 (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 at 266-7). The Arlington Heights test looks to the impact of the official action, whether there has been a clear pattern unexplainable on other grounds besides discrimination, the historical background of the

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decision, the specific sequence of events leading up to the challenged decision, and departures from the normal procedural sequence. Substantive departures may also be relevant "if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. at 266-7.

In this case, the Arlington Heights factors are clearly met. The impact of the EO will clearly fall disproportionately on Muslims and individuals from the countries cited in the EO. As an initial matter, when asked about his proposed ban on Muslims in a July 2016 interview with NBC's Meet the Press, the then Republican presidential nominee explained, "I'm looking now at territory. People were so upset when I used the word 'Muslim': 'Oh, you can't use the word Muslim."' Remember this. And I'm okay with that, because I'm talking territory instead of Muslim." See Jenna Johnson, Donald Trump Is Expanding His Muslim Ban, Not Rolling It Back, Washington Post (July 24, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/07/24/donald-trump-is-expanding-his-muslim-ban-not-rolling-it-back/?utm_term=.139272f67dd2. Consistent with this statement, the countries targeted by the EO are all majority Muslim.

When signing the EO, furthermore, President Trump publicly promised that under the EO, preference will be given to Christians from the "countries of concern." See Michael D. Shear & Helene Cooper, Trump Bars Refugees and Citizens of 7 Muslim Countries, N.Y. Times (Jan. 27, 2017), https://www.nytimes.com/2017/01/27/us/politics/trump-syrian-refugees.html

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("[President Trump] ordered that Christians and others from minority religions be granted priority over Muslims."); Carol Morello, Trump Signs Order Temporarily Halting Admission of Refugees, Promises Priority for Christians, Wash. Post (Jan. 27, 2017), https://www.washingtonpost.com/world/national-security/trump-approves-extreme-vetting-of-refugees-promises-priority-for-christians/2017/01/27/007021a2-e4c7-11e6-a547-5fb9411d332c_story.html?utm_term=.c30584b100c2. It is clear from the President's public statements that the EO is intended not only to target Muslim-majority countries, but also to have a disparate impact between Muslims and Christians from the same countries.

Given the disparate impact of the EO, a historical background of public statements of animus against Muslims, and the specific sequence of promises by President Trump that he would "ban" Muslims, strongly favor a decision other than the one reached, the Arlington Heights factors are clearly met. See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. at 266-7. Petitioners have therefore asserted a prima facie claim of discriminatory purpose and of discriminatory impact. It is the government's burden to rebut the resulting "presumption of unconstitutional action." Washington v. Davis, 426 U.S. 229, 241 (1976).

II. Without a Stay of Removal, Petitioners Face Irreparable Harm

Along with the likelihood of success on the merits, the irreparable injury inquiry is one of "the most critical" factors in adjudicating stay applications. Nken, 556 U.S. at 433. Without a stay of removal, Petitioners will suffer irreparable harm for three main reasons: (1) near certain

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return to their country of origin, where they may face threats of persecution, death, and torture, (2) inability to effectively communicate with legal counsel from outside the United States; and, (3) the harm that would be inflicted on Petitioners who are lawfully present in the United States.

Despite the fact that Petitioners have lawful entry documents, Respondents will likely return them to the country from which their travel originated or their country of origin, placing their lives in imminent danger. See EO Sec.3(c); 8 U.S.C. § 1231(b)(1)(A) (arriving aliens denied entry "shall be removed to the country in which the alien boarded the vessel or aircraft on which the alien arrived in the United States"). Petitioners will face extreme difficulty in pursuing their claims to lawful entry to the United States if removed from the United States. Should Respondents remove Petitioners they will likely face months if not years seeking permission to return to the United States, permission which may never be granted.

III. The Issuance of a Stay Will Not Substantially Injure the Government, and the Public Interest Lies in Granting Petitioner's Request for a Stay of Removal

The Court in Nken found that the last two stay factors, injury to other parties in the litigation and the public interest, merge in immigration cases because Respondent is both the opposing litigant and the public interest representative. Nken, 556 U.S. at 435. The Court also noted that the interest of Respondent and the public in the "prompt execution of removal orders" is heightened where "the alien is particularly dangerous" or "has substantially prolonged his stay by abusing the process provided to him." Nken, 556 U.S. at 436 (citations omitted). Here, neither

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of these factors nor any other factors exist to suggest that the Respondent or the public have any interest in Petitioners' removal beyond the general interest noted in Nken. Furthermore, the Nken Court recognized the "public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." See Nken, 556 U.S. at 436. The Petitioners in this case would both face substantial harm if removed, as would their families, shifting the balance of hardship in favor of staying their removal.

Respondent cannot make any particularized showing that granting Petitioners a stay of removal would substantially injure its interests or conflict with the public interest in preventing a wrongful removal, such that the third and fourth Nken factors would outweigh the hardship Petitioners would face if removed.

IV. CONCLUSION

For the reasons stated above, this Court should grant Petitioners' motion for a stay of removal.

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Dated this 27th day of January, 2016.

_S/ Matt Adams_____
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CERTIFICATE OF SERVICE

RE: B.I.C. v. Johnson, et al.

I, **Matt Adams**, am an employee of Northwest Immigrant Rights Project. My business address is 615 Second Ave., Ste. 400, Seattle, Washington, 98104. I hereby certify that on **January 28, 2017**, I **electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to:**

Office of the United States Attorney
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I also served a copy of the foregoing by mailing it express U.S. mail, postage pre-paid to:

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Executed in Seattle, Washington, on January 28, 2017.

s/Matt Adams
Matt Adams, Attorney for Petitioner

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