IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PARS EQUALITY CENTER, *et al*., Plaintiffs, v. DONALD J. TRUMP, *in his official* capacity as President of the United States, *et al*., Defendants.	Civil Action No. 1:17-cv-00255-TSC

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Consistent with the Executive's broad constitutional authority over foreign affairs and national security, Sections 1182(f) and 1185(a) of Title 8 expressly authorize the President to suspend or restrict entry of any class of aliens when in the national interest. Exercising that authority, the President issued Executive Order No. 13,780 (Order), which temporarily suspends (i) entry of certain foreign nationals from six countries that Congress and the previous Administration determined pose a heightened terrorism risk and (ii) decisions on refugee applications. Those suspensions apply only for a short period, to enable the new Administration to review the Nation's screening and vetting procedures to ensure that they adequately detect terrorists. For the past 30 years, every President has invoked his power to protect the Nation by suspending entry of categories of aliens. As a legal matter, this Order is no different.

The Order replaces former Executive Order No. 13,769 (Revoked Order). After the Ninth Circuit declined to stay a nationwide injunction against the Revoked Order, the President decided to issue a new Order to address the court's concerns rather than engaging in protracted litigation. This new Order applies only to aliens outside the United States who lack a visa—individuals who "ha[ve] no constitutional rights regarding" their admission. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Even as to them, the Order includes a detailed waiver process to mitigate any undue hardship. It also eliminates any preference for religious minorities.

As two district courts have now concluded, these changes are substantial. *See Sarsour v. Trump*, No. 17-cv-00120-AJT-IDD, slip op. at 23 (E.D. Va. Mar. 24, 2017) (attached hereto); *Wash. v. Trump*, No. C17-0141JLR, 2017 WL 1045950, at *3 (W.D. Wash. Mar. 16, 2017). Yet Plaintiffs here are still seeking an extraordinary remedy of a preliminary injunction, to enjoin portions of the Order nationwide. For at least three reasons, Plaintiffs' request should be denied.

First, Plaintiffs' claims are not justiciable. The four organizational plaintiffs' expenditures on legal counseling, education, and lobbying efforts do not constitute cognizable injuries-in-fact under binding D.C. Circuit precedent. As for the sixteen individual plaintiffs, several of them are aliens outside the United States who lack constitutional rights regarding their entry, while others are not even subject to the Order. For the remaining individuals who seek to have family members come visit or join them here in the United States, their challenges to the Order are not ripe because the family members have not been determined to be otherwise eligible for a visa and denied a waiver. Until that happens, neither the family members nor the individual plaintiffs have suffered any injuries fairly traceable to the Order.

Second, Plaintiffs' claims fail on the merits. Two separate provisions of the immigration laws grant the President broad authority that plainly encompasses the Order's temporary suspensions of entry and refugee admissions. Plaintiffs' statutory and procedural arguments are inconsistent with the text of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101 *et seq*., as well as historical practice. And as a constitutional matter, the President's national-security judgments provide "a facially legitimate and bona fide reason" for the Order. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). Indeed, the Order's text and purpose are explicitly religion-neutral, and the Order no longer grants any preference for victims of religious persecution. Even were Establishment Clause cases from the domestic setting relevant, those cases make clear that the Order must be judged by what it says and does—not, as Plaintiffs suggest, by what supposedly lies in the hearts of its drafters.

Third, at a minimum, Plaintiffs cannot demonstrate a need for preliminary relief. All of the substantive sections of the Order challenged by Plaintiffs are currently enjoined nationwide. And even if the Order were to be enforced tomorrow, no immediate upheaval would occur: no visa

would be revoked; no lawful permanent resident or visa-holder would be barred from entering the country; and no one lawfully within the United States on the Order's effective date would lose any prior ability to leave the country and later return. Plaintiffs hope that certain unadmitted, non-resident aliens will be issued visas or be permitted to resettle as refugees, but those individuals have already been waiting months if not years. Enforcement of the Order would not immediately disrupt the status quo, and therefore entry of preliminary relief is unwarranted.

As Plaintiffs' motion reflects, the Order has been the subject of heated political debate and intense disagreement. But the precedent set by this case will long transcend this Order, this President, and this constitutional moment. This Court should not enter extraordinary, preliminary relief that second-guesses and enjoins the President's national-security judgment—particularly when Plaintiffs' claims are not justiciable; their claims are not likely to succeed on the merits; only the Government faces imminent and irreparable injury from its inability to effectuate the Order; and Plaintiffs are plainly not entitled to the nationwide relief they have requested. In cases that spark such disagreement, it is critical to adhere to foundational principles concerning justiciability, statutory and constitutional interpretation, and the scope of injunctive relief. Applying those principles here, the Court should deny Plaintiffs' motion for a preliminary injunction.

BACKGROUND

I. Statutory Background

The INA governs admission of aliens into the United States. Admission normally requires a valid immigrant or nonimmigrant visa, absent an exception to the general rule. *Id*. §§ 1181, 1182(a)(7)(A)(i), (B)(i)(II), 1203. The process of obtaining a visa typically includes an in-person interview and results in a decision by a State Department consular officer. *Id*. §§ 1201(a)(1), 1202(h), 1204; 22 C.F.R. § 42.62. Although a visa usually is necessary for admission, it does not

guarantee admission; the alien still must be admissible upon arriving at a port of entry. 8 U.S.C. §§ 1201(h), 1225(a).

Congress has created a Visa Waiver Program, which enables nationals of approved countries to seek temporary admission for tourism or certain business purposes without a visa. 8 U.S.C. §§ 1182(a)(7)(B)(iv), 1187. In 2015, Congress excluded from travel under that Program aliens who are dual nationals of or had recently visited Iraq or Syria, where "[t]he Islamic State of Iraq and the Levant (ISIL) . . . maintain[s] a formidable force," and dual nationals of and recent visitors to countries designated by the Secretary of State as state sponsors of terrorism (currently Iran, Sudan, and Syria).[1] *Id*. § 1187(a)(12)(A)(i)-(ii). Congress authorized the Department of Homeland Security (DHS) to designate additional countries of concern, considering whether a country is a "safe haven for terrorists," "whether a foreign terrorist organization has a significant presence" in the country, and "whether the presence of an alien in the country . . . increases the likelihood that the alien is a credible threat to" U.S. national security. *Id*. § 1187(a)(12)(D)(i)-(ii). Applying those criteria, in February 2016, DHS excluded recent visitors to Libya, Somalia, and Yemen from travel under the Program.[2]

Separately, the U.S. Refugee Admissions Program (Refugee Program) allows aliens who fear persecution on account of race, religion, nationality, or other specified grounds to seek admission. 8 U.S.C. §§ 1101(a)(42), 1157. Refugees are screened for eligibility and admissibility abroad; if approved, they may be admitted as refugees without a visa. *Id*. §§ 1157(c)(1), 1181(c).

[1] U.S. Dep't of State, *Country Reports on Terrorism 2015*, at 6, 299-302 (June 2016), https://www.state.gov/documents/organization/258249.pdf.

[2] DHS, *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016), https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program.

Congress expressly authorized the President to determine the maximum number of refugees to be admitted each fiscal year. *Id*. § 1157(a)(2)-(3).

Although Congress created these various avenues to seek admission, it accorded the Executive broad discretion to suspend or restrict admission of aliens. Section 1182(f) provides:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may . . . for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f). In addition, Section 1185(a)(1) grants the President broad general authority to adopt "reasonable rules, regulations, and orders" governing entry of aliens, "subject to such limitations and exceptions as [he] may prescribe." *Id*. § 1185(a)(1).

II. The Revoked Order

On January 27, 2017, the President issued the Revoked Order. It directed the Secretaries of Homeland Security and State to assess current screening procedures to determine whether they were sufficient to detect individuals who were seeking to enter this country to do it harm. Revoked Order § 3(a)-(b). While that review was ongoing, the Revoked Order suspended for 90 days entry of foreign nationals of the seven countries already identified as posing heightened terrorism-related concerns in the context of the Visa Waiver Program. *Id*. § 3(c). It authorized the Secretaries to make case-by-case exceptions to the suspension. *Id*. § 3(g). It similarly directed a review of the Refugee Program, and, pending that review, suspended entry under the Program for 120 days, subject to waivers. *Id*. § 5(a). It also suspended admission of Syrian refugees indefinitely and directed agencies to prioritize refugee claims premised on religious-based persecution if the religion was "a minority religion in the individual's country of nationality." *Id*. § 5(b)-(c).

The Revoked Order was challenged in multiple courts. On February 3, 2017, a district court in Washington enjoined enforcement nationwide of Sections 3(c), 5(a)-(c), and (e). *Wash. v. Trump*, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). On February 9, following accelerated briefing and argument, a Ninth Circuit panel declined to stay that injunction pending appeal. *Wash. v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam). Although acknowledging that the injunction may have been "overbroad," the court declined to narrow it, concluding that "[t]he political branches are far better equipped" to do so. *Id*. at 1166-67.

III. The Order

Responding to the Ninth Circuit's invitation, on March 6—in accordance with the joint recommendation of the Attorney General and Secretary of Homeland Security—the President issued the Order. *See* Joint Ltr. to President (Mar. 6, 2017) (attached hereto as Exh. A). The Order, which took effect on March 16, 2017, replaces the Revoked Order, and adopts significantly revised provisions, in part to address the Ninth Circuit's concerns.

A. Temporary Entry Suspension for Six Countries

Section 2(c) of the Order temporarily suspends entry of nationals from six countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen. The suspension's explicit purpose is to enable the President—based on the recommendation of the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence—to assess whether current screening and vetting procedures are adequate to detect terrorists seeking to infiltrate the Nation. Order § 1(f). As the Order explains, each of the designated countries "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones," which is why Congress and the Executive previously designated them. *Id*. § 1(b)(i), (d). The Order details the circumstances of each country that both give rise to

"heightened risks" of terrorism and diminish those foreign governments' "willingness or ability to share or validate important information about individuals seeking to travel to the United States" to screen them properly. *Id*. § 1(d)-(e).[3]

The Order "suspend[s] for 90 days" the "entry into the United States of nationals of those six countries." Order § 2(c). Addressing concerns the Ninth Circuit raised, however, the Order clarifies that the suspension applies only to aliens who (1) are outside the United States on the Order's effective date, (2) do not have a valid visa on that date, and (3) did not have a valid visa on the effective date of the Revoked Order (January 27, 2017). *Id*. § 3(a). It also excludes other categories of aliens, some of which had concerned the Ninth Circuit, including (among others) any lawful permanent resident and any foreign national admitted to or paroled into the United States or granted asylum or refugee status. *See id*. § 3(b).

The Order also contains a detailed waiver provision, which permits consular officers to grant case-by-case waivers when denying entry "would cause undue hardship" and "entry would not pose a threat to national security and would be in the national interest." Order § 3(c). The Order describes illustrative circumstances when waivers could be appropriate, including:

- individuals who seek entry "to visit or reside with a close family member (*e.g*., a spouse, child, or parent) who is a [U.S.] citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa";
- individuals who were previously "admitted to the United States for a continuous period of work, study, or other long-term activity" but are currently outside the country and seeking to reenter; and
- individuals who seek entry for "significant business or professional obligations."

[3] Although the Revoked Order also suspended entry of foreign nationals of Iraq, the new Order omits Iraqi nationals from the suspension because of "the close cooperative relationship between" the U.S. and Iraqi governments, and the fact that, since the Revoked Order, "the Iraqi government has expressly undertaken steps" to supply the information necessary to help identify possible threats. Order § 1(g); *see id*. § 4.

Id. Requests for waivers can be made during the visa application process, and will be acted on by a consular officer "as part of [that] process." *Id*.; *see* DHS, *Q&A: Protecting the Nation from Foreign Terrorist Entry to the United States* (Mar. 6, 2017) (attached hereto as Exh. B); U.S. Dep't of State, *Executive Order on Visas* (Mar. 13, 2017) (State Guidance) (attached hereto as Exh. C).

B. Temporary Refugee Suspension and Cap

The Order also directs an immediate review to determine whether the Refugee Program's processes adequately identify terrorist threats, and "what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat" to the country. Order §6(a). To facilitate that review, the Order suspends travel of refugees into the United States under the Refugee Program for 120 days. "Terrorist groups have sought to infiltrate several nations through refugee programs," and "some of those who have entered the United States through our immigration system"—including "individuals who first entered the country as refugees"—"have proved to be threats to our national security." *Id*. § 1(b)(iii), (h). Moreover, more than 300 individuals who entered the United States are currently the subject of counterterrorism investigations. *Id*. § 1(h). The Order thus concludes that temporarily pausing the Refugee Program is necessary to ensure that those seeking to do the United States harm do not enter as refugees while the new Administration assesses the adequacy of current screening procedures.

The Order authorizes the Secretaries of State and Homeland Security jointly to make "case-by-case" exceptions where doing so is "in the national interest and does not pose a threat" to the Nation's security or welfare—*e.g*., if "denial of entry would cause undue hardship." Order § 6(c). Unlike the Revoked Order, the Order does not prioritize refugee claims based on persecution against religious minorities. It also omits the provision indefinitely suspending refugee applications of Syrian nationals, and exempts refugee applicants the State Department has formally

scheduled for transit as of the Order's effective date. *Id*. In a provision not challenged here, the Order limits refugee admissions in excess of 50,000 in fiscal year 2017. *Id*. § 6(b).

IV. Subsequent Litigation

Meanwhile, the Ninth Circuit in *Washington*, acting *sua sponte*, denied rehearing en banc over the dissent of five judges, who issued three separate opinions. Amended Order (Dkt. No. 191), *Wash*. *v*. *Trump*, No. 17-35105 (9th Cir. Mar. 17, 2017). Judge Bybee explained that *Mandel* provides the governing "test for judging executive and congressional action [for] aliens who are outside our borders and seeking admission." *Id*., slip op. at 11 (Bybee, J., dissenting from denial of rehearing en banc) (*Washington* Bybee Dissent). Judge Kozinski opined that using campaign and other unofficial statements made outside the process of "crafting an official policy" to establish "unconstitutional motives" is improper, unprecedented, "unworkable," and would produce "absurd result[s]." *Id*., slip op. at 5-7 (Kozinski, J., dissenting from denial of rehearing en banc) (*Washington* Kozinski Dissent).

In the underlying Western District of Washington case, the district court held that the TRO issued against the Revoked Order did not extend to the new Order due to the "substantial distinctions" between them, "both in the manner in which [the Order] is implemented and the rational [the Order] gives for its implementation." *Wash*. *v*. *Trump*, 2017 WL 1045950, at *3.

The Order has been subject to challenge in other cases as well. One district court declined to enter preliminary relief against any portion of the Order. *See Sarsour*, slip op. at 23. The District of Hawaii enjoined Sections 2 and 6 of the Order nationwide, and the District of Maryland enjoined Section 2(c) of the Order nationwide. *See Hawai'i v*. *Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 1011673, at *17 (D. Haw. Mar. 15, 2017); *Int'l Refugee Assistance Project (IRAP) v*. *Trump*, 2017 WL 1018235, at *18 (D. Md. Mar. 16, 2017), *appeal docketed*, No. 17-1351 (4th Cir.).

STANDARD OF REVIEW

Emergency relief is "an extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 689 (2008). The movant "must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008). Injunctive relief that "deeply intrudes into the core concerns of the executive branch"—including foreign affairs and national security—may be awarded only upon "an extraordinarily strong showing" as to each element. *Adams v. Vance*, 570 F.2d 950, 954-55 (D.C. Cir. 1978).

Plaintiffs assert facial challenges to the Order. "Facial challenges are disfavored" compared to as-applied challenges. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008). They are thus "the most difficult challenge[s] to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Plaintiffs must show more than that the Order "*might* operate unconstitutionally under some conceivable set of circumstances." *Id*. (emphasis added). Instead, they bear the "heavy burden" of "establish[ing] that no set of circumstances exist under which the [Order] would be valid." *Id*. Thus, Plaintiffs must show that all or almost all applications will result in the unlawful exclusion of foreign nationals seeking entry into the United States.

ARGUMENT

I. Plaintiffs' Claims Are Not Justiciable.

A. The Four Organizational Plaintiffs Lack Standing

The four organizational Plaintiffs—Pars Equality Center; Iranian American Bar Association (IABA); National Iranian American Council (NIAC); and Public Affairs Alliance of Iranian Americans, Inc. (PAAIA)—have failed to demonstrate a cognizable injury-in-fact; have

not alleged any injury plausibly allowing them to bring religious discrimination claims; and are outside the zone of interests on their statutory claims.[4]

1. The Organizations Have Not Suffered a Redressable Injury in Fact

When an organization seeks to sue on its own behalf, it must establish standing in the same manner as a private individual. *See People for the Ethical Treatment of Animals (PETA) v. Dep't of Agric*., 797 F.3d 1087, 1093 (D.C. Cir. 2015) ("[Plaintiff] asserts organizational standing only, which requires it, like an individual plaintiff, to show actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision."). Plaintiffs here seek to establish standing based on an alleged diversion of its resources, pursuant to *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). *See* PI Mot. at 21-22 n.7.

The D.C. Circuit has interpreted *Havens Realty* to impose a two-part test for determining "whether an organization's injury is concrete and demonstrable or merely a setback to its abstract social interests[.]" *PETA*, 797 F.3d at 1094. First, "we begin an inquiry into *Havens* standing by asking whether the defendant's allegedly unlawful activities injured the plaintiff's interest in promoting its mission." *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc*., 659 F.3d 13, 25 (D.C. Cir. 2011). "If the answer is yes, we then ask whether the plaintiff used its resources to counteract that injury." *Id*. Here, the four organizational plaintiffs satisfy neither step.

a. To satisfy the first element, the government's conduct must "directly conflict with the organization's mission." *Nat'l Treasury Emps. Union (NTEU) v. United States*, 101 F.3d 1423,

[4] Plaintiffs also attached a declaration from Richard M. Pettigrew, the Executive Director of Archaeological Legacy Institute. *See* Exh. 20 (ECF No. 35-2). But neither Mr. Pettigrew nor his organization is a plaintiff in this action, *see* Am. Compl. (ECF No. 34) ¶¶ 12-37, nor is Plaintiffs' motion for a preliminary injunction brought on either's behalf. *See* PI Mot. at 1 n.1. Thus, his declaration and that organization are irrelevant for present purposes.

1430 (D.C. Cir. 1996). Standing is appropriate only when "the action challenged . . . [is] at loggerheads with the stated mission of the plaintiff." *Id*. at 1429; *see also PETA*, 797 F.3d at 1095.

The four organizational plaintiffs here all define their mission as promoting various interests of Iranian-Americans and the Iranian-American community. *See* Pars Decl. (Exh. 1) ¶ 3 ("dedicated to helping all members of the Iranian-American community . . . realize their full potential as informed, self-reliant, and responsible members of American society"); IABA Decl. (Exh. 2) ¶ 3 ("educate the Iranian-American community in the United States about legal issues of interest"); NIAC Decl. (Exh. 3) ¶ 4 ("protect civil rights and opportunities for Iranian Americans at home, and support candidates who represent the Iranian-American communities' values"); PAAIA Decl. (Exh. 4) ¶ 7 ("to represent and advance the interests of the Iranian-American community"). But the challenged Order here is not "at loggerheads" with those interests; indeed, the Order is entirely silent with respect to Iranian-Americans. The Order by its terms does not apply to any Iranian-Americans directly—*i.e*., it does not apply to U.S. citizens, § 3(a); certain dual citizens, § 3(b)(iv); lawful permanent residents, § 3b(i); or those within the United States on March 16, 2017, § 3(a)(i). The Order applies only to aliens who are abroad, who do not already have a valid visa to come to the United States, and who are otherwise eligible for a visa but unable to provide information sufficient to justify a waiver. *See* § 3. Thus, the plaintiff organizations' missions are "not necessarily inconsistent with" the Order itself. *NTEU*, 101 F.3d at 1430.

The organizations assert that the Order conflicts with their mission because the Order, notwithstanding its silence with respect to Iranian-Americans, places "a negative label on the Iranian-American community[.]" Pars Decl. ¶ 11; *see also, e.g*., IABA Decl. ¶ 17; NIAC Decl. ¶ 29; PAAIA Decl. ¶ 21. As an initial matter, it is far from clear that this perceived stigma, by itself, constitutes a sufficient "direct conflict" between the organization's mission and the

government conduct to satisfy this portion of Article III standing. *NTEU*, 101 F.3d at 1430; *see Allen v. Wright*, 468 U.S. 737, 755 (1984) ("[S]tigmatizing injury . . . accords a basis for standing only to those persons who are personally denied equal treatment[.]"). But in any event, because the Order itself does not discriminate against Iranian-Americans in any way, the Order's effect on the organizations' missions (if any) would be attenuated at best—which is again not sufficient for standing. *See Allen*, 468 U.S. at 757 (no standing to challenge "the IRS's grant of tax exemptions to some racially discriminatory schools" because "[t]he line of causation between that conduct and desegregation of respondents' schools is attenuated at best").

b. Even assuming an adequate conflict with the organizations' missions, they have failed to demonstrate that they meet the second prong required for standing—a cognizable expenditure of resources to counteract the Order. Their declarations describe efforts related to legal counseling, educating their members and the public, and lobbying members of Congress and other issue-based advocacy efforts. None of those expenditures is sufficient to create standing.

First, many of the organizations' alleged expenditures relate to legal counseling services provided to individuals in connection with the Order. *See* Pars Decl. ¶¶ 8-10, 16-17; IABA Decl. ¶¶ 11, 22-25, 43-47; PAAIA Decl. ¶ 30. But the D.C. Circuit's "precedent makes clear that an organization's use of resources for litigation, investigation in anticipation of litigation, or advocacy is not sufficient to give rise to an Article III injury." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015); *see also Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) ("'The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization.'" (quoting *Ass'n for Retarded Citizens of Dallas v. Dallas Cty. Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994))).

Legal counseling services are particularly ill-suited for expanding *Havens Realty* to provide standing, given that such a theory would allow a legal organization to challenge virtually any policy that negatively affects its broad social interests or potential future clients. *See Ass'n for Retarded Citizens of Dallas*, 19 F.3d at 244.

Second, the organizations describe their efforts related to educating their members and other interested individuals about the Order. *See* Pars Decl. ¶¶ 19-20, 31; IABA Decl. ¶¶ 51-52; NIAC Decl. ¶¶ 33-36, 52-54; PAAIA Decl. ¶¶ 23, 28-29. Although the organizations describe a diversion of resources away from other programs to allow for these educational efforts, the organizations do not describe any *additional* expenditures beyond their normal operating costs, which is a pre-requisite for converting such expenditures into Article III injury-in-fact. *See Food & Water Watch*, 808 F.3d at 920 ("[A]n organization does not suffer an injury in fact where it expend[s] resources to educate its members and others unless doing so subjects the organization to operational costs beyond those normally expended." (modifications omitted)); *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011); *Nat'l Taxpayers Union*, 68 F.3d at 1434.

Third, several of the organizations describe their harm as time spent developing legislative initiatives, engaging members of Congress, and other lobbying or advocacy efforts. *See* NIAC Decl. ¶¶ 40, 47-48; PAAIA Decl. ¶¶ 25, 27. But again, standing is denied "when the only 'injury' arises from the effect of the regulations on the organizations' lobbying activities, or when the 'service' impaired is pure issue-advocacy." *PETA*, 797 F.3d at 1093-94 (citations omitted); *see also Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1162 & n.4 (D.C. Cir. 2005).

Stripping away these non-cognizable expenditures reveals Plaintiffs' injury to be nothing more than a deeply felt, but nonetheless intangible disagreement with the Government's policy. Indeed, the abstract nature of the organizations' injuries is confirmed by the fact that all four

organizations claim they continued to suffer harm *even after* the Revoked Order was enjoined and before the new Order was even announced let alone implemented. *See* Pars Decl. ¶ 22; IABA Decl. ¶ 27; NIAC Decl. ¶ 38; PAAIA Decl. ¶ 26. Such abstract policy disagreements are insufficient for standing under Article III.

2. None of the Organizations Has Suffered a Religious Discrimination Injury

Even assuming Plaintiffs could allege a cognizable injury-in-fact for Article III generally, they must still allege a cognizable injury in support of each particular claim. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[O]ur standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press."). Here, none of the organizations has demonstrated an injury supporting their claims of religious discrimination.

Under the Establishment Clause, a party must demonstrate how the religiously discriminatory conduct affected them personally. *See In re Navy Chaplaincy*, 534 F.3d 756, 764–65 (D.C. Cir. 2008) ("When plaintiffs are not themselves affected by a government *action* except through their abstract offense at the *message* allegedly conveyed by that action, they have not shown injury-in-fact to bring an Establishment Clause claim, at least outside the distinct context of the religious display and prayer cases."). Similarly, under the Equal Protection Clause, a plaintiff must establish that he is being discriminated against on the challenged basis, either as a member of that class or individually. *See Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 601-02 (2008) ("Plaintiffs in [Equal Protection] cases generally allege that *they* have been arbitrarily classified as members of an 'identifiable group.'" (emphasis added)).

Here, Plaintiffs seek to bring religious discrimination claims under both the Establishment and Equal Protection Clauses. *See* PI Mot. at 24-32. These organizational plaintiffs lack standing, however, because not a single one of them claims any religion-based harm. The organizations are

designed to promote the interests of Iranian Americans, which would, at most, allow them to pursue their claims of national-origin discrimination. *See* PI Mot. at 28-29. But the organizations' declarations say nothing at all about religion or any religion-based harm they may have suffered. Absent a concrete *religion*-based harm to the organizations—as opposed to their harms stemming from alleged discrimination on the basis of *national origin*—these four organizational plaintiffs lack standing to bring their religious-discrimination claims.

3. The Organizational Plaintiffs Are Outside the Zone of Interests

As for the organizational plaintiffs' claims arising under the Refugee Act, the INA, and the APA, the organizations are outside the relevant zone of interests. In *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987), the D.C. Circuit rejected a refugee counseling organization's attempt to challenge the Government's refugee interdiction program. With respect to the Refugee Act, the court noted that "on its face, the statute appears to regulate or protect only the interest of aliens in applying for asylum," and that "nothing in the Act or its legislative history indicates that the individual appellants' interests in association with aliens comes within the zones of interests to be protected or regulated." *Id*. at 813, 815. As for the INA, the court found "no intent to protect or regulate the HRC's interest in counseling, or its members' interests in associating with, interdicted Haitians." *Id*. at 815; *see also Fed'n for Am. Immigration Reform v. Reno*, 93 F.3d 897, 900-04 (D.C. Cir. 1996) (immigration restriction advocacy organization was outside the zone of interests of the INA); *cf. Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1361, 1364 (D.C. Cir. 2000) (immigration lawyers association lacked third-party standing).

Here, the organizations point to no statutory provision in either the INA or the Refugee Act that promotes their interests. *Cf. Save Jobs USA v. Dep't of Homeland Sec*., No. 15-CV-0615 (TSC), 2016 WL 5396663, at *6 (D.D.C. Sept. 27, 2016) (organization was within zone of interests

of the INA based on specific statutory provisions protecting their interests), *appeal docketed*, No. 16-5287 (D.C. Cir.). Indeed, the four organizations here are even further removed than the organization and the members at issue in *Haitian Refugee Center*. There, the organization and its members sought to interact *directly* with the potential refugees; here, the four organizations' interests are only with respect to Iranian-Americans and ensuring that *those* individuals can interact with Iranian nationals potentially seeking entry into the United States. Accepting this twice-removed interest as sufficient would effectively eliminate the zone-of interests test altogether. *See Gracey*, 809 F.2d at 813.

B. The Individual Plaintiffs Lack Standing

Plaintiffs' motion for a preliminary injunction is also brought on behalf of sixteen individual plaintiffs. For a variety of reasons, however, none of the individuals has demonstrated that the Order causes an "imminent," "concrete and particularized" injury, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992), that is "legally and judicially cognizable," *Raines v. Byrd*, 521 U.S. 811, 819 (1997).

1. Aliens Outside the United States Have No Constitutional Right to Entry

Several of the Plaintiffs are aliens located outside the United States seeking entry presumably for the first time: John Doe #3; John Doe #7; John Doe #8; Jane Doe #8; and Jane Doe #9. *See* Pls.' Exhs. 16A, 16B; 18A, 18B; 19A, 19B; 9; 10. One of these aliens (John Doe #3) is seeking a visa to begin a fellowship at a hospital in Boston. The other four aliens are seeking admission as refugees to the United States.

It is black-letter law, however, that aliens such as these have no constitutional rights regarding their entry into the United States. *See Plasencia*, 459 U.S. at 32; *see also Mandel*, 408 U.S. at 762 ("It is clear that Mandel personally, as an unadmitted and nonresident alien, had no

constitutional right of entry to this country as a nonimmigrant or otherwise."). Whether viewed as standing or part of the merits, then, it is clear that these five individuals have no legally cognizable claim or injury.

Moreover, it is speculative whether the challenged portions of the Order, if enforced, would actually injure these individuals in any imminent way. None of the four refugee applicants (John Does #7-8, Jane Does #8-9) has yet been accepted into the Refugee Program. *See* Exh. 18B ¶ 3; Exh. 19B ¶ 3; Exh. 9 ¶ 13; Exh. 10 ¶ 12. Thus, there are still several steps before these individuals are classified as refugees under U.S law (let alone scheduled for travel to the United States). *See* Dep't of State, "U.S. Refugee Admissions Program," https://www.state.gov/j/prm/ra/admissions/index.htm (setting forth the process for refugee application, admission, and travel to the United States, and noting that "[t]he total processing time varies . . . but the average time from the initial UNHCR referral to arrival as a refugee in the United States is about 18-24 months"). Even if some delay in that process were a cognizable judicial harm, it is speculative whether the 120-day suspension challenged here would actually cause a delay: a separate provision of the Order not challenged here, § 6(b), limits the number of refugees admissible to the United States for FY2017 to 50,000, and as of February 28, 2017 already over 37,000 refugees have been admitted.[5] Thus, even assuming Plaintiffs' requested relief were granted (and the Order were otherwise able to be implemented), it would remain wholly speculative whether any of these four individuals would be approved as a refugee, and then be scheduled to travel to a port of entry where they could apply for one of the few refugee admissions remaining between now and

[5] Department of State, Summary of Refugee Admissions, *available at* http://www.wrapsnet.org/s/Refugee-Admissions-Report-2017_02_28.xls. This section of the Order is currently enjoined pursuant to the District of Hawaii's injunction.

September 30, 2017 (the end of FY2017). Plaintiffs have therefore failed to demonstrate an imminent injury stemming from the 120-day suspension.

As for John Doe #3 who is seeking a nonimmigrant visa to begin a fellowship in the United States, *see* Exhs. 16A, 16B, it appears likely that he was issued his visa prior to March 16, 2017. *See* Exh. 16B ¶ 9 (stating, in a declaration signed February 25, 2017, that "the weekend of February 25-26, 2017" he "receive[d] an email from the U.S. Embassy in Dubai instructing me to drop off my passport for the issuance of my J-1 visa" and "I have made arrangements to ensure that the visa is stamped into my passport"). As the holder of a valid visa on the Order's effective date, then, the Order's suspension of entry would not apply to John Doe #3. *See* Order § 3(a)(iii) (excluding from the suspension on entry anyone who has "a valid visa on the effective date of this order"). And whatever past harms John Doe #3 may have suffered, those would not provide standing for seeking prospective relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). Thus, none of these five plaintiffs has standing to assert their claims.

2. Many Individuals' Claimed Injuries Rest on Mistaken Interpretations of the Order

Many of the other individual plaintiffs also do not have cognizable harms because they are not covered by the Order. There are five plaintiffs whose primary claim of harm is their inability under the Order to leave and then re-enter the United States: John Doe #1; John Doe #5 (on behalf of himself and Baby Doe #1); Jane Doe #11; and Jane Doe #12. But that harm is based on a mistaken understanding of the Order.

According to their declarations, all five of the above individuals appear to have been in the United States on the effective date of the Order. *See* Exh. 15 ¶ 2; Exh. 17 ¶¶ 3, 14; Exh. 12 ¶ 10; Exh. 13 ¶ 2. The premise of these individuals' concerns is that once they leave the United States, the Order would prevent them from returning. *See, e.g.*, Jane Doe #12 (Exh. 13) ¶ 11 ("If and

when the March 6 Executive Order is enforced, I will be unable to receive a new F-1 visa when I travel to Paris, France this summer.").

It is not clear whether Jane Doe #12 (or any of the other individuals) plans to travel outside the United States and then return prior to June 14, 2017 (the expiration of the current 90-day suspension). But in any event, these plaintiffs misunderstand how the Order operates. Because they were all within the United States on the effective date of the Order, by its plain terms the Order does not apply to them *at all*—now or in the future. *See* Order § 3(a)(i) ("[T]he suspension of entry pursuant to section 2 of this order shall apply *only* to foreign nationals of the designated countries who . . . are outside the United States *on the effective date of this order*[.]" (emphases added)).[6] The DHS Q&As confirm this interpretation. *See* Exh. B, Questions 4-6.

Even for an individual in the United States on the Order's effective date who leaves and then must apply for a new visa, therefore, the Order does not apply to that individual and would not affect that individual's future application for a new visa. To be sure, an individual generally must be found eligible for and issued a visa to return to the United States, *see id*. Question 6, but that was true even prior to the Order (and also currently while the Order is enjoined). The Order does not affect these five individuals, and they therefore lack standing to challenge it.

3. The Individuals Whose Relatives Seek Visas Allege Speculative Injuries for Claims That Are Not Yet Ripe

For the remaining six individual plaintiffs, their primary claim of harm is their desire to have family members visit or join them in the United States: Ali Asaei; Shiva Hissong; Jane Doe #1; Jane Doe #4; Jane Doe #10; and Jane Doe #13. But it is speculative whether any of their family

[6] There are likely additional reasons why the Order would not apply to some or all of these individuals. For example, all appear to have possessed valid visas on the effective date, *see* Order § 3(a)(iii); Baby Doe #1 is a U.S. citizen, *see* Exh. 17 ¶ 6; and Jane Doe #11 is a dual citizen of Iran and France, *see* Exh. 12 ¶ 2, Order § 3(b)(iv).

members will even be affected by the Order's 90-day suspension on entry. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (plaintiff must show imminent, "certainly impending" injury). Moreover, these individuals' claims are not yet ripe because their family members may not be eligible for visas under existing law, or if they are otherwise found eligible may be able to obtain waivers under the Order. *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.").

a. These individual plaintiffs have failed to carry their burden of demonstrating certainly impending injury from the 90-day suspension on entry. Section 2(c) merely imposes a 90-day suspension of entry for certain nationals of six countries. Nothing in it suspends adjudication of visa applications. Indeed, Plaintiffs offer nothing to substantiate their fear that this short pause will delay the issuance of their relatives' visas (if their relatives are found otherwise eligible).

For two of the six individuals (Mr. Asaei and Jane Doe #13), their family members' visa applications were refused before the Order was scheduled to take effect. *See* Exh. 5 ¶¶ 14-15; Exh. 14 ¶¶ 14, 20. The Order's 90-day suspension on entry provision therefore has no present effect on them, and it is speculative whether it would have any effect on future applications.[7] One of the other individuals (Jane Doe #10) states that she "recently" submitted a Form I-730 (Refugee/Asylee Relative Petition) for her husband. *See* Exh. 11 ¶ 10. But those petitions currently have a wait-time of approximately eight months before USCIS processes them.[8] Even

[7] Mr. Asaei appears to have decided to leave the United States and return to Iran, *see* Exh. 5 ¶¶ 18-20, so it is doubtful that his family members would apply again.

[8] https://egov.uscis.gov/cris/processTimesDisplayInit.do, search for "Service Center Processing Dates" for the Nebraska Service Center and the Texas Service Center.

assuming that Section 2(c) applies to the granting of this type of petition, therefore, it is doubtful that the 90-day suspension would have any effect on Jane Doe #10's petition.

As for the other three individual plaintiffs, the family members' visa applications, if they were indeed executed at an interview, appear to have been refused for administrative processing. Shiva Hissong's parents have been waiting since their visa interviews in October 2016. *See* Exh. 6 ¶ 12. Jane Doe #1's fiancée has also been waiting since his visa interview in October 2016. *See* Exh. 7 ¶ 11. It is unclear whether Jane Doe #4's parents have formally submitted visa applications at in-person interviews, but they allege that they have been waiting since November 2016. *See* Exh. 8 ¶ 4. Because none of these individuals were issued visas, it must be assumed that their visa applications were refused. *Cf*. 22 C.F.R. § 42.81(a) ("consular officer must either issue or refuse the visa" once application is executed before him during an interview). And to the extent their applications are still undergoing administrative processing, that would continue even if the Order were implemented. It is at least uncertain, therefore, whether or how the 90-day pause would affect them. Accordingly, none of these individual plaintiffs has established an "imminent" harm.

b. Plaintiffs' claim that Section 2(c) will prevent their relatives from ultimately receiving visas is also speculative. The Order provides that "[c]ase-by-case waivers could be appropriate" for "close family member[s]" of a United States citizen, lawful permanent resident, or other alien lawfully admitted. Order § 3(c)(iv). It is therefore entirely possible that these individual plaintiffs' family members—if they are otherwise admissible—might obtain such a waiver.

Plaintiffs attempt to cast doubt on whether this waiver system is meaningful or effective. *See* PI Mot. at 22. But they have no basis for those assertions, nor could they because the State Department has not yet been allowed to implement the waiver process. And as Plaintiffs acknowledge, the waiver process would be integrated into the existing visa-adjudication

procedures, including as part of the regular visa interviews. *See* PI Mot. at 22 n.8. Unless and until plaintiffs' relatives are found otherwise eligible for visas but then denied waivers, plaintiffs' asserted injuries are not ripe, because they assume "contingent future events that . . . may not occur at all." *Texas*, 523 U.S. at 300.

4. The Individual Plaintiffs Likewise Fail to Allege an Injury Supporting their Religious Discrimination Claims

Even if some of the individual plaintiffs here have alleged a sufficient Article III injury for some claims, none has alleged a sufficient injury for the religious-discrimination claims. Similar to the organizations, although some of the individual plaintiffs' declarations state that they are Muslim, none of them actually describes any harm *to their religious interests*.

Some of the declarations describe generally feeling "extremely anxious, stressed, unable to sleep and eat, and nervous" as a result of the Order. Jane Doe #1 Decl. (Exh. 7) ¶ 19. Even assuming that allegation is sufficiently connected to religion to give standing for a religious-discrimination claim, that psychological harm still does not create Article III standing. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86 (1982) ("[T]he psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms."); *Allen*, 468 U.S. at 755; *In re Navy Chaplaincy*, 534 F.3d at 764.

Nor is it sufficient under Article III for plaintiffs simply to rely on their family members who might be subject to the Order. The Order does not operate against plaintiffs themselves and does not deny them equal treatment based on their nationality or religion. They therefore have not suffered "any personal injury" based on their own non-discriminatory treatment. *Valley Forge*, 454 U.S. at 485-86.

At most, plaintiffs are attempting to vindicate "the legal rights or interests of third parties," which courts generally do not allow, *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004), even for Establishment Clause claims. *See In re Navy Chaplaincy*, 534 F.3d at 764-65 (plaintiffs lacked standing to "complain[] about employment discrimination suffered by other[] [co-religionists], not by the plaintiff himself"); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004) (denying a non-custodial parent the ability to litigate an Establishment Clause claim on behalf of the child). Such a rationale for standing is especially improper here because plaintiffs' foreign relatives—the actual subjects of the alleged discriminatory treatment—do not possess Establishment Clause rights, *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *DKT Mem'l Fund v. Agency for Int'l Dev.*, 887 F.2d 275, 285 (D.C. Cir. 1989), or any constitutional rights regarding entry into this country, *see Mandel*, 408 U.S. at 762. Nor does the INA afford third parties any judicially cognizable interest in the issuance or denial of a visa to an alien abroad. Thus, the individual plaintiffs do not have standing to bring the religious-discrimination claims.

C. No Plaintiff Has Standing to Seek Relief as to Potential Future Actions

Plaintiffs here request an injunction as to Sections 2(c)-(e), 3, 6(a), and 6(c) of the Order. Whatever Plaintiffs' standing as to the entry and refugee suspensions, Order §§ 2(c), 3, 6(a), 6(c), no plaintiff can assert any imminent harm from §§ 2(d)-(e). Those sections relate to future inter-governmental diplomatic activities and internal recommendations made to the President by his Cabinet members. As such, they cannot plausibly have any immediate impact on Plaintiffs.

Indeed, it would be impossible for Plaintiffs to demonstrate harm from these provisions given that the President and his Cabinet officials have not yet implemented them—the sections are expressly contingent on future actions and reports. *See* Order §§ 2(d)-(e). There would also be serious constitutional questions associated with a judicial order enjoining these sections—*i.e.*,

prohibiting the Executive from engaging with foreign nations in a certain way, or enjoining the President from receiving the recommendations of his Cabinet. *See generally United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (discussing "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"); U.S. Const. Art. II, § 2, cl. 1 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."). Any claim as to these provisions therefore is not ripe, is not causing imminent harm, and cannot easily be remedied by an order from the Judiciary.

D. Plaintiffs' Claims Are Barred By the Doctrine of Consular Nonreviewability

Consular nonreviewability also bars Plaintiffs' claims. "[T]he power to expel or exclude aliens" is "a fundamental sovereign attribute exercised by the Government's political departments" and thus "largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). "[T]he doctrine of consular nonreviewability," which long predated the INA, provides that the "decision to issue or withhold a visa," or to revoke one, "is not subject to judicial review . . . unless Congress says otherwise." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999); *see also id.* at 1158-60 (citing authorities); *Morfin v. Tillerson*, --- F.3d ----, No. 15-3633, 2017 WL 1046112, at *1 (7th Cir. Mar. 20, 2017) ("[F]or more than a hundred years courts have treated visa decisions as discretionary and not subject to judicial review for substantial evidence and related doctrines of administrative law."). Far from saying otherwise, Congress has reaffirmed the doctrine: it has expressly forbidden "judicial review" of visa revocation (subject to narrow exceptions not relevant here), 8 U.S.C. § 1201(i), and it has not authorized any judicial review of visa denial, *see, e.g.*, 6 U.S.C. § 236(b)(1), (c)(1), (f); 8 U.S.C. § 1104(a)(1).

There is, at most, limited jurisdiction available "when United States sponsors of a foreign individual claim that the State Department's denial of a visa to an alien violated their constitutional rights." *Saavedra Bruno*, 197 F.3d at 1163. But no review is available for statutory claims. *Id*. at 1164. And whatever limited review may be available to a U.S. citizen asserting her *own* constitutional rights and seeking review of a specific visa denial, it plainly does not encompass Plaintiffs' sweeping challenge, which is based largely if not entirely on asserted constitutional rights held by others.

II. Plaintiffs Are Not Likely to Succeed on the Merits

Even if Plaintiffs' challenges to the Order were justiciable, they would not warrant emergency relief because none is likely to succeed. Indeed, Plaintiffs fall far short of carrying their "heavy burden" to demonstrate that they are likely to prevail on the merits of their facial challenge by "establish[ing] that no set of circumstances exists under which the [Order] would be valid." *Salerno*, 481 U.S. at 745.

A. The Order Is A Valid Exercise of the President's Statutory Authority

1. The Order Falls Squarely Within the President's Broad Authority Under Sections 1182(f) and 1185(a)

"'[T]he power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of the government.'" *Mandel*, 408 U.S. at 765. Congress has conferred expansive authority on the President, including in two statutory provisions that the Order expressly invokes. Order §2(c).

First, Section 1182(f) provides that "[w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend

the entry of all aliens or any class of aliens as immigrants or nonimmigrants," or "impose on the entry of aliens any restrictions he may deem to be appropriate." "The President's sweeping proclamation power [under Section 1182(f)] provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the [inadmissibility] categories in section 1182(a)." *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987). Every President over the last thirty years has invoked that authority to suspend or restrict entry of certain classes of aliens.[9]

Second, Section 1185(a) broadly authorizes the "President" to "prescribe" reasonable "rules, regulations, and orders," and "limitations and exceptions" regarding entry of aliens. That provision is the latest in a line of statutory grants of authority tracing back nearly a century. *See* Pub. L. No. 65-154, §1(a), 40 Stat. 559 (1918). Originally limited to times of war or declared national emergency, Congress removed that limitation in 1978, when it enacted Section 1185(a) in its current form. Pub. L. 95-426, §707(a), 92 Stat. 963, 992-93 (1978).

Both of those provisions comfortably encompass the Order's temporary suspension of entry of aliens under the Refugee Program and from six countries that the President—in consultation with the Attorney General and the Secretaries of State and Homeland Security—concluded required special precautions while the review of existing screening and vetting protocols is completed. That temporary measure is a paradigmatic exercise of the President's authority to "suspend the entry" of "any class of aliens" he finds may be "detrimental to the

[9] *See, e.g.*, Proclamation 5517 (1986) (Reagan; Cuban nationals); Exec. Order No. 12,807 (1992) (George H.W. Bush; government officials who impeded anti-human-trafficking efforts); Proclamation 8342 (2009) (George W. Bush; same); Proclamation 6958 (1996) (Clinton; Sudanese government officials and armed forces); Proclamation 8693 (Obama; aliens subject to U.N. Security Council travel bans).

interests of the United States," 8 U.S.C. §1182(f), and to prescribe reasonable "limitations" on entry, *id*. §1185(a)(1).

2. Section 1152 Does Not Prevent the President from Suspending the Entry of Nationals from the Designated Foreign Countries

Plaintiffs argue that both the entry and refugee suspensions are unlawful because nationality-based distinctions are prohibited by other statutory provisions. *See* PI Mot. at 34.

a. With respect to the refugee suspension, the argument is frivolous. Even assuming 8 U.S.C. § 1522(a)(5) applies, *see* PI Mot. at 34, the suspension does not run afoul of it: the Order's 120-day suspension of the Refugee Program applies *globally*, to all refugees without regard to nationality, religion, or any other characteristic. *See* Order § 6(a). Thus, there is no plausible basis for attacking the Refugee Program's suspension as discriminatory.

b. As for the Order's entry suspension in Section 2(c), Plaintiffs argue that the President cannot draw nationality-based distinctions under § 1182(f), due to the later-enacted § 1152(a)(1)(A), which prohibits discrimination on the basis of nationality in the issuance of immigrant visas. *See* PI Mot. at 34. Even if that argument were correct, it would not narrow the President's authority under § 1185(a)—which was substantially amended in 1978, *after* § 1152(a)(1)(A)'s enactment. Nothing in § 1185(a)'s current text or post-1978 history limits the President's authority to restrict entry by nationals of particular countries. Plaintiffs wholly fail to address this independent statutory basis for the President's authority.

c. Even if Plaintiffs were correct about § 1152(a)(1)(A) limiting the President's authority, that would have no bearing on the vast majority of the Order's applications. By its terms, that provision governs only issuance of "immigrant" visas. 8 U.S.C. § 1152(a)(1)(A); *see id*. § 1101(a)(15)-(16), (20). However, the vast majority—more than 70%—of visas issued in the last

two fiscal years to nationals of the six countries at issue were *nonimmigrant* visas.[10] Section 1152(a)(1)(A) thus has no application to such aliens. It likewise has no application to those entering under the Refugee Program, who do not receive visas and are admitted under separate authority. *See* 8 U.S.C. § 1181(c). Even where Section 1152(a)(1)(A) applies, Congress made clear that it does not "limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications," *id*. §1152(a)(1)(B), which at most is all the Order's temporary pause does. *Cf*. *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 104 F.3d 1349, 1353 (D.C. Cir. 1997). Plaintiffs, therefore, cannot meet the "heavy burden" of "establish[ing] that no set of circumstances exist under which the [Order] would be valid." *Salerno*, 481 U.S. at 745. To the contrary, it would still be valid in the vast majority of applications.

d. In any event, Plaintiffs' statutory argument is wrong. Even where it applies, § 1152(a)(1)(A) does not restrict the President's authority to draw nationality-based distinctions under §§ 1182(f) and 1185(a). Section 1152(a)(1)(A) was enacted in 1965 to abolish the prior system of nationality-based quotas for immigrant visas. Congress replaced that system with uniform, per-country percentage limits. Section 1152(a)(1)(A) addresses the subject of relative "preference" or "priority" (and reciprocal disadvantage or "discrimination") in the allocation of immigrant visas by making clear that the uniform percentage limits are the only limits that may be placed on the number of immigrant visas issued to nationals of any country.

Section 1152(a)(1)(A) thus governs the ordinary process of allocating and issuing immigrant visas. Its plain text governs only "the issuance of an immigrant visa"; it does not purport to restrict the President's antecedent, longstanding authority to suspend entry of "any class of

[10] https://travel.state.gov/content/visas/en/law-and-policy/statistics/annual-reports/report-of-the-visa-office-2016.html; https://travel.state.gov/content/visas/en/law-and-policy/statistics/annual-reports/report-of-the-visa-office-2015.html.

aliens" or to prescribe reasonable "rules, regulations, and orders" regarding entry as he deems appropriate. And it has never been understood to prohibit the President from drawing nationality-based distinctions under § 1182(f). For example, President Reagan invoked § 1182(f) to "suspend entry into the United States as immigrants by all Cuban nationals," subject to exceptions. Proclamation 5517 (1986). *See also* Proclamation 6958 (1996) (members of Sudanese government and armed forces); Proclamation 5829 (1988) (certain Panamanian nationals); Proclamation 5887 (1988) (Nicaraguan government officers and employees). Moreover, the Supreme Court has deemed it "perfectly clear that [Section 1182(f)] grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187 (1993).

Section 1185(a), too, has long been understood to authorize nationality-based distinctions. In 1979, the Office of Legal Counsel construed it as authorizing the President to "declare that the admission of Iranians or certain classes of Iranians would be detrimental to the interests of the United States." *Immigration Laws and Iranian Students*, 4A Op. O.L.C. 133, 140 (Nov. 11, 1979). Two weeks later, President Carter invoked Section 1185(a) to direct "limitations and exceptions" regarding "entry" of certain "Iranians." Exec. Order No. 12,172 (1979), *as amended by* Exec. Order No. 12,206, 45 Fed. Reg. 24,101 (Apr. 7, 1980) (expanding the prior Executive Order to apply to all Iranians, not just those "holding nonimmigrant visas").[11] Plaintiffs are thus simply wrong to assert that nationality-based distinctions are improper in administering the immigration laws. *See also, e.g.*, *Narenji v. Civiletti*, 617 F.2d 745, 746-748 (D.C. Cir. 1979) (upholding

[11] In discounting the Government's reliance on Executive Order No. 12,172 with respect to immigrants, the District of Maryland decision ignored the 1980 amendment expanding that Order beyond only non-immigrants. *See IRAP*, 2017 WL 1018235, at *10.

regulation that required nonimmigrant-alien post-secondary-school students who were Iranian natives or citizens to provide residence and immigration status to INS).

Interpreting § 1152(a)(1)(A) to prohibit the President from drawing these and other nationality-based distinctions would raise serious constitutional questions that the Court must avoid if possible. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). As these examples illustrate, limiting the entry of nationals of particular countries can be critical to the President's ability to conduct the Nation's foreign affairs and protect its security. Yet Plaintiffs' statutory interpretation would completely disable the President from restricting the entry of immigrants from any country—even one with which the United States was on the verge of war.

Plaintiffs offer no sound reason to adopt that constitutionally dubious interpretation or to upset the long-settled understanding of the President's statutory authority. Plaintiffs cite *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 472-73 (D.C. Cir. 1995), but that case was about the processing of immigrant visas, did not involve an exercise of the President's authority under §§ 1182(f) or 1185(a), and ultimately was vacated after Congress amended the law while the decision was on appeal. *See* 519 U.S. 1 (1996). That decision hardly reflects a categorical bar on nationality-based distinctions. In fact, "given the importance to immigration law of, *inter alia*, national citizenship, passports, treaties, and relations between nations, the use of such classifications is commonplace and almost inevitable." *Rajah v. Mukasey*, 544 F.3d 427, 435 (2d Cir. 2008).[12]

[12] The District of Maryland recently concluded that the Order was inconsistent with § 1152(a)(1)(A). *See IRAP*, 2017 WL 1018235, at *9-10. But that Court's interpretation would lead to the non-sensical result that an alien must be issued a visa even though they are validly barred from entering the country.

3. The Order Does Not Violate the APA

Plaintiffs also argue that the Order has effectively revoked State Department rules and regulations without following notice-and-comment. *See* PI Mot. at 36-40.

As an initial matter, the Order is an act of the President which is not reviewable for compliance with the APA. *See Detroit Int'l Bridge Co. v. Gov't of Canada*, 189 F. Supp. 3d 85, 100 (D.D.C. 2016). Moreover, accepting Plaintiffs' argument would effectively tie the President's hands under §§ 1182(f) and 1185(a). Requiring notice-and-comment rulemaking prior to any such Presidential proclamation would be fundamentally contrary to the D.C. Circuit's recognition that § 1182(f) provides the President with a "sweeping proclamation power" that serves as "a safeguard against the danger posed by any particular case or class of cases" not already covered by the INA. *Abourezk*, 785 F.2d at 1049 n.2. The fundamental premise of Plaintiffs' argument simply has no basis in the APA, the INA, or historical practice.

In any event, Plaintiffs' claims are wrong on their own terms. Contrary to Plaintiffs' characterizations, *see* PI Mot. at 36-38, nothing in the Order precludes an individualized determination on a visa application. In fact, Section 3(c) of the Order makes clear that waivers should be "decide[d] on a case-by-case basis[.]"

Nor does the Order create an extra-statutory basis for finding aliens ineligible for entry. *See* PI Mot. at 36-37. The basis for ineligibility is the President's statutory authority under §§ 1182(f) and 1185(a). Indeed, the State Department has long treated aliens covered by exercises of the President's § 1182(f) authority as ineligible for visas. *See* U.S. Dep't of State, 9 *Foreign Affairs Manual* 302.14-3(B) (2016).

Finally, the Order does not bar anyone from applying for refugee status. *See* PI Mot. at 38-39. The Order, by its terms, suspends only *decisions* on refugee applications, *see* Order § 6(a), as

DHS has confirmed. *See* Exh. B, Question 26 ("The Departments of Homeland Security and State will conduct [refugee] interviews as appropriate and consistent with the Executive Order. However, the Executive Order suspends decisions on applications for refugee status[.]"). The Order is not subject to the APA, but in any event does not run afoul of any APA requirements.

B. The Order Does Not Violate the Due Process Clause

Plaintiffs do not appear to contend that the Order implicates any due-process rights held by the affected aliens, who of course lack constitutional rights regarding their admission. *Plasencia*, 459 U.S. at 32. Instead, Plaintiffs' claim focuses on "the rights of persons in the United States whose family members abroad are barred from entering this country." PI Mot. at 32. That theory fails for three reasons.

First, the Due Process Clause confers no entitlement on persons in the United States regarding the entry of others. *See Kerry v. Din*, 135 S. Ct. 2128, 2131 (2015) (plurality opinion) ("There is no such constitutional right."). Indeed, the D.C. Circuit has squarely held as much with respect to the deportation of a noncitizen family member. *Swartz v. Rogers*, 254 F.2d 338, 339 (D.C. Cir. 1958) ("[W]e think the wife has no constitutional right which is violated by the deportation of her husband."). Plaintiffs ignore this binding decision.

Second, even if the Due Process Clause applied, Plaintiffs' procedural due-process claims would fail because they do not explain what further process the Constitution could possibly require. Unlike the plaintiff in *Din*, Plaintiffs here do not seek additional explanation for an individualized immigration decision or contend that officials misapplied a legal standard to a particular case. *See* 135 S. Ct. at 2132 (plurality opinion). Instead, Plaintiffs challenge the President's decision to suspend the entry of certain nationals of six countries and the Refugee Program. Plaintiffs do not and cannot claim that due process requires notice or individualized

hearings where, as here, the government acts through categorical judgments rather than individual adjudications. *See Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 446 (1915); *Yassini v. Crosland*, 618 F.2d 1356, 1363 (9th Cir. 1980).

Third, even if some individualized process were required, the Order more than provides it through the consular review of waiver requests (part of the visa-application process), including for foreign nationals seeking to "visit or reside with a close family member." Order § 3(c)(iv); *see id.* § 3(c)(i)-(ix). Plaintiffs do not even attempt to identify any inadequacy in that process.

C. Plaintiffs' Religious Discrimination Claims Fail

1. *Mandel* is the Appropriate Standard

The Supreme Court has made clear that "[w]hen the Executive exercises" its authority to exclude aliens from the country "on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the" asserted constitutional rights of U.S. citizens. *Mandel*, 408 U.S. at 770. This rule reflects the Constitution's allocation of power over immigration matters, which is "to be exercised exclusively by the political branches of government." *Id.* at 765. Control of the borders is "vitally and intricately interwoven with" matters at the heartland of the President's inherent authority, including "the conduct of foreign relations" and "the war power." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). Immigration matters therefore "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Id.* at 589; *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

Mandel's rule governs Plaintiffs' claims that the Executive's decision suspending entry of aliens violates Plaintiffs' asserted constitutional rights. *Mandel* itself rejected a claim that the Executive's exclusion of an alien violated the First Amendment rights of U.S. citizens who sought

to "hear[] and meet[] with" the alien. 408 U.S. at 760, 763-70. Because the Attorney General had a "facially legitimate and bona fide" reason for denying the waiver—that the alien had violated the conditions of prior visas—the Court declined to "look behind the exercise of that discretion" or "test it by balancing its justification against the [plaintiffs'] First Amendment interests." *Id*. at 769-70. And *Fiallo* applied that same rule to reject a claim that an Act of Congress unconstitutionally discriminated against certain aliens based on their sex and the legitimacy of their children, 430 U.S. at 792-96. The D.C. Circuit did the same in *Miller v. Christopher*, 96 F.3d 1467, 1470-71 (D.C. Cir. 1996), *aff'd sub nom*. *Miller v. Albright*, 523 U.S. 420 (1998). Other courts of appeals have also applied the *Mandel* standard to reject claims that immigration policies unlawfully discriminated on the basis of "religion, ethnicity, gender, and race." *Rajah*, 544 F.3d at 438; *Washington* Bybee Dissent at 16-18 (collecting cases); *see also Narenji*, 617 F.2d at 747 ("Distinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive. So long as such distinctions are not wholly irrational they must be sustained." (citations omitted)).

Some courts have held that the *Mandel* standard is better suited to reviewing individual visa decisions than broad immigration policy. *See, e.g*., *Washington v. Trump*, 847 F.3d at 1162. But that is contrary to both *Fiallo* and *Miller*. More fundamentally, the argument that courts "cannot look behind the decision of a consular officer, but can examine the decision of the President[,] stands the separation of powers on its head" and "cannot withstand the gentlest inquiry." *Washington* Bybee Dissent 12. "The President's unique status under the Constitution distinguishes him from other executive officials," and his singular "constitutional responsibilities and status" call for added "judicial deference and restraint." *Nixon v. Fitzgerald*, 457 U.S. 731, 750, 753 (1982). And in few areas is the President's authority greater than in matters involving

foreign relations and national security. *See, e.g., Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414-15 (2003); *Knauff*, 338 U.S. at 542; *Curtiss-Wright Exp. Corp.*, 299 U.S. at 320. The President's power in this area "is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015). The President's "unique constitutional position" and "respect for the separation of powers" compel even greater solicitude for policy decisions made by the President himself than those made by his subordinates. *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992).

2. The Order Amply Satisfies the *Mandel* Standard

Mandel's rule compels rejection of plaintiffs' claims. The Order's entry suspension is expressly premised on a facially legitimate, bona fide purpose: protecting national security. The President determined that a review of the Nation's screening and vetting procedures is necessary, and that a temporary pause in entry from six countries of concern is important to "prevent infiltration by foreign terrorists" and "reduce investigative burdens" while the review is ongoing. Order § 2(c). The six countries were chosen because they present heightened risks, which the Order explains country-by-country; indeed, Congress or the Executive had previously identified each as presenting terrorism-related concerns. The risk of continued entry from those countries during the review was, in the President's judgment, "unacceptably high." *Id.* § 1(f).

Plaintiffs urge this Court to cast aside the President's judgment, asserting that "[t]he government's purported national-security justifications for the March 6 Executive Order ring hollow." PI Mot. at 31. As support, Plaintiffs rely on a blog post from the CATO Institute indicating that "from 1975-2015, there was not a single case of an American being killed in a terrorist attack in this country by a person born in any of the six countries specified in the March 6

Executive Order." *Id*.[13] This line of argument only underscores the need for the *Mandel* standard. The President's national-security judgments cannot be beholden to blog posts from the CATO Institute, and courts should not second-guess those judgments on that basis. As the Supreme Court has recognized, when "[t]he Executive . . . deem[s] nationals of a particular country a special threat," "a court would be ill equipped to determine the[] authenticity and utterly unable to assess the[] adequacy" of that determination. *Reno v. Am.-Arab Anti-Discrimination Comm. (AAADC)*, 525 U.S. 471, 491 (1999); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) ("[N]ational security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess."). Because there is no basis for discounting the Order's national-security purpose, the Order amply satisfies the *Mandel* standard.

3. The Order Complies with the Establishment Clause

Plaintiffs seek to apply Establishment Clause precedents from the domestic context, involving things like local religious displays and school prayers. *See* PI Mot. at 24-25. But those cases are not properly applied to foreign-policy, national-security, and immigration judgments of the President. The "unreasoned assumption that courts should simply plop Establishment Clause cases from the domestic context over to the foreign affairs context ignores the realities of our world." *Washington* Bybee Dissent 8 n.6. Doing so would be a potentially dangerous extension of Establishment Clause analysis, extending to "every foreign policy decision made by the political branches, including our dealings with various theocracies across the globe." *Washington* Kozinski Dissent 3 n.2. This Court should reject such extensive "intrusion of the judicial power into foreign

[13] Citing https://www.cato.org/blog/guide-trumps-executive-order-limit-migration-national-security-reasons.

affairs" committed to the political branches. *Id*. In any event, the Order here complies with these Establishment Clause precedents.

a. The Order's text and purpose are religion-neutral. On its face, the Order is entirely neutral in terms of religion. The only provisions in the Revoked Order touching on religion—provisions addressing the Refugee Program that were intended to assist victims of religious persecution—were removed.

The entry suspension also was not adopted "with the ostensible and predominant purpose of advancing religion." *McCreary*, 545 U.S. at 860. Its explicit, religion-neutral objective is to address the risk that potential terrorists might exploit possible weaknesses in the Nation's screening and vetting procedures while the review of those procedures is underway. *See* Order § 1(d). That express "secular purpose" for a facially neutral policy cannot properly be deemed a "sham" or "merely secondary to a religious objective." *McCreary*, 545 U.S. at 864. In judging the government's true "object," the Supreme Court has looked to the law's "operation," because "the effect of a law in its real operation is strong evidence of its object." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993). Here, the suspension's "operation" confirms its stated purpose. As the Order itself explains, it applies to six countries based on risk, not religion; and in those six countries, the suspension applies irrespective of any alien's religion.

Plaintiffs note that each of the six countries is Muslim-majority. PI Mot. at 26. But that fact does not establish that the suspension's object is to single out Islam. Those countries were previously identified by Congress and the Executive for reasons that Plaintiffs do not contend were religiously motivated: each "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones." Order § 1(d). In addition, those countries represent a small fraction of the world's 50 Muslim-majority nations and approximately

10% of the global Muslim population.[14] And the suspension covers *every* national of those countries, including many non-Muslim individuals, if they meet the Order's criteria. Moreover, to regard the dominant religion of a foreign country as evidence of an Establishment Clause violation could intrude on "every foreign policy decision made by the political branches." *Washington* Kozinski Dissent 3 n.2. Such measures often address particular nations with a dominant religion. *See Washington* Bybee Dissent 16-18 (collecting cases rejecting challenges to National Security Entry-Exit Registration System, which applied to certain nationals of 24 Muslim-majority nations and North Korea).

b. Plaintiffs' principal argument is that "[t]hroughout the presidential campaign, then-candidate Trump stated that his plan was to ban Muslims." PI Mot. at 26. Plaintiffs' reliance on campaign statements in the face of a religion-neutral Order is wrong for at least three reasons.

First, under the Constitution's structure and its separation of powers, courts evaluating a presidential policy directive should not second-guess the President's stated purpose by looking beyond the policy's text and operation. The "presumption of regularity" that attaches to all federal officials' actions, *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926), applies with the utmost force to the President himself. Indeed, that presumption applies to subordinate Executive officials precisely "because they are designated . . . as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'" *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting U.S. Const. art. II, § 3).

Second, even in the domestic context, courts evaluate whether official action has an improper religious purpose by looking at "the 'text, legislative history, and implementation of the

[14] Pew-Templeton Global Religious Futures Project, *Muslim Population by Country* (2010), http://www.globalreligiousfutures.org/religions/muslims.

statute,' or comparable official act," not through "judicial psychoanalysis of a drafter's heart of hearts," *McCreary*, 545 U.S. at 862-63. Searching for governmental purpose outside the operative terms of governmental action and official pronouncements is fraught with practical "pitfalls" and "hazards" that would make courts' task "extremely difficult." *Palmer v. Thompson*, 403 U.S. 217, 224 (1971). And it makes no sense in the Establishment Clause context, because it is only an "official objective" of favoring or disfavoring religion gleaned from "readily discoverable fact" that implicates the Clause. *McCreary*, 545 U.S. at 862; *see Salazar v. Buono*, 559 U.S. 700, 715 (2010) (plurality op.) (rejecting a finding that Congress's stated purpose for land-transfer statute was "illicit" because the court "took insufficient account of the context in which the statute was enacted and the reasons for its passage").

Third, even if courts could look beyond official acts and statements to identify governmental purpose, they should not rely (as Plaintiffs suggest here) on statements by political candidates made as private citizens before assuming office. Statements by private persons cannot reveal "the government's ostensible object." *McCreary*, 545 U.S. at 860. The Courts of Appeals have accordingly declined to rely on private communications that "cannot be attributed to any government actor" to impute an improper purpose to government action. *Glassman v. Arlington Cty.*, 628 F.3d 140, 147 (4th Cir. 2010); *see Modrovich v. Allegheny Cty.*, 385 F.3d 397, 411-12 (3d Cir. 2004); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1031 (10th Cir. 2008).

Using comments by political candidates to question the stated purpose of later official action is particularly problematic. Statements of what candidates might attempt to achieve if elected, which are often simplified and imprecise, are not "official act[s]." *McCreary*, 545 U.S. at 862. They are made without the benefit of advice from an as-yet-unformed Administration, and they cannot bind elected officials who later conclude that a different course is warranted. *See*

Republican Party of Minn. v. White, 536 U.S. 765, 780 (2002); *see also Washington* Kozinski Dissent 4-5. Permitting campaign statements to contradict official pronouncements of the government's objectives would inevitably "chill political debate during campaigns." *Phelps v. Hamilton*, 59 F.3d 1058, 1068 (10th Cir. 1995) (declining to rely on campaign statements).

It also would encourage scrutiny of the past religion-related statements of all manner of government officials. Throughout American history, politicians have invoked religious doctrines and texts on the campaign trail in support of positions on a host of issues. If a candidate's religiously related campaign statements could form the basis of an Establishment Clause challenge to a facially neutral law, numerous important laws could be subject to colorable Establishment Clause challenges. And it would suggest that it is somehow improper for elected representatives to base their support for legislation in part on religious beliefs.

Moreover, attempting to assess what campaign statements reveal about the motivation for later action would "mire [courts] in a swamp of unworkable litigation," forcing them to wrestle with intractable questions, including the level of generality at which a statement must be made, by whom, and how long after its utterance the statement remains probative. *Washington* Kozinski Dissent 5. That approach would inevitably devolve into the "judicial psychoanalysis" of a candidate's "heart of hearts" that *McCreary* repudiated. 545 U.S. at 862.

This case illustrates these difficulties. Virtually all of the President's statements on which Plaintiffs rely were made before he assumed office—before he took the prescribed oath to "preserve, protect and defend the Constitution," U.S. Const. art. II, § 1, cl. 8. Taking that oath marks a profound transition from private life to the Nation's highest public office, and manifests the singular responsibility and independent authority to protect the welfare of the Nation that the Constitution necessarily reposes in the Office of the President. Virtually all of the statements also

preceded the President's formation of a new Administration, including Cabinet-level officials who recommended adopting the Order. And they predated the President's decision—made after courts expressed concern regarding the Revoked Order—to avoid further litigation and instead to adopt the new, revised Order in response to courts' concerns. As another district court recently held, "the substantive revisions reflected in [the Order] have reduced the probative value of the President's [past] statements" and undercut Plaintiffs' argument that "the predominate purpose of [the Order] is to discriminate against Muslims based on their religion." *Sarsour*, slip op. at 24.

III. Plaintiffs Cannot Demonstrate Irreparable Harm

As this Court has previously recognized, Plaintiffs must make a significant showing in order to demonstrate sufficient irreparable harm: "The standard for irreparable harm is particularly high in the D.C. Circuit. Proving irreparable injury is a considerable burden, requiring proof that the movant's injury is *certain, great and actual*—not theoretical—and *imminent*, creating a clear and present need for extraordinary equitable relief to prevent harm." *Save Jobs USA v. Dep't of Homelad Sec*., 105 F. Supp. 3d 108, 112 (D.D.C. 2015) (modifications and citations omitted). Here, even assuming Plaintiffs have satisfied Article III standing, they cannot demonstrate irreparable harm

First, all of the substantive sections challenged by Plaintiffs have already been enjoined nationwide by other courts. *See Hawai'i*, 2017 WL 1011673, at *17 (enjoining nationwide Sections 2 and 6 of the Order); *IRAP*, 2017 WL 1018235, at *18 (enjoining Section 2(c) nationwide).[15] Given these existing injunctions, Plaintiffs cannot possibly demonstrate any imminent irreparable harm stemming from the Order. *See* ECF No. 26.

[15] The only section challenged by Plaintiffs that is not currently enjoined is Section 3, but that section has no operation apart from the suspension of entry in Section 2(c).

Second, even if the Order were to begin being enforced, none of the Plaintiffs here would suffer irreparable harm. The organizational plaintiffs, by their own declarations, make clear that their harms exist regardless of whether the Order is enforced or enjoined. And having failed to demonstrate any *additional* expenditure of resources due to the Order, it is far from clear that the mere diversion of resources from one activity to another would constitute *irreparable* harm that must be addressed through preliminary injunctive relief.

As for the individual plaintiffs, allowing the Order to be enforced would not upset the status quo. The aliens currently outside the United States (and the individual Plaintiffs associated with them) have already been or will be waiting months or years, and Plaintiffs have not demonstrated that an injunction from this Court would bring those aliens to the United States with any greater immediacy. Moreover, if the Order were enforced, those aliens would have available to them the possibility of a waiver allowing entry under the Order, either as refugees under Section 6(c) or as "close family member[s]" under Section 3(c)(iv).

Finally, Plaintiffs cannot simply rely on an alleged Establishment Clause violation to support irreparable harm. Plaintiffs must establish irreparable harm "with respect to each claim[.]" *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1226 (11th Cir. 2008). And on their Establishment Clause claim, Plaintiffs not only lack standing, but the First Amendment does not confer any constitutional rights on the only persons subject to the Order—aliens abroad—and the Order does not affect the Plaintiffs' own First Amendment rights. It would therefore be inappropriate to base a finding of irreparable harm on that purported claim.

IV. The Balance of Equities and the Public Interest Make Injunctive Relief Inappropriate

On the other side of the scales, an injunction would cause direct, irreparable injury to the government and public interest, which merge in this context. *See Nken v. Holder*, 556 U.S. 418,

435 (2009). "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *accord New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *see, e.g.*, *O Centro Espirita Beneficiente Uniao de Vegetal v. Ashcroft*, 314 F.3d 463, 467 (10th Cir. 2002). *A fortiori*, the same principle applies to a national-security judgment of the President made pursuant to express statutory authorization. "[N]o governmental interest is more compelling than the security of the Nation," *Haig v. Agee*, 453 U.S. 280, 307 (1981); *see United States v. Abu Ali*, 528 F.3d 210, 240 (4th Cir. 2008), and "the President has unique responsibility" in this area, *Sale*, 509 U.S. at 188.

Indeed, Plaintiffs' motion makes clear the degree to which they are asking this Court to second-guess the President's national-security judgments and oversee this Nation's foreign affairs. *See, e.g.*, PI Mot. at 43-45 (discussing why the Order is purportedly "contrary to longstanding U.S. policy" of "support[ing] political opposition efforts in Iran," and instead "plays into the hands of hard-liners in the Iranian government"). Those foreign relations concerns are appropriately within the province of the President and Congress to decide, not for this Court to oversee at the behest of private parties. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) (holding that discretionary relief "interjecti[ng] into so sensitive a foreign affairs matter as this" would be inappropriate based on generalized claims not "specifically addressed to such concerns"); *Adams*, 570 F.2d at 955.

Given that the political branches' "[p]redictive judgment[s]" on matters of foreign policy and national security are entitled to the greatest possible deference, *Egan*, 484 U.S. at 529, courts should not second-guess the Executive's determination that "a preventive measure" in this area is

necessary to address a particular risk. *Humanitarian Law Project*, 561 U.S. at 35; *see AAADC*, 525 U.S. at 491. The Court should therefore decline to enjoin enforcement of the Order.

V. The Scope of Any Relief Must Be Limited to the Harm Found

Even if the Court were to conclude some injunctive relief were necessary, that relief must be appropriately tailored. *First*, the injunction cannot be issued against the President directly, as courts have recognized for over 150 years. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867). *Second*, facial invalidation of the Order would be inappropriate because Plaintiffs cannot carry their burden of showing that "no set of circumstances exists under which the [Order] would be valid." *Salerno*, 481 U.S. at 745. The Order is clearly lawful as applied to some aliens—for example, aliens abroad with no significant connection to the country or to a U.S. citizen or resident.

Third, any relief must be "limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis v. Casey*, 518 U.S. 343, 357 (1996). Thus, the relief for any individual plaintiff with standing would be to enjoin the Order as applied to that individual and/or their family members. For the organizational plaintiffs, the relief could extend only to particular individuals—whom the organizations have not yet identified—with whom the organizations have a close existing relationship, whose own constitutional rights have been violated by the denial of entry to a specific alien abroad who is otherwise eligible for a visa, and who face an imminent risk of injury. At an absolute maximum, the Court should limit any relief to only Iranian nationals and refugees, since Plaintiffs have not identified any harms outside that group. Under no circumstances, however, should the Court grant Plaintiffs' requested relief which is plainly overbroad.

CONCLUSION

The Court should deny Plaintiffs' motion for a preliminary injunction.

Dated: March 28, 2017

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PARS EQUALITY CENTER, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *in his official* capacity as President of the United States, *et al.*, Defendants.	)	Civil Action No. 1:17-cv-00255-TSC

Exhibit A:

Joint Letter to President (Mar. 6, 2017)

March 6, 2017

President Donald J. Trump
The White House
Washington D.C., 20500

Dear Mr. President,

As Attorney General and Secretary of Homeland Security, we are concerned about weaknesses in our immigration system that pose a risk to our Nation's security. Our concerns are particularly acute as we evaluate certain countries that are unable or unwilling to provide the United States with adequate information about their nationals, as well as individuals from nations that have been designated as "state sponsors of terrorism," and with which we have no significant diplomatic presence. We therefore urge you to take measures—pursuant to your inherent authority under the Constitution and as authorized by Congress—to diminish those risks by directing a temporary pause in entry from these countries.

Since the devastating attacks of September 11, 2001, a substantial majority of those convicted in U.S. courts for international terrorism-related activities were foreign-born. Moreover, senior government officials have expressed concerns that foreign nationals who seek to aid, support, or commit acts of terrorism will seek to infiltrate the United States through our immigration benefits programs such as the Refugee Admissions Program. At present, more than 300 persons who came to the United States as refugees are under FBI investigation for potential terrorism-related activities. There are currently approximately 1000 pending domestic terrorism-related investigations, and it is believed that a majority of those subjects are inspired, at least in part, by ISIS.

We expend enormous manpower and resources investigating terrorism-related activities of foreign nationals admitted to the United States, as well as extremists within the United States inspired by terrorist organizations such as ISIS and core al-Qa'ida, which have strongholds in certain areas of these countries, and which use widespread and broad-based social-media strategies for recruiting. Preventing and responding to terrorism at home encompasses thousands of national security personnel across the federal government—in effect, we admit individuals at risk for terrorism and then try to identify and stop them from carrying out their terrorist

activities. This places unacceptable stress on our law enforcement resources, which could be better spent on other efforts to weaken those terrorist organizations, protect the homeland, and safeguard our national security.

Although the convictions and investigations involve individuals from countries around the world, we have particular concerns about our current screening and vetting processes for nationals of certain countries that are either state sponsors of terrorism, or that have active conflict zones in which the central government has lost control of territory to terrorists or terrorist organizations, such as ISIS, core al-Qa'ida, and their regional affiliates. This increases the risk that nationals of these countries (or those purporting to be nationals) may be members of terrorist or extremist groups, or may have been radicalized by hostile governments or terrorist organizations.

This danger to our national security is heightened by the fact that effective collaboration on counter-terrorism, including in the visa issuance and refugee vetting processes, requires adequate information sharing. To the extent a government is a state sponsor of terrorism and hostile to the United States, or lacks control over territory, its passport issuances, and thus over the records of its citizens in such territory, there is a greater risk that the United States will not have access to necessary records to be able to verify important information about individuals seeking to travel from that country to the United States. Furthermore, based on DHS data and the experience of its operators, nationals from these countries are more likely to overstay their visas and are harder to remove to their home countries.

The Executive Branch, under your leadership, should complete a thorough and fresh review of the particular risks to our Nation's security from our immigration system. Therefore, we believe that it is imperative that we have a temporary pause on the entry of nationals from certain countries to allow this review to take place—a temporary pause that will immediately diminish the risk we face from application of our current vetting and screening programs for individuals seeking entry to the United States from these countries.

We stand prepared to take whatever steps are necessary to address this situation.

Sincerely,

Jefferson B. Sessions III
Attorney General

John Francis Kelly
Secretary of Homeland Security

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PARS EQUALITY CENTER, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *in his official* capacity as President of the United States, *et al.*, Defendants.	)	Civil Action No. 1:17-cv-00255-TSC

Exhibit B:

DHS Q&As (Mar. 6, 2017)

Q&A: Protecting the Nation From Foreign Terrorist Entry To The United States

Release Date: March 6, 2017

March 6, 2017 11:30 a.m. EST
Office of Public Affairs
Contact: 202-282-8010

Q1. Who is subject to the suspension of entry under the Executive Order?

Per the Executive Order, foreign nationals from Sudan, Syria, Iran, Libya, Somalia, and Yemen, who are outside the United States and who did not have a valid visa at 5 p.m. Eastern Standard Time on January 27, 2017, and do not have a valid visa on the effective date of this order are not eligible to enter the United States while the temporary suspension remains in effect. Thus any individual who had a valid visa either on January 27,

2017 (prior to 5:00 PM) or holds a valid visa on the effective date of the Executive Order is not barred from seeking entry.

Q2. Will "in-transit" travelers within the scope of the Executive Order be denied entry into the United States and returned to their country of origin?

Those individuals who are traveling on valid visas and arrive at a U.S. port of entry will still be permitted to seek entry into the United States. All foreign nationals traveling with a visa must continue to satisfy all requirements for entry, including demonstrating that they are admissible. Additional information on applying for admission to the United States is available on CBP.gov. (https://www.cbp.gov/travel/international-visitors/applying-admission-united-states)

Q3. I am a national from one of the six affected countries currently overseas and in possession of a valid visa, but I have no prior travel to

the United States. Can I travel to the United States?

Per the Executive Order, foreign nationals from Sudan, Syria, Iran, Libya, Somalia, and Yemen who have valid visas will not be affected by this Executive Order. No visas will be revoked solely based on this Executive Order.

Q4. I am presently in the United States in possession of a valid single entry visa but I am a national of one of the six impacted countries. Can I travel abroad and return to the United States?

Regardless of the Executive Order, your visa is not valid for multiple entries into the Unites States. While the Executive Order does not apply to those within the United States and your travel abroad is not limited, a valid visa or other document permitting you to travel to and seek admission to the United States is still required for any subsequent entry to the United States.

Q5. I am presently in the United States in possession of a valid multiple entry visa

but am a national of one of the six affected countries, can I travel abroad and return to the United States?

Yes. Individuals within the United States with valid multiple entry visas on the effective date of the order are eligible for travel to and from the United States, provided the visa remains valid and the traveler is otherwise admissible. All foreign nationals traveling with a visa must satisfy all admissibility requirements for entry. Additional information on applying for admission to the United States is available on CBP.gov. (https://www.cbp.gov/travel/international-visitors/applying-admission-united-states)

Q6. I am from one of the six countries, currently in the United States in possession of a valid visa and have planned overseas travel. My visa will expire while I am overseas, can I return to the United States?

Travelers must have a valid visa to travel to the United States, regardless of the Executive Order. Travelers who

do not have a valid visa due to its expiration while abroad must obtain a new valid visa prior to returning to the United States.

Q7. Will the Department of Homeland Security (DHS) and the Department of State (DOS) be revoking the visas of persons ineligible to travel under the revised Executive Order?

Visas will not be revoked solely as a result of the Executive Order. The Department of State has broad authority under Section 221(i) of the Immigration and Nationality Act to revoke visas.

Q8. What is the process for overseas travelers affected by the Executive Order to request a waiver?

Waivers for overseas travelers without a valid U.S. visa will be adjudicated by the Department of State in conjunction with a visa application.

Q9. How are returning refugees and asylees affected by the Executive Order?

Returning refugees and asylees, i.e., individuals who have already been granted asylum or refugee status in the United States, are explicitly excepted from this Executive Order. As such, they may continue to travel consistent with existing requirements.

Q10. Are first-time arrival refugees with valid /travel documents allowed to travel to the United States?

Yes, but only refugees, regardless of nationality, whose travel was already formally scheduled by the Department of State, are permitted to travel to the United States and seek admission. The Department of State will have additional information.

Q11. Will unaccompanied minors within the scope of the Executive Order be denied boarding and or

denied entry into the United States?

The Executive Order applies to those who do not have valid visas. Any individuals, including children, who seek entry to the United States must have a valid visa (or other approved travel document) before travel to the United States. The Secretary of State may issue a waiver on a case-by-case basis when in the national interest of the United States. With such a waiver, a visa may be issued.

Q12. Is DHS complying with all court orders?

DHS is complying, and will continue to comply, with all court orders in effect.

Q13. When will the Executive Order be implemented?

The Executive Order is effective at 12:01 A.M., Eastern Standard Time, on March 16, 2017.

Q14. Will the Executive Order impact Trusted Traveler Program membership?

No. Currently, CBP does not have reciprocal agreements for a Trusted Traveler Program with any of the countries designated in the Executive Order.

Q15. When will CBP issue guidance to both the field and airlines regarding the Executive Order?

CBP will issue guidance and contact stakeholders to ensure timely implementation consistent with the terms of the Executive Order.

Q16. Will first-time arrivals with valid immigrant visas be allowed to travel to the U.S.?

Yes. Individuals holding valid visas on the effective date of the Executive Order or on January 27, 2017 prior to 5:00 PM do not fall within the scope of the Order.

Q17. Does this affect travelers at all ports of entry?

Yes, this Executive Order applies to travelers who are applying for entry into the United States at any port of

entry—air, land, or sea—and includes preclearance locations.

Q18. What does granting a waiver to the Executive Order mean? How are waivers applied to individual cases?

Per the Executive Order, the Departments of Homeland Security and State can review individual cases and grant waivers on a case-by-case basis if a foreign national demonstrates that his or her entry into the United States is in the national interest, will not pose a threat to national security, and that denying entry during the suspension period will cause undue hardship.

Q19. Does "from one of the six countries" mean citizen, national, or born in?

The Executive Order applies to both nationals and citizens of the six countries.

Q20. How does the lawsuit/stay affect DHS operations in implementing this Executive Order?

Questions regarding the application of specific federal court orders should be directed to the Department of Justice.

Q21. Will nationals of the six countries with valid green cards (lawful permanent residents of the United States) be allowed to return to the United States?

Per the Executive Order, the suspension of entry does not apply to lawful permanent residents of the United States.

Q22. Can a dual national who holds nationality with one of the six designated countries traveling with a passport from an

unrestricted country travel to the United States?

The Executive Order exempts from its scope any dual national of one of the six countries when the individual is traveling on a passport issued by a different non-designated country.

Q23. Can a dual national who holds nationality with one of the six designated countries and is currently overseas, apply for an immigrant or nonimmigrant visa to the United States?

Please contact the Department of State for information about how the Executive Order applies to visa applicants.

Q24. Are international students, exchange visitors, and their dependents from the six countries (such as F, M, or J visa holders)

included in the Executive Order? What kind of guidance is being given to foreign students from these countries legally in the United States?

The Executive Order does not apply to individuals who are within the United States on the effective date of the Order or to those individuals who hold a valid visa. Visas which were provisionally revoked solely as a result of the enforcement of Executive Order 13769 are valid for purposes of administering this Executive Order. Individuals holding valid F, M, or J visas may continue to travel to the United States on those visas if they are otherwise valid.

Please contact the State Department for information about how the Executive Order applies to visa applicants.

Q25. What happens to international students, exchange visitors or their dependents from the six countries, such as F, M or J visa holders if their visa

expires while the Executive Order is in place and they have to depart the country?

The Executive Order does not affect F, M, or J visa holders if they currently have a valid visa on the effective date or held a valid visa on January 27, 2017 prior to the issuance of the Executive Order. With that said, travelers must have a valid visa to travel to the United States, regardless of the Executive Order. Travelers whose visa expires after the effective date of the Executive Order must obtain a new, valid visa to return to the United States.

Q26. Can U.S. Citizenship and Immigration Services (USCIS) continue refugee interviews?

The Departments of Homeland Security and State will conduct interviews as appropriate and consistent with the Executive Order. However, the Executive Order suspends decisions on applications for refugee status, unless the Secretary of Homeland Security and the Secretary of State jointly determine, on a case-by-case basis, that the entry of an individual as a refugee is in the national interest and would not pose a threat to the security or welfare of the United States.

Q27. Can the exception for refugee admission be used for Refugee/Asylee Relative Petitions (Form I-730) cases where a family member is requesting a beneficiary follow to join?

No. Individuals who already have valid visas or travel documents that permit them to travel to the United States are exempt from the Executive Order. To the extent that an individual does not yet have such documents, please contact the Department of State.

Q28. Does the Executive Order apply to those currently being adjudicated for naturalization or adjustment of status?

USCIS will continue to adjudicate Applications for Naturalization (Form N-400) and Applications to Register Permanent Residence or Adjust Status (Form I-485) and grant citizenship consistent with existing practices.

Q29. Will landed immigrants of Canada affected by the Executive Order be eligible for entry to the United States?

Landed immigrants of Canada who hold passports from one of the six countries are eligible to apply for a visa, and coordinate a waiver, at a location within Canada.

Q30. Has CBP issued clear guidance to CBP officers at ports of entry regarding the Executive Order?

CBP has and will continue to issue any needed guidance to the field with respect to this Executive Order.

Q31. What coordination is being done between CBP and the carriers?

CBP has been and will remain in continuous communication with the airlines through CBP regional carrier liaisons. In addition, CBP will hold executive level calls with airlines in order to provide guidance, answer questions, and address concerns.

Q32. What additional screening will nationals of restricted countries (as well as any visa applications) undergo as a result of the Executive Order?

In making admission and visa eligibility determinations, DHS and DOS will continue to apply all appropriate security vetting procedures.

Q33. Why is a temporary suspension warranted?

The Executive Order signed on March 6, 2017, allows for the proper review and establishment of standards to prevent terrorist or criminal infiltration by foreign nationals. The Executive Order protects the United States from countries compromised by terrorism and ensures a more rigorous vetting process. Protecting the American people is the highest priority of our Government and this Department.

Congress and the Obama Administration designated these six countries as countries of concern due to the national security risks associated with their instability and the prevalence of terrorist fighters in their territories.The conditions in the six designated countries present a recognized threat, warranting additional scrutiny of their nationals seeking to travel to and enter the United States. In order to ensure that the U.S.

Government can conduct a thorough and comprehensive analysis of the national security risks, the Executive Order imposes a 90-day suspension on entry to the United States of nationals of those countries.

Based on commitments from the Government of Iraq, the suspension of entry in this Executive Order will not apply to nationals of Iraq. Iraq has taken steps to increase their cooperation with the United States in the vetting of Iraqi nationals and as such it was determined that a temporary suspension is not warranted.

DHS will faithfully execute the immigration laws and the President's Executive Order, and will treat all of those we encounter humanely and with professionalism.

Q34. Why is a suspension of the refugee program warranted?

Some of those who have entered the United States as refugees have also proved to be threats to our national security. For example, in October 2014, an individual admitted to the United States as a refugee from Somalia, and who later became a naturalized U.S. citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction in connection with a plot to set off a bomb at a Christmas tree-lighting ceremony in Portland, Oregon. The Federal Bureau of Investigation has reported that approximately 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations.

Q35. How were the six countries designated in the Executive Order selected?

The six countries, Iran, Libya, Somalia, Sudan, Syria, and Yemen, had already been identified as presenting concerns about terrorism and travel to the United States.Specifically, the suspension applies to countries referred to in, or designated under—except Iraq—section 217(a)(12) of the INA, 8 U.S.C. § 1187(a)(12).In that provision Congress restricted use of the Visa Waiver Program by dual nationals of, and aliens recently present in, (A) Syria and Iraq, (B) any country designated by the Secretary of State as a state sponsor of terrorism (currently Iran, Syria, and Sudan), and (C) any other country designated as a country of concern by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence.In 2016, the former Secretary of Homeland Security designated Libya, Somalia, and Yemen as additional countries of concern regarding aliens recently present in those countries.

For the purposes of this Executive Order, although Iraq has been previously identified, based on commitments from the Government of Iraq, the suspension of entry in this Executive Order will not apply to nationals of Iraq. However, those who are dual nationals of Iraq and aliens recently present in Iraq continue to have restricted use of the Visa Waiver Program.

On the basis of negotiations that have taken place between the Government of Iraq and the U.S. Department of State in the last month, Iraq will increase

cooperation with the U.S. Government on the vetting of its citizens applying for a visa to travel to the United States.As such it was determined that a temporary suspension with respect to nationals of Iraq is not warranted at this time.

Q36. Why was Iraq treated differently in this Executive Order?

The close cooperative relationship between the United States and the democratically-elected Iraqi government, the strong U.S. diplomatic presence in Iraq, the significant presence of U.S. forces in Iraq, and Iraq's commitment to combat ISIS justify different treatment.In particular, those Iraqi government forces that have fought to regain more than half of the territory previously dominated by ISIS have earned special status.In addition, since Executive Order 13769 was issued, the Iraqi government has expressly undertaken steps to provide additional information about its citizens for purposes of our immigration decisions.Accordingly, it is no longer necessary to include Iraq in the temporary suspension applicable to the other six countries, but visa applications and applications for admission to the United States by Iraqi nationals will be subjected to additional scrutiny to determine if they have connections with ISIS or other terrorist organizations.

Q37. Are Iraqi nationals subject to the Executive Order? Will they require a

waiver to travel to the United States?

This Executive Order does not presently suspend the entry of nationals of Iraq. However, all travelers must have a valid travel document in order to travel to the United States. Admissibility will be determined by a CBP officer upon arrival at a Port of Entry. Please contact the Department of State for information related to visa eligibility and application.

Topics: Border Security (/topics/border-security), Homeland Security Enterprise (/topics/homeland-security-enterprise), Immigration Enforcement (/topics/immigration-enforcement)

Keywords: immigration (/keywords/immigration), immigration enforcement (/keywords/immigration-enforcement)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PARS EQUALITY CENTER, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *in his official* capacity as President of the United States, *et al.*, Defendants.	)	Civil Action No. 1:17-cv-00255-TSC

Exhibit C:

State Guidance (Mar. 13, 2017)

ALERT
MARCH 6, 2017

Important Announcement

Executive Order on Visas

On March 6, 2017, President Trump signed a new Executive Order on Protecting the Nation from Foreign Terrorist Entry into the United States which directs us to review current screening procedures, while protecting national security – our top priority when issuing visas.

We are working closely with the Departments of Homeland Security and Justice to ensure that we implement the Executive Order in accordance with its terms, in an orderly fashion, and consistent with any applicable court orders, with the objective of maximizing national security.

The Executive Order becomes effective 12:01 a.m. Eastern Time on March 16, 2017, providing time to make orderly operational adjustments. We will keep the public informed about changes affecting travelers to the United States.

We do not plan to cancel any previously scheduled visa appointments. After the new Executive Order goes into effect, any individual who believes he or she is eligible for a waiver or exemption should apply for a visa and disclose during the visa interview any information that might qualify the individual for a waiver/exemption. A consular officer will carefully review each case to determine whether the applicant is affected by the Executive Order, and, if so, whether the applicant qualifies.

The Executive Order provides specifically that no visas issued before the effective date of the Executive Order will be revoked pursuant to the Executive Order, and it does not apply to nationals of affected countries who have valid visas on the date it becomes effective.

The order further instructs that any individual whose visa was marked revoked or cancelled solely as a result of the original Executive Order issued on January 27, 2017, (E.O. 13769) will be entitled to a travel document permitting travel to the United States, so that the individual may seek entry. Any individual in this situation who seeks to travel to the United States should contact the closest U.S. embassy or consulate to request a travel document.

· FAQs on the Executive Order - Department of Homeland Security

Frequently Asked Questions

Q: Does this Order apply to dual nationals?

This Executive Order does not restrict the travel of dual nationals, so long as they are traveling on the passport of an unrestricted country and, if needed, hold a valid U.S. visa.

Our embassies and consulates around the world will process visa applications and issue nonimmigrant and immigrant visas to otherwise eligible visa applicants who apply with a passport from an unrestricted country, even if they hold dual nationality from one of the six restricted countries.

Q: Does this apply to U.S. Lawful Permanent Residents?

No. As stated in the Order, lawful permanent residents of the United States are not affected by the Executive Order.

Q: Are there special rules for legal residents of Canada?

Legal residents of Canada who hold passports of a restricted country can apply for an immigrant or nonimmigrant visa to the United States if the individual presents that passport, and proof of legal resident status, to a consular officer. These applications must be made at a U.S. consular section in Canada. A consular officer will carefully review each case to determine whether the applicant is affected by the E.O. and, if so, whether the case qualifies for a waiver.

Q: Will you process waivers for those affected by the E.O.? How do I qualify for a waiver to be issued a visa?

As specified in the Executive Order, consular officers may issue visas to nationals of countries identified in the E.O. on a case-by-case basis, when they determine: that issuance is in the national interest, the applicant poses no national security threat to the United States, and denial of the visa would cause undue hardship.

An individual who wishes to apply for a waiver should apply for a visa and disclose during the visa interview any information that might qualify the individual for a waiver. A consular officer will review each case to determine if the applicant is affected by the E.O. and, if so, whether the case qualifies for a waiver.

Waiver decisions will be made by the consular officer abroad at the time of adjudication.

Q: I sponsored my family member for an immigrant visa, and his interview appointment is after the effective date of the Order. Will he still be able to receive a visa?

The Executive Order provides several examples of categories of cases that may qualify for a discretionary waiver, to be considered on a case-by-case basis, if in the national interest entry would not threaten national security, and denial would cause undue hardship. Among the examples provided, a foreign national who seeks to enter the United States to reside with a close family member who is a U.S. citizen or lawful permanent resident (e.g., a spouse, child, or parent) may be considered for a waiver if the denial of entry during the suspension period would cause undue hardship.

An individual who wishes to apply for a waiver should apply for a visa and disclose during the visa interview any information that might qualify the individual for a waiver. A consular officer will carefully review each case to determine whether the applicant is affected by the E.O. and, if so, whether the case qualifies for a waiver.

Q: Can those needing urgent medical care in the United States still qualify for a visa?

The Executive Order provides several examples of categories of cases that may qualify for a waiver, to be considered on a case-by-case basis when in the national interest, when entry would not threaten national security, and denial would cause undue hardship. Among the examples provided, a foreign national who seeks to enter the United States for urgent medical care may be considered for a waiver.

An individual who wishes to apply for a waiver should apply for a visa and disclose during the visa interview any information that might qualify the individual for a waiver. A consular officer will carefully review each case to determine whether the applicant is affected by the E.O. and, if so, whether the case qualifies for a waiver.

Q: I'm a student or short-term employee that was temporarily outside of the United States when the Executive Order went into effect. Can I return to school/work?

If you have a valid, unexpired visa, the Executive Order does not apply to your return travel.

If you do not have a valid, unexpired visa, the Executive Order provides several examples of categories of cases that may qualify for a discretionary waiver. These waivers will be considered, on a case-by-case basis, to determine if the traveler's entry would be in the national interest, would not threaten national security, and if denial would impose undue hardship. Among the examples provided, a foreign national who has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, who is outside the United States on the effective date of the Order, may be considered for a waiver if they seek to reenter the United States to resume that activity and the denial of reentry during the suspension period would impair the activity.

An individual who wishes to apply for a waiver should apply for a visa and disclose during the visa interview any information that might qualify the individual for a waiver. A consular officer will carefully review each case to determine whether the applicant is affected by the E.O. and, if so, whether the case qualifies for a waiver.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

LINDA SARSOUR, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Civil Action No. 1:17cv00120 (AJT/IDD)
DONALD J. TRUMP, *et al.*,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

Presently pending before the Court is Plaintiffs' "Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction" [Doc. No. 13] (the "Motion"). The Court held a hearing on the Motion on March 21, 2017, following which it took the Motion under advisement. Upon consideration of the Motion, the memoranda in support thereof and in opposition thereto, the arguments of counsel at the hearing held on March 21, 2017, and for the reasons set forth below, the Motion is DENIED.[1]

I. BACKGROUND

The Plaintiffs seek an emergency order enjoining the enforcement of Executive Order 13,780 ("EO-2" or the "Order"), issued by President Donald J. Trump ("President Trump" or the "President") on March 6, 2017 and scheduled to go into effect on March 16, 2017. Subject to a number of enumerated limitations, exemptions, and waivers, the Order suspends entry into the United States by nationals of six countries for 90 days and by all refugees for 120 days. EO-2

[1] Both parties have urged the Court to decide the Motion on the merits. In particular, the Plaintiffs claim that given the nature of their Establishment Clause injuries, the harm inflicted by EO-2 is not confined to any particular provision and persists so long as any of its provisions continue to operate. Given the nature of Plaintiffs' claims, the temporary and limited nature of the injunctions already issued, and the facts that appear to be particular to these Plaintiffs, the Court concludes that there remains a justiciable controversy ripe for adjudication and will therefore decide the Motion on its merits.

explicitly rescinds Executive Order 13,769 ("EO-1"), which similarly temporarily barred nationals from certain countries from obtaining visas or entering the United States but did not contain the exemptions and waivers now in EO-2 and also included certain religious preferences no longer in EO-2.

The ultimate issue in this action is whether the President exceeded his authority, either as delegated to him by Congress or as provided by the Constitution. But because Plaintiffs seek at the beginning of this case the relief they would ultimately obtain at the end of the case should they prove successful, Plaintiffs must show not only that (1) they are likely to succeed on the merits of their claim that EO-2 exceeded the President's authority, but also that (2) without immediate injunctive relief, Plaintiffs face imminent irreparable harm; (3) the balance of equities, including the balance of hardships, weigh in their favor; and (4) issuance of the requested injunction on an emergency basis is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

A. Factual History

1. Executive Order No. 1

On January 27, 2017, President Trump issued Executive Order 13,769, titled "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 8977 (Jan. 27, 2017). EO-1 immediately suspended immigrant and nonimmigrant entry into the United States for 90 days to aliens from Iraq, Iran, Libya, Sudan, Somalia, Syria, and Yemen. EO-1 also suspended the U.S. Refugee Admissions Program ("USRAP") for 120 days, *id.* § 5(a), and suspended the entry of all refugees from Syria indefinitely, *id.* § 5(c). Furthermore, in screening refugees, government bodies were directed "to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority

religion in the individual's country of nationality." *Id.* § 5(b). The order provided for "case-by-case" exceptions to the 120-day refugee suspension. *Id.* § 5(f).

A group of plaintiffs including the State of Washington and the State of Minnesota challenged EO-1 on both constitutional and statutory grounds in the United States District Court for the Western District of Washington. *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). On February 3, 2017, the district court issued a nationwide injunction halting enforcement of the operative portions of that order, although it did not provide a specific basis for finding that the plaintiffs were likely to succeed on the merits. *Id.* On February 9, 2017, the United States Court of Appeals for the Ninth Circuit denied the defendants' emergency appeal to stay the district court's order, which it construed as a preliminary injunction. *Washington v. Trump*, 847 F.3d 1151, 1165-66 (9th Cir. 2017). The Ninth Circuit found that the defendants had not demonstrated a likelihood of success on the merits as to the plaintiffs' procedural due process claim, but it reserved judgment on the plaintiffs' Establishment Clause and Equal Protection Clause claims, noting that they "raise[d] serious allegations and present[ed] significant constitutional questions." *Id.* at 1168.

Separately, on February 13, 2017, this Court enjoined the enforcement of section 3(c) only as to Virginia residents and students enrolled in state educational institutions located in the State of Virginia. *Aziz v. Trump*, No. 1:17-cv-116, --- F. Supp. 3d ---, 2017 WL 580855 (E.D. Va. Feb. 13, 2017) (Brinkema, J.). This Court ruled that the plaintiffs had clearly demonstrated a likelihood of success on the merits of their Establishment Clause claim, but it did not address their other claims. That injunction has not been appealed.

2. Executive Order No. 2

Responding to the successful legal challenges to EO-1, on March 6, 2017, President Trump issued EO-2. EO-2 explicitly rescinds EO-1 and was scheduled to go into effect on March 16, 2017 at 12:01 a.m. EDT. EO-2 has the same title as EO-1 and has many of the same stated policies and purposes. It also has substantial differences, as discussed in detail below. Briefly summarized, EO-2 removes Iraq from the list of designated countries whose nationals are covered by the Order, eliminates the indefinite suspension of all refugees from Syria, exempts otherwise covered persons who are located in the United States or who had appropriate travel documents as of the date on which EO-1 was issued, provides a list of categories where otherwise covered persons qualify for consideration of a waiver, and removes any religious-based preferences for waivers. The Order also contains substantially more justification for its national security concerns and the need for the Order, including why each particular designated country poses specific dangers.

Before the Order's effective date, the State of Hawaii and a United States citizen challenged the Order in the United States District Court for the District of Hawaii. On March 15, 2017, the Hawaii court issued a nationwide temporary restraining order ("TRO") enjoining the enforcement of sections 2 and 6 of EO-2. *Hawai'i v. Trump*, No. 1:17-cv-00050, 2017 WL 1011673 (D. Haw. Mar. 15, 2017). At the hearing in this action before this Court on March 21, 2017, Defendants represented that they expected the District of Hawaii court to extend the TRO, with their consent, until that court decides the pending motion for a preliminary injunction, a hearing on which has been scheduled for March 29, 2017.[2] The TRO has not been appealed.

[2] The TRO did not have an expiration date, but it will expire on March 29, 2017, unless extended. *See* Fed. R. Civ. P. 65(b)(2) ("The order expires at the time after entry—not to exceed 14 days—that the court sets . . . ."). Where the court has not set a specific time of expiration, the order simply expires fourteen days after entry.

A separate group of six individuals and three organizations challenged EO-2 in the United States District Court for the District of Maryland, alleging that it inflicted stigmatizing injuries as well as various other more particularized forms of harm. In an order signed on March 15, 2017 but entered on March 16, 2017, the Maryland court issued a nationwide preliminary injunction enjoining the enforcement of section 2(c) of EO-2. *Int'l Refugee Assist. Proj. v. Trump*, No. 8:17-cv-00361-TDC, --- F. Supp. 3d ---, 2017 WL 1018235 (D. Md. Mar. 16, 2017).

Litigation in the Western District of Washington also continues. In that case, Plaintiffs filed an emergency motion to enforce the court's February 3, 2017 preliminary injunction of EO-1. The district court rejected that motion, finding that EO-2 did not violate the court's prior preliminary injunction because EO-2 is substantively different from EO-1. Order Denying Washington's Emergency Motion to Enforce the Preliminary Injunction, *Washington v. Trump*, No. C17-0141JLR (W.D. Wash. Mar. 16, 2017), ECF No. 163.

By way of summary, at this point, the District of Hawaii court's TRO remains in effect as to sections 2 and 6 of the Order until March 29, 2017, and the District of Maryland court's preliminary injunction remains in effect as to section 2(c) of the Order. All other sections of EO-2 are in force at this time. Plaintiffs in this litigation ask this Court to enjoin the enforcement of EO-2 in its entirety.

B. Plaintiffs Who Move for Emergency Relief

All Plaintiffs are Muslims who are presently residing in various locations across the country and claim that they have been harmed by the issuance of EO-2 in a variety of ways. Among the injuries they allege is the harm created by a stigma against Muslims living in the United States. Specifically, they claim that as a result of Defendants' conduct, beginning with the initial announcement of the "Muslim Ban," Defendants have promoted views that (1)

disfavor and condemn their religion of Islam; (2) marginalize and exclude Muslims, including themselves, based on the claim that Muslims are disposed to commit acts of terrorism; (3) endorse other religions and nonreligion over Islam; (4) Muslims are outsiders, dangerous, and not full members of the political community; and (5) all non-adherents of Islam are insiders and therefore favored. Amended Complaint [Doc. No. 11] ("AC") ¶¶ 20-38. In addition, Plaintiffs allege a range of other injuries based on each's particular status in the United States and each's relationships with persons outside of the United States. The following eight Plaintiffs have joined in the Motion.[3]

Plaintiffs Basim Elkarra, Hussam Ayloush, and Adam Soltani are United States citizens who allegedly "are no longer able to bring their family members from Syria and Iran to visit them in the United States as a direct result of the Revised Muslim Ban [EO-2] as they otherwise would." Plaintiffs' Motion ("Pls.' Mot.") 6. They further allege that, as "prominent civil rights and grassroots activists," they "have had to change their conduct adversely in that they have been required to assist and advocate on behalf of Muslims targeted or stigmatized by the First Muslim Ban [EO-1], push back against the anti-Muslim sentiment fomented and legitimized by Defendants, and defend their religion as a religion of peace on national media outlets and through grassroots efforts." *Id.*

Plaintiff John Doe No. 6 is also a United States citizen. He recently filed a marriage petition for his Sudanese wife currently residing outside of the United States, which he claimed would be "subjected to a more onerous application process that will require her to make heightened showings to obtain a waiver from the Revised Muslim Ban [EO-2], pursuant to Sec. 3(c)(iv) of the Revised Muslim ban, based solely on her Sudanese national origin." *Id.* 6-7. That

[3] Plaintiffs John Doe No. 5 is a Sudanese national and lawful permanent resident of the United States who initially joined in the presently pending Motion; however, on March 21, 2017, he withdrew his Motion. [Doc. No. 31.]

petition was approved while this Motion was pending, however, [*see* Doc. No. 31], and her visa application is now pending.

Plaintiffs John Doe Nos. 7 and 8 are lawful permanent residents of the United States. John Doe No. 7 is a Syrian national, and John Doe No. 8 is a Sudanese national. John Doe No. 7 filed a marriage petition for his wife, which is currently pending. John Doe No. 8 also filed a marriage petition for his wife, which was approved, but her visa application remains pending. These three Plaintiffs allege that under EO-2, "their wives' visa applications will be subject to a more onerous application process that will require [them] to make heightened showings to obtain a waiver from the Revised Muslim Ban." *Id.* 7.

Plaintiffs John Doe Nos. 2 and 3 are students of Somali and Yemeni national origin who were issued single-entry F-1 student visas which expire upon completion of their studies. They allege that they intended to travel outside of the United States but that, if they do so now, they "will be subjected to a more onerous application process that will require them to make heightened showings to obtain a waiver." *Id.* They claim that this inability to travel imposes a hardship because they are additionally deprived of the opportunity to see their families, and they may not be able to stay in student housing during school breaks. *Id.* 7-8.

C. Procedural History

President Trump issued EO-1 on January 27, 2017. Three days later, on January 30, 2017, Plaintiffs filed their Complaint for Injunctive and Declaratory Relief [Doc. No.1] against President Trump, Secretary of the Department of Homeland Security John F. Kelly, the U.S. Department of State, and the Director of National Intelligence.[4] Then, on March 13, 2017,[5] after

[4] On February 3, 2017 and February 27, 2017, three separate motions to intervene were filed by *pro se* movants Janice Wolk Grenadier [Doc. No. 2], Raquel Okyay [Doc. No. 4], and Vincent A. Molino [Doc. No. 8]. The Court denied each of these motions. [Doc. Nos. 5, 10.]

President Trump's March 6, 2017 issuance of EO-2, which explicitly rescinded EO-1, Plaintiffs filed their Amended Complaint for Injunctive and Declaratory Relief [Doc. No. 11] as well as their presently pending "Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction" [Doc. No. 13].

II. LEGAL STANDARD

Federal Rule of Civil Procedure 65 authorizes federal courts to issue temporary restraining orders and preliminary injunctions. "The standard for granting either a TRO or a preliminary injunction is the same." *Moore v. Kempthorne*, 464 F. Supp. 2d 519, 525 (E.D. Va. 2006) (citation omitted) (internal quotation marks omitted). Both are "extraordinary remedies involving the exercise of a very far-reaching power to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola*, 245 F.3d 335, 339 (4th Cir. 2001). The movants bear the burden to establish that (1) they are likely to succeed on the merits of their case; (2) they are likely to suffer irreparable harm in the absence of injunctive relief; (3) the balance of the equities tips in their favor; and (4) an injunction would be in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *Manning v. Hunt*, 119 F.3d 254, 263 (4th Cir. 1997); *see also Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013).

III. ANALYSIS

A. Standing

In order to obtain the requested injunction, Plaintiffs must first demonstrate that they have standing to challenge EO-2. Defendants dispute that any of the Plaintiffs have standing. "Standing doctrine functions to ensure, among other things, that the scarce resources of the

[5] In their Motion, Plaintiffs incorrectly claim that they filed their Amended Complaint on March 10, 2017. *See* Def.'s Mot. 8. The Amended Complaint is dated "March 13, 2017," *see* AC 53, and the Court's CM/ECF electronic case filing system also indicates that the document was electronically filed on March 13, 2017.

federal courts are devoted to those disputes in which the parties have a concrete stake." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191. To establish standing, a plaintiff must set forth specific facts to demonstrate that (1) he has "suffered an 'injury in fact' . . . which is (a) concrete and particularized . . . and (b) 'actual or imminent, not conjectural or hypothetical"; (2) there exists "a causal connection between the injury and the conduct complained of"; and (3) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). Plaintiffs must demonstrate standing for every claim, but a claim is justiciable if even only one Plaintiff has standing to raise it. *Bostic v. Schaefer*, 760 F.3d 352, 370-71 (4th Cir. 2014).

Because of the nature of Plaintiffs' statutory and constitutional claims, their showing of standing may be based on subjective, non-economic, or intangible injuries. *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997) ("[R]ules of standing recognize that noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable."); *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 605 (4th Cir. 2012) ("[P]laintiffs have been found to possess standing when they are 'spiritual[ly] affront[ed]' as a result of 'direct' and 'unwelcome' contact with an alleged religious establishment within their community." (quoting *Suhre*, 131 F.3d at 1086-87)); *Bostic*, 760 F.3d at 372 (Equal Protection Clause challenges, like Establishment Clause challenges, can be premised on "stigmatic injury stemming from discriminatory treatment."). However, the allegation of injury in the form of a stigma alone is insufficient to support standing; there must also be a "cognizable injury caused by personal contact [with the offensive conduct]." *Suhre*, 131 F.3d at 1090; *see also Moss*, 683 F.3d at 607 (finding standing where plaintiffs alleged "outsider" status after having received a letter from

their school district promoting a "course of religious education [with] Christian content" and "prayers and other Christian references [at] school events").

In this case, all Plaintiffs claim that in addition to the stigma that the Order has imposed on them as Muslims, they have suffered "cognizable injury caused by personal contact" because EO-2 prevents or impermissibly burdens their ability to (1) reunite with their foreign national spouses or other relatives; (2) travel internationally without fear of forfeiting their own visas; (3) renew their visas without being subjected to a heightened standard of review; and (4) attend other life activities without the need to combat the pernicious effects of EO-2 through religious advocacy and outreach. Based on these alleged injuries and the facts that have been presented, the Court finds for the purposes of the Motion that Plaintiffs have made a sufficient showing that they have standing to challenge EO-2.

B. Plaintiffs' Likelihood of Success on the Merits

Section 2(c) of EO-2 suspends the entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen for 90 days, subject to the limitations, exemptions, and waivers in sections 3 and 12. Section 6 of EO-2 suspends decisions on applications for refugee status worldwide for 120 days, subject to waivers issued under section 6(c). Plaintiffs seek to enjoin EO-2 in its entirety on the grounds that all or parts of the Order exceed the President's statutory or constitutional authority and that, in any event, the Order, as a whole, has the unconstitutional effect of imposing upon them a stigma based on their status as Muslims.

"[A] party seeking a preliminary injunction . . . must clearly show that it is likely to succeed on the merits."[6] *Dewhurst v. Century Alum. Co.*, 649 F.3d 287, 290 (4th Cir. 2011).

[6] Plaintiffs claim that "a showing of likelihood of success on the merits is required 'only if there is no imbalance of hardships in favor of the plaintiff.'" Pls.' Mot. 12 (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 808 (4th Cir. 1991)). After the Supreme Court's decision in *Winter* in 2008, the Fourth Circuit concluded that "[o]ur . . . standard in several respects [as stated in *Direx Israel, Ltd.*] now stands in fatal tension with the Supreme

The "requirement . . . is far stricter than . . . [a] requirement that the plaintiff demonstrate only a grave or serious *question* for litigation." *Real Truth About Obama, Inc. v. F.E.C.*, 575 F.3d 342, 346-47 (4th Cir. 2009), *judgment vacated on other grounds*, 559 U.S. 1089 (2010), and *adhered to in relevant part*, 607 F.3d 355 (4th Cir. 2010).[7] In determining whether the Plaintiffs have made the required showing, the issue is not whether EO-2 is wise, necessary, under- or over-inclusive, or even fair. It is not whether EO-2 could have been more usefully directed to populations living in particular geographical areas presenting even greater threats to national security or even whether it is politically motivated. Rather, the core substantive issue of law, as to which Plaintiffs must establish a clear likelihood of success, is whether EO-2 falls within the bounds of the President's statutory authority or whether the President has exercised that authority in violation of constitutional restraints.

1. Plaintiffs' Claim that EO-2 Violates the Immigration and Nationality Act (Count IV[8])

Plaintiffs claim that section 2(c) of EO-2 bars entry into the United States based on nationality and therefore violates the Immigration and Nationality Act of 1952 ("INA"), Pub. L. No. 82-414, 66 Stat. 163, 8 U.S.C. §§ 1101-1537 (2012). Plaintiffs argue that 8 U.S.C. § 1152(a)(1)(A) ("Section 1152") bars EO-2. Defendants claim that the President's broad

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Court's 2008 decision in *Winter*. . . . [T]he . . . balance-of-hardship test may no longer be applied in granting or denying preliminary injunctions in the Fourth Circuit." *Real Truth About Obama, Inc. v. F.E.C.*, 575 F.3d 342, 346-47 (4th Cir. 2009), *judgment vacated on other grounds*, 559 U.S. 1089 (2010).

[7] The Supreme Court vacated the Fourth Circuit's opinion in *Real Truth About Obama, Inc.* following its opinion in *Citizens United v. F.E.C.*, 558 U.S. 310 (2010), and remanded to the Fourth Circuit "for 'further consideration in light of *Citizens United* and the Solicitor General's suggestion of mootness.'" *Real Truth About Obama, Inc. v. F.E.C.*, 607 F.3d 355 (4th Cir. 2010) (quoting *Real Truth About Obama, Inc. v. F.E.C.*, 559 U.S. 1089 (2010)). In a published order issued per curiam, the Fourth Circuit reissued Parts I and II of its earlier opinion, "stating the facts and articulating the standard for the issuance of preliminary injunctions," and remanded the case to the district court for further consideration in accordance with the Supreme Court's directive.

[8] Plaintiffs' labelling of this claim as "Count V" in their Amended Complaint appears to be a typo, as there is no Count IV. *See* AC 50.

authority under 8 U.S.C. § 1182(f) ("Section 1182(f)") to bar entry of "any aliens or class of aliens" is not restricted by Section 1152.[9]

Congress has the exclusive constitutional authority to create immigration policies. *See Galvan v. Press*, 347 U.S. 522, 531 (1954).[10] In exercising that authority, Congress has enacted (and repealed) a wide variety of immigration statutes over the years, with a wide variety of restrictions and authorizations. As a result, the current version of the INA, a comprehensive statute governing immigration and the treatment of aliens originally passed in 1952, is a legislative rabbit warren that is not easily navigated.

Section 1182(a)(3)(B) identifies those aliens seeking to enter the United States who are "inadmissible" because of certain identified activities related to terrorism. These aliens include, with certain exceptions, aliens who have engaged in "terrorist activities," are reasonably believed to be engaged or "likely to engage after entry in any terrorist activities," are representatives of a terrorist organization, endorse or espouses terrorist activities or persuade others to do so, have received military-type training from a terrorist organization, or are the spouses or children of an alien who is inadmissible. 8 U.S.C. § 1182(a)(3)(B)(i). "Terrorist activity" is defined broadly. *See id.* § 1182(a)(3)(B)(iii).

In addition to the specific criteria for inadmissibility set forth in Section 1182(a)(3)(B), Section 1182(f), which was also passed in 1952, delegates broad authority to the President to bar entry into the United States of "any aliens or class of aliens." More specifically, Section 1182(f) provides that:

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[9] The Court will first assess Plaintiffs' statutory claims pursuant to its obligation to avoid constitutional rulings whenever possible. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

[10] Defendants contend that the President has Article II authority, as well as statutory authority, to issue EO-2. Given the Court's ruling, there is no need to consider the merits of Defendants' Article II contentions.

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

Id. § 1182(f). 8 U.S.C. § 1185(a) ("Section 1185(a)"), passed in 1978, further delegates authority to the President:

> Unless otherwise ordered by the President, it shall be unlawful for an alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.

Id. § 1185(a)(1). President Trump relies explicitly on his authority under Section 1182(f) and Section 1185(a) to suspend the entry of all nationals from the six designated countries for 90 days as well as to suspend the entry of all refugees under the United States Refugee Admissions Program for 120 days. EO-2 §§ 2(c), 6.

In 1965, Congress amended the INA to prohibit certain types of discrimination in connection with the issuance of immigrant visas. Section 1152 provides:

> No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence.

8 U.S.C. § 1152(a)(1)(A). Plaintiffs rely centrally on this provision to argue that the President's exercise of his authority under Sections 1182(f) and 1185(a) is limited and restricted by the non-discrimination provision in Section 1152.

8 U.S.C. § 1201(h) ("Section 1201(h)") is also relevant. In pertinent part, it provides:

> Nothing in [the INA] shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted the United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this chapter, or any other provision of law.

Id. § 1201(h). So as to leave no doubt as to the scope of entitlement granted by the issuance of an immigrant visa, Congress mandated that the text of this provision "appear upon every visa application." *Id.*

Plaintiffs urge this Court to conclude that section 2(c) of EO-2 discriminates on the basis of nationality and is therefore prohibited by Section 1152. Plaintiffs argue in this regard that because this non-discrimination section was added after Section 1182(f), Congress intended that it supersede Section 1182(f) to the extent the two sections conflict. Plaintiffs argue in support of this position that, historically, presidents have used Section 1182(f) only to prohibit the issuance of visas to classes of applicants that are not subject to Section 1152. *See* Pls.' Mot. 27-28. Plaintiffs also contend that because, when applicable, Section 1152(a) applies to any assessment of the terrorism related grounds for inadmissibility under Section 1182(a)(3)(B), Section 1152(a)'s non-discrimination restrictions must also be read to apply to the President's exercise of authority under Section 1182(f) and 1185(a), at least in so far as that authority is exercised to bar entry based on terrorism concerns. For all these reasons, Plaintiffs claim that Congress foreclosed the President's ability to make national security determinations on the basis of criteria prohibited under Section 1152.

In response to Plaintiffs' position, Defendants see presidential authority and authorizations in Sections 1182(f) and 1185(a) unaffected by Section 1152 and contend that the President's authority under those sections "comfortably encompass the Order's temporary suspension of entry of aliens from six countries." Defendant's Memorandum in Opposition to Plaintiffs' Motion [Doc. No. 22] ("Defs.' Mem. Opp'n") 17. They contend, in this regard, that Section 1185(a) was enacted after Section 1152 and that, in any event, Section 1152 prohibits discrimination only in the issuance of an *immigration* – not a *non*-immigration – visa "in the

ordinary process of visas and admissions." *Id.* 18. Section 1152 "does not purport to, and has never been interpreted to restrict, the President's longstanding authority [under Sections 1182(f) or 1185(a)]." *Id.* Defendants further contend that since most of the aliens that Plaintiffs claim will be affected by EO-2 – students, employees, tourists, refugees, and family – would seek to obtain *non*-immigrant visas, any limitations imposed by Section 1152 would not extend to the President's authority to bar entry of that class of aliens seeking non-immigration visas.

In construing the proper scope of the President's statutory authority, the Court has reviewed the text and structure of the INA as a whole and, specifically, the practical, operational relationship each of the above referenced provisions has with the others. Based on that analysis, the Court concludes, at a minimum, that Section 1152's non-discrimination restrictions, which apply in connection with the issuance of immigrant visas, do not apply to the issuance or denial of non-immigrant visas or entry under Section 1182(f).[12]

The Court also has substantial doubts that Section 1152 can be reasonably read to impose any restrictions on the President's exercise of his authority under Sections 1182(f) or 1185(a). Under those sections, the President has unqualified authority to bar physical entry to the United States at the border. Sections 1182(f) and 1152(a) deal with different aspects of the immigration process, and Section 1201(h) makes clear that while clearly related, the process of issuing a visa, and the rules and regulations related thereto, involves an aspect of the immigration process that is separate and distinct from the process of actually permitting entry into the country. There is nothing in the legislative scheme to suggest that Congress intended Section 1152 to restrict the exercise of the President's unqualified authority under Section 1182(f) with respect to a

[12] The District of Maryland court attempted to reconcile these seemingly contradictory provisions of the INA in *International Refugee Assistance Project*. There, the court concluded that Section 1152 bars the President from discriminating on the basis of nationality in the issuance of immigrant visas only. *Int'l Refugee Assist. Proj.*, 2017 WL 1018235, at *10.

completely distinct aspect of the immigration process. To do so would appear to make Section 1201(h) all but meaningless. Likewise, the Court sees little merit to Plaintiffs' argument that because there are specific grounds for inadmissibility in Section 1182(a)(3)(B) based on terrorist activities, the President is foreclosed from barring entry of "aliens or classes of aliens" under Section 1182(f) based on national security concerns related to terrorism. Nothing in the text of Section 1182(a)(3)(B) or any other provision of the INA suggests that an alien may be barred from entering the United States on terrorism grounds only through the regular visa application process. This provision simply provides grounds that establish *per se* ineligibility to receive a visa or to be admitted into the country. It also shows that Congress knows how to make a provision applicable to both the visa decision and the entry decision when it so intends and that the two aspects of immigration are distinct. *See* 8 U.S.C. § 1182(a) ("Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States . . . .").

For the above reasons, the Court cannot say at this point in the litigation that Plaintiffs have clearly shown that the President's authority under Section 1182(f) and 1185(a) is limited by Section 1152 with respect to either immigrant or non-immigrant visas. Plaintiffs have therefore not demonstrated that they are likely to succeed on the merits of their INA statutory claim even if EO-2 discriminates on the basis of nationality (Count IV).

2. Plaintiffs' Claim that EO-2 Constitutes Unlawful Agency Action Under the Administrative Procedures Act (Count III)

Plaintiffs claim that the issuance of EO-2 violates the Administrative Procedures Act ("APA"), 5. U.S.C. §§ 701-706 (2012). Although the APA defines an "agency" broadly to include "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," 5 U.S.C. § 701, this definition is not broad enough to

include the Office of the President. The Supreme Court has explicitly found that "the President's actions [a]re not reviewable under the APA, because the President is not an 'agency' within the meaning of the APA." *Dalton v. Specter*, 511 U.S. 462, 469 (1994); *see also Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) ("Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA."). Accordingly, because President Trump's issuance of EO-2 is not reviewable under the APA, Plaintiffs have not demonstrated that they are likely to succeed on the merits as to their unlawful agency action claim (Count III).

3. Plaintiffs' Claim that EO-2 Violates the Establishment Clause (Count I)

Plaintiffs also allege that EO-2 violates the Establishment Clause because it disfavors the religion of Islam.[13] The First Amendment prohibits any "law respecting an establishment of religion," U.S. Const. amend. I, and "mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). If an act is discriminatory on its face, than it will be subject to strict scrutiny. *Larson v. Valente*, 456 U.S. 228, 246, 255 (1982). If it is not discriminatory on its face, then courts typically apply a three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) to determine whether the act violates the Establishment Clause.[14]

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[13] As a threshold matter, there remain open issues concerning to what extent recognized Establishment Clause principles and prohibitions developed over time with respect to domestic government conduct transfer seamlessly in application to restrict government conduct touching upon national security matters, including immigration and the treatment of aliens with no claim to citizenship or other immigration benefits. Nevertheless, for the purpose of this Motion, and because the Plaintiffs invoke the Establishment Clause based on their personal status as U.S. citizens or as lawful residents of the United States, the Court assumes, without deciding, that the President's exercise of his authority to issue EO-2 is circumscribed by settled Establishment Clause principles.

[14] There is one additional test to find a violation of the Establishment Clause, which has only once been invoked and is not relevant to this litigation. Regardless of whether a government action is facially neutral, that action will be found constitutional where there is "unambiguous and unbroken history" that unequivocally demonstrates the Framers' intent that the Establishment Clause not prohibit the government action. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (finding the opening of congressional session with a prayer constitutional).

The text of EO-2, unlike that of EO-1, makes no mention of religion as a criterion for benefits or burdens. Nevertheless, Plaintiffs maintained at the hearing that EO-2, section 1(f), which articulates President Trump's rationale behind the Order, is nevertheless discriminatory on its face because the national security risk referenced to justify EO-2 in that section is demonstrably false and EO-2's plain language therefore betrays the Order's discriminatory intent.

As an initial matter, and as Plaintiffs concede in their brief, the language of EO-2 is facially neutral. *See* Pls' Mot. 5 ("[EO-2] creates a framework that although neutral on its face, carries through the same invidious intent insofar it essentially seeks to preserve a portion of the First Muslim Ban [EO-1]."). To be facially neutral simply means that there is no discrimination in "that which is shown by the mere language employed, without any explanation, modification, or addition from extrinsic facts or evidence." *Face*, *Black's Law Dictionary* (10th ed. 2014). Discrimination based on religion cannot be inferred from the language EO-2 employs. EO-2 draws no "explicit and deliberate distinctions" based on religion. *See Larson v. Valente*, 456 U.S. 228, 262 (1982). Moreover, the Court sees no basis for the claim that EO-2's stated and referenced justifications are "demonstrably false," and no inference of religious discrimination can be reasonably inferred from those justifications. EO-2 is therefore "facially neutral," and the Court applies the *Lemon* test to assess its constitutional validity under the Establishment Clause of the First Amendment.

Under the *Lemon* test, to withstand an Establishment Clause challenge, the government action (1) "must have a secular legislative purpose," (2) "its principal or primary effect must be one that neither advances nor inhibits religion," and (3) "the statute must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-13 (quoting *Walz v. Tax*

Comm'n of City of N.Y., 397 U.S. 664, 668 (1970) (internal citation omitted). Plaintiffs do not contend that EO-2 fails to satisfy the second or third prongs of the *Lemon* test, and the Court only needs to consider whether EO-2 has a secular purpose.

EO-2 clearly has a stated secular purpose: the "protect[ion of United States] citizens from terrorist attacks, including those committed by foreign nationals." EO-2 § 1(a). It also details the overall policy and purpose for the Order. *See id*. ("The screening and vetting protocols and procedures associated with the visa-issuance process and the United States Refugee Admissions Program (USRAP) play a crucial role in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States. It is therefore the policy of the United States to improve the screening and vetting protocols and procedures associated the visa-issuance process and the USRAP."); *id.* § 2(c) (explaining that the suspensions are needed "[t]o temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order"). The Court must therefore first determine to what extent and on what basis it will look behind the Order's stated secular purpose and justification to determine whether EO-2 constitutes a subterfuge or pretext for a true purpose of religious discrimination. The Plaintiffs contend in that regard that the Court must consider what they claim is a long and unbroken stream of anti-Muslim statements made by both candidate Trump and President Trump, as well as his close advisors, which, taken together, makes clear that EO-1 and EO-2 are nothing more than subterfuges for religious discrimination against Muslims. Defendants contend that given the

clearly articulated secular purpose and national security related justifications in EO-2, the Court should not consider any such statements and end its inquiry at the text of EO-2.

In determining how to proceed, the Court is cast upon cross jurisprudential currents. On the one hand, this prong of the *Lemon* analysis "contemplates an inquiry into the subjective intentions of the government." *Mellen v. Bunting*, 327 F.3d 355, 372 (4th Cir. 2003). On the other hand, the Supreme Court has repeatedly cautioned that in the immigration context, a court should not "look behind the exercise of [Executive Branch] discretion" when exercised "on the basis of a facially legitimate and bona fide reason." *Kliendienst v. Mandel*, 408 U.S. 753, 770 (1972). In *Mandel*, the Supreme Court recognized that First Amendment rights were implicated in the government's denial of a visa to an invited foreign lecturer. Nevertheless, and even though the government did not attempt to justify that denial on national security grounds, the Supreme Court concluded that where the government has provided a facially legitimate and bona fide reason, "the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who [claim they are injured by the visa denial]." *Id.*; *see also Fiallo v. Bell*, 430 U.S. 787, 795 (1977) (confirming that a broad "policy choice" is to be reviewed under the same "standard . . . applied in[]*Mandel*"). As reflected in these rulings, a court must extend substantial deference to the government's facially legitimate and non-discriminatory stated purposes. *See, e.g.*, *Appiah v. U.S. I.N.S.*, 202 F.3d 704, 710 (4th Cir. 2000) ("The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the president in the area of immigration and naturalization." (quoting *Matthews v. Diaz*, 426 U.S. 67, 81-82 (1976)).

Since *Mandel* and *Fiallo*, the Supreme Court has counseled that the focus of a district court's inquiry should be on whether the stated purpose "was an apparent sham, or the secular purpose secondary." *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 865 (2005) (While courts "often . . . accept governmental statements of purpose, in keeping with the respect owed in the first instance to such official claims, . . . in those unusual cases where the claim was an apparent sham, or the secular purpose secondary, the unsurprising results have been findings of no adequate secular object."). It also directs that a court must develop an "an understanding of official objective . . . from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." *Id.* at 862. Based on these principles, the Court rejects the Defendants' position that since President Trump has offered a legitimate, rational, and non-discriminatory purpose stated in EO-2, this Court must confine its analysis of the constitutional validity of EO-2 to the four corners of the Order. The Court has therefore carefully assessed President Trump's facially legitimate national security basis for EO-2 against the backdrop of all of the statements the President and his closest advisors have made.[15]

When this Court reviewed and enjoined EO-1, "the question [wa]s whether the [order] was animated by national security concerns at all." *Aziz*, 2017 WL 580855, at *10 (Brinkema, J.). President Trump and his advisors made statements that allowed the inference that the President's purpose in exercising his authority under Section 1182(f) to issue EO-1 was to impose burdens wholesale on people who subscribe to the Islamic faith, *viz*., a "Muslim Ban." That possible purpose was also reflected in the text and structure of EO-1, which contained language that, when considered in connection with public statements, suggested that Christians

[15] These statements are recounted in detail in Plaintiffs' briefs and the opinions of those courts that have enjoined the enforcement of EO-1 and EO-2. *See Hawai'i v. Trump*, No. 1:17-cv-00050, 2017 WL 1011673, at *13-15 (D. Haw. Mar. 15, 2017); *Int'l Refugee Assist. Proj. v. Trump*, No. 8:17-cv-00361-TDC, --- F. Supp. 3d ---, 2017 WL 1018235, at *3-4 (D. Md. Mar. 16, 2017); *Aziz v. Trump*, --- F. Supp. 3d ---, No. 1:17-cv-116, 2017 WL 580855, at *3-5 (E.D. Va. Feb. 13, 2017).

would be given a benefit not available to Muslims. EO-2 is materially different in structure, text, and effect from EO-1 and has addressed the concerns raised not only by this Court but also by other courts that reviewed and enjoined EO-1. EO-2 was not rushed into immediate effect but, rather, was issued ten days before its effective date, permitting government bodies to better prepare for its effective implementation. It does not indefinitely suspend the entry of refugees from Syria, and it applies to all refugees, no matter where they are located. It does not direct that preference be given to any particular religion or group of religion over any other.

EO-2 also effectively excludes large categories of otherwise covered nationals from the relatively short suspension of any right to enter the United States. For example, section 3(a) limits the scope of section 2(c) to aliens who were not in the United States on the Order's effective date and who did not have a valid visa on that date or on the effective date of EO-1.[16] Under section 3(b), all of the Plaintiffs involved in this litigation are exempted from the reach of the Order. Similarly, under section 12(c) and (d), all immigrant and non-immigrant visas issued before the issuance of EO-2, including those marked revoked or cancelled pursuant to EO-1, are valid and reinstated. EO-2 also contains multiple circumstances and categories under which consular officials are permitted to grant case-specific waivers to coverage under section 2(c) or section 6(a).[17] EO-2 §§ 3(c), 6(c). Iraq is eliminated from the list of suspended countries because "the Iraqi government has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to finals orders of removal" since

[16] Other groups of aliens whose inclusion in the scope of EO-1 concerned the Ninth Circuit are similarly excluded from the scope of EO-2, including legal permanent residence, foreign nationals admitted to or paroled into the United States, foreign nationals granted asylum, refugees already admitted to the United States, and people granted particular forms of protection from removal. EO-2 § 3(b).

[17] This list includes, *inter alia*, foreign nationals previously "admitted to the United States for a continuous period of work, study, or other long-term activity" but who currently reside outside of the United States and seek to re-enter; those who seek entry for "significant business or professional obligations and the denial of entry would impair those obligations"; and those who seek entry "to visit or reside with a close family member (e.g., a spouse, child, or parent) who is a [U.S.] citizen, legal permanent resident, or alien lawfully admitted on a valid nonimmigrant visa." EO-2 § 3(c).

President Trump issued EO-1. *Id.* § 4. Finally, a "Policy and Purpose" section has been added which provides an extensive justification for the Order on the basis of national security, including information specific to each of the six countries referenced in EO-2.[18] *Id.* § 1. And as stated above, EO-2 was also explicitly revised in response to judicial decisions that identified problematic aspects of EO-1 and invited revisions.[19]

Given the revisions in EO-2, the question is now whether the President's past statements continue to fatally infect what is facially a lawful exercise of presidential authority. In that regard, the Supreme Court has held that "past actions [do not] forever taint any effort on [the government's] part to deal with the subject matter. . . . District courts are fully capable of adjusting preliminary relief to take account of genuine changes in constitutionally significant conditions." *McCreary*, 545 U.S. at 848. This Court is no longer faced with a facially discriminatory order coupled with contemporaneous statements suggesting discriminatory intent. And while the President and his advisors have continued to make statements following the issuance of EO-1 that have characterized or anticipated the nature of EO-2,[20] the Court cannot conclude for the purposes of the Motion that these statements, together with the President's past statements, have effectively disqualified him from exercising his lawful presidential authority

[18] When it issued its stay of the district court's TRO of EO-1, the Ninth Circuit indicated it had invited President Trump to make the sorts of changes that he has now made in his reissuance of the Order. *See Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) ("Despite the district court's and our own repeated invitations to explain the urgent need for the Executive Order to be placed immediately into effect, the Government submitted no evidence . . . .").

[19] As President Trump states in the Order, "I am revoking Executive Order 13769 and replacing it with this order, which expressly excludes from the suspensions categories of aliens that have prompted judicial concerns and which clarifies or refines the approach to certain other issues or categories of affected aliens." EO-2 § 1(i); *cf.* Order Denying Washington's Emergency Motion to Enforce the Preliminary Injunction, *Washington v. Trump*, No. C17-0141JLR, at 5-6 (W.D. Wash. Mar. 16, 2017), ECF No. 163. (noting significant differences between EO-1 and EO-2 in denying the plaintiffs' emergency motion to enforce the court's preliminary injunction of EO-1 against EO-2 on the grounds that EO-2 constituted the same conduct previously enjoined).

[20] Among these are the President's reference to EO-2 as a "watered-down version" of EO-1, [*see* Doc. No. 28]; and Presidential Advisor Stephen Miller's statement that a revised executive order was "going to have the same basic policy outcome for the country" and that it would be issued "with mostly minor technical differences." Pls' Mot., Ex. Y.

under Section 1182(f). In other words, the substantive revisions reflected in EO-2 have reduced the probative value of the President's statements to the point that it is no longer likely that Plaintiffs can succeed on their claim that the predominate purpose of EO-2 is to discriminate against Muslims based on their religion and that EO-2 is a pretext or a sham for that purpose. To proceed otherwise would thrust this Court into the realm of "'look[ing] behind' the president's national security judgments . . . result[ing] in a trial *de novo* of the president's national security determinations," *Aziz*, 2017 WL 580855, at *8, and would require "a psychoanalysis of a drafter's heart of hearts," all within the context of extending Establishment Clause jurisprudence to national security judgments in an unprecedented way.

For the above reasons, Plaintiffs have not made a clear showing that they are likely to succeed on the merits as to their Establishment Clause claim (Count I).

4. Plaintiffs' Claim that EO-2 Violates the Equal Protection Clause (Count II)

Plaintiffs also contend that EO-2 violates the Equal Protection Clause of the First Amendment by targeting Muslims for distinctive treatment. The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.[21] It is undisputed that EO-2 has a differential impact on Muslims. According to Plaintiffs, "there are approximately 166 million people in these six countries, all of whom will be affected by the [Order], and 97 percent of whom are Muslim." Pls.' Mot. 23. Defendants do not dispute that the countries affected are overwhelmingly Muslim.

"[A] law, neutral on its face and serving ends otherwise within the power of government to pursue, is not invalid under the Equal Protection Clause simply because it may affect a greater

[21] Although the Clause only applies to state and local governments according to its text, the Supreme Court has held that it also applies to the federal government through the Due Process Clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

proportion of one race than of another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). This precept is particularly applicable in the area of immigration measures related to national security concerns. Relying on Supreme Court precedent, the Fourth Circuit has emphasized that where a particular immigration measure is facially neutral and has a rational national security basis that is "facially legitimate and bona fide," such a measure will survive an Equal Protection Clause challenge. *Rajah v. Mukasy*, 544 F.3d 427, 438 (4th Cir. 2008) (quoting *Romero v. INS*, 399 F.3d 109, 111 (2d Cir. 2005)). "Distinctions on the basis of nationality may be drawn in the immigration field by Congress or the Executive . . . [and must be upheld] [s]o long as [they] are not wholly irrational . . . ." *Id.* (quoting *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979)).

In *Rajah,* the Fourth Circuit rejected an Equal Protection Clause challenge to a program that required all non-permanent resident males over the age of sixteen from a group of countries that were, except for North Korea, predominantly Muslim to appear personally at government facilities for registration and fingerprinting and to present immigration related documents ("the Program"). Individuals who did not appear risked potential arrest. *Id*. at 433. The Fourth Circuit concluded that there was a rational national security basis for the special registration requirements because (1) the terrorist attacks of September 11, 2001 "were facilitated by the lax enforcement of immigration laws"; (2) "[t]he Program was designed to monitor more closely aliens from certain countries selected on the basis of national security criteria"; and (3) the "Program was a plainly rational attempt to enhance national security." *Id*. at 438-39. Rejecting the plaintiffs' Equal Protection Clause challenge, the Fourth Circuit observed:

> To be sure, the Program did select countries that were, with the exception of North Korea, predominantly Muslim. Petitioners argue, without evidence other than that fact, that the Program was motivated by an improper animus toward Muslims. However, one major threat of terrorist attacks comes from radical Islamic groups. The Program was clearly tailored to those facts. It excluded males under 16 and females on the grounds that military age men are a greater

> security risk. Muslims from non-specified countries were not subject to registration. Aliens from the designated countries who were qualified to be permanent residents in the United States were exempted whether or not they were Muslims. The Program did not target only Muslims: non-Muslims from the designated countries were subject to registration. There is therefore no basis for petitioner's claim.

Id. at 439. Plaintiffs argue that EO-2 is suspect because it does not extend to other countries that pose greater terrorist threats, considering that there is no evidence that individuals who committed acts of terrorism in the United States have actually come from the designated countries. But the Fourth Circuit dispatched those sorts of arguments as well:

> Petitioners also challenge the Program based on their perception of its effectiveness and wisdom. They argue, among other things, that it has not succeeded in catching a terrorist. However, we have no way of knowing whether the Program's enhanced monitoring of aliens has disrupted or deterred attacks. In any event, such a consideration is irrelevant because an *ex ante* rather than an *ex post* assessment of the Program is required under the rational basis test.

Id. at 439.

EO-2 identified a broad range of conditions, circumstances, and conditions that raise "facially legitimate and bona fide" national security bases for the Order, including that each of the designated countries (1) has conditions that present "heightened risks"; (2) is a state sponsor of terrorism; (3) has been actively compromised by terrorist organizations; or (4) contains active combat zones. EO-2 § 2(d). The President sees in these circumstances conditions that "diminish[] the foreign government's willingness or ability to share or validate important information about individuals seeking travel to the United States," and "the significant presence in each of these countries of terrorist organizations, members, and others exposed to these organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States." *Id.* § 1(d). Moreover, "once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delayed issuing, or refuse to issue, travel documents."

Id. EO-2 also identifies specific conditions in each designated country "that demonstrate why their nationals continue to present heightened risks to the security of the United States." *Id.* § 1(e). The President has concluded that "[i]n light of the conditions in these six countries, until the assessment of current screening and vetting procedures required by section 2 of this order is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harming national security of the United States is unacceptably high." *Id.* § 1(f). These are judgments committed to the political branches – not to the courts.

Moreover, as with the Program at issue in *Rajah*, EO-2 is similarly tailored to limit the scope of the temporary suspension. EO-2 contains limitations, exemptions, and waivers that undercut any inference that the purpose of the Order was to discriminate against Muslims because of their religion or nationality rather than national security concerns. Also as in *Rajah*, while the Order pertains to predominantly Muslin countries, it applies to any particular person equally, whether Muslim or non-Muslim. Overall, EO-2 identifies a rational security basis for its issuance at least as strong and explicit as that found sufficient in *Rajah*. Plaintiffs again argue that the stated justifications and revisions reflected in EO-2 cannot overcome the President's statements, including that EO-2 is a "watered-down" version of EO-1. But those statements do not eliminate the real substantive differences between the two orders, and for the reasons previously discussed within the context of Plaintiffs' Establishment Clause challenge, those statements are insufficient for the Court to conclude that the Plaintiffs have clearly shown that they will likely succeed on their Equal Protection Clause challenge in Count III.

C. Irreparable Harm in the Absence of Preliminary Relief

The Fourth Circuit has held that, as a matter of law, "loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 520-21 (4th Cir. 2002) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Aziz v. Trump*, No. 1:17-cv-116 (LMB/TCB), 2017 WL 580855, at *10 (E.D. Va. Feb. 13, 2017). These Plaintiffs allege violations of the Establishment Clause of the First Amendment of the United States Constitution in Count I, *see* AC ¶¶ 87-97, as well as various other forms of irreparable harm including (1) inability to arrange visits from foreign relatives, (2) more stringent review of spousal marriage petitions, and (3) more stringent review of a visa application. Without ruling specifically on these claims of irreparable harm, the Court finds it sufficient that Plaintiffs' First Amendment rights are implicated in EO-2; and Plaintiffs should therefore not be denied injunctive relief based on the lack of irreparable harm.

D. Balance of Equities

In order to obtain the requested injunction, plaintiffs must establish, separately from any showing of irreparable harm, that the "balance of equities" weighs in their favor. In determining whether plaintiffs have made that showing, "[i]n each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Winter*, 555 U.S. at 24 (quoting *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 542 (1987)).

Plaintiffs argue that EO-2 has inflicted five different categories of harm on them: it (1) may prevent them from reuniting with their foreign national spouses due to EO-2's heightened standard of review of marriage applications and visas; (2) may prevent them from renewing their own visas because those visas will be subject to a heightened standard of review; (3) may

prevent them from traveling internationally out of their fear that they may somehow forfeit their own visas by doing so; (4) has imposed a stigma on the American Muslim community of which they are a part; and (5) has required them to devote their time and attention to publicly advocating on behalf of the American Muslim community.

All of these alleged harms are either speculative or were already experienced before or independently of EO-1 or EO-2. For example, with respect to the harms alleged in category 1, Plaintiffs claim that their marriage petitions filed on behalf of their spouses or their relatives' visas will either be delayed in processing or subject to new, never before imposed, heightened standards of scrutiny. In support of that claim, they point to section 3(c) of EO-2, which provides consular officials with the discretion to issue individual waivers "if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest," as well as section 4, which subjects nationals of Iraq to "thorough review," and section 5, which directs various agencies within the executive branch to implement a uniform screening and vetting procedure for screening all individuals who seek to enter the United States. Yet, as reflected in a State Department Alert issued on March 6, 2017, visa application appointments continue to be held. *See* Defs.' Mem. Opp'n 12. Defendants have further represented that currently, while the enforcement of EO-2 has been enjoined by other Courts, applications are being reviewed in substantially the same way as before the issuance of either EO-1 or EO-2. In fact, on March 21, 2017, Plaintiff John Doe No. 6 "advise[d] the Court that his marriage petition that he filed for his wife was approved, and her visa application is currently pending." [Doc. No. 31.] In short, there is no evidence that relevant visa applications

have been processed, delayed, or denied in any meaningfully different way than before the issuance of EO-1 and EO-2.

Similarly speculative are the harms claimed in categories 2 and 3, based on certain of the Plaintiffs' currently held visas and their immigration status. For example, Plaintiffs John Doe Nos. 2 and 3, who have valid F-1 student visas, allege that EO-2's interferes with their ability to travel. But these Plaintiffs are in a category expressly exempted from the temporary ban of the Order. In that regard, section 3(a) provides that "the suspension of entry . . . shall apply only to foreign nationals of the designated countries who: (i) are outside the United States on the effective date of this order; (ii) did not have a valid visa at 5:00 p.m., eastern standard time on January 27, 2017; and (iii) do not have a valid visa on the effective date of this order." EO-2 § 3(a). Plaintiffs John Doe Nos. 2 and 3 were inside the United States on the effective date of the Order and had valid F-1 visas both as of January 27, 2017 and as of March 16, 2017, the effective date of the Order. They are therefore exempt from EO-2's temporary suspension of entry, and it is completely speculative whether these Plaintiffs would experience any harm as a result of EO-2 were they to travel within the United States or internationally.

Finally, with respect to the harms included in categories 4 and 5, certain Plaintiffs claim that they are being harmed by EO-2 because they are "prominent civil rights activists . . . [who have been forced] to spend a significant amount of their time . . . assisting and advocating on behalf of Muslims targeted by th[e] order and pushing back against the anti-Muslim sentiment that Defendants have fomented and legitimized through their actions."[22] These individuals have engaged in these activities in connection with their chosen calling and careers and were engaged in similar civil rights activities before and independently of the issuance of EO-2. Likewise, the stigma Plaintiffs have felt, judging by their description, emanated before either executive order

[22] Def.'s Mot. 15.

issued; and while those feelings of stigma are undoubtedly legally cognizable injuries and may have been deepened with the issuance of the executive orders, they were primarily experienced separate and apart from the issuance of the orders and will not be cured if the Court were to grant the Motion. Therefore, any stigma that was in fact caused by the orders cannot be materially undone or redressed at this point beyond what has already been effected through the injunctions already issued by other district courts.

In contrast to the speculative and abstract hardships that Plaintiffs may experience in the absence of immediate relief, "the Government's interest in combating terrorism is an urgent objective of the highest order." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). In EO-1, the President did "little more than reiterate that fact" and "submitted no evidence" to demonstrate the need for immediate action. *Washington v. Trump*, 847 F.3d 1151, 1165-66 (9th Cir. 2017). However, in EO-2, the President has provided a detailed justification for the Order based on national security needs, and enjoining the operation of EO-2 would interfere with the President's unique constitutional responsibilities to conduct international relations, provide for the national defense, and secure the nation. On balance, Plaintiffs have not established that the equities tip in their favor.

E. Public Interest

Plaintiffs must also establish that the issuance of an injunction is in the public interest. "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)) (internal quotation marks omitted). Based on the record now before the Court, the parties' respective interests described above, the subject matter of EO-2, and the protections to the public that EO-2 is intended to

provide, Plaintiffs have not established that the public interest favors issuance of immediate relief in this action.

V. CONCLUSION

For the above reasons, Plaintiffs have not established that (1) they are likely to succeed on the merits of their case, (2) the balance of hardships tips in their favor, or (3) immediate relief would be in the public interest. Accordingly, they have not established that they are entitled to obtain the extraordinary remedy of an injunction enjoining the enforcement of EO-2. Plaintiffs' Motion is therefore denied.

The Court will issue an appropriate order.

/s/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
March 24, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PARS EQUALITY CENTER, *et al*.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:17-cv-00255-TSC
DONALD J. TRUMP, *in his official capacity as President of the United States*, *et al*.,	)	
Defendants.	)	

[PROPOSED] ORDER

This matter came before the Court on Plaintiffs' motion for a preliminary injunction. The Court has considered the motion, any response and reply thereto, and the complete record in the matter. Having considered the foregoing, Plaintiffs' motion is hereby **DENIED**.

DATED: _____.

_____
Tanya S. Chutkan
U.S. District Judge