IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNIVERSAL MUSLIM ASSOCIATION OF AMERICA, *et al*.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:17-cv-00537-TSC
DONALD J. TRUMP, *in his official capacity as President of the United States*, *et al*.,	)	
Defendants.	)	

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

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INTRODUCTION

This is the second challenge to Executive Order 13,780 ("Order")[1] to be heard by this Court in the context of a preliminary injunction. Plaintiffs in this case consist of an organization—the Universal Muslim Association of America ("UMAA")—and two "Doe" plaintiffs. Plaintiffs challenge Section 2 of the Order which, among other things, suspends the entry of nationals from six countries that Congress determined pose a heightened terrorism risk. Plaintiffs also challenge Section 4 of the Order, which applies thorough screening standards as it concerns visa applicants who are Iraqi nationals.

Plaintiffs' motion for a preliminary injunction should be denied for at least three reasons. *First*, Plaintiffs' claims are not justiciable. UMAA is an organization that hosts various conferences for which it would like to invite speakers from Iran or Iraq. While UMAA alleges that the Order hinders its ability to host these conferences, the organization lacks standing in its own right because it has not suffered a redressable injury-in-fact, and it also lacks associational standing to represent the interests of its members. As for the Doe plaintiffs, they are Yemeni asylees who are seeking derivative asylum for their overseas minor children. However, the Order does not affect the processing of those children's applications in any manner whatsoever. Because the Does' sole claim relates to their children, they lack standing to challenge 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 suspension of entry provisions. 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 justification

[1] *See* 82 Fed. Reg. 13,209 (Mar. 6, 2017).

provides "a facially legitimate and bona fide reason" for the Order. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). 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. Plaintiffs also present a First Amendment "right to receive information" claim, but that claim is foreclosed by *Mandel*. Finally, the Iraqi screening procedures in Section 4 of the Order fall well within the Executive's discretion, and any challenge to those procedures would raise substantial separation-of-powers concerns.

Third, at a minimum, Plaintiffs cannot demonstrate a need for preliminary relief. Plaintiffs ignore that the suspension-of-entry provision has already been preliminarily enjoined and, in any event, Plaintiffs would suffer no irreparable harm from implementation of the Order. The balance of equities and public interest also tilt sharply in Defendants favor. For these reasons, as set forth in more detail below, this Court should deny Plaintiffs' request for preliminary injunctive relief.

BACKGROUND

I. Statutory Background

The INA governs admission of aliens into the United States. In addition to other criteria, admission generally requires a valid immigrant or nonimmigrant visa, or another valid travel document. 8 U.S.C. §§ 1181, 1182(a)(7)(A)(i), (B)(i)(II), 1203. The process of applying for 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. §§ 41.102, 41.121, 42.62, 42.81. 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).[2] *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.[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 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).

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[2] 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.

[3] 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.

II. The Revoked Order

On January 27, 2017, the President issued Executive Order 13,769 (the "Revoked Order"). *See* 82 Fed. Reg. 8977 (Jan. 27, 2017). 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 also authorized the Secretaries to make case-by-case exceptions to the suspension. *Id*. § 3(g).

The Revoked Order was challenged in multiple courts. On February 3, 2017, a district court in Washington enjoined enforcement nationwide of, among other things, Section 3(c)'s suspension of entry. *Wash. v. Trump*, No. C17-0141 JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). On February 9, 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 as Ex. A). The Order, which took effect on March 16, 2017, revokes and replaces the Revoked Order, and adopts significantly revised provisions, in part to respond to the Ninth Circuit's concerns.

Section 2(c) of the Order temporarily suspends entry of certain nationals from six countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen. The suspension's explicit purpose is to enable the Executive Branch—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." *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).

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 (5:00 PM EST on January 27, 2017). *Id*. § 3(a). It also explicitly excludes other categories of aliens, including 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 set of detailed waiver provisions, which permit consular officers or officials of Customs and Border Patrol to grant case-by-case waivers when denying entry under Section 2 of the Order "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."

Id. Information to support a wavier can be provided during the visa application process, and may 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 as Ex. B); U.S. Dep't of State, *Executive Order on Visas* (Mar. 22, 2017) ("State Guidance") (attached as Ex. C).

Critically, the Order recognizes that Iraqi nationals are entitled to different treatment under the President's national security judgment. Although the Revoked Order also suspended entry of foreign nationals of Iraq, the new Order recognized changed national security circumstances and exempts Iraq from the temporary travel suspension because, "since Executive Order 13769 was issued, the Iraqi government has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal." Order § 1(g); *see also id*. § 4.[4] The Order acknowledges, however, that portions of Iraq "remain active combat zones" with substantial territories controlled by the Islamic State of Iraq and Syria ("ISIS"). Order § 1(g). Accordingly, the Order provides that applications by Iraqi nationals for visas, admission, or other immigration benefits should undergo a "thorough review" to include

[4] The Order also acknowledges the 'close cooperative relationship between the United States and the democratically elected Iraqi government," as well as other factors, for excluding Iraq from the temporary travel suspension. Order § 1(g).

"consideration of whether the applicant has connections with ISIS or other terrorist organizations or with territory that is or has been under the dominant influence of ISIS." *Id.* § 4.

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, *Wash. v. Trump*, No. 17-35105 (9th Cir. Mar. 17, 2017), ECF No. 191. 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, ECF No. 191-5 (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, ECF No. 191-4 (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 rationale [the Order] gives for its implementation." *Wash. v. Trump*, No. C17-0141 JLR, 2017 WL 1045950, at *3 (W.D. Wash. Mar. 3, 2017).

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 v. Trump*, No. 1:17cv00120 (AJT/IDD), 2017 WL 1113305 (E.D. Va. Mar. 24, 2017). The District of Hawaii enjoined Section 2 of the Order nationwide, as well as Section 6 (which contains provisions, not being challenged here, regarding refugees). *See Hawai'i v. Trump*, 2017 WL 1167383, at *9 (D.

Haw. Mar. 29, 2017), *appeal docketed*, No. 17-5589 (9th Cir. Mar. 30, 2017). And the District of Maryland enjoined Section 2(c) of the Order nationwide. *Int'l Refugee Assistance Project v. Trump*, No. TDC-17-0361, 2017 WL 1018235, at *18 (D. Md. Mar. 16, 2017) ("*IRAP*"), *appeal docketed*, No. 17-1351 (4th Cir. Mar. 17, 2017).

STANDARD OF REVIEW

Emergency relief is "an extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (citation omitted). 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) (citation omitted). 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.*

ARGUMENT

I. Plaintiffs' Claims Are Not Justiciable

A. UMAA Lacks Standing to Sue in its Own Right

UMAA lacks standing to sue in its own right because it has not suffered an injury-in-fact related to its annual convention; a feeling of stigma is not by itself a cognizable injury-in-fact; and UMAA is outside the zone of interests protected by the INA.

1. The Organization Has Not Suffered a Redressable Injury-in-Fact Related to Its Annual Convention

UMAA's primary claim to injury-in-fact relates to its upcoming national convention, for which UMAA allegedly wants to invite speakers from Iran or Iraq to attend. *See* Pls.' Br. at 17-18 (ECF No. 11-1); UMAA Decl. ¶¶ 20-25 (ECF No. 10-2). UMAA's purported injuries, however, are not concrete or imminent, nor are they sufficiently ripe. Thus, UMAA lacks standing to challenge the Order.

a. UMAA's main theory of injury is that the Order creates "barriers to entry by Iranian and Iraqi nationals," which means "UMAA cannot know whether a given speaker would be able to attend the convention when it invites him or her." UMAA Decl. ¶ 21. That uncertainty allegedly makes speakers less likely to accept UMAA's invitation to attend the convention, *see id.* ¶ 22, and also makes it harder for UMAA to advertise the convention, *see id.* ¶ 23.

These purported injuries, however, were not caused by the Order; uncertainty has *always* existed regarding the admission of foreign nationals into the United States. For example, Iranian and Iraqi nationals are generally required—wholly apart from the Order—to apply for and obtain a visa prior to visiting the United States. *See* Background, Section I, *supra*. No visa applicant is *entitled* to issuance of a visa or admission to the United States. *See* 8 U.S.C. §§ 1201(g)-(h), 1361. Thus, even prior to the Order, there was always uncertainty regarding a foreign national's ability

to actually attend an event, *i.e.*, they might be unable to establish eligibility for a visa or determined to be ineligible at a port of entry. Indeed, UMAA's own declaration makes this point clear. *See* UMAA Decl. ¶ 14 (discussing how UMAA extended an invitation to a person who only afterwards "submitted an application for a nonimmigrant visa to travel to the United States"). Because the uncertainty causing UMAA's purported injuries existed even prior to the Order, an injunction against the Order would not redress UMAA's claimed harms. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 229 (2003) (holding that plaintiffs lacked standing to challenge to a particular statutory provision, because even "if the Court were to strike down" that provision, "it would not remedy the . . . plaintiffs' alleged injury because" other provisions imposing that injury "would remain unchanged"), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010); *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 939-40 (D.C. Cir. 2004), *overruled on other grounds by Perry Capital LLC v. Mnuchin*, 848 F.3d 1072 (D.C. Cir. 2017).

UMAA might believe that the Order will introduce *greater* uncertainty as compared to the prior system. But that assumption is wholly speculative, and UMAA has offered no factual basis for it. Nor could UMAA offer any facts regarding the effect of Section 2(c) of the Order: The State Department has not yet been allowed to implement the waiver process contemplated by the that section of the Order. In essence, UMAA's injury would be wholly a matter of probabilities—*i.e.*, hoping that an injunction against the Order would decrease the uncertainty surrounding future speakers' visa applications. That theory is not sufficiently concrete to establish standing. *Cf. Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 939 ("[A] quest for ill-defined 'better odds' is not close to what is required to satisfy the redressability prong of Article III."). Because UMAA's claimed injury—uncertainty about speakers' ability to travel to the United States—existed even prior to the Order, that injury does not provide standing to challenge the Order.

b. UMAA also has not submitted sufficient evidence demonstrating an injury-in-fact regarding its inability to bring speakers to its annual convention. UMAA's declaration states generally that "many of the scholars UMAA seeks to invite to the United States in the future are Iranian and Iraqi nationals." UMAA Decl. ¶ 12. But that assertion, by itself, is insufficient to establish an actual, imminent injury-in-fact. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992) ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require.").

With respect to the annual convention, UMAA's declaration fails to describe how the Order "leaves UMAA unable to invite scholars to its upcoming national convention and other events." Pls.' Br. at 17. Indeed, when describing last year's national convention, UMAA's declaration does not describe hosting *any* speakers from Iran, and states that out of the "approximately 30 speakers, three or four . . . were invited to the United States from Iraq." UMAA Decl. ¶ 13. Given this small percentage of speakers from Iran or Iraq, UMAA's declaration does not demonstrate that the Order "significantly harms UMAA's ability to attract attendees" to its convention. Pls.' Br. at 18.

The *only* specific individual identified by UMAA as a potential invitee for its 2017 convention is Mr. Karbalaei. *See* UMAA Decl. ¶ 25. According to UMAA's declaration, however, Mr. Karbalaei possessed a valid visa to travel to the United States for an event on February 4, 2017. *See id.* ¶¶ 14, 16-17. Thus, Mr. Karbalaei is not subject to the Order. *See* Order § 3(a)(ii) (stating that "the suspension of entry pursuant to section 2 of this order" does not apply to individuals who had "a valid visa at 5:00 p.m., eastern standard time on January 27, 2017"). Mr. Karbalaei would of course need to apply for a new visa once his prior visa expires, *see* UMAA Decl. ¶ 16, but that application would be processed and adjudicated pursuant to normal procedures—not subject to the

Order. *Cf.* Ex. B, DHS Q&As, Questions 6 and 16. The only particular individual that UMAA has concrete plans to invite to its 2017 convention is therefore not subject to the Order, and cannot provide standing for UMAA to challenge the Order.

c. Even assuming UMAA could otherwise establish standing to challenge the Order's suspension of entry in Section 2(c), any such challenge would not be ripe. The potential speakers UMAA seeks to bring to its convention 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. Indeed, the Order provides that "[c]ase-by-case waivers could be appropriate" when a "foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations[.]" Order § 3(c)(iii). In fact, UMAA says it oftentimes arranges for foreign scholars to attend its events, and has "served as an institutional sponsor for some of its speakers' visa applications," UMAA Decl. ¶¶ 12, 13, thus further increasing the possibility that UMAA's invited speakers could obtain a waiver. Accordingly, unless and until UMAA's invited speakers are found otherwise eligible for visas but then denied waivers under the Order, UMAA's asserted injuries are not ripe. *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." (citation omitted)).[5]

[5] UMAA does not appear to claim standing in its own right pursuant to *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). *See* Pls.' Br. at 15-18. In any event, any such theory would be meritless because UMAA's mission of promoting the interests of American Shia Muslims, *see* UMAA Decl. ¶ 7, is not necessarily "at loggerheads with" the Order itself, which applies only to foreign nationals abroad. *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996) (citation omitted). Moreover, UMAA has not identified any expenditure of additional resources necessary to counteract the Order's alleged injury to its mission. *Cf. Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011) (noting that "a 'self-inflicted' budgetary choice . . . cannot qualify as an injury in fact for purposes of standing"); *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) ("NTU cannot convert its ordinary program costs into an injury in fact[.]").

2. Stigma Is Not Itself a Cognizable Injury-in-Fact

UMAA also asserts injury in its own right because "UMAA and its members are hurt and upset" by the Order and its effects. UMAA Decl. ¶ 27. Even assuming that an organization can meaningfully suffer such a "psychological" harm, it is well-settled that such harm, by itself, is not sufficient to constitute an Article III injury-in-fact. *See Valley Forge Christian Coll. v. Americans 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."); *In re Navy Chaplaincy*, 534 F.3d 756, 764-65 (D.C. Cir. 2008). Thus, UMAA's purported psychological injuries are likewise insufficient to establish standing.

3. UMAA Is Outside the Zone of Interests

As for UMAA's claims arising under the INA and the Administrative Procedure Act ("APA"), UMAA is outside the relevant zone of interests. The D.C. Circuit has repeatedly rejected organizations' attempts to challenge immigration policies that do not apply directly to them. *See Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 815 (D.C. Cir. 1987) (refugee counseling organization was outside the INA's zone of interests because the statutes reflected "no intent to protect or regulate the HRC's interest in counseling, or its members' interests in associating with, interdicted Haitians"); *Fed'n for Am. Immigration Reform (FAIR) v. Reno*, 93 F.3d 897, 900-04 (D.C. Cir. 1996) (immigration restriction advocacy group 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).

For an organization to establish it is within the relevant zone of interests under the INA, the organization must point to a specific statutory provision promoting its interests. *See FAIR*, 93 F.3d at 901; *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 INA's zone of interests based on specific statutory provisions protecting their interests), *appeal docketed*, No. 16-5287 (D.C. Cir. Sept. 30, 2016). Here, UMAA has pointed to no statutes purportedly protecting their interests. And to the extent UMAA's interest is simply in associating with foreign nationals, that is precisely the interest that was held to be insufficient in *Haitian Refugee Center*, 809 F.2d at 815. Thus, UMAA is outside the zone of interests, and cannot bring its INA claims directly or under the APA.

B. UMAA Lacks Associational Standing

UMAA also relies on a theory of associational standing, seeking to represent the interests of UMAA's members who wish to bring family members to the United States. *See* Pls.' Br. at 18; UMAA Decl. ¶¶ 28-31. In order to establish associational standing, an organization must demonstrate that "(1) at least one of its members would have standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Sierra Club v. EPA,* 292 F.3d 895, 898 (D.C. Cir. 2002). UMAA does not satisfy these requirements.

1. UMAA Has Not Adequately Identified a Specific Member

In order to satisfy the first factor, "[w]hen a petitioner claims associational standing, it is not enough to aver that unidentified members have been injured. Rather, the petitioner must specifically 'identify members who have suffered the requisite harm.'" *Chamber of Commerce v. EPA*, 642 F.3d 192, 199–200 (D.C. Cir. 2011) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)). Where plaintiffs have "not identified a single member who was or would be injured by [a Government action]," associational standing is lacking. *Id.* at 200; *see also Am. Chemistry Council v. Dep't of Transp.,* 468 F.3d 810, 815, 820 (D.C. Cir. 2006) ("Our standard has

never been that it is *likely* that at least one member has standing. At the very least, the identity of the party suffering an injury in fact must be firmly established.").

Here, UMAA fails to identify even a single member who would be harmed by application of the Order. In fact, UMAA does not even maintain a membership list. *See* UMAA Decl. ¶ 4. The lack of such a list is fatal to a claim of associational standing. Even if "it is certainly possible" that such a member exists, such "speculation does not suffice." *Summers*, 555 U.S. at 499. Accordingly, UMAA's attempt to establish associational standing fails on this basis alone.

2. The Organization's Members Would Lack Article III and Prudential Standing

a. Even if UMAA had adequately identified one of its members, any such member would individually lack standing. As discussed above, even if an individual wishes to have a family member subject to the suspension of entry provision in Section 2(c) join them in the United States, those claims are not yet ripe: Unless and until those individuals' relatives are found otherwise eligible for visas but then denied waivers, those individuals' asserted injuries are not ripe because they assume "contingent future events that . . . may not occur at all." *Texas*, 523 U.S. at 300 (citation omitted). Moreover, UMAA members would be outside the relevant zone of interests for the INA and APA claims. *See Haitian Refugee Ctr.*, 809 F.2d at 815; *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1163-64 (D.C. Cir. 1999).

b. Plaintiffs attempt to argue that UMAA's members would have standing based on the mere existence of the waiver provision. *See* Pls.' Br. at 41. Even assuming UMAA could pursue those members' claims, however, this theory is incorrect for several reasons.

First, the waiver process is integrated into the existing visa-adjudication procedure, which travelers must already apply under. Applicants would provide information relevant to the wavier inquiry during visa application interviews with consular officers, and again those interviews would

occur even in the absence of the Order. *See* Order § 3(c); State Guidance, *supra*. Thus, the Order does not create a "special, more onerous procedure," Pls.' Br. at 41, at least from the perspective of visa applicants who would have to submit an application and undergo a consular interview even absent the Order.

Second, the waiver procedure does not actually apply to any of UMAA's members who are here in the United States. *See* UMAA Decl. ¶ 4. The Order (and its waiver process) would apply only to UMAA members' foreign national relatives who are seeking admission to the United States and were otherwise covered by the Order. Because UMAA's members are not denied equal treatment, they lack standing to challenge the Order regardless of the perceived "message of disfavor on the basis of religion and nationality" that they believe the waiver process embodies. Pls.' Br. at 41 (citation omitted); *see Valley Forge*, 454 U.S. at 485-86 (stating that "the psychological consequence presumably produced by observation of conduct with which one disagrees" is not the type of "personal injury" that confers Article III standing); *In re Navy Chaplaincy*, 534 F.3d at 764 (plaintiff not personally subject to religious discrimination cannot manufacture standing by "re-characteriz[ing]" his abstract challenge to "government *action*" that "allegedly violates the Establishment Clause" as a challenge to "a governmental *message* [concerning] religion" to which he is personally subjected).

Third, any claims by UMAA members would be barred by prudential standing limitations. A plaintiff "generally must assert his own legal rights and interests," except in the limited circumstances where he has "third party standing to assert the rights of another." *Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004). That exception is inapplicable here, however, because UMAA members cannot assert an Establishment Clause claim *on behalf of the third party aliens abroad* who are subject to the Order. Lacking any substantial connections to this country, those

aliens abroad possess no Establishment Clause rights, *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *DKT Mem'l Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 285 (D.C. Cir. 1989), and no constitutional rights regarding entry into this country, *see Mandel*, 408 U.S. at 762. Thus, unlike in the *Washington* stay decision—where the Revoked Order was held to apply to individuals who did have constitutional rights (*e.g.*, lawful permanent residents)—Plaintiffs cannot assert "third party standing" on behalf of aliens subject to the Order because those aliens have no "first party" rights to begin with. *Cf. Washington*, 847 F.3d at 1160, 1165.

Accordingly, UMAA members could assert an Establishment Clause claim only if *their own rights* under that Clause are being violated. They are not. The UMAA members' religion is entirely immaterial to their alleged familial injuries, which would arise from purported discrimination against their family members abroad. Thus, the UMAA members' own Establishment Clause rights are not implicated by how the Order treats aliens abroad seeking entry. *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, e.g.*, *Smith v. Jefferson County Board of School Commissioners*, 641 F.3d 197, 207 (6th Cir. 2011) (en banc) (public-school teachers who sued school district for closing their school and replacing it with a private religious one lacked "prudential . . . standing" under the Establishment Clause because they "d[id] not allege any infringement of their own religious freedoms," but rather "only economic injury to themselves"); *McCollum v. California Department of Corrections & Rehabilitation*, 647 F.3d 870, 878-79 (9th Cir. 2011) (Wiccan chaplain who sued prison that refused to hire him lacked "prudential standing" under the Establishment Clause because the "claim, at bottom, assert[ed] not his own rights, but those of third party inmates").

In short, even assuming UMAA could otherwise satisfy the criteria for associational standing, its members would still lack standing because the Order's treatment of aliens abroad does not implicate the UMAA members' *own* rights.[6] UMAA has therefore failed to establish standing, either in its own right or on behalf of its members.

C. The Individual Doe Plaintiffs Lack Standing Because the Order Does Not Affect Their Children's Ability to Come to the United States

The two other plaintiffs are John Doe #1 and Jane Doe #1, a husband and wife who are Yemeni citizens, who live in the United States with four of their six children, and who are now trying to bring their two remaining children to live with them here in the United States. *See* Decl. of John Doe #1 ¶¶ 2-8 (ECF No. 17-2); Decl. of Jane Doe #1 ¶¶ 2-8 (ECF No. 17-3). These individual plaintiffs lack standing to challenge the Order, however, because the Order does not restrict their two remaining children's ability to come to the United States.

As described in John Doe #1's declaration, he was previously granted asylum by the United States on the basis of religious and political persecution. *See* Decl. of John Doe #1 ¶ 6. His wife and three children also "received asylum status through their family relationship" to him, and John Doe #1 has now filed a petition for his two remaining sons to join him in the United States. *Id.* ¶¶ 6, 8. That petition is a Form I-730 petition, *see id.* ¶ 8, which is known as a "Refugee/Asylee

[6] Plaintiffs cite the district court's decision in *IRAP* as support for their theory. Pls.' Br. at 41. The district court in *IRAP* in turn supported this theory by citing *Jackson v. Okaloosa County*, 21 F.3d 1531 (11th Cir. 1994). *See IRAP v. Trump*, 2017 WL 1018235, at *7. But in that case, the denial of equal treatment to minority residents regarding public housing was itself a legally cognizable injury. *See Jackson*, 21 F.3d at 1537-41; *Ne. Fla. Chapter, Associated Gen. Contractors v. Jacksonville*, 508 U.S. 656, 666 (1993). Here, in contrast, the Order does not operate against UMAA's members 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.

Relative Petition," or more colloquially a petition for "derivative asylum" or "follow-to-join asylee" benefits. *See generally* 8 U.S.C. § 1158(b)(3); 8 C.F.R. § 208.21(d).

Once a principal asylee's I-730 petition is approved, the I-730 petition's beneficiary (the family member still abroad) is then scheduled for an interview. The beneficiary must provide certain documentation, and assuming that the interviewer confirms the beneficiary's eligibility, the beneficiary is then issued a travel document to the United States. *See generally* U.S. Embassy in Djibouti, *Application and Processing Instructions for Following-to-join Asylum Cases (Visas 92)*, https://dj.usembassy.gov/visas/immigrant-visas-refugee-asylee-follow-join/. The travel document is known as a "Visa 92" or "V-92." *See id*. Despite the title, that travel document is not technically a visa, but functions similarly to permit the beneficiary to schedule travel to the United States.[7]

Critically, nothing in the Order suspends processing of I-730 petitions, scheduling of interviews for approved I-730 petition beneficiaries, or issuing travel documents for those individuals. The processing of those petitions will therefore continue in the normal course. Assuming a beneficiary's eligibility is confirmed during an interview, nothing in the Order prevents the beneficiary from obtaining a V-92 travel document or scheduling travel to the United States. The Order itself provides that the suspension of entry does not apply to individuals who obtain travel documents "other than a visa" that are issued even after the Order's effective date:

[7] The V-92 travel document is not a visa because visas may only be issued by State Department consular officers. *See* 8 U.S.C. § 1101(a)(16), (26) (only consular officers may issue visas); *id*. § 1101(a)(9) (defining "consular officer"). Asylum claims (including follow-to-join asylee benefits), in contrast, may only be adjudicated by DHS or by the Attorney General. *See* 8 U.S.C. § 1158(b). Thus, even when State Department consular officers conduct interviews of I-730 petition beneficiaries (such as at the Embassy in Djibouti), those consular officers are acting on behalf of DHS, and therefore they do not formally issue "visas" to approved beneficiaries. *See generally* 9 Foreign Affairs Manual 203.5-2 (describing the different DHS and State Department roles in processing follow-to-join asylee cases).

> The suspension of entry pursuant to section 2 of this order shall not apply to . . . any foreign national who has a document other than a visa, valid on the effective date of this order or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission[.]

Order § 3(b)(iii). That language includes V-92 travel documents, such as those that would be issued to the Doe plaintiffs' children once they are interviewed and confirmed to be eligible.

Accordingly, the Order does not affect the Doe children in any manner whatsoever. It does not postpone the scheduling of their interviews, nor does it prevent them from entering the United States assuming they are confirmed to be eligible at an interview. The Doe plaintiffs' sole claim of injury is that the Order "prevents them from bringing their two young sons from Yemen to the United States." Pls.' Br. at 19. Because the Order does not apply to their two young sons, however, the individual Doe plaintiffs clearly lack standing to challenge the Order.

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

Plaintiffs' requested preliminary injunction is exceedingly broad: requesting an injunction as to the entirety of Sections 2 and 4, and also as to certain affirmative directives and reporting requirements. *See* Proposed Order (ECF No. 11-2). Not only is this relief vastly overbroad, *see* Section V, *infra*, but Plaintiffs have failed to establish standing for it. *See Summers*, 555 U.S. at 493 (plaintiff "bears the burden of showing that he has standing for each type of relief sought" (citation omitted)). Even if Plaintiffs have standing to challenge the temporary suspension on entry and/or the enhanced screening for Iraqi nationals, Order §§ 2(c), 4, Plaintiffs do not and cannot show any imminent harm from the remainder of the provisions they seek to enjoin.

Sections 2(a)-(b) and 2(d)-(g) relate to internal governmental reviews, recommendations, and reporting to be undertaken by Cabinet members, and to future inter-governmental diplomatic activities. Plaintiffs' motion nowhere describes how these provisions harm them; indeed these provisions cannot plausibly have any immediate impact on Plaintiffs because they relate to future

actions. Any purported harm to Plaintiffs from these provisions therefore amounts, at best, to a "theory of *future* injury" that "is too speculative to satisfy the well-established requirement that threatened injury must be certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013) (quotation omitted).[8]

E. Plaintiffs' Visa Application-Related Claims Are Barred by Consular Nonreviewability Principles

Longstanding principles reflected in the doctrine of consular nonreviewability also preclude review of Plaintiffs' claims related to the President's authority to issue the Order and of any prospective visa applications. "[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) (citation omitted). "[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*, 197 F.3d at 1159; *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).

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[8] There would also be serious constitutional questions associated with a judicial order enjoining these provisions—*i.e.*, prohibiting the President from engaging with foreign nations in a certain way, or from receiving the recommendations of his Cabinet. *See generally United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936); U.S. Const. art. II, § 2, cl. 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 (citation omitted). 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

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 (citation omitted). Congress has conferred expansive authority on the President, including in the 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 statutory sections encompass the Order's temporary suspension of entry of aliens from six countries that the President 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 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 Section 2 of the Order violates Section 1152 of the Immigration and Nationality Act because it has the practical effect of suspending the issuance of visas to nationals of six countries. Plaintiffs' argument misconstrues the effect of Section 1152.

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[9] *See, e.g.*, Proclamation No. 5517 (1986) (Reagan; Cuban nationals as immigrants); Exec. Order No. 12,807 (1992) (George H.W. Bush; government officials who impeded anti-human-trafficking efforts); Proclamation No. 8342 (2009) (George W. Bush; same); Proclamation No. 6958 (1996) (Clinton; government officials and armed forces of Sudan); Proclamation No. 8693 (2011) (Obama; aliens subject to U.N. Security Council travel bans and individuals meeting the criteria for economic sanctions under certain Executive Orders).

a. Regarding the entry suspension provision 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* Pls.' Br. at 37. 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.

b. Even if Plaintiffs were correct that Section 1152(a)(1)(A) limits 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 the issuance of "immigrant" visas. 8 U.S.C. § 1152(a)(1)(A); *see id*. § 1101(a)(15)-(16), (20). Plaintiffs appear to concede as much, repeatedly describing how Section 1152 applies to those visas. *See* Pls.' Br. at 37 (asserting that UMAA members "have pending petitions for their relatives to obtain immigrant visas to travel to the United States"); *id*. at 38 (asserting that the Order violates "the INA's prohibition against discrimination against national origin in the issuance of immigrant visas."). UMAA's alleged injuries, however, relate to its desire to have Shi'a scholars visit the United States to speak at events, such as UMAA's national convention, rather than immigrate to the United States. Pls.' Br. at 16-18. These alleged injuries (to the extent they exist at all, *see* Part I.A.1, *supra*) relate to the suspension of *nonimmigrant* visas.

Moreover, even in the context of immigrant visas, Congress made clear that Section 1152(a)(1)(A) 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.

c. In any event, Plaintiffs' statutory argument is simply wrong. Even where it applies, Section 1152(a)(1)(A) does not restrict the President's authority to draw nationality-based distinctions under Sections 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 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).

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, 44 Fed. Reg. 67,947 (Nov. 26, 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"). 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 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).[10]

B. Plaintiffs' Religious Discrimination Claims Fail

Plaintiffs claim the Order violates the Establishment and Equal Protection Clauses because it "single[s] out Muslims for discriminatory treatment." Pls.' Br. at 21. These claims—along with Plaintiffs' other constitutional claims—fail under *Mandel* given the President's facially legitimate, bona fide reason for issuing the Order. In any event, even applying domestic-law standards rather than *Mandel*'s test, Plaintiffs' religious discrimination claims are untenable.

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).

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[10] Plaintiffs also cite the District of Maryland's analysis regarding § 1152(a)(1)(A), *see* Pls.' Br. at 36, 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.

Mandel's rule governs Plaintiffs' claims alleging 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; *Taniguchi v. Schultz*, 303 F.3d 950, 957-58 (9th Cir. 2002) (applying *Mandel* to reject equal-protection challenge to INA provision); *Washington* Bybee Dissent at 16-18 (collecting cases).

Plaintiffs contend the *Mandel* standard is better suited to reviewing individual visa decisions than broad immigration policy. *See* Pls.' Br. at 38-39 (citing *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).[11]

2. The Order More Than Satisfies the *Mandel* Standard

Mandel's rule compels rejection of Plaintiffs' constitutional 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,

[11] Plaintiffs cannot avoid *Mandel*, *Fiallo*, and *Miller* by arguing that those cases represent deference only to Congressional policy choices. *Mandel* itself involved a challenge to Executive Branch action—*i.e.*, the Attorney General's denial of a waiver. *See* 408 U.S. at 767-68. And the courts of appeals, including the D.C. Circuit, have likewise applied *Mandel* and *Fiallo*'s limited standard of review to Executive Branch policies. *See, e.g.*, *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." (emphasis added, citations omitted)). Fundamentally, there is no basis for distinguishing between Congressional and Executive Branch policy judgments given that "the power of exclusion of aliens" is not only a Congressional prerogative, but "is also inherent in the executive department of the sovereign[.]" *Knauff*, 338 U.S. at 543.

which the Order explains country-by-country. 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 the government's asserted national-security interests are "wholly absent." Pls.' Br. at 22. As support, Plaintiffs rely on an opinion piece in Newsweek indicating that "people from the six listed countries have not killed a single person in terrorist attacks in the United States," as well as Plaintiffs' own view that other or additional countries should have been included in the Order. *Id.*; *see id.* at 33.[12] This line of argument only underscores the need for the *Mandel* standard, as any significant action of the President with respect to nationals security will likely face criticism and scrutiny in the media. 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."). Here, the plaintiffs are essentially asking the Court to ignore the national security judgment of the President, as informed by his cabinet, and instead substitute its own judgment based on media critiques. On the contrary, *Mandel* itself made clear that the inquiry into whether the Attorney General's stated reason was "facially legitimate and bona fide" does *not* include "look[ing] behind" that reason. 408 U.S. at 769-70. A court can ensure that the stated rationale is valid and consistent with the government's action, but

[12] Citing http://www.newsweek.com/where-do-terrorists-come-not-seven-countries-named-550581.

its review should be limited to the face of the Order, instead of scouring the public record for criticisms that cannot be adequately vetted or addressed in the context of litigation involving sensitive national security concerns. Because the Order plainly outlines legitimate and neutral national security rationales for the President's action in detail, the Order more than satisfies the *Mandel* standard.

Plaintiffs also urge the Court to reject the Order's stated purpose because it purportedly was given "in bad faith." Pls.' Br. at 39. But, at the most, separate opinions in one Supreme Court case have suggested that a court may question a consular officer's stated statutory basis for denying a particular immigrant visa upon "an affirmative showing of bad faith . . . plausibly alleged with sufficient particularity," and even then only where denial of the alien's visa is alleged to violate a U.S. citizen's spouse's fundamental rights. *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring in the judgment); *see id.* at 2141-47 (Breyer, J., dissenting). That circumstance is far removed from Plaintiffs' broadside challenge to a formal national-security determination by the President of the United States, pursuant to express statutory authority and in accordance with the recommendations of the Attorney General and the Secretary of Homeland Security.

In any event, Plaintiffs have not established that the Order's stated purpose was given in bad faith. To the contrary, the President's actions in response to concerns raised by courts regarding the Revoked Order—and taken after consultation with the Executive officers responsible for legal, foreign-relations, national-security, and immigration matters—demonstrate *good faith*. As the Order explains, the Revoked Order had two provisions addressing religion that were aimed at aiding victims of religious persecution. Order § 1(b)(iv). When the Ninth Circuit and other courts expressed concern that the provisions might draw improper religious distinctions, the President removed them to make clear that national security, not religion, is the Order's focus. The

new Order also limited the scope of the Revoked Order in numerous other significant respects. That is the exact opposite of bad faith.

3. The Order Complies with the Establishment and Equal Protection Clauses

Plaintiffs seek to apply precedents from the domestic context, involving things like local religious displays and school prayers. *See* Pls.' Br. 21-33. 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 [and Equal Protection] Clause cases from the domestic context over to the foreign affairs context ignores the realities of our world." *Washington* Bybee Dissent at 8 n.6. Doing so would be a potentially dangerous extension of religious discrimination 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 "intrusion of the judicial power into foreign affairs" committed to the political branches. *Id*. In any event, the Order complies with these precedents.[13]

a. The Order's Text and Purpose Are Religion-Neutral

The Establishment and Equal Protection Clauses both require the government to "'pursue a course of neutrality toward religion,' favoring neither one religion over others nor religious adherents collectively over nonadherents." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*,

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[13] In addition to their religious discrimination claims, Plaintiffs also contend that the Order discriminates on the basis of national origin. *See* Pls. Br. at 33-34. This claim fails, too. The Order does not distinguish on the basis of national origin insofar as that term implicates ethnic heritage; rather, discrimination on the basis of *nationality* implicates whether "a person ow[es] permanent allegiance to a state." 8 U.S.C. § 1101(a)(21) (defining "national"). Moreover, courts—including the D.C. Circuit—have repeatedly affirmed that "[d]istinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive." *Narenji*, 617 F.2d at 747 (explaining that distinctions based on nationality "must be sustained" "[s]o long as [they] are not wholly irrational"); *see also, e.g.*, *Jean v. Nelson*, 727 F.2d 957, 978 n.30 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985); *Rajah*, 544 F.3d at 435.

512 U.S. 687, 696 (1994) (internal citation omitted); *see McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (noting that in the context of the Establishment Clause, "[n]eutrality . . . requires an equal protection mode of analysis"). The Order fully comports with that principle. It does not draw "explicit and deliberate distinctions" based on religion. *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982); *see* Pls.' Br. at 31 (conceding that the Order "does not explicitly discriminate against Muslims"). To the contrary, 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.[14]

The entry suspension also was not adopted "with the ostensible and predominant purpose of advancing religion." *McCreary*, 545 U.S. at 860. The facially neutral Order's stated "secular purpose"—protecting against terrorism—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." *Lukumi*, 508 U.S. at 535. Here, the suspension applies to six countries based on risk, not religion; and in those six countries, the suspension applies irrespective of any alien's religion.

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[14] Plaintiffs attempt to impute anti-Muslim animus from references in the Order to collecting and publishing information about foreign nationals who have been "radicalized" and about "so-called 'honor killings'" among other "acts of gender-based violence against women." Order § 11; *see* Pls.' Br. at 24. This is grasping at straws. A person can be "radicalized" for any reason, and "[h]onor crimes are not specific to any religion nor are they limited to any one region of the world." Human Rights Watch, Oral Intervention at 57th Session of the UN Commission on Human Rights (Apr. 6, 2001), *available at* http://pantheon.hrw.org/legacy/press/2001/04/un_oral12_0405.htm.

Plaintiffs note that each of the six countries is "overwhelmingly Muslim." Pls.' Br. at 22; *see id*. at 32-33. 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.[15] Moreover, to regard the dominant religion of a foreign country as evidence of an Establishment or Equal Protection 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). Where the government acts, as here, on secular grounds, courts may not infer religious animus or improper purpose based on how the impact of that action happens to fall. *See Town of Greece v. Galloway*, 134 S. Ct. 1811, 1824 (2014) (So long as the government "maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders . . . in an effort to achieve religious balancing."); *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 658 (2002).

Moreover, the Order's treatment of Iraq, another Muslim-majority nation that was subject to the Revoked Order, further underscores the Order's neutrality with respect to religion. The Order specifically concluded that, "since Executive Order 13769 was issued, the Iraqi government

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

has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal." Order § 1(g). Thus, the Order determined that Iraq should not be subject to a temporary suspension of travel based on plainly neutral criteria related to national security. At the same time, the Order recognizes that security circumstances in Iraq require additional scrutiny to ensure that visa applicants are not connected to ISIS or other terrorist organizations. *Id*. § 4. The careful treatment of Iraq in the Order and the President's acknowledgment of enhanced cooperation demonstrate that the Order is based solely on national security risk and not on any other factor.

Nor does Plaintiffs' disagreement with the President's national security judgment or the timing of the Order's issuance, *see* Pls.' Br. at 25-26, 32-33, render the Order's stated purpose a sham. Courts "must defer to [the Executive's] stated reasons if a 'plausible secular purpose . . . may be discerned from the face of the [Order].'" *Trunk v. City of San Diego*, 629 F.3d 1099, 1108 (9th Cir. 2011) (quoting *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983)); *see Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc*., 224 F.3d 283, 288 (4th Cir. 2000). Such deference is particularly warranted where the Executive is making predictive judgments that "implicate[] sensitive and weighty interests of national security and foreign affairs." *Humanitarian Law Project*, 561 U.S. at 33-34. Here, the Order's aim is to predict where the risk exists *going forward*. And it is well-established that, in making such predictive judgments, the government "is not required to conclusively link all the pieces in the puzzle before [courts] grant weight to its empirical conclusions." *Id*. at 35. Consequently, Plaintiffs' attempt to undermine the President's judgment here—including through reliance on a leaked, draft report based solely on backward-looking evidence—must be rejected. *See* Pls.' Br. at 25, 32. This draft document could not possibly overcome the forward-looking and final, *official* assessment of the President and multiple Cabinet

Secretaries. Ex. A, Joint Ltr. to President (Mar. 6, 2017); *see Nat'l Ass'n of Home Builders v. Defs. of Wildlife* (*NAHB*), 551 U.S. 644, 658-59 (2007). Nor should the Court question the bona fides of the new Order based on Plaintiffs' assumptions about how quickly the Executive Branch should have been able to proceed. *See* Pls.' Br. at 25-26. The President moved expeditiously to issue a revised order that satisfied the *Washington* Court's concerns, in consultation with senior advisors.

b. The Order Cannot be Enjoined Based on Campaign Statements or Other Unofficial Comments

Plaintiffs assert that statements by the President—nearly all before assuming office, while still a private citizen and political candidate—and informal remarks of his aides demonstrate that the entry suspension is intended to target Muslims based on their religion. *See* Pls.' Br. at 3-6, 24. Plaintiffs' reliance on such statements in the face of a religion-neutral Order is wrong.

First, under the Constitution's structure and its separation of powers, courts evaluating a presidential policy 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 statute,' or comparable official act," not through "judicial psychoanalysis of a drafter's heart of hearts," *McCreary*, 545 U.S. at 862-63. Divining purpose outside the operative terms of governmental action and official pronouncements is "extremely difficult," posing practical

"pitfalls" and "hazards." *Palmer v. Thompson*, 403 U.S. 217, 224 (1971). And it makes no sense in the Establishment Clause context, because only an "official objective" of favoring or disfavoring religion gleaned from "readily discoverable fact" 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 at 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*, 2017 WL 1113305, at *12.[16]

C. Plaintiffs' Right to Receive Information Claim Fails

Plaintiffs allege that the Executive Order infringes on their First Amendment rights to "receive information and ideas" because it "prevents UMAA from inviting" various speakers who "are barred from obtaining visas." Pls.' Br. at 35. As noted elsewhere, nothing in the Order "prevents" UMAA from conducting its programming, inviting foreign speakers, or encouraging the free flow of information and ideas. The Order therefore will not have the effect that UMAA ascribes to it. *See* Part I.A.1, *supra*.

In any event, Plaintiffs' claim is squarely foreclosed by *Mandel*, which itself involved a First Amendment claim and which Plaintiffs appear to agree governs their claim here. *See* Pls.' Br. at 34 (citing *Mandel*, 408 U.S. at 762-63). Plaintiffs, however, fail to cite the Court's *holding* that, in the immigration context, "courts will neither look behind the exercise [of Executive] discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Mandel*, 408 U.S. at 770. That holding

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[16] Plaintiffs point to two statements made after the President assumed office. *See* Pls.' Br. at 25. In the first, a presidential advisor described the then-forthcoming new Order as serving the "same basic policy outcome" as the Revoked Order. *Id*. In the second, the President characterized the new Order as "a watered-down version of" the Revoked Order. *Id*. But neither of these informal statements—which were not part of the official process in issuing the new Order—display any religious bias or purpose. The statements merely reflect the fact that the new Order and the Revoked Order aimed at the same fundamental national-security objective of facilitating a review of the sufficiency of existing screening and vetting procedures. *See* Order § 1(b)-(i). The new Order pursues that objective through substantially revised provisions, which account for the *Washington* Court's concerns, and the differences between the new Order and the Revoked Order are clear on the face of the documents.

forecloses Plaintiffs' claim, particularly because, as discussed above, the *Mandel* standard is more than satisfied here. *See* Section II.B.2, *supra*.[17]

D. Plaintiffs Cannot Prevail on Their Section 4 Claims

Plaintiffs seek to enjoin Section 4 of the Order, but say virtually nothing about why that Section is unlawful. And even setting aside the above arguments, Section 4 is entirely lawful. A contrary ruling by this Court would raise substantial separation-of-powers concerns.

First, as a threshold matter, UMAA lacks standing to challenge Section 4 because UMAA fails to identify any concrete harm that arises from implementing Section 4's screening procedures. Those procedures impose no substantive restrictions on issuing visas, but instead merely call for thoroughly screening Iraqi nationals' visa applications in light of the ongoing conflict in Iraq and ISIS's influence over a significant portion of Iraq's territory. Order §§ 1(g), 4. Even if UMAA had standing to challenge the Order's suspension on entry provision, that is a far cry from establishing standing to challenge the increase in screening procedures required by Section 4.

Second, Plaintiffs' vaguely argue that Section 1152(a)(1)(A)'s nondiscrimination provision precludes heightened screening for Iraqi nationals. *See* Pls.' Br. at 36. That provision, however, does not apply at all to "the *procedures* for the processing of immigrant visa applications." 8 U.S.C. § 1152(a)(1)(B) (emphasis added). Section 4's instruction to consider certain information when reviewing Iraqi nationals' applications for visas, admission, or other immigration benefits is procedural, thus falling within the carve-out of Section 1152(a)(1)(B). And in any event, Plaintiffs do not contest that Section 1185 would provide independent authority for Section 4 of the Order.

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[17] Because *Mandel* is dispositive, it would be inappropriate to apply intermediate scrutiny as Plaintiffs request. *See* Pls.' Br. at 35-36. Nonetheless, Plaintiffs' argument that the Order "is not narrowly tailored," *id*. at 36, wholly ignores all of the Order's exceptions and waiver provisions. *See* Order § 3(a) (limited scope), § 3(b) (six exceptions), § 3(c) (nine waiver provisions).

Third, even if consular non-reviewability does not foreclose a challenge to the temporary suspension on entry, the doctrine clearly forecloses Plaintiffs' attempt to micro-manage the visa adjudication process. Plaintiffs' challenge thus runs headlong into the doctrine that "courts lack subject matter jurisdiction to review the visa-issuing process itself." *Saleh v. Holder*, 84 F. Supp. 3d 135, 139 (E.D.N.Y. 2014) (citation and quotation omitted); *cf. Saavedra Bruno*, 197 F.3d at 1159 ("a consular official's decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise"); *Wan Shih Hsieh v. Kiley*, 569 F.2d 1179, 1181 (2d Cir. 1978) ("no jurisdictional base exists for review of the action of the American Consul . . . suspending or denying the issuance of immigration visas").

Finally, Plaintiffs' challenge to Section 4 raises substantial separation-of-powers concerns. Section 4 represents nothing more than a directive that applications for Iraqi nationals "be subjected to thorough review," with consideration of certain information "as appropriate." Order § 4. Section 4 demonstrates the neutrality of the order because it excludes Iraq from the suspension on travel while recognizing that nationals from Iraq may still require some additional scrutiny during the visa issuance process. Courts are wholly ill-equipped to evaluate or decide this nuanced foreign policy decision. *Cf. Smith v. Obama*, --- F. Supp. 3d ---, 2016 WL 6839357, at *11-15 (D.D.C. Nov. 21, 2016), *appeal docketed*, No. 16-5377 (D.C. Cir. Dec. 21, 2016) (holding that court lacked jurisdiction "to determine whether the President is correct that operations against ISIL are necessary and appropriate in order to defend the national security of the United States" (modifications omitted)). Plaintiffs' request that this Court intercede and impose its own judgment as to what level of screening is appropriate for Iraqi nationals in light of the many national security, military, and foreign policy considerations described in the Order, *see* Order §§ 1(g), 4, would

clearly be inappropriate and raise substantial separation-of-powers concerns. For this reason as well, Plaintiffs' challenge to Section 4 should be rejected.

III. Plaintiffs Cannot Demonstrate Irreparable Harm

This Court has previously recognized that 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 Homeland Sec.*, 105 F. Supp. 3d 108, 112 (D.D.C. 2015) (modifications and citations omitted). Here, Plaintiffs offer a meager one-page analysis of how they will suffer irreparable harm in the absence of a preliminary injunction. That analysis is wrong: Even assuming Plaintiffs have satisfied Article III standing, they cannot demonstrate irreparable harm.

First, Plaintiffs wholly ignore that Section 2 of the Order has already been preliminarily enjoined nationwide. *See Hawai'i*, 2017 WL 1167383, at *9 (enjoining Sections 2 and 6); *see also IRAP*, 2017 WL 1018235, at *18 (enjoining Section 2(c)). Given these existing injunctions of the Order's temporary entry suspension, which was the near-exclusive focus of Plaintiffs' preliminary-injunction motion, Plaintiffs cannot possibly "demonstrate[] that they will suffer great, concrete, corroborated and certain irreparable harm absent the injunctive relief" they seek. *Jones v. Dist. of Columbia*, 177 F. Supp. 3d 542, 545 (D.D.C. 2016) (Chutkan, J.).

Second, even if the Order were to start being enforced, none of the Plaintiffs would suffer irreparable harm. UMAA offers no evidence regarding specifically how the Order would impair its upcoming 2017 convention. And based on the 2016 convention, it appears that a relatively small percentage—only three or four people out of thirty speakers—would have been potentially

affected by the Order. *See* UMAA Decl. ¶ 13. UMAA has not explained how the (potential) inability of a relatively small number of speakers to attend this particular convention, at this particular time, would cause irreparable harm to UMAA. As for the individual Doe plaintiffs, implementation of the Order would have no effect on them or their children.

Third, 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 constitutional rights on the only persons subject to the Order—aliens abroad. 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

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). *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), and "the President has unique responsibility" in this area, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993).

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, *Dep't of Navy v. Egan*, 484 U.S. 518, 529 (1988), courts should not second-guess the Executive's determination that "a preventive measure" here 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 thus 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, an injunction cannot be issued against the President directly, as courts have recognized for over 150 years. *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866).

Second, facial invalidation of Sections 2 and 4 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. Moreover, much of Section 2 involves provisions that pertain solely to internal governmental operations and inter-governmental communications—such as preparing reports and the collecting information from foreign governments—that can have no impact on Plaintiffs at all. As for Section 4, enjoining that provision would have the effect of constraining the Government's ability to review relevant, terrorism-related information when reviewing applications submitted by

Iraqi nationals. Both these provisions that concern solely internal or diplomatic matters and the vetting procedures regarding Iraqi nationals clearly have lawful applications.

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 UMAA, the relief could extend only to particular individuals invited to speak at UMAA's events. For the Doe children, the relief would be to process their applications in the normal course, which is already occurring because they are not covered by the Order.

Finally, in no event should the Court adopt paragraphs 5-9 of Plaintiffs' proposed order, which purports to regulate the timing of Defendants' processing of visa applications, would require Defendants to provide and/or rescind various forms of guidance, and would also require monthly reports to the Court concerning the details of certain visa applications and decisions. *See* Proposed Order ¶¶ 5-9. Plaintiffs' motion nowhere explains how any of this relief would redress their purported harms, rather than positioning Plaintiffs as private attorneys general to police third-party visa adjudications. Moreover, this relief "would alter, rather than preserve, the *status quo* by commanding some positive act," and Plaintiffs have not acknowledged or satisfied the "higher standard" for imposing mandatory injunctive relief of this nature. *Daily Caller v. Dep't of State*, 152 F. Supp. 3d 1, 6 (D.D.C. 2015). Plaintiffs' proposed order is effectively a discovery request, and an unreasonably burdensome and intrusive one at that.

CONCLUSION

The Court should deny Plaintiffs' motion for preliminary injunctive relief.

Dated: April 10, 2017

Respectfully submitted,

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EXHIBIT A

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

EXHIBIT B

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)

Last Published Date: March 6, 2017

EXHIBIT C

Alert
MARCH 22, 2017

Important Announcement

Executive Order on Visas

Federal district courts in Hawaii and Maryland have issued nation-wide orders barring the Department from implementing portions of Executive Order 13780, "Protecting the Nation from Foreign Terrorist Entry," including Section 2(c) regarding the suspension of entry for certain nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen. U.S. embassies and consulates continue to process visa applications for nationals of these six countries as before.

The guidance below regarding implementation processes for Executive Order 13780 is not currently in effect; it was posted before the aforementioned court orders and describes how the Department intended to implement Executive Order 13780.

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 DISTRICT OF COLUMBIA

UNIVERSAL MUSLIM ASSOCIATION OF AMERICA, *et al*.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:17-cv-00537-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