No. 17-15589

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAII; ISMAIL ELSHIKH,

Plaintiffs – Appellees,

v.

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

Defendants – Appellants.

On Appeal from the United States District Court
for the District of Hawaii
(1:17-cv-00050-DKW-KSC)

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INTRODUCTION

When the government previously was before this Court defending the now-revoked Executive Order, No. 13,769 (Jan. 27, 2017) (Revoked Order), the Court held that the Revoked Order likely violated the due-process rights of certain aliens in or seeking to enter the United States. *Washington v. Trump*, 847 F.3d 1151, 1165-67 (2017) (per curiam). Although the Court acknowledged that injunctive relief might be "overbroad in some respects," the Court reasoned that "it [was] not [its] role to try, in effect, to rewrite the Executive Order." *Id*. at 1167. "The political branches," it noted, "are far better equipped to make appropriate distinctions." *Id.*

The President accepted that invitation in the new Executive Order, No. 13,780 (Mar. 6, 2017) (Order), now before the Court. Among many other changes, the Order expressly excludes lawful permanent residents and foreign nationals present in the United States. The Order applies only to foreign nationals outside the United States who lack a visa—individuals who "ha[ve] no constitutional rights regarding" their admission. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Even then, the Order temporarily suspends only (i) the entry of certain foreign nationals from six countries that Congress and the Executive previously determined pose a heightened terrorism risk and (ii) the processing of refugee applications and travel of refugees not yet admitted—all subject to a waiver process to mitigate any undue hardship. Order §§ 2(c), 3(c), 6(a), 6(c).

Those entry and refugee suspensions apply for a short period, to enable the President and his Cabinet to review current screening procedures to ensure that they adequately detect potential terrorists. For the past 30 years, every President has invoked his constitutional and express statutory authority to protect the Nation by suspending entry of certain categories of aliens. *See* 8 U.S.C. §§ 1182(f), 1185(a). As a legal matter, the Order is no different. It represents the President's good-faith effort to accommodate this Court's concerns while simultaneously fulfilling his duty to protect national security. As one court recently explained, the new Order "is materially different in structure, text, and effect from [the Revoked Order] and has addressed the concerns raised not only by this Court but also by other courts that reviewed and enjoined" the Revoked Order. *Sarsour v. Trump*, 2017 WL 1113305, at *11 (E.D. Va. Mar. 24, 2017).

The district court nevertheless granted an extraordinary preliminary injunction against the Order. It barred implementation nationwide, directly second-guessing the national-security judgment of the President of the United States (as well as the Attorney General and Secretaries of Homeland Security and State). The injunction here also sweeps far more broadly than the injunction at issue in *Washington*: beyond enjoining the entry suspension for nationals from the six listed countries (Iran, Libya, Somalia, Sudan, Syria, and Yemen) in Section 2(c), the court enjoined the refugee suspension in Section 6(a); a lower annual limit on refugee

admission in Section 6(b); and even provisions that concern only the internal governmental operations or diplomatic activities in Sections 2(a)-(b), (d)-(g), 6(d), and other portions of 6(a). Plaintiffs never specifically challenged many of these other provisions; indeed, plaintiffs' complaint and temporary restraining order (TRO) papers made no specific mention of Section 6(b)'s refugee cap.

The district court did not issue its sweeping injunction based on this Court's due-process concerns in *Washington*. Nor did the district court apply the test in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), for challenges to the denial of entry to aliens from outside the United States, and determine that the President's national-security judgment is not "a facially legitimate and bona fide reason" for Sections 2 and 6. *Id.* at 770. The court simply declined to apply *Mandel*'s test, holding instead that the entire Order likely violates the Establishment Clause under case law from domestic contexts. The court did so not because the Order refers to, or distinguishes on the basis of, religion: the Order applies to all nationals of the listed countries, and all refugees from any country, regardless of anyone's religion. The court reasoned instead that the Order is driven by religious animus. It based that conclusion largely on statements the President made as a political candidate, before he took the oath to uphold the Constitution, formed an Administration, and consulted with the Cabinet heads charged with keeping this Nation safe.

Every step in the district court's analysis is flawed. Plaintiffs' challenge to the Order is not properly adjudicable because the State of Hawaii and Dr. Ismail Elshikh do not have any constitutionally cognizable, non-speculative injuries. Moreover, their Establishment Clause claim is not likely to succeed. The district court should have deferred to the President's facially legitimate, bona fide national-security judgment. And even in the domestic setting, courts judge the legitimacy of a law by what it says and does, and occasionally by the official context that surrounds it—not by what supposedly lies in the hearts of its drafters. The district court compounded its error by entering an exceptionally overbroad injunction that goes far beyond redressing any plausible injury to Hawaii and Dr. Elshikh.

To be sure, this Order has been the subject of heated debate. But the precedent set by this case will long transcend this Order, this President, and this constitutional moment. The decision below openly disagrees with and enjoins the President's national-security judgment—even though plaintiffs' Establishment Clause claim fails to satisfy basic requirements of justiciability (Part I), that claim is not likely to succeed on the merits (Part II), the government faces imminent and irreparable injury from its inability to implement Sections 2 and 6 (Part III), and plaintiffs plainly are not entitled to a nationwide injunction that extends well beyond any individual harms they have alleged (Part IV). In cases that spark such intense disagreement, it is critical to adhere to foundational principles concerning justiciability, constitutional

interpretation, and scope of remedies. Applying those principles here, the injunction below should be reversed.

STATEMENT OF JURISDICTION

The district court's jurisdiction was invoked under 28 U.S.C. § 1331. E.R. 138. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). The district court entered its preliminary injunction on March 29, 2017. E.R. 25. Defendants filed a timely notice of appeal on March 30, 2017. E.R. 79.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in entering a nationwide preliminary injunction barring enforcement of Sections 2 and 6 of the Order.

STATEMENT OF THE CASE

A. Statutory Background

The Immigration and Nationality Act (INA or Act), 8 U.S.C. §§ 1101 *et seq.*, governs admission of aliens into the United States. Admission generally requires a valid immigrant or nonimmigrant visa or another valid travel document. *Id.* §§ 1181, 1182(a)(7)(A)(i), (B)(i)(II), 1203. The process of obtaining a visa typically includes an in-person interview and results in a decision by a State Department consular officer. *Id.* §§ 1201(a)(1), 1202(h), 1204; 22 C.F.R. § 42.62. Although a visa ordinarily is necessary for admission, it does not guarantee admission; the alien still

must be found admissible upon arriving at a port of entry. 8 U.S.C. §§ 1201(h), 1225(a).

Congress has created a Visa Waiver Program enabling 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," U.S. Dep't of State, *Country Reports on Terrorism 2015*, at 6, 299-302 (June 2016), as well as dual nationals of and recent visitors to countries designated by the Secretary of State as state sponsors of terrorism (currently Iran, Sudan, and Syria). 8 U.S.C. § 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.[1]

Separately, the U.S. Refugee Admissions Program (Refugee Program) allows aliens who fear persecution on account of race, religion, nationality, or other specified grounds to seek admission. 8 U.S.C. §§ 1101(a)(42), 1157. Refugees are screened for eligibility and admissibility abroad; if approved, they may be admitted without a visa. *Id.* §§ 1157(c)(1), 1181(c). Congress expressly authorized the President to determine the maximum number of refugees to be admitted each fiscal year. *Id.* § 1157(a)(2)-(3).

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

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

8 U.S.C. § 1182(f). In addition, Section 1185(a)(1) grants the President broad general authority to adopt "reasonable rules, regulations, and orders" governing

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[1] 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.

entry of aliens, "subject to such limitations and exceptions as [he] may prescribe." *Id.* § 1185(a)(1).

B. The Revoked Order

On January 27, 2017, the President issued the Revoked Order. It directed an assessment of the adequacy of current screening procedures to detect individuals 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 the entry of foreign nationals of the seven countries already identified as posing heightened terrorism-related concerns in the context of the Visa Waiver Program, subject to case-by-case exceptions. *Id.* § 3(c), (g). It similarly directed a review of the Refugee Program, and, pending that review, suspended entry under the Program for 120 days, subject to case-by-case waivers. *Id.* § 5(a). It also suspended admission of Syrian refugees indefinitely and directed agencies to prioritize refugee claims premised on religious-based persecution if the religion was "a minority religion in the individual's country of nationality." *Id.* § 5(b)-(c), (e).

C. Litigation Challenging the Revoked Order

The Revoked Order was challenged in several courts. On February 3, 2017, a district court in Washington enjoined enforcement nationwide of Sections 3(c), 5(a)-(c), and (e). *Washington v. Trump*, 2017 WL 462040, at *3 (W.D. Wash. Feb. 3, 2017). On February 9, following accelerated briefing and argument, a panel of

this Court declined to stay the Washington district court's injunction pending appeal. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam), *reh'g denied*, No. 17-35015 (9th Cir. 2017). The panel held that the government had not shown it was likely to succeed on the *Washington* plaintiffs' due-process claims. *Id.* at 1164-67. The panel "reserve[d] consideration" on the plaintiffs' Establishment Clause challenge and "express[ed] no view" on their other claims. *Id.* at 1164, 1168. 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.

D. The Order

On March 6, responding to this Court's ruling—and in accordance with the joint recommendation of the Attorney General and Secretary of Homeland Security, E.R. 83-84—the President issued the Order. The Order, which took effect on March 16, 2017, rescinds the Revoked Order and adopts significantly revised provisions, in part to address this Court's concerns. As the district court that enjoined the Revoked Order in *Washington* noted, the new Order differs in "substantial" respects. *Washington v. Trump*, 2017 WL 1045950, at *3 (W.D. Wash. Mar. 16, 2017). At issue here are Sections 2 and 6 of the Order.

1. Temporary entry suspension for six countries

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

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

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

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

- 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 [U.S.] for a continuous period of work, study, or other long-term activity" but are currently outside the country and seek to reenter; and

- individuals who seek entry for "significant business or professional obligations."

Id. Individuals can present evidence supporting waiver requests during the visa-application process, which will be acted on by a consular officer "as part of [that] process." *Id.*; *see* E.R.85-87; DHS, *Q&A: Protecting the Nation From Foreign Terrorist Entry To The United States* (Mar. 6, 2017).[3]

2. Temporary suspension of Refugee Program and lower annual limit on refugees

Section 6 of the Order suspends adjudication of applications under the Refugee Program and admission of refugees for 120 days to permit the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, to review the Program and "determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States." Order § 6(a). The suspension does not apply to refugee applicants who were formally scheduled for transit to the United States before the Order's effective date, and also is subject to case-by-case waivers. *Id.* § 6(a), (c). And Section 6(b) of the Order limits to 50,000 the number of refugees who may be admitted in fiscal

[3] https://www.dhs.gov/news/2017/03/06/qa-protecting-nation-foreign-terrorist-entry-united-states.

year 2017. Unlike the Revoked Order, the Order does not prioritize refugee claims by religious minorities.

E. District Court's Temporary Restraining Order

Plaintiffs originally filed this action to challenge the Revoked Order on statutory and constitutional grounds. E.R. 204. The district court stayed proceedings while this Court considered whether to stay the nationwide injunction of the Revoked Order in *Washington*. E.R. 206. After the new Order issued, plaintiffs filed their operative complaint and moved for a TRO against Sections 2 and 6 of the Order "across the nation." E.R. 173.

Plaintiffs are the State of Hawaii and Dr. Ismail Elshikh. They claim that the Order exceeds the President's statutory authority and also violates due process and the Establishment Clause. E.R. 167-73. Hawaii alleges that the Order would adversely affect students and faculty at its state-run educational institutions, reduce tourism, and damage the public welfare. *See* E.R. 139-41. Dr. Elshikh is a Muslim U.S. citizen who lives in Hawaii with his wife and children. E.R. 142-43. Dr. Elshikh alleges that his Syrian mother-in-law currently lacks a visa to enter the country and accordingly cannot visit family members in Hawaii. *Id.*

On March 15, after expedited briefing and argument, the district court entered a nationwide TRO, barring enforcement of Sections 2 and 6 of the Order. The court held that Hawaii generally has standing to challenge the Order because it alleges

harm to its public-university system and its tourism industry. E.R. 41-45. The court did not determine whether Hawaii has standing to bring an Establishment Clause claim on its own behalf, because it ruled that Dr. Elshikh has standing to assert that claim. E.R. 45-46 n.9. The court held that Dr. Elshikh's allegation that he is deeply saddened by the Order's allegedly discriminatory message is sufficient to establish Article III injury. E.R. 48-49.

On the merits, the district court held that the plaintiffs are likely to succeed on their Establishment Clause claim. Applying *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court ruled that the Order lacks a primary secular purpose. E.R. 53. The court acknowledged that the Order "does not facially discriminate for or against any particular religion, or for or against religion versus non-religion." E.R. 54. But it concluded that extrinsic circumstances show "religious animus dr[ove] the promulgation of the Executive Order." E.R. 57. Principally relying on public statements by then-candidate Donald Trump and two of the President's advisors, the court ruled that any religiously neutral purpose of protecting national security was "secondary" to a "'religious objective' of temporarily suspending the entry of Muslims." E.R. 60 (citation omitted). The court "expresse[d] no views on [p]laintiffs' due-process or INA-based statutory claims." E.R. 53 n.11.

The district court presumed that the Establishment Clause violation caused irreparable harm to Dr. Elshikh, and concluded that the balance of equities supported

a TRO. E.R. 64-66. The court restrained enforcement of Sections 2 and 6 of the Order nationwide. E.R. 66. It subsequently denied the government's motion for clarification, which pointed out that the injunction barred enforcement of subsections of Sections 2 and 6 that had not been the focus of the litigation or the court's order—some of which, like the refugee cap, plaintiffs never specifically cited in their TRO briefing; others of which involve purely internal or diplomatic activities of the government, E.R. 230; and others of which the district court's TRO ruling did not address.

F. District Court's Preliminary Injunction

On March 29, the district court converted the TRO to a preliminary injunction, concluding that the same considerations that supported the TRO justified preliminary-injunctive relief. E.R. 18-19. It rejected the government's argument that *Mandel* requires the Order be upheld if the President exercised his authority "on the basis of a facially legitimate and bona fide reason." E.R. 15. The court also disagreed that "the actions taken during the interval between [the Revoked Order] and the new Executive Order represent 'genuine changes in constitutionally significant conditions.'" E.R. 17 (emphasis omitted) (quoting *McCreary County v. ACLU*, 545 U.S. 844, 874 (2005)).

The district court further rejected the government's argument that any injunction should be limited to Section 2(c)'s temporary suspension on entry for

nationals of six countries. The court reasoned that "the entirety of the Executive Order runs afoul of the Establishment Clause," and the "historical context and evidence relied on by the Court * * * does not parse between Section 2 and Section 6, nor * * * between subsections within Section 2." E.R. 20-21. The court declined to tailor its injunction to exclude provisions of Section 2 and 6 that concern only the government's internal or diplomatic communications and activities, or to exclude refugee-related provisions, including the 50,000-refugee cap that plaintiffs never specifically challenged. E.R. 22. Finally, the court declined to stay its ruling pending appeal. E.R. 23.

G. Subsequent District Court Decisions

Meanwhile, several district courts addressed the new Order. The district court in *Washington*, noting the substantial differences between the Revoked Order and the new Order, held that its injunction against the Revoked Order does not extend to the new Order. 2017 WL 1045950, at *3. A district court in Virginia denied a motion to enjoin the new Order, explaining that it "is materially different in structure, text, and effect from [the Revoked Order] and has addressed the concerns raised not only by this Court but also by other courts that reviewed and enjoined" the Revoked Order, and the plaintiffs there were not likely to succeed in challenging it on Establishment Clause grounds. *Sarsour*, 2017 WL 1113305, at *11. Finally, a district court in Maryland granted a preliminary injunction against only Section 2(c)

of the Order, specifically declining to enjoin other provisions in Sections 2 and 6, including the refugee-related provisions; that ruling is currently before the Fourth Circuit on expedited appeal. *IRAP v. Trump*, 2017 WL 1018235, at *18 (D. Md. Mar. 16, 2017), *appeal pending*, No. 17-1351 (4th Cir.).

SUMMARY OF ARGUMENT

I. The preliminary injunction should be vacated because plaintiffs' Establishment Clause claim is not justiciable for three reasons. First, the asserted injuries to Hawaii's university system and tourism revenues, even if judicially cognizable, are non-imminent and speculative. Hawaii fails to identify any aliens abroad who have concrete plans to enter the country that actually would be delayed by Section 2(c)'s 90-day entry suspension. And Dr. Elshikh likewise is speculating as to whether Section 2(c) would impede his mother-in-law's entry. Nor are any of those purported injuries plausibly caused by Section 6's refugee restrictions or the internal-review and diplomatic-engagement provisions in Sections 2 and 6. As for Dr. Elshikh's asserted psychological reaction to the Order's allegedly discriminatory message, that is an abstract stigmatic injury that does not support standing. Second, the State and Dr. Elshikh lack prudential standing to raise the Establishment Clause claim, because their own religious freedoms are not infringed by the Order's treatment of aliens abroad seeking entry, and those aliens do not themselves have

constitutional rights concerning entry. Third, consular-nonreviewability principles provide yet another barrier to plaintiffs' Establishment Clause claim.

II. Plaintiffs also are unlikely to succeed on the merits because their Establishment Clause claim is foreclosed by controlling precedent. This Court may not overturn the Executive's exclusion of aliens based on a "facially legitimate and bona fide reason." *Mandel*, 408 U.S. at 770. Sections 2 and 6 of the Order go well beyond that threshold: they are facially neutral with respect to religion, and amply supported by national-security determinations in the Order itself. The district court misread this Court's stay ruling in *Washington* as holding that *Mandel*'s substantive standard, which governs challenges to the Executive's decisions to deny entry to aliens outside the United States, is irrelevant. This Court, however, held only that *Mandel* does not render such decisions unreviewable. The district court's reading of *Mandel* contradicts Supreme Court and Ninth Circuit precedent and would upend the separation of powers. In any event, plaintiffs' claims fail even under domestic Establishment Clause standards. The district court held that Section 2 and 6 are likely unconstitutional based not on what they say or do, but on an assertedly improper motive inferred in large part from campaign statements. The Supreme Court has rejected that approach: only the official purpose of government action is material, and Sections 2 and 6 are religion-neutral.

III. The balance of equities also weighs strongly against a preliminary injunction. Enjoining the President when he is acting at the height of his powers—*i.e.*, to protect national security by regulating the entry of aliens with express congressional authorization—imposes serious irreparable injury on the government and the public. By contrast, denying plaintiffs preliminary relief causes them no substantial irreparable harm: their alleged injuries, which are based on speculation about the temporary delay of entry of third-party aliens abroad, are not legally cognizable or irreparable. Those purported injuries certainly do not outweigh the harms to the government and the public from enjoining the Order. That is particularly clear regarding the refugee restrictions in Section 6 and the internal-review provisions in Sections 2 and 6, which plainly do not injure plaintiffs at all.

IV. At the very least, the district court's nationwide injunction is overbroad. It improperly attempts to enjoin the President himself, which Supreme Court precedent forbids. It enjoins Sections 2 and 6 on their face, even though those provisions have many manifestly constitutional applications; some subsections of the provisions (like the refugee cap) were not specifically challenged by plaintiffs below; and others address only agencies' internal or diplomatic action that regulates no one. The injunction also violates Article III and well-settled equitable principles by granting sweeping, nationwide relief that is far broader than necessary to redress any cognizable injuries plaintiffs allege.

STANDARD OF REVIEW

A plaintiff seeking a preliminary injunction must show that "he is likely to succeed on the merits," that "he is likely to suffer irreparable harm," and that "the balance of equities" and "public interest" favor an injunction. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1289 (9th Cir. 2013). He also must show that his claim is justiciable. *Id.* at 1286. This Court generally reviews the grant of a preliminary injunction for "abuse of discretion," but it reviews the district court's "interpretation of the underlying legal principles" and any justiciability issues "de novo." *Id.* In addition, "because [i]njunctive relief * * * must be tailored to remedy the specific harm alleged * * * [a]n overbroad injunction is an abuse of discretion." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009) (internal quotation marks omitted).

ARGUMENT

The injunction under review rests solely on plaintiffs' Establishment Clause claim. Although plaintiffs principally challenged the Order below as exceeding the President's statutory authority and violating due process, ECF No. 65-1, at 24-40, the district court correctly did not adopt either argument. The Order falls well within two statutory grants of power to the President: he may "suspend the entry of all aliens or of any class of aliens" when he finds doing so is in the national interest, 8 U.S.C. § 1182(f), and he may prescribe "reasonable rules, regulations, and orders,"

and "limitations and exceptions," regarding entry of aliens, *id.* § 1185(a). Plaintiffs' due-process challenge equally lacks substance: the revisions reflected in the new Order—including narrowing its scope and establishing a case-by-case waiver process—completely address any conceivable due-process claim. *Cf. Washington*, 847 F.3d at 1165-66. The district court instead issued the TRO—and then converted it into the injunction—solely because it held that the Order likely violates the Establishment Clause. E.R. 14 n.3, 53 n.11. In so holding and issuing its injunction, the district court erred in multiple independent respects.

I. Plaintiffs' Establishment Clause Challenge To Sections 2 And 6 Of The Order Is Not Justiciable

Plaintiffs fail to satisfy bedrock requirements of Article III standing and ripeness. Moreover, in the particular circumstances presented here, their Establishment Clause claim is foreclosed by prudential-standing limitations and consular-nonreviewability principles. Accordingly, this Court should reverse the preliminary injunction, wholly apart from the merits.

A. Plaintiffs' Establishment Clause Claim Is Barred By Standing And Ripeness Requirements

Neither Hawaii nor Dr. Elshikh has demonstrated that Section 2 or Section 6 of the Order causes an "imminent," "concrete and particularized" injury, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992), that is "legally and judicially cognizable," *Raines v. Byrd*, 521 U.S. 811, 819 (1997). Additionally, most of their

claimed injuries are not ripe because they rest on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998).

1. Hawaii alleges injuries that are speculative, non-imminent, and non-cognizable

a. The district court principally held that Hawaii has standing because Section 2(c)'s entry suspension will prevent nationals of the six countries from attending or visiting the University of Hawaii as students or faculty. E.R. 9, 41-43. But Hawaii fails to make the requisite showing that such "possible future injur[ies]" are "certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (emphasis omitted).

First, Hawaii identifies no individual who has "concrete plans" to come to the University of Hawaii that have been impeded by Section 2(c). *Lujan*, 504 U.S. at 564. Hawaii alleges specific numbers of individuals from the covered countries who are currently studying or teaching under valid visas (and thus are not covered by the Order), but merely "anticipat[es]" that "future recruitment efforts * * * *may* be impacted" if unknown potential students or faculty from the covered countries wish to come to the university while Section 2(c) is still in effect. E.R. 120-22 (emphasis added); *see* E.R. 42 (district court discussing "any prospective recruits" who may be affected). "Such 'some day' intentions * * * do not support a finding of the 'actual or imminent' injury that [the Supreme Court's] cases require." *Lujan*, 504 U.S. at

564. That is especially true because the relevant intentions are not Hawaii's, but "the unfettered choices [of] independent actors" that "courts cannot presume * * * to predict." *Id.* at 562.

Second, it is "speculative" whether Section 2(c) would restrict any intended entry by potential students or faculty. *Lujan*, 504 U.S. at 561. Section 2(c) merely suspends entry for a 90-day period. Plaintiffs cannot show that it would affect, for instance, prospective students or faculty who would not arrive until "the coming school year." E.R. 120-21. Moreover, Section 2(c) is subject to "[c]ase-by-case waivers" in "appropriate * * * circumstances," including for some engaged in "study" or "business or professional obligations." Order § 3(c)(i), (iii). Unless and until a prospective student or faculty member requests a waiver and is denied, the university's injuries are not ripe because they assume "contingent future events that may not occur." *Texas*, 523 U.S. at 300. At a minimum, any suit must await final agency action denying a waiver and visa. *See* 5 U.S.C. § 704.[4]

Although the district court concluded that the asserted injuries to the University of Hawaii are "nearly indistinguishable" from the injuries before the

[4] The district court alternatively suggested that the University will be injured because students or faculty whose entry is not barred by Section 2(c) will nevertheless be "dissuad[ed]" from attending due to "the environment caused" by the Order and Revoked Order. E.R. 42, 122. That purported injury is speculative and not "fairly traceable" to the Order, because it results from the "personal choice" of the prospects who decline to attend. *McConnell v. FEC*, 540 U.S. 93, 228 (2003).

Washington stay panel, E.R. 9, 43, a comparison underscores the defects in Hawaii's submission. The panel found that Washington's public universities specifically identified "two visiting scholars," "three prospective employees," and "two medicine and science interns" with imminent travel plans who "were not permitted to enter the United States" because of the Revoked Order; and Minnesota's public universities identified existing "[s]tudents and faculty" who were "restricted from traveling" abroad because the Revoked Order would prevent them from returning. *Washington*, 847 F.3d at 1159-60. Hawaii has made no such showing.

b. The district court also held that Hawaii adduced sufficient evidence that the Order will reduce the State's revenues by causing a decline in tourism. E.R. 10, 44-45. This standing theory is even more speculative and attenuated. Hawaii identifies no person from the six countries who has concrete plans to visit Hawaii but is unable to do so because of Section 2(c)'s 90-day entry suspension. E.R. 98-100, 107-10. Hawaii's speculation that such individuals exist lacks record support. The district court focused on data that there were 122 fewer visitors from the Middle East and Africa in January 2017 than in January 2016. ER 44 (citing E.R. 98-99). But that slight decrease cannot plausibly be attributed to the Revoked Order, much less imputed to the Order, because (i) the Revoked Order was in effect only for the final few days of January 2017 and (ii) there are numerous other countries in the Middle East and Africa that may influence Hawaiian tourism far more than the

countries covered by the Orders. The court also credited the "expect[ation]" of a State official that the alleged "uncertainty" caused by the Orders "may depress tourism." E.R. 44 (citing E.R. 109-10). Mere "uncertainty" is neither "fairly traceable" to the Order nor "redressable" by a preliminary injunction against it. *Clapper*, 133 S. Ct. at 1147, 1151.

c. In addition, the State's alleged injuries are indisputably not caused by the provisions in Sections 2 and 6 for internal review of vetting procedures or the refugee-related provisions in Section 6. Those provisions have no effect on the State's university system or its tourist revenues. Indeed, plaintiffs' TRO briefing never specifically cited the refugee cap, and barely mentioned either the refugee suspension or the internal-review provisions.

d. Finally, there is an additional, fundamental defect in the State's asserted bases for standing. A person ordinarily lacks a "judicially cognizable interest" in enforcement or non-enforcement of the law against a third party, *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), including the immigration laws, *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984). That principle applies with special force where a State seeks to challenge the federal government's denial of entry to aliens abroad based on incidental consequences on the State's treasury or operations. The Constitution assigns the formation and implementation of immigration policy exclusively to the Legislative and Executive Branches of the National Government

precisely because immigration is an inherently national matter. *See Arizona v. United States*, 567 U.S. 387, 395 (2012); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). More generally, under our Constitution's structure of separate national and state sovereigns, the necessary autonomy of each is inconsistent with the notion that a State has a "legally and judicially cognizable" interest in avoiding the incidental financial or other consequences of the manner in which federal officials implement federal law. *Raines*, 521 U.S. at 819; *see id.* at 819-20 (suggesting that "standing inquiry" should be "especially rigorous" when "separation of powers" disputes are involved).

2. Dr. Elshikh alleges injuries that are either abstract or speculative and non-imminent

a. The district court held that Dr. Elshikh is injured by the Order based on his allegation that he is deeply saddened by the allegedly discriminatory message it conveys about Muslims. E.R. 11, 48 (quoting E.R. 93). That holding is foreclosed by Supreme Court and Circuit precedent.

The Supreme Court has "ma[de] clear" that "the stigmatizing injury often caused by racial [or other invidious] discrimination * * * accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Allen v. Wright*, 468 U.S. 737, 755 (1984), *abrogated on other grounds, Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). That rule fully applies to the Establishment Clause: "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 "even though the disagreement is phrased in constitutional terms" under the Establishment Clause. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86 (1982).

Likewise, this Court has emphasized that an "abstract stigmatic injury" resulting from the perception that government conduct turns individuals into "political outsiders" based on their religious affiliation does not confer standing. *Newdow v. Lefevre*, 598 F.3d 638, 643 (9th Cir. 2010) (quoting *Allen*, 468 U.S. at 755-56). Accordingly, this Court held that a plaintiff could not challenge a federal statute that "merely recognize[d] 'In God We Trust' [as] the national motto" but did not itself force the plaintiff to come into "unwelcome direct contact" with that motto. *Id.*; *accord Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1016 (9th Cir. 2010) (same, for federal statute that codifies the Pledge of Allegiance without mandating that anyone recite it).

To be sure, a plaintiff can sometimes suffer an intangible, "spiritual" injury from alleged Establishment Clause violations, such as schoolchildren who are "subjected to unwelcome religious exercises" or "forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 486 & n.22. Likewise, as the district court noted (E.R. 47), this Court has held that plaintiffs have standing to challenge

local-government speech that is disseminated where they reside, explicitly about a religious issue, and allegedly adverse to a particular religion. *Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d 1043, 1047, 1052 (9th Cir. 2010) (en banc) (city residents had standing to challenge city resolution condemning certain actions and beliefs of Catholic Church); *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1248, 1252 (9th Cir. 2007) (county resident had standing to challenge removal of Christian cross from county seal). But such cases are inapposite here. An Executive Order of the President is far removed from the more immediate exposure resulting from local-government speech, and the Order itself does not expose Dr. Elshikh personally to *any* religious exercise, message, or practice, because it says nothing about religion.

Dr. Elshikh cannot manufacture standing by "re-characteriz[ing]" his abstract injury from "government *action*" directed against others as personal injury from "a governmental *message* [concerning] religion" directed towards him. *In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008). That approach would "eviscerate well-settled standing limitations" in cases like *Valley Forge*, *Allen*, and *Newdow*, because it would "allow anyone who becomes aware of a government action that allegedly violates the Establishment Clause to sue over it on the ground that they are offended by the allegedly unconstitutional 'message' communicated by that action." *Id.*; *see Catholic League*, 624 F.3d at 1048 ("Had a Protestant in Pasadena brought

this suit, he would not have had standing."). Indeed, that approach would mean that the Order could be challenged by any Muslim in this country.

b. Dr. Elshikh also alleged that the Order injures him because Section 2(c) will bar his mother-in-law's entry to the country. E.R. 46-47 (citing E.R. 94-95). The district court noted the allegation but correctly did not find that he has a cognizable injury on that basis. E.R. 50-51. Dr. Elshikh's alleged injury is not ripe because his mother-in-law has not applied for a waiver and potentially might receive one under Section 3(c)(iv) as a "close family member" of Dr. Elshikh, his wife, and their children, who all are U.S. citizens. E.R. 50, 93. Moreover, it is speculative whether Section 2(c)'s 90-day entry suspension even would apply to his mother-in-law, because her visa-application interview had not been scheduled as of March 2, 2017; it is possible that, wholly apart from Section 2(c), she would not receive a visa (if at all) until after the expiration of Section 2(c)'s 90-day period. E.R. 94-95. At a minimum, this alleged injury cannot support standing to challenge Section 6's refugee-related provisions or Section 2's internal-review provisions, because they do not concern the mother-in-law's visa.

B. Plaintiffs' Establishment Clause Claim Is 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). Although this rule

has traditionally been framed as a "prudential standing" requirement, the Supreme Court recently reserved the question whether it is better characterized as a limitation on the "right of action on the claim." *Lexmark*, 134 S. Ct. at 1387 n.3. Regardless of the label, plaintiffs here fail to satisfy the substance of this well-established rule.

Starting first with the exception to the rule, plaintiffs cannot assert an Establishment Clause claim *on behalf of the third party aliens abroad* who are subject to Sections 2(c) and 6. 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 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 the aliens subject to the Order because those aliens have no "first party" rights. *Cf. Washington*, 847 F.3d at 1160, 1165.

Because the exception to the rule is inapplicable, plaintiffs can assert an Establishment Clause claim only if *their own rights* under that Clause are being violated. They are not. The State obviously has no religion, and it is alleging only institutional and financial injuries. Similarly, Dr. Elshikh's own religion is entirely immaterial to his alleged familial injuries from any purported discrimination against

his mother-in-law. Thus, neither Hawaii's nor Dr. Elshikh's own religious-freedom rights are implicated by how the Order treats aliens abroad seeking entry. *See McCollum v. Cal. Dep't 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"); *Smith v. Jefferson Cty. Bd. of School Comm'rs*, 641 F.3d 197, 207 (6th Cir. 2011) (en banc) (public-school teachers who sued school district for closing their specialized school and contracting with private religious school as replacement 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").[5]

[5] Neither the district court nor the *Washington* stay panel held otherwise. Like the *Washington* stay panel, the district court declined to decide whether a State has standing to bring an Establishment Clause claim on its own behalf, because it held that Dr. Elshikh had standing to bring his own Establishment Clause claim. E.R. 45 n.9. But it so held based on Dr. Elshikh's abstract stigmatic injury, which is not judicially cognizable. *Supra* pp. 26-29. And thus neither court decided whether a U.S. citizen's own Establishment Clause rights are at issue if, as is the case here, his claim depends on the treatment of a relative who is an alien abroad. *Id.*

C. Plaintiffs' Establishment Clause Claim Is Barred By Consular-Nonreviewability Principles

Longstanding principles reflected in the doctrine of consular nonreviewability also bar plaintiffs' Establishment Clause claim. "[T]he power to expel or exclude aliens" is "a fundamental sovereign attribute exercised by the Government's political departments" and thus "largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). "[T]he doctrine of consular nonreviewability," which well predated the INA, provides that the "decision to issue or withhold a visa," or to revoke one, for an alien abroad "is not subject to judicial review * * * unless Congress says otherwise." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999); *see id.* at 1158-60 (citing authorities); *Brownell v. Tom We Shung*, 352 U.S. 180, 184 n.3, 185 n.6 (1956). Far from saying otherwise, Congress has reaffirmed the doctrine: it has expressly forbidden "judicial review" of visa revocations (subject to a narrow exception), 8 U.S.C. § 1201(i), and it has not authorized any judicial review of visa denials, *see, e.g.*, 6 U.S.C. § 236(b)(1), (c)(1), (f); 8 U.S.C. § 1104(a)(1), even by the alien affected, much less by third parties like Hawaii or Dr. Elshikh.

To be sure, courts have recognized that limited review may be available to a U.S. citizen alleging that his own constitutional rights have been violated by the denial of a visa to an alien. *See, e.g.*, *Saavedra Bruno*, 197 F.3d at 1163-64 (distinguishing *Mandel* on these grounds); *see also Kerry v. Din*, 135 S. Ct. 2128

(2015) (distinguishable on same grounds); *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008) (same). And, as the *Washington* stay panel recognized, review is available for constitutional claims by aliens who have already entered the country and thus have constitutional rights. *Washington*, 847 F.3d at 1161-63. But review is not available here on either of those grounds: plaintiffs' Establishment Clause claim asserts that the Order discriminates against third parties who have no First Amendment rights—*i.e.*, aliens abroad seeking entry and who have not been denied visas.

II. Plaintiffs' Establishment Clause Claim Is Unlikely To Succeed On The Merits

Even if plaintiffs' Establishment Clause claim is justiciable, it is not likely to succeed. The district court erred by applying the wrong legal standard. It should have analyzed and upheld the Order under *Mandel* in light of the President's facially legitimate and bona fide reason for it. In any event, the court's analysis is untenable even aside from *Mandel*.

A. Plaintiffs' Establishment Clause Claim Fails Under *Mandel* Because The Order Rests On A Facially Legitimate, Bona Fide Reason

1. The Supreme Court has made clear that "when 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. That 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 core 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; *see United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

Mandel's rule governs plaintiffs' claims that the Executive's decision suspending entry of aliens violates the Establishment Clause. *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 on the basis of illegitimacy and sex in granting preferential immigration status. *See* 430 U.S. at 792-96. This Court also has applied

Mandel to reject claims that immigration policies constituted unlawful discrimination. *See, e.g.*, *Taniguchi v. Schultz*, 303 F.3d 950, 957-58 (9th Cir. 2003) (applying *Mandel* to reject equal-protection challenge to INA provision).

Contrary to the district court's apparent understanding, E.R. 6, the government does not argue that *Mandel* renders the Establishment Clause inapplicable. Nor does the government maintain that *Mandel* means no party may seek review of the Order. *Cf. Washington*, 847 F.3d at 1161. Rather, *Mandel* supplies the substantive standard for evaluating a challenge by a U.S. citizen who claims his own constitutional rights are violated by the exercise of Congress's or the Executive's authority to deny entry to aliens outside the United States. In *Mandel* itself, the Court found the statement of a "facially legitimate and bona fide reason" sufficient to reject a First Amendment challenge. 408 U.S. at 770. And in cases applying *Mandel* to statutes implementing broad immigration policies, this Court has viewed *Mandel*'s test as equivalent to rational-basis review. *See An Na Peng v. Holder*, 673 F.3d 1248, 1258 (9th Cir. 2012); *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1065 (9th Cir. 2003).[6]

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[6] *Mandel*'s substantive standard, which applies to challenges to decisions to deny entry to aliens at the Nation's borders, does not govern every issue concerning "substance and implementation of immigration policy," *Washington*, 847 F.3d at 1163—such as post-removal detention, *Zadvydas v. Davis*, 533 U.S. 678 (2001), or suspension of deportation, *INS v. Chadha*, 462 U.S. 919 (1983), of aliens present in the United States.

2. *Mandel*'s rule compels rejection of plaintiffs' claims because both Sections 2 and 6 are expressly premised on a facially legitimate, bona fide reason: protecting national security. With respect to Section 2, the President determined that a review of the Nation's screening and vetting procedures is necessary, and that a temporary pause in entry from six countries of concern is important to "prevent infiltration by foreign terrorists" and "reduce investigative burdens" while the review is ongoing. Order § 2(c). The six countries were chosen because they present heightened risks, which the Order explains; Congress or the Executive had previously identified each as presenting terrorism-related concerns. The risk of continued entry from those countries during the review was, in the President's judgment, "unacceptably high." *Id.* § 1(f).

Similarly, with respect to Section 6, the President determined that "[t]errorist groups have sought to infiltrate several nations through refugee programs." Order § 1(b)(iii). He concluded that a temporary suspension of the refugee program is necessary to allow the government "to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States." *Id.* § 6(a). Those national-security and terrorism-related aims, which are facially legitimate and bona fide, require rejecting plaintiffs' challenges to the Order.

3. The district court concluded that the Order likely violates the Establishment Clause because, despite its stated national-security objective, it was the product of "religious animus." E.R. 57. That conclusion is irreconcilable with Supreme Court precedent. 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. American-Arab Anti-Discrimination Comm. (AAADC)*, 525 U.S. 471, 491 (1999). Indeed, *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 it cannot search for ulterior motives in extrinsic material. *Id.* Likewise, the rational-basis rubric this Court applies in analyzing immigration statutes and policies under *Mandel*, *see An Na Peng*, 673 F.3d at 1258, asks only "whether the governmental body *could* have had no legitimate reason for its decision." *Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1162 (9th Cir. 1997) (internal quotation marks omitted).

At the most, separate opinions in one Supreme Court case have suggested that a court may question a consular officer's stated reason for denying a particular 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 fundamental rights. *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment); *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. Likewise, plaintiffs' own Establishment Clause rights are not violated by the denial of a visa to an alien abroad. *Supra* pp. 30-31.

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 this Court and other 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*. For example, as the Order explains, the Revoked Order had two provisions that were aimed at aiding victims of religious persecution. Order § 1(b)(iv). After this Court and others 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.

B. The District Court Erred By Declining To Apply *Mandel*'s Test

The district court mistakenly believed itself bound to disregard *Mandel* based on this Court's stay ruling in *Washington*. E.R. 56 (quoting 847 F.3d at 1167-68). This Court's discussion of *Mandel* was directed to whether the Revoked Order was judicially reviewable, which is not at issue here. *See Washington*, 847 F.3d at 1162-63. The Court did not hold that *Mandel*'s substantive standard is inapplicable to Establishment Clause claims. Indeed, this Court did not address *Mandel* at all in its brief discussion of plaintiffs' Establishment Clause challenge, on which the Court expressly "reserve[d] consideration." *Id.* at 1168.

The *Washington* stay ruling should not be construed as holding that *Mandel*'s substantive standard for constitutional challenges applies only to individualized visa-denial decisions, not broader policy determinations. *First*, both the Supreme Court and this Court have applied *Mandel* to policy decisions made by Congress. *See supra* pp. 34-35. According less deference to immigration-policy decisions made "at the highest levels" of government than those by lesser officials, *Washington*, 847 F.3d at 1162, would also be fundamentally inconsistent with the constitutional structure. "[T]he promulgation of broad policy is precisely what we expect the political branches to do; Presidents rarely, if ever, trouble themselves with decisions to admit or exclude individual visa-seekers." Am. Order, *Washington v. Trump*, No. 17-35105, slip op. at 13 (9th Cir. Mar. 17, 2017) (Bybee, J., dissenting

from denial of rehearing en banc) (*Washington* Bybee Dissent). It is in prescribing general policies where the political branches' expertise and constitutional prerogatives are at their zenith.

Second, it would be particularly inappropriate not to apply *Mandel* to immigration-policy decisions made by the President himself. The notion that a court "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." *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). In few areas is the President's authority greater than in matters involving foreign relations and national security. *See, e.g.*, *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414-15 (2003); *Knauff*, 338 U.S. at 542; *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). The President's power in this case, moreover, "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), through 8 U.S.C. § 1182(f) and § 1185(a)(1).

The President's "unique constitutional position" and "respect for the separation of powers" compel even greater solicitude for policy decisions made by

the President than those made by his subordinates. *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992). For example, unlike agencies' actions, the President's policy decisions are not reviewable under the APA, and courts "ha[ve] no jurisdiction * * * to enjoin the President in the performance of his official duties." *Id.* at 800-03 (plurality opinion) (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867)); *id.* at 823-28 (Scalia, J., concurring in part and concurring in the judgment). For similar reasons, a sitting President is absolutely immune from suits for damages "based on [his] official acts," *Fitzgerald*, 457 U.S. at 754, and from criminal prosecution, *see A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 222-23 (2000). And "[p]residential communications" are subject to a "presumptive privilege," which is "fundamental to the operation of Government and inextricably rooted in the separation of powers," and which has particular force in the context of national security. *United States v. Nixon*, 418 U.S. 683, 708, 710-11 (1974). The fact that the Order was issued by the President means that it should be afforded far greater, not lesser, deference than the decision of a consular officer.

Third, the Establishment Clause cases the district court applied in place of *Mandel*'s standard have no proper application to foreign-policy, national-security, and immigration judgments of the President. Those cases addressed domestic questions involving local zoning laws, school subsidies, and the like. *See* E.R.

53-56 (citing, *e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *Lemon*, 403 U.S. 602); E.R. 16. The "assumption that courts should simply plop Establishment Clause cases from the domestic context over to the foreign affairs context ignores the realities of our world." *Washington* Bybee Dissent 8 n.6. That approach arguably would subject "every foreign policy decision made by the political branches, including our dealings with various theocracies across the globe," to Establishment Clause scrutiny. Am. Order, *Washington*, No. 17-35105, slip op. at 3 n.2 (Kozinski, J., dissenting from denial of rehearing en banc) (*Washington* Kozinski Dissent). This Court should reject such extensive "intrusion of the judicial power into foreign affairs" committed to the political branches. *Id.*

C. The Order Is Valid Even Under The Establishment Clause Standards For Domestic Issues

1. The Order's text and purpose are religion-neutral

The district court's conclusion that the Order likely violates the Establishment Clause fails even on its own terms. "The touchstone" of Establishment Clause analysis is that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary*, 545 U.S. at 860. The district court correctly acknowledged that the Order "does not facially discriminate for or against any particular religion, or for or against religion versus non-religion," and does not "contain any term or phrase that can be reasonably

characterized as having a religious origin or connotation." E.R. 54. As noted, the only provisions in the Revoked Order touching on religion—provisions addressing the Refugee Program that were intended to assist victims of religious persecution—were removed.

The Order also was not adopted "with the ostensible and predominant purpose of advancing religion." *McCreary*, 545 U.S. at 860. Its explicit, religion-neutral objective is to address the risk that potential terrorists might exploit possible weaknesses in the Nation's screening and vetting procedures while the review of those procedures is underway. That "secular purpose" formally stated by the President for a facially neutral policy cannot properly be deemed a "sham" or "merely secondary to a religious objective." *Id.* at 864. In judging the government's true "object" in the context of a Free Exercise Clause claim, the Supreme Court has also looked to the law's "operation." *Lukumi*, 508 U.S. at 535. Here, the Order's "operation" confirms its stated purpose. The Order's entry suspension applies to six countries based on risk, not religion; and in those six countries, the suspension applies irrespective of any alien's religion. The Order's refugee suspension is equally neutral toward religion, applying to all refugees without regard to their religion. The remaining provisions of Sections 2 and 6, which concern only internal and diplomatic activities of the government, do not plausibly reflect an impermissible purpose.

The district court considered the Order's entry suspension religiously motivated because the six countries to which it applies "have overwhelmingly Muslim populations." E.R. 55. 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). They also represent a small fraction of the world's 50 Muslim-majority nations and only approximately 10% of the global Muslim population.[7] Moreover, the suspension covers *every* national of the six countries, including non-Muslim individuals, if they meet the Order's religion-neutral criteria.

The district court dismissed these aspects of the Order, rejecting "[t]he notion that one can demonstrate animus toward any group of people only by targeting all of them at once." E.R. 54. That misstates the government's position, which is that the six countries were selected for reasons unrelated to religion, and the mere fact that each country happens to have a Muslim majority does not mean that national-security measures affecting those countries are based on religious animus. Where the government acts, as here, on secular grounds, courts may not infer religious

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

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). The district court's approach threatens to hinder the Executive in dealing with particular nations with a dominant religion. *See Washington* Bybee Dissent 16-18; *Washington* Kozinski Dissent 3 n.2.[8]

2. The Order cannot be enjoined based on campaign statements and other unofficial comments

The district court also held that plaintiffs were likely to succeed on their Establishment Clause challenge based on extrinsic material that, in the court's view, suggests that the Order was motivated by religious animus. Specifically, the court inferred that the entry suspension is intended to target Muslims due to their religion

[8] The remaining provisions of Section 2 and 6, all of which the district court improperly enjoined, are not limited to the six designated countries. Section 6's refugee suspension and annual cap apply worldwide. Order § 6(a)-(b). The provisions of Sections 2 and 6 that concern only internal governmental operations likewise draw no distinction among countries. The district court nevertheless asserted that the refugee provisions reflect religious bias because "nearly half" of recent refugees are Muslim, and Section 2's provisions providing for a review of internal procedures are "permeated" with the same "religious objective." E.R. 20-21 & n.6. That loose, limitless reasoning could subject virtually any foreign-policy decision to allegations of religious animus.

based on statements by the President—nearly all made before assuming office, while still a private citizen and political candidate—and informal remarks of advisors or aides. E.R. 57-60 & n.14. The court's reliance on such statements in the face of a religion-neutral Order is fundamentally wrong for at least three reasons.

a. Under the Constitution's separation of powers, courts evaluating a presidential policy decision 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).

Mandel's justifications for accepting the Executive's facially legitimate, bona fide judgments regarding the exclusion of aliens also require crediting the text and operation of the President's Order. Probing the President's grounds for immigration policies would thrust "ill equipped" courts into the untenable position of evaluating the "adequacy" and "authenticity" of the Executive's reasons underlying its foreign-affairs and national-security judgments. *AAADC*, 525 U.S. at 491. Such a rule also

would invite impermissible intrusion on privileged internal Executive Branch deliberations, *see Nixon*, 418 U.S. at 708, and potentially litigant-driven discovery that would disrupt the President's execution of the laws, *see Fitzgerald*, 457 U.S. at 749-50. Indeed, the plaintiffs in *Washington* have notified the government that they want nearly a year of discovery, including up to 30 depositions of White House staff and Cabinet-level officials. *See* Joint Status Report & Discovery Plan at 5-13, *Washington v. Trump*, No. 17-141 (W.D. Wash. Apr. 5, 2017) (ECF No. 177). This Court should reject a rule that invites such probing of the Chief Executive's subjective views.

b. Even in the ordinary 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 (citation omitted). Searching for governmental purpose outside the operative terms of governmental action and official pronouncements is fraught with practical "pitfalls" and "hazards" that would make courts' task "extremely difficult." *Palmer v. Thompson*, 403 U.S. 217, 224 (1971). And it makes no sense in the Establishment Clause context, because it is only an "official objective" of favoring or disfavoring religion that implicates the Clause. *McCreary*, 545 U.S. at 862; *see Board of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 249 (1990) (plurality opinion)

("[W]hat is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law.") (emphasis in original); *Trunk v. City of San Diego*, 629 F.3d 1099, 1108 (9th Cir. 2011) ("[W]e must defer to Congress's stated reasons if a plausible secular purpose may be discerned from the face of the statute.").

Despite acknowledging this important limitation on Establishment Clause analysis, E.R. 58, the district court failed to apply it. Instead, the court effectively misread *McCreary* to allow inquiry into "the veiled psyche" of the President and his advisors. 545 U.S. at 863. *McCreary* involved display of the Ten Commandments, which, unlike the Order, have explicitly religious content. Even then, *McCreary*'s analysis centered on the text of the resolutions the counties serially adopted authorizing the displays, objective features of those displays, and materials that government actors deliberately made part of the official record, such as testimony of the county executive's pastor. *Id.* at 868-74. The religious purpose of the original Ten Commandments display was readily evident at the outset from the resolution authorizing it. *Id.* at 868-69. The counties' second resolution compounded the problem, making the religious aim even more explicit. *Id.* at 870. The counties' third and final display was created "without a new resolution or repeal of the old one," the display itself still displayed a "sectarian spirit," and it "quoted more of the

purely religious language of the Commandments than the first two displays had done." *Id.* at 870, 872.

McCreary thus held that the final display's "purpose * * * need[ed] to be understood in light of context," and the context of the counties' prior official actions made their objective clear. 545 U.S. at 874. Even then, the Court disclaimed any holding that "the Counties' past actions forever taint any effort on their part to deal with the subject matter." *Id.* at 873-74. Moreover, the Court expressly described its previous cases as resting on analysis of objective factors directly related to the law at issue: "In each case, the government's action was held unconstitutional only because openly available data"—a law's text or obvious effects, the policy it replaced, official public statements of the law's purpose, or "comparable official act[s]"—"supported a commonsense conclusion that a religious objective permeated the government's action." *Id.* at 862-63; *see Lukumi*, 508 U.S. at 534-35. The President's Order, in contrast, conveys no religious message and was revised to eliminate any misperception of religious purpose. And it reflects the considered views of the Attorney General and Secretaries of Homeland Security and State, whose motives have not been impugned. Official context thus confirms its secular, national-security purpose.

c. Even if courts could look beyond official acts and statements to identify governmental purpose, they may not rely (as the district court did 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. Courts thus have correctly 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 County*, 628 F.3d 140, 147 (4th Cir. 2010); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1031 (10th Cir. 2008); *Modrovich v. Allegheny County*, 385 F.3d 397, 411-12 (3d Cir. 2004).

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 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); *Washington* Kozinski Dissent 4-5. And 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).

Permitting consideration of campaign statements also would encourage scrutiny of 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 such campaign statements could form the basis for an Establishment Clause challenge to a facially neutral law, numerous important laws could be subject to challenge.

The district court reasoned that the fact that statements were made "during a campaign does not wipe them from the reasonable memory of a reasonable observer." E.R. 17 n.5 (internal quotation marks omitted). The problem with campaign statements is not that they are necessarily fleeting, but that they prove nothing about the official objective underlying subsequent action. Attempting to assess what campaign statements reveal about the motivation for later action would "mire [courts] in a swamp of unworkable litigation," forcing them to wrestle with intractable questions, including the level of generality at which a statement must be made, by whom, and how long after its utterance the statement remains probative. *Washington* Kozinski Dissent 5. That approach would inevitably devolve into the "judicial psychoanalysis" of a candidate's "heart of hearts" that *McCreary* repudiated. 545 U.S. at 862.

This case illustrates these difficulties. Nearly all of the President's statements relied on by the district court in entering the TRO were made before the President

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 President. Those statements also preceded the President's formation of a new Administration and his consultation with 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.[9]

If the Court were to consider "informal statements" at all, it should reject "open season on anything a politician or his staff may have said," and instead should "[l]imit[] the evidentiary universe to activities undertaken while crafting [the] official policy" at issue. *Washington* Kozinski Dissent 6. Here, none of the statements the district court canvassed was part of the Executive's process of developing the Order. Most were made long before even the Revoked Order that

[9] The district court discussed one statement by the President after taking office that characterized the new Order as "a watered-down version of" the Revoked Order. E.R. 18. But that informal statement—which was not part of the official process in issuing the new Order—does not display any religious bias. It merely reflects the fact that the new Order seeks to achieve similar national security goals as the original Order, as narrowed to account for the *Washington* Court's concerns.

the Order replaced. None referred to Section 2(c)'s 90-day entry suspension, and none in substance corresponds to that policy: a short, temporary suspension of entry of nationals from specific countries previously identified by Congress and the Executive as presenting special terrorism-related concerns bears no resemblance to a "Muslim ban."

The district court itself acknowledged that "past conduct" need not "forever taint any effort by [the Administration] to address the security concerns of the nation." E.R. 62. The court suggested that it might consider the "context" to have "change[d]" if the President were to "take affirmative actions to neutralize the endorsement message so that 'adherence to religion is not relevant in any way to a person's standing in the political community.'" E.R. 62-63 (brackets and citation omitted). But the President *did* make significant changes in the new Order. *See Sarsour*, 2017 WL 1113305, at *12 ("[T]he 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."). None of the statements at issue thus provides a basis for disregarding the Order's stated secular objective.[10]

III. The Balance Of Equities Weighs Strongly Against Enjoining The Order

The remaining preliminary-injunction factors independently require reversal. The injunction causes direct, irreparable injury to the interests of the government and the public (which merge here, *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*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). That principle applies with special force here. The Supreme Court has repeatedly stressed the breadth and significance of the President's power to protect national security on behalf of the entire United States, both on his own and particularly when authorized by Congress. *Supra* pp. 33-34, 40-41.

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[10] The district court cited a statement by a presidential adviser made before the new Order was adopted describing the then-forthcoming Order as serving the "same basic policy outcome" as the Revoked Order. E.R. 59-60. That remark reflects no improper religious purpose. As the Order itself explains, both it 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, and the differences between it and the Revoked Order are clear on the face of the documents.

Moreover, the Order sets forth detailed considerations underlying the President's assessment that the national-security risk warrants the review of procedures, and the related temporary entry suspension and refugee restrictions, required by Sections 2 and 6. Order § 1(d)-(f), (h)-(i). This responds to the *Washington* stay panel's inquiry into the support for the President's rationale. 847 F.3d at 1168. Remarkably, the district court discounted the harm its injunction poses to the governmental and public interest based on what it deemed "the questionable evidence supporting the Government's national security motivations." E.R. 66. That holding contravenes the Supreme Court's admonition that the political branches' "[p]redictive judgment[s]" on matters of foreign policy and national security are entitled to the utmost deference. *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988). Courts should not second-guess the Executive's determination that "a preventive measure" in this area is necessary to address a particular risk. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010); *see AAADC*, 525 U.S. at 491.

By contrast, plaintiffs were required but failed to "demonstrate that irreparable injury is *likely* in the absence of an injunction" during the short period that Sections 2 and 6 of the Order would be in effect. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Even if plaintiffs had demonstrated cognizable injury, *but see supra* pp. 22-29, the potential temporary delay in the entry of Dr. Elshikh's mother-in-law, a few university students and faculty, and some tourists—all of

whom lack substantial connections to this country—does not constitute *irreparable* harm to plaintiffs. The district court did not meaningfully suggest otherwise, reasoning instead that "irreparable harm may be *presumed* with the finding of a violation of the First Amendment." E.R. 18, 64. But although this Court has applied that principle in cases involving freedom of speech and expression, it has not applied it to claims under the Establishment Clause. In any event, the principle does not apply here: that Clause does not confer any rights on the only persons subject to the Order—aliens abroad without substantial connections to this country—and the Order does not affect the plaintiffs' own Establishment Clause rights. *Supra* pp. 30-31. In sum, balancing the respective interests, the district court's injunction was clearly unwarranted.

IV. The District Court's Nationwide Injunction Barring Enforcement Of Sections 2 And 6 Of The Order Is Improper

Finally, even if some injunctive relief were appropriate, the nationwide injunction that the district court entered is vastly overbroad. At the threshold, the injunction violates the 150-year-old rule that federal courts cannot issue an injunction that runs against the President himself. *Johnson*, 71 U.S. (4 Wall.) at 501. In addition, the district court could not validly enjoin Sections 2 and 6 on the premise that they are facially unlawful, because plaintiffs have not carried their burden of showing that "no set of circumstances exists under which the [Order] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Sections 2 and 6 are

clearly lawful as applied to some aliens—for example, aliens abroad with no sufficient connection to the country or to a U.S. citizen or resident.

Beyond those threshold problems, the injunction's broad scope—barring enforcement of Sections 2 and 6 in their entirety, as to all persons nationwide—violates the well-settled rule that injunctive relief must be limited to addressing the individual plaintiffs' own cognizable, irreparable injuries. Both Article III and well-settled principles of equity require that injunctive relief "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) (Article III); *see Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (equitable principles); *see also Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004) (per curiam). This Court has repeatedly vacated or narrowed injunctions that were broader than necessary to redress the plaintiff's specific harm pending further proceedings. *See, e.g.*, *Stormans*, 586 F.3d at 1140; *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 146, 1480 (9th Cir. 1994). The injunction here contravenes that rule in at least two ways.

First, the injunction improperly enjoins enforcement of parts of Sections 2 and 6 that are unrelated to any alleged harm to plaintiffs—many of which plaintiffs never specifically challenged below. Both Sections 2 and 6 contain provisions that pertain solely to internal government operations—for example, directing federal agencies to review their own internal procedures, make recommendations and

update policies, and initiate inter-governmental diplomatic and official communications. Such provisions could not plausibly harm plaintiffs. Indeed, plaintiffs never specifically argued that these provisions are unlawful or injurious apart from generically assailing Sections 2 and 6 in their entirety. Enjoining them is thus plainly improper.

Likewise, Section 6's refugee provisions, including those temporarily suspending the refugee program (§ 6(a)) and adopting a 50,000-per-year refugee cap (§ 6(b)), cause no injury to plaintiffs. Indeed, plaintiffs' TRO briefing never specifically cited Section 6(b)'s refugee cap. Moreover, neither Hawaii nor Dr. Elshikh claims any harm from Section 6(b)'s 50,000-per-year refugee cap, and neither demonstrates any concrete harm from the temporary refugee suspension. *Supra* pp. 25, 29. As the Maryland district court's ruling reflects, there is no plausible basis for enjoining provisions other than Section 2(c). *See IRAP*, 2017 WL 1018235, at *18.

The district court nevertheless declined to narrow its injunction to exclude these provisions "because the entirety of the Executive Order runs afoul of the Establishment Clause." E.R. 20. That reasoning erroneously conflates the breadth of the plaintiff's legal theory with what is necessary to remedy the plaintiff's irreparable injury. *See Lewis*, 518 U.S. at 357; *Meinhold*, 34 F.3d at 1480. The court also asserted that the government had not "provide[d] a workable framework for

narrowing [the injunction's] scope" for the internal-review provisions. E.R. 22. But the court did not address the government's detailed explanation why each subsection at issue aside from Section 2(c) concerns solely internal or diplomatic matters and does not harm plaintiffs. ECF No. 251, at 4-7, 25-27.

Second, even as to Section 2(c)'s entry suspension, the district court erred by enjoining it as to all persons everywhere, rather than redressing only plaintiffs' particular cognizable injuries that are found to result from a violation of plaintiffs' own rights. In particular for Dr. Elshikh, even assuming that the possible delay in his mother-in-law's ability to travel to Hawaii were a cognizable, irreparable injury, it would be fully redressed by enjoining the Order's application to her. The same would be true for Hawaii with respect to any particular students, faculty, or tourists adversely affected by Section 2(c) whom Hawaii could identify. The injunction barring application of Section 2(c) to any alien thus is far broader than "necessary to provide complete relief to the plaintiffs." *Madsen*, 512 U.S. at 765; *see Meinhold*, 34 F.3d at 1480 (vacating injunction of federal policy as to all persons except plaintiff). It also threatens "substantial interference" with other courts' ability to address the same issues. *United States v. AMC Entm't*, 549 F.3d 760, 770 (9th Cir. 2008).

The court defended this overbreadth in part by citing (E.R. 20) the *Washington* stay ruling and *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct.

2271 (2016), which stressed the importance of uniform immigration policy. But respect for uniformity—and for the Constitution's and Congress's vesting of authority over the Nation's borders in the Executive—requires leaving the Order's nationwide policy in place, with individualized exceptions for any particular alien as to whom plaintiffs establish irreparable injury based on a likely violation of plaintiffs' own constitutional rights. Finally, *Washington* recognized that the injunction there "might be overbroad," but declined to narrow the injunction because doing so would require "rewrit[ing] the Executive Order." 847 F.3d at 1167. Here, however, limiting the injunction to redressing the cognizable and irreparable harms to particular individuals requires no rewriting of the Order, as the severability clause makes clear. *See* Order § 15(a).

CONCLUSION

For these reasons, the district court's preliminary injunction should be vacated. At a minimum, the injunction should be vacated and remanded with instructions to narrow it in accordance with the principles set forth above.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-volume limitations of Rule 32(a)(7)(B). The brief contains 13,981 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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