UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ARAB AMERICAN CIVIL RIGHTS LEAGUE, *et al.*,

Plaintiffs,

Case No. 17-10310

v.

Hon. Victoria A. Roberts

DONALD TRUMP, President of the United States, *et al.*,

Oral Argument Requested

Defendants.
_____/

DEFENDANTS' MOTION TO DISMISS

Defendants, President Donald J. Trump, in his official capacity; the United States Department of Homeland Security ("DHS"); U.S. Customs and Border Protection ("CBP"); U.S. Citizenship and Immigration Services ("USCIS"); the United States Department of State; the United States Department of Justice; the Office of the Director of National Intelligence; Secretary of Homeland Security John F. Kelly, in his official capacity; acting CBP Commissioner Kevin K. McAleenan, in his official capacity; Acting USCIS Director Lori Scialabba, in her official capacity; Secretary of State Rex W. Tillerson, in his official capacity; Attorney General Jefferson B. Sessions III, in his official capacity; Director of National Intelligence Dan

Coats,[1] in his official capacity; and the United States of America, through their attorneys, file this Motion to Dismiss pursuant to Fed. R. Civ. P. 12.

1. Plaintiffs filed their Second Amended Complaint (ECF No. 41) (hereinafter, "Plaintiffs' Complaint") on March 16, 2017 seeking to strike down and enjoin Executive Order 13,780, 82 Fed. Reg. 13,209 (2017) in its entirety.

2. For the reasons set forth in the accompanying brief, Plaintiffs' Complaint should be dismissed.

3. This motion is being filed pursuant to the schedule set in this matter on March 31, 2017 in this Court's Order Granting the Parties' Stipulated Motion for a Fourteen Day Extension of Time for Defendants to Answer or File Response. (ECF No. 68.) On April 12, 2017, Plaintiffs' attorneys were contacted by telephone in order to seek concurrence in this motion pursuant to E.D. Mich. LCR 7.1. The parties could not come to any agreement regarding the relief requested; hence, the need to file this motion and its accompanying memorandum.

[1] On March 16, 2017, Dan Coats was sworn in as the Director of National Intelligence of the United States of America, automatically substituting for Michael P. Dempsey, former acting Director of National Intelligence, as a party in accordance with Federal Rule of Civil Procedure 25(d).

RELIEF REQUESTED

WHEREFORE, for the reasons set forth in the accompanying brief, Defendants respectfully request that this Court dismiss Plaintiffs' Complaint with prejudice.

Respectfully submitted,

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Dated: April 17, 2017

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FOR THE EASTERN DISTRICT OF MICHIGAN
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ARAB AMERICAN CIVIL RIGHTS LEAGUE, *et al.*,

Plaintiffs,

v.

DONALD TRUMP, President of the United States; **U.S. DEPARTMENT OF HOMELAND SECURITY** ("DHS"); **U.S. CUSTOMS AND BORDER PROTECTION** ("CBP"); **U.S. CITIZENSHIP AND IMMIGRATION SERVICES** ("USCIS"); **U.S. DEPARTMENT OF STATE**; **U.S. DEPARTMENT OF JUSTICE**; **OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE**; **JOHN KELLY**, Secretary of Homeland Security; **KEVIN K. MCALEENAN**, Acting Commissioner of CBP; **LORI SCIALABBA**, Acting Director of USCIS; **REX W. TILLERSON**, Secretary of State; **JEFFERSON B. SESSIONS III**, U.S. Attorney General; **MICHAEL DEMPSEY**, Acting Director of National Intelligence; and the **UNITED STATES OF AMERICA**,

Defendants.
_____/

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DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Defendants submit this brief in support of their Motion to Dismiss (ECF No. 76) Plaintiffs' Second Amended Complaint (ECF No. 41) ("Plaintiffs' Complaint"). Although Plaintiffs seek to enjoin and declare Executive Order 13,780 ("Order"), 82 Fed. Reg. 13,209 (2017) "[a]s unlawful and invalid," it is Plaintiffs' Complaint that should be dismissed in its entirety because their claims are not justiciable and fail on the merits. At a minimum, the portions of Plaintiffs' Complaint seeking to enjoin the Order beyond Section 2(c) should be dismissed because Plaintiffs lack standing to challenge the other provisions.

Plaintiffs' claims are not justiciable because the individual plaintiffs—eight citizens and one lawful permanent resident ("LPR") of the United States—cannot demonstrate any cognizable injury fairly traceable to the Order unless and until their alien relatives on whose behalf they filed immigrant petitions have been found eligible for a visa and denied a waiver. The organizational plaintiffs also lack standing because they lack associational standing and have failed to name anyone subject to the Order whom they wish to invite, let alone denied a waiver.

Furthermore, Plaintiffs' claims fail on the merits. The Immigration and Nationality Act ("INA") grants the President broad authority that plainly encompasses the Order's temporary suspension-of-entry provisions. And

Plaintiffs' argument that this suspension violates their constitutional rights fails because the President's national security justification provides "a facially legitimate and bona fide reason" for the Order. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). Case law makes clear that the Order must be judged by what it says and does—not by what supposedly lies in the hearts of its drafters. Finally, Plaintiffs present a First Amendment "right to receive information" claim that is also foreclosed by *Mandel*. *See Almario v. Atty. Gen.*, 872 F.2d 147, 151 (6th Cir. 1989) ("[T]his court is … limited in its review of [immigration policies because] … *Kleindienst* … requires that we exercise a very narrow standard of review assuming the classification at issue … is supported by a facially legitimate and *bona fide* reason"). For these reasons, this Court should dismiss Plaintiffs' Complaint.

BACKGROUND OF THE ORDER

Under the INA, an alien seeking entry into the United States generally must present a valid immigrant or nonimmigrant visa or other travel document, in addition to satisfying other criteria. *See* 8 U.S.C. §§ 1181, 1182(a)(7)(A)(i), (B)(i)(II), 1203.[1] The process of applying for a visa typically includes an in-person

[1] To enter and remain in the United States lawfully, Congress generally requires (as a precondition to admission in immigrant or non-immigrant status)

interview and results in a decision by a State Department consular officer. *Id.* at §§ 1201(a)(1), 1202, 1204. Eligibility for a visa depends on many factors, including nationality. *See, e.g.*, *id.* at §§ 1184(e), 1735. The INA also grants the President broad discretion to restrict or suspend the entry of certain classes of aliens. First, 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 by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

Second, Section 1185(a)(1) makes it unlawful for an alien to enter or attempt to enter the country "except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe."

On January 27, 2017, the President issued the Revoked Order. Courts across the country, including this one, weighed in on it, *compare Louhghalam v.Trump*,

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each alien to possess a valid visa. *See* 8 U.S.C. §§ 1182(a)(7)(A)&(B); *Montgomery v. Ffrench*, 299 F.2d 730, 734 (8th Cir. 1962) ("Admission of an alien to this country is not a right but a privilege which is granted only upon such terms as the United States prescribes."). There are several ways to obtain "immigrant visas" that would allow the recipients to become LPRs following admission. One way for an alien to receive an immigrant visa—the way relevant to Plaintiffs' Complaint—is to have a United States citizen or LPR file a Form I-130 *Petition for Alien Relative* ("petition") with the USCIS on the alien's behalf. Once approved, the petition will classify the intended beneficiary under one of the congressionally-

— F. Supp. 3d —, 2017 WL 479779 (D. Mass. Feb. 3, 2017) (denying a preliminary injunction), *with Washington v. Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017) (per curiam) (declining to stay an injunction); *and* Order, ECF No. 8. In the light of these judicial decisions, the President re-examined the national security circumstances giving rise to the Order to determine whether they could be addressed in a manner consistent with these decisions. Addressing the courts' decisions, and at the urging of the Attorney General and Secretary of Homeland Security,[2] the President issued the Order on March 6, 2017. The Order took effect and replaced the Revoked Order on March 16.

The Order's purpose is to enable the assessment of whether current screening and vetting procedures are sufficient to detect potential terrorists seeking to infiltrate the nation. Order at § 1(f). The President thus ordered a temporary, 90-day suspension on entry of certain foreign nationals from six nations previously "identified as presenting heightened concerns about terrorism and travel to the United States" in 2015 and 2016: Iran, Libya, Somalia, Sudan, Syria, and Yemen. *Id*. at § 1(a), (d)–(f).[3]

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created immigrant relative categories within the INA. *See* 8 C.F.R. § 204.1(a)(1).

[2] Joint Ltr. to President (Mar. 6, 2017), https://www.dhs.gov/sites/default/files/publications/17_0306_S1_DHS-DOJ-POTUS-letter_0.pdf.

[3] The Visa Waiver Program enables certain nationals of participating

Each of the six designated countries "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones." Order at §1(d). The Order details how each country presents "heightened risk[s]" that terrorists from those countries could enter the United States and that their governments may lack the "willingness or ability to share or validate important information about individuals seeking to travel to the United States" to screen them properly. To that end, the Order "suspend[s] for 90 days" the "entry into the United States of nationals of those six countries." Order at § 2(c). In response to court rulings concerning the Revoked Order, however, the Order excludes other categories of aliens and 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 at 5:00 p.m. (EST) on January 27, 2017. Order at § 3(a).

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countries to seek temporary admission without first obtaining a visa. 8 U.S.C. §§ 1182(a)(7)(B)(iv), 1187. In 2015, however, Congress excluded individuals from certain Visa Waiver Program-participating countries from visa-free travel. *Id.* at § 1187(a)(12). In February 2016, DHS also excluded recent visitors to Libya, Somalia, and Yemen from benefitting from the program. In short, Congress and DHS determined that conditions in the seven countries warranted more scrutiny. The Order notably excludes Iraq because "since Executive Order 13769 was issued, the Iraqi government has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal." Order at § 1(g).

The Order also contains a detailed waiver provision. Order at § 3(c). It permits consular officers (and the Commissioner of U.S. Customs and Border Protection or his delegee) 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." *Id*. Waivers may be appropriate for:

- foreign nationals who were previously "admitted to the United States for a continuous period of work, study, or other long-term activity," but who are currently outside the country and seeking to reenter;
- individuals who seek entry for "significant business or professional obligations"; and
- 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."

Waiver requests will be reviewed "as part of the visa issuance process." Order at § 3(c); *see also* U.S. Dep't of State, *Executive Order on Visas* (Mar. 22, 2017), https://travel.state.gov/content/travel/en/news/important-announcement.html. Individuals may provide consular officers with information relevant to eligibility for a waiver during a visa-application interview.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs' Complaint was filed on March 16.[4] The nine individual plaintiffs reside in the United States and are petitioning for their immediate relatives

[4] On March 15, 2017, the District Court for the District of Hawaii enjoined

(spouses, fiancés, parents, or minors), who are nationals of one of the designated countries, to apply for immigrant visas overseas.[5] The five organizational plaintiffs seek to represent the interests of the individual plaintiffs or their own free speech interest in bringing nationals of the designated countries to the United States.

LEGAL STANDARD

A party may seek dismissal of an action by challenging subject matter jurisdiction under Rule 12(b)(1), at which point the plaintiff bears the burden of proving jurisdiction. *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1130 (6th Cir. 1996). A challenge to standing addresses a court's subject matter jurisdiction. *Kepley v. Lanz*, 715 F.3d 969, 972 (6th Cir. 2013). A court may not exercise jurisdiction if a claimant lacks standing or the claim is unripe. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Under Rule 12(b)(1), a court may "resolve factual disputes when necessary to resolve challenges to subject matter

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enforcement of Sections 2 and 6 of the Order nationwide. *See Hawai'i v. Trump*, No. 17-cv-50, 2017 WL 1011673, at *1 (D. Haw. Mar. 15, 2017). A day later, the District Court for the District of Maryland entered a nationwide preliminary injunction against enforcement of Section 2(c) of the Order. *See Int'l Refugee Assistance Project v. Trump*, No. 17-cv-361, 2017 WL 1018235, at *18 (D. Md. Mar. 16, 2017). Defendants have appealed both decisions.

[5] The issuance or denial of a visa application is for each consular officer, 8 U.S.C. § 1201(a)(1), but even that does not guarantee entry, *id.* at §§ 1154(e), 1201(h), which is ultimately a decision for CBP officers.

jurisdiction," *Kepley*, 715 F.3d at 972, and weigh evidence to determine its power to hear the case, *United States v. Ritchie,* 15 F.3d 592, 598 (6th Cir. 1994).

Rules 12(c) and (b)(6) allow district courts to dismiss a complaint on the pleadings or for failure "to state a claim upon which relief can be granted." To survive a motion to dismiss under either, a plaintiff must show that his complaint alleges facts which, if proven, would entitle him to relief, *First Am. Title Co. v. DeVaugh*, 480 F.3d 438, 443 (6th Cir. 2007); *see also Grindstaff v. Green,* 133 F.3d 416, 421 (6th Cir. 1998), which requires showing "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This standard imposes both legal and factual demands upon plaintiffs. *16630 Southfield Ltd. P'ship v. Flagstar Bank, FSB*, 727 F.3d 502, 503 (6th Cir. 2013). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "The plausibility of an inference depends on a host of considerations, including common sense and the strength of competing explanations for the defendant's conduct." *Flagstar*, 727 F.3d at 505. This prevents costly discovery. *Id.* (citing *Twombly*, 550 U.S. at 558). Regardless,

courts may dismiss claims not legally cognizable. *See, e.g.*, *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007).

ARGUMENT

I. Plaintiffs' Challenges To The Order Are Not Justiciable.

Plaintiffs' claims either lack Article III or prudential standing, or are not yet ripe. Plaintiffs fail to demonstrate a "legally and judicially cognizable" injury, *Raines v. Byrd*, 521 U.S. 811, 819 (1997), consisting of, at minimum, a "concrete and particularized" injury that is "actual or imminent, not conjectural or hypothetical," *Lujan*, 504 U.S. at 560–61. Moreover, Plaintiffs fail to demonstrate standing for each claim and form of relief sought. *See Davis v. FEC*, 554 U.S. 724, 734 (2008). Plaintiffs cannot even show that the Order is unconstitutional as applied to them, rendering any facial challenge nonjusticiable. *See, e.g.*, *Mathews v. Ohio Pub. Emp. Ret. Sys.*, 91 F. Supp. 3d 989, 1005–06 (S.D. Ohio 2015).

First, the petitioner plaintiffs lack standing to challenge on their own behalf (or on the behalf of their beneficiary family members) any visa denials under the Order. They cannot claim standing under the guise of pursuing the interests of their beneficiary family members because principles of consular nonreviewability have long provided that an alien abroad cannot obtain judicial review of the denial of a visa. *See, e.g.*, *Brownell v. Tom We Shung*, 352 U.S. 180, 184 n.3, 185 n.6 (1956);

Bangura v. Hansen, 434 F.3d 487, 492, 501–02 (6th Cir. 2006). They similarly cannot claim to be bringing suit to defend their own interests in the granting of a visa to a family member. The Sixth Circuit in *Bangura* clarified that a petitioning U.S. citizen spouse's due process claim must fail regarding denial of the same visa because the "denial of an immediate relative visa does not infringe upon the right to marry." *Id.* at 496. Plaintiffs' claims are foreclosed by the same principles of nonreviewability. *Cf. United States ex rel. London v. Phelps*, 22 F.2d 288, 290 (2d Cir. 1927) ("Whether the consul has acted reasonably or unreasonably is not for us to determine. Unjustifiable refusal to visé a passport may be ground for diplomatic complaint …. [But i]t is beyond the jurisdiction of the court." (citation omitted)).

Second, to the extent Plaintiffs challenge alleged delays to the visa application process caused by the Order, such delay (even if the aliens are otherwise eligible for visas) does not confer standing. *See Kodra v. Sec'y, Dep't of State*, 903 F. Supp. 2d 1323, 1327 (M.D. Fla. 2012). Yet, here, that is precisely what Plaintiffs complain of: they seek to challenge the Order's temporary, 90-day suspension on entry, which is subject to waivers even during that brief period.

Third, even if the petitioner plaintiffs had standing with respect to visa denials, their claims are not ripe because no visas have been denied. "The doctrine[] of ... ripeness ... originate[s] in Article III's 'case' or 'controversy'

language, no less than standing does." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 351 (2006). Ripeness ensures that courts "avoid[] ... premature adjudication," particularly where future agency decision-making or factual determinations may change the character of the controversy or obviate the need for judicial relief altogether. *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2009). Here, Plaintiffs' allegations indicate their claims are unripe. Their relatives in the designated countries appear to be potentially eligible for a waiver under the Order. *See* Order at §§ 3(c)(iv), 6(c). Unless and until they are actually denied a visa, their ability to seek entry—and thus their alleged injury—"rests upon 'contingent future events.'" *Texas v. United States*, 523 U.S. 296, 300 (1998). Simply put, *potential* difficulties in entry are insufficient because they are merely "possible future injur[ies]," much less injuries that are "certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (emphasis omitted).

Any attempt to demonstrate standing based on the Establishment Clause similarly fails. With such claims, a plaintiff cannot establish standing without showing a personal injury beyond "the psychological consequence presumably produced by observation of conduct with which one disagrees." *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485–86 (1982). Plaintiffs, rather, must demonstrate a "particular and concrete

injury to a personal constitutional right." *Id.* at 482. This, for example, could include a "direct harm of what is claimed to be an establishment of religion, such as a mandatory prayer in a public school classroom," or that Plaintiffs "have incurred a cost or been denied a benefit on account of their religion," such as "when the availability of a tax exemption is conditioned on religious affiliation." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133–34 (2011); *see also Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815, 820–21 (7th Cir. 2014); *Catholic League for Religious & Civ. Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1049–50 (9th Cir. 2010) (en banc).

Neither the individual nor organizational plaintiffs make such a showing here. First, they cannot demonstrate "direct harm" because the Order does not require Plaintiffs to "see or do anything." *Lew*, 773 F.3d at 820; *see also Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1016 (9th Cir. 2010) (no standing to challenge Pledge of Allegiance because "nothing in the Pledge [or the statute codifying it] actually requires anyone to recite it"). In other words, the Order does not "convey[] a government message of disapproval and hostility toward their religious beliefs[.]" *Catholic League*, 624 F.3d at 1053.

Likewise, Plaintiffs cannot show they have incurred a cost or been denied a benefit on account of their religion. Some Plaintiffs have not yet applied for visas

and the applications of those that have are being processed and will continue to be processed even if the Order were not enjoined. *See, e.g.*, *Lew*, 773 F.3d at 821 (rejecting standing where "the plaintiffs were never denied the parsonage exemption because they never asked for it"). Indeed, given the waiver provisions in Section 3(c), Plaintiffs' claims with respect to aliens seeking entry or a visa in the *future* are entirely speculative—assuming without a basis that they will be denied waivers—and therefore not ripe under Article III in the first place. *See, e.g.*, *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997) ("Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all."); *Suhre v. Haywood Cnty.*, 131 F.3d 1083, 1091 (4th Cir. 1997) (rejecting "untenable assumptions" about *future* events).

In any event, Plaintiffs may not assert others' potential Establishment Clause claims. 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).[6] Here, Plaintiffs cannot assert an Establishment Clause claim on behalf of third-party aliens abroad

[6] 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 Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.3 (2014).

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), and no constitutional rights regarding entry into this country, *see Mandel*, 408 U.S. at 762. Nor can Plaintiffs assert a claim that their *own* Establishment Clause rights are being violated because their religion is entirely immaterial to the purported discrimination against their loved ones abroad. *See Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 207 (6th Cir. 2011) (en banc). Indeed, Plaintiffs would have standing in this case, if at all, only to assert their freedom of speech/association claim based on allegedly being deprived of the ability to speak with aliens temporarily excluded under the Order (see below). But that provides them no basis to invoke the Establishment Clause.

II. Plaintiffs' Failure To State A Claim

A. The Order Is A Valid Exercise Of The President's Authority Because It Falls Squarely Within 8 U.S.C. §§ 1182(f) And 1185(a).

"[T]he power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the

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Regardless of the label, Plaintiffs here fail to satisfy the substance of this rule.

political branches of the government." *Mandel*, 408 U.S. at 765. Congress also conferred broad authority on the President within the two provisions the Order invokes: 8 U.S.C. §§ 1182(f) and 1185(a). Order at § 2(c).

First, Section 1182(f) provides that "[w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or of any class of aliens as immigrants or nonimmigrants," or "impose on the entry of aliens any restrictions he deems to be appropriate." "The President's sweeping proclamation power [under Section 1182(f)] provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the [inadmissibility] categories in section 1182(a)." *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987); *see Mow Sun Wong v. Campbell*, 626 F.2d 739, 744 n.9 (9th Cir. 1980). Every President over the last 30 years has invoked that authority to suspend or restrict entry of classes of aliens.[7]

[7] *See, e.g.*, Proclamation 5517 (1986) (Cuban nationals as immigrants); Exec. Order No. 12,807 (1992) (government officials who impeded anti-human-trafficking efforts); Proclamation 8342 (2009) (same); Proclamation 6958 (1996) (government officials and armed forces of Sudan); Proclamation 8693 (aliens subject to U.N. Security Council travel bans and meeting criteria for designation for certain Executive Orders imposing financial sanctions).

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

Both of those provisions comfortably encompass the Order's temporary suspension of entry of aliens from six countries that the President—in consultation with the Attorney General, the Secretary of State, and the Secretary of Homeland Security—concluded require special precautions while the review of existing screening and vetting protocols is completed. That temporary measure is a paradigmatic exercise of the President's authority to "suspend the entry" of "any class of aliens" he finds may be "detrimental to the interests of the United States," 8 U.S.C. § 1182(f), and to prescribe "limitations" and "exceptions" on entry, *id.* § 1185(a)(1).

B. The Order Does Not Violate the Establishment Clause.

The Order was issued by the President after consultation with Executive Branch advisors and agencies, implementing a judgment concerning foreign

relations and national security. It makes no mention of any religion or religion in general, and its operative effects are all unrelated to religious belief or affiliation. *See Sarsour v. Trump*, — F. Supp. 3d —, 2017 WL 1113305 at *9 (E.D. Va. Mar. 24, 2017) (finding that the Order is facially neutral and does not distinguish based on religion). Its purpose is to ensure that the nation's screening and vetting procedures detect threats to the United States.

In few areas is the President's authority greater than in foreign relations and national security. *See, e.g.*, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414–15 (2003); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). The President's power in this case "is at its maximum," *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 decisions made by the President than 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)).

Moreover, relying on these principles, 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; *see Fiallo v. Bell*, 430 U.S. 787, 796 (1977). That rule reflects the Constitution's allocation of power over immigration matters, which "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952); *see Knauff*, 338 U.S. at 542. Accordingly, the Order's national security purpose demonstrates a facially legitimate and bona fide purpose that ends the analysis without need to look at Plaintiffs' perceived religious animus. *See Mandel*, 408 U.S. at 77; *Fiallo*, 430 U.S. at 796; *cf. also United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 490 (2d Cir. 1950) (L. Hand, J.) ("An alien has no such privilege; unless the ground stated is on its face insufficient, he must accept the decision, for it was made in the 'exercise of discretion,' which we have again and again declared that we will not review.").

But even were it appropriate to apply case law addressing *domestic* applications of the Establishment Clause to the President's foreign policy and national security decisions, such official action must be adjudged by "'text,

legislative history, and implementation of the statute or comparable official act[ion],'" not through "judicial psychoanalysis of a drafter's heart of hearts." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). This is because stigmatization and alienation caused by the government *publicly* communicating a message favoring or disfavoring religion is the harm that Establishment Clause jurisprudence seeks to avoid. *See Board of Kiryas Joel v. Grumet*, 512 U.S. 687, 696 (1994); *McCreary*, 545 U.S. at 863 (explaining that it is the objective manifestation of governmental action that the public observes and that thus has the potential to "stir[] up ... strife" and "make outsiders of nonadherents"). Where governmental action does not actually convey such a message, the Establishment Clause thus cannot be violated.

To pass muster under the Establishment Clause, government action (1) "must 'have a secular purpose,'" (2) "'its principal or primary effect must be one that neither advances nor inhibits religion,'" and (3) it "'must not foster an excessive government entanglement with religion.'" *Jefferson Cnty.*, 788 F.3d at 586–87 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)).[8] Plaintiffs

[8] An Establishment Clause claim can also involve two other inquiries—an "endorsement" analysis, *see Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor,

allege that the Order "has the purpose and effect of inhibiting religion." Am. Compl. at ¶ 358. Yet Plaintiffs' allegations raise neither of *Lemon*'s first two prongs past the plausibility threshold. Plaintiffs' allegations that the Order "will have the effect of discriminating against Muslims, disfavoring and disadvantaging Islam," *id.* at ¶ 355, are flatly contradicted by the terms and effect of the Order itself, and fail to raise the inference of wrongdoing to at least the level of plausibility, *see Iqbal*, 556 U.S. at 678, or stake out a legally cognizable Establishment claim, *see Bredesen*, 500 F.3d at 527.

1. The Order heightens security; it does not inhibit religion.

The *Lemon* effects analysis poses an "objective" inquiry, asking "'whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.'" *Smith*, 788 F.3d at 587 (quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)). A government action "has a religious effect where it is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a

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J., concurring), and a historical approach regarding the specific practice. *Smith*, 788 F.3d at 587 (quoting *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014)). The first inquiry "clarified" the effects prong in *Lemon*, asking "whether the action conveyed an objective message that the government was endorsing religion." *Smith*, 788 F.3d at 589. This inquiry is more fully addressed below. And under *Galloway*, history supports the Order's constitutionality.

disapproval, of their religious choices." *ACLU of Ky. v. Grayson Cnty., Ky.*, 591 F.3d 837, 845 (6th Cir. 2010) (quotation omitted). But a reasonable person must be able to perceive that purportedly religious message; the possibility of construing a religious message based on incidental or ancillary religious effects is insufficient. *See ACLU of Ky. v. Mercer Cnty., Ky.*, 432 F.3d 624, 636 (6th Cir. 2005) (looking at "whether the reasonable person *would* [so] conclude"). "The First Amendment does not prohibit practices which … create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact." *Lee v. Weisman*, 505 U.S. 577, 598 (1992).

That the six countries covered by Section 2(c) have "predominantly Muslim" populations, Am. Compl. at ¶ 161, does not establish that the primary effect of Section 2(c)—let alone Sections 6(a) and 6(b), which apply worldwide—is to disapprove or inhibit the practice of Islam. Those countries were identified by Congress and a prior Administration for reasons that Plaintiffs do not contend were religiously motivated or had a primary effect of inhibiting religion. The Order temporarily pauses entry from the six identified countries in order to "prevent infiltration by foreign terrorists" while the review of screening and vetting procedures is ongoing. The six countries represent a handful of the world's 50

Muslim-majority nations and approximately 10% of the global Muslim population. And Section 2(c) covers every national of those countries, including non-Muslims, if they meet the Order's neutral criteria and are not entitled to a waiver. Given the overwhelming security orientation of the Order and the absence of any reference to religion, Plaintiffs fail to plausibly allege a likelihood that a reasonable observer would understand the Order to have a "meaningful and practical [religious] impact," *see Lee*, 505 U.S. at 598, such that it would send "the 'unmistakable message' of endorsing religion," *see Grayson Cnty.*, 591 F.3d at 848 (quoting *Mercer Cnty.*, 432 F.3d at 637).[9]

The Order also explicitly excludes Iraq, another Muslim-majority nation that was subject to the Revoked Order, because "since Executive Order 13769 was issued, the Iraqi government has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal." Order at § 1(g). Thus, the Order excludes Iraq from the temporary travel suspension based on plainly neutral criteria related to national

[9] Plaintiffs are not alleging that they were directly exposed to religious discrimination, but claim a stigmatic injury based on campaign statements and third-party characterizations of the Order. The Order, however, makes no reference to religion to cause any stigma. *See Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 72 (2d Cir. 2001). There is therefore no direct contact with a sectarian religious view for standing. *See Washegesic v. Bloomingdale Pub. Schs.*, 33 F.3d 679, 682

security, and reflecting the most current national security analysis. The Order simultaneously recognizes that circumstances in Iraq require additional scrutiny to ensure that visa applicants are not connected to terrorist organizations. *Id.* at § 4. This careful treatment of Iraq and the President's acknowledgment of cooperation demonstrate how the Order is based solely on national security interests.

Moreover, to regard the dominant religion of a foreign country as evidence of religious discrimination could intrude on "every foreign policy decision made by the political branches," *Washington v. Trump*, — F.3d —, 2017 U.S. App. LEXIS 4838, at *18, n.2 (9th Cir. Mar. 17, 2017) (Kozinski, J., dissenting from denial of rehearing en banc), because such measures often address particular nations with a dominant religion, *id.* at *39–41 (Bybee. J., dissenting from denial of rehearing en banc). This litigation parallels the several challenges to the National Security Entry-Exit Registration System, which required non-immigrant alien male nationals of 24 Muslim-majority nations and North Korea to appear for registration and fingerprinting based on terrorism concerns. *Id.*; *see also Rajah v. Mukasey*, 544 F.3d 427, 433–34, 439 (2d Cir. 2008). The aliens in those cases argued that, owing to the religious makeup of the countries selected, the system discriminated against them on the basis of, *inter alia*, religion, and "was motivated

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(6th Cir. 1994).

by an improper animus toward Muslims." *Id.* at 439. Every circuit to address that program held that any impact resulting from this selection criteria failed to show discrimination on the basis of religion or other characteristic. *Id.*; *Malik v. Gonzales*, 213 F. App'x 173, 174–75 (4th Cir. 2007); *Kandamar v. Gonzales*, 464 F.3d 65, 72–74 (1st Cir. 2006); *Zafar v. U.S. Att'y Gen.*, 461 F.3d 1357, 1367 (11th Cir. 2006); *Hadayat v. Gonzales*, 458 F.3d 659, 664–65 (7th Cir. 2006); *Shaybob v. Att'y Gen.*, 189 F. App'x 127, 130 (3d Cir. 2006); *Ahmed v. Gonzales*, 447 F.3d 433, 439 (5th Cir. 2006)); *see also Adenwala v. Holder*, 341 F. App'x 307, 309 (9th Cir. 2009); *Roudnahal v. Ridge*, 310 F. Supp. 2d 884, 892 (N.D. Ohio 2003). In light of this overwhelming rejection of religious discrimination in a measure that targeted a far greater number of majority Muslim nations—and thus would present a far stronger case for finding an impermissible anti-Muslim effect—Plaintiffs' bare allegations fail to plausibly suggest that an objective observer would perceive an "unmistakable" religious effect from the Order itself. *See Grayson Cnty.*, 591 F.3d at 848.

2. Under *Lemon*, the Order cannot be enjoined on the basis of campaign statements or the Revoked Order.

In conformity with *Lemon*'s first prong, the Order espouses a secular purpose, which is entitled to "deference" so long as it is "not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864. Plaintiffs attempt to overcome the

facially neutral purpose of the Order by pointing to campaign statements and the Revoked Order. Plaintiffs' efforts must fail, however, because the Order is qualitatively different from the types of governmental actions struck down for an impermissible "ostensibly and predominant purpose of advancing religion." *See id.* at 860; *accord ACLU v. Ashbrook*, 375 F.3d 484, 491 (6th Cir. 2004). The Order, which suspends entry of aliens and does not reference religion, is nothing like the nakedly sectarian symbols or actions challenged in the four post-*Lemon* cases where the Supreme Court found an impermissible religious purpose. *See McCreary*, 545 U.S. at 859. In those cases, a governmental entity erected or promoted the Ten Commandments, the Christian crèche or cross, or prayer in a public forum—actions which directly involved patently religious symbols or activities. *Id.* at 859, n.9 (listing the four cases where these violations occurred); *see also Catholic League*, 624 F.3d at 1049–50 (listing Establishment cases finding standing—all involving a religious symbol or text, or a religious activity).

Even where courts have struck actions under the first *Lemon* prong that are not merely educational or symbolic, but have the effect of law, such enactments invariably reference and draw distinctions on the basis of religion. *See, e.g.*, *Catholic League*, 624 F.3d at 1049–50 (resolution specifically named and criticized directive by Catholic cardinal and Vatican); *Awad v. Ziriax*, 670 F.3d

1111, 1128 (10th Cir. 2012) (upholding preliminary injunction against Oklahoma amendment that specifically named and excluded "Sharia law"). Plaintiffs can point to no support for their suggestion that an impermissible religious purpose can be imputed when the action lacks the barest mention of an idea, symbol, or practice associated with any or all religions. As the Sixth Circuit has observed, "if there is no manifest religious purpose for a display, an Establishment Clause complaint should fail[.]" *Grayson Cnty.*, 591 F.3d at 848.

Plaintiffs assert the need for a contextual inquiry that would encompass campaign statements, but *McCreary* itself illustrates that searching the legislative context and sequence of events is not appropriate unless the governmental action is overtly *religious* and the court must search beyond the challenged action for a "legitimizing *secular* purpose." 545 U.S. at 871 (emphasis added). Under *McCreary*, outside contextual evidence is only referenced in an attempt to rebut the presumptively religious purpose—not to disprove a presumptively secular one. *Id.* at 863 (action has only been invalidated when "openly available data support[] a commonsense conclusion that a religious objective permeate[s]" it); *Grayson Cnty.*, 591 F.3d at 848 (explaining that "evidence [rebutting an improper religious] purpose must be external" and objectively observable without psychoanalysis). As courts have made clear, a contextual inquiry is only necessary to look for an

alternative explanation to the "common sense" presumption of *religious intent* drawn from information with an objective portent (such as how a Ten Commandments display undeniably has some relation to religion), that would evince a redeeming secular purpose. *See id; Mercer Cnty*, 432 F.3d at 639 ("That [the Ten Commandments] are religious merely begs the question whether *this display* is religious; it does not answer it."). No such contextual inquiry is thus permitted where, as here, the religiously—neutral government action fails to trigger a "common sense" presumption of religious purpose.

Additionally, in general, under the Constitution's structure and its separation of powers, courts evaluating a presidential policy directive should not second-guess the President's stated purpose by looking beyond the policy's text and operation. The "presumption of regularity" that attaches to all federal officials' actions, *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926), applies with the utmost force to the President himself. Indeed, it applies to his subordinate 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). The Supreme Court has accordingly explained in the immigration context that courts may not "look behind the exercise of

[Executive] discretion" taken "on the basis of a facially legitimate and bona fide reason," such as the security objective the Order describes. *See Mandel*, 408 U.S. at 77; *Fiallo*, 430 U.S. at 796. That clear rule, and the presumption upon which it is premised—which Plaintiffs never address—disposes of their Establishment Clause claim. As those cases recognize, Plaintiffs' approach would thrust courts into the untenable position of probing the "adequacy" and "authenticity" of the President's judgments on foreign affairs and national security. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999). It would invite impermissible intrusion on Executive deliberations, which are constitutionally "privilege[d]" against such inquiry, *United States v. Nixon*, 418 U.S. 683, 708 (1974), as well as litigant-driven discovery that would disrupt the President's ongoing execution of the laws, *see, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). Searching for governmental purpose outside *official* pronouncements and the operative terms of governmental action is fraught with practical "pitfalls" and "hazards" that courts should avoid. *Palmer v. Thompson*, 403 U.S. 217, 224 (1971).

Even if the Court *could* look beyond the Order's official purpose for suspending the entry of certain foreign nationals and refugees, the Court nonetheless may not look to informal statements by the President or his surrogates. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 623–24 & n.52 (2006). Using comments

by political candidates to question the stated purpose of later action is particularly problematic. Candidates are not government actors, and statements of what they might attempt 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). Indeed, such statements by private persons cannot reveal "the government's ostensible object," *McCreary*, 545 U.S. at 859-60, because it is only an "*official* objective" of favoring or disfavoring religion gleaned from "readily discoverable fact" that implicates the Clause, *id*. at 862 (emphasis added); *see Salazar v. Buono*, 559 U.S. 700, 715 (2010) (plurality opinion). Thus, courts routinely decline to rely on private communications that "cannot be attributed to any government actor" to impute an improper purpose to official action. *Glassman v. Arlington Cnty.*, 628 F.3d 140, 147 (4th Cir. 2010); *see Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1031 (10th Cir. 2008); *Modrovich v. Allegheny Cnty.*, 385 F.3d 397, 411–12 (3d Cir. 2004).

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); *Kevorkian v. Thompson*, 947 F. Supp. 1152, 1164 (E.D. Mich. 1997). It also would be unworkable, requiring the "judicial psychoanalysis" *McCreary* repudiated. 545 U.S. at 862; *see Mergens*, 496 U.S. at 249 ("[W]hat is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators[.]"). Even considering Plaintiffs' proffered extrinsic evidence, none of it demonstrates that *this* Order—adopted after the President took office and took the oath to "preserve, protect and defend the Constitution," U.S. Const. art. II, § 1, cl. 8, in response to specific, identifiable national security objectives not tied to religion—was driven by religious animus. Plaintiffs' marquee statement proves the point: they cite a 15-month-old campaign press release advocating a "complete shutdown" on Muslims entering the country. Am. Compl. at ¶¶ 1, 54, 57. That release and other proffered statements reveal nothing about the Order's aim, because the Order does no such thing. Far from banning Muslims indefinitely, the Order pauses for 90 days entry from just six countries previously identified as posing particular risks, which is subject to religion-neutral exceptions and case-by-case waivers. There is a complete disconnect between Plaintiffs' imputed purpose and the Order's actual effect. And even were that not so, "the substantive revisions reflected in [the Order] have reduced the probative value of the President's [past] statements" and undercut any

claim that "the predomina[nt] purpose of [the Order] is to discriminate against Muslims based on their religion." *Sarsour*, 2017 WL 1113305, at *12.[10]

In sum, the Order is qualitatively different from actions found to have an impermissible religious purpose under the Establishment Clause in that it references no religious sect or symbol. The Order, for this reason, fails to trigger the "commonsense" presumption that a religious purpose is in play that would require a court to parse the legislative history and sequence of events to find a "legitimizing secular purpose." *See McCreary*, 545 U.S. at 869-73. Separation-of-powers principles and the deference due to immigration determinations by the Executive only underscore the absence of any judicial need or authority to go beyond the text and legal operation of the Order to ascertain its secular purpose.

C. Plaintiffs' Equal Protection Claim Is Equally Unavailing.

Plaintiffs claim that the Order violates the equal protection component of the Fifth Amendment's Due Process Clause. But again, the petitioner plaintiffs are only entitled, if anything, to review under the "facially legitimate and bona fide"

[10] The Order also reflects the considered views of the Secretary of State, the Secretary of Homeland Security, and the Attorney General, who announced the Order and whose motives have not been impugned. The President's efforts to accommodate courts' concerns while simultaneously fulfilling his constitutional duty to protect the nation only confirms that the Order's intention is not to discriminate along religious lines.

standard of a visa denial, which Plaintiffs do not allege has happened to any of their beneficiary relatives. *See Fiallo*, 430 U.S. at 796. In any event, where an equal protection claim is made regarding an immigration law, at most rational-basis review applies. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 83 (1976) (using a "wholly irrational" standard); *see also Guzman v. U.S. Dep't of Homeland Sec.*, 679 F.3d 425, 432 (6th Cir. 2012) (using rational basis approach); *Ashki v. INS*, 233 F.3d 913, 920 (6th Cir. 2000) (same). This is because it is well-established that "unfettered discretion over the admission or expulsion of aliens 'is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Almario*, 872 F.2d at 150 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)); *Diaz*, 426 U.S. at 81.

Under rational basis scrutiny, a classification must be upheld unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the government's actions were irrational." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000); *see also Guzman*, 679 F.3d at 432. The Order easily satisfies this standard. The President may draw distinctions based on nationality in the context of immigration and entry into the country so long as the distinction is not wholly irrational. *See, e.g., Jean v. Nelson*, 727 F.2d 957, 978 n.30 (11th Cir. 1984) (en

banc), *aff'd on non-constitutional grounds*, 472 U.S. 846 (1985); *Ashki*, 233 F.3d at 920; *Rajah*, 544 F.3d at 435; *Appiah v. INS*, 202 F.3d 704, 710 (4th Cir. 2000).

Here, the President's determination that nationals from the six countries identified are associated with a heightened risk of terrorism creates a rational basis for the Order. The Order's time-limited terms, subject to the exceptions and waivers laid out above, are also rationally related to national security. The Second Circuit confronted a similar challenge to a program that "required all non-permanent resident males over the age of sixteen from a group of countries that were, except for North Korea, predominantly Muslim to appear personally at government facilities for registration and fingerprinting and to present immigration related documents …. Individuals who did not appear risked potential arrest." *Sarsour*, 2017 WL 1113305, at *12 (citing *Rajah*, 554 F.3d at 433). The court noted that the program, in relevant part, targeted "aliens from certain countries selected on the basis of national security criteria" who were "neither citizens nor even lawful permanent residents" and concluded that the program "was plainly a rational attempt to enhance national security." *Rajah*, 554 at 439.[11]

[11] And although there was "no way of knowing whether the Program's enhanced monitoring of aliens has disrupted or deterred attacks…. [S]uch a consideration is irrelevant because an *ex ante* rather than *ex post* assessment of the Program is required under the rational basis test." *Rajah*, 544 F.3d at 439.

D. Plaintiffs' Free Speech Claim Is Foreclosed By *Mandel*.

Apart from the more individualized harms discussed above, the organizational Plaintiffs' bring their own free-speech claims. *See, e.g.*, Am. Compl. ¶¶ 232–42. Essentially, Plaintiffs allege that the Order infringes on their rights to listen to speakers from the affected countries. *See id.* But nothing in the Order prevents the organizational Plaintiffs from conducting their programming, inviting foreign speakers (who may apply for a waiver if subject to the temporary suspension), or encouraging the free flow of information and ideas.

Regardless, Plaintiffs' claim is squarely foreclosed by *Mandel*, which itself involved a free speech/association claim. 408 U.S. 753, 769–70 (1972). The *Mandel* plaintiffs challenged the Attorney General's decision to deny a waiver of a visa ineligibility to a Belgian journalist. Ultimately, the *Mandel* Court instructed that "when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts [sha]ll neither look behind the exercise [of Executive] discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Id.* at 770. The Sixth Circuit has explained *Mandel* by stating that the Court "ignored the existence of the professors' First Amendment rights altogether." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 687 (6th Cir. 2002). This

forecloses Plaintiffs' free-speech claims, particularly because, as discussed above, the *Mandel* standard is more than satisfied in this case. *See, e.g.*, *Ben-Issa v. Reagan*, 645 F. Supp. 1556, 1562 (W.D. Mich. 1986).

CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiff's Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2017, I electronically filed the foregoing DEFENDANTS' MOTION TO DISMISS with the Clerk of the Court for the United States District Court for the Eastern District of Michigan by using the CM/ECF system, which will electronically serve all counsel of record.

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