No. A-_____

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
APPLICANTS

v.

STATE OF HAWAII, ET AL.

APPLICATION FOR STAY PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND PENDING FURTHER PROCEEDINGS IN THIS COURT

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

PARTIES TO THE PROCEEDING

The applicants (defendants-appellants below) are Donald J. Trump, in his official capacity as President of the United States; the Department of Homeland Security; Elaine C. Duke, in her official capacity as Acting Secretary of Homeland Security; the Department of State; Rex W. Tillerson, in his official capacity as Secretary of State; and the United States of America.

The respondents (plaintiffs-appellees below) are the State of Hawaii, Dr. Ismail Elshikh, John Does 1 and 2, and the Muslim Association of Hawaii, Inc.

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Pursuant to this Court's Rule 23 and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of applicants President Donald J. Trump, et al., respectfully applies for a stay of the preliminary injunction issued by the United States District Court for the District of Hawaii, pending the consideration and disposition of the government's appeal from that injunction to the United States Court of Appeals for the Ninth Circuit and, if the court of appeals affirms the injunction, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court.

The Constitution and Acts of Congress confer on the President broad authority to prevent aliens abroad from entering this country

when he deems it in the Nation's interest. In order to protect national security, the President exercised that authority by issuing Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017) (Proclamation). The Proclamation is the culmination of an extensive, worldwide review process conducted by multiple government agencies to determine what information is necessary from each foreign country in order to admit nationals of that country to the United States while ensuring that travelers do not pose a security or public-safety threat. Whereas the President's prior immigration orders were temporary measures to facilitate that review, the Proclamation directly responds to the completed review and its specific findings. After the review, the Acting Secretary of Homeland Security found that some countries continue to be unwilling or unable to share needed information with the United States, to reliably verify the identity of their nationals, or to control terrorists within their borders. Accordingly, the Acting Secretary recommended that the President impose restrictions on the entry of certain nationals of eight countries -- Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia -- in order to protect the security of the United States.

The President reviewed the Acting Secretary's recommendation; consulted with the Acting Secretary, the Secretaries of State and Defense, and the Attorney General; considered foreign-policy, national-security, and counterterrorism goals; and assessed each

country's distinct circumstances. The President then issued the Proclamation, which restricts the entry of certain nationals of the eight countries identified in the Acting Secretary's recommendation. The Proclamation describes the President's judgment that these restrictions are necessary both to prevent the entry of foreign nationals about whom the United States lacks sufficient information, and to elicit more information and more secure practices from foreign governments that are deficient. The entry suspensions are subject to certain exceptions, case-by-case waivers, and periodic review.

The Proclamation differs from the President's prior executive orders both in process and substance. It is the product of a review process undertaken by multiple Cabinet officers and government officials, none of whose motives has ever been questioned. And it is based on express findings of inadequacies in the information-sharing practices, identity-management protocols, and risk factors for certain countries, as well as a Presidential determination that tailored entry restrictions will both protect the Nation and encourage those countries to improve. The Proclamation covers different countries than the prior orders: it removes one majority-Muslim country; adds other countries, some of which are not majority-Muslim; and excludes various nonimmigrant travelers from all but one of the majority-Muslim countries. These differences confirm that the Proclamation is

based on national-security and foreign-affairs objectives, not religious animus.

Notwithstanding the significant differences between the Proclamation and the President's prior orders, the district court again issued a preliminary injunction largely barring enforcement worldwide of the Proclamation's entry suspensions, concluding that the Proclamation likely violates the Immigration and Nationality Act. The court relied heavily on a Ninth Circuit opinion that has since been vacated by this Court, see Trump v. Hawaii, No. 16-1540, 2017 WL 4782860 (Oct. 24, 2017). The government immediately appealed to the Ninth Circuit and requested a stay pending appeal and further proceedings in this Court. On November 13, 2017, the court of appeals stayed part but not all of the injunction. It stayed the injunction "except as to 'foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.'" Addendum (Add.) 1.

All of the relevant factors strongly support a full stay of the Hawaii court's injunction. First, if the Ninth Circuit upholds the injunction, there is a reasonable probability that this Court will grant a writ of certiorari, as it did the last time courts barred the President from enforcing entry restrictions on certain foreign nationals in the interest of national security. See Trump v. IRAP, 137 S. Ct. 2080, 2086 (2017). The injunction nullifies a formal national-security directive of the President, and the

district court's interpretations of the INA would constrain the ability of this and all future Presidents to take measures to protect the Nation and achieve critical foreign-relations objectives. Second, there is more than a fair prospect that this Court will reverse the injunction because respondents' claims are neither justiciable nor meritorious. Whereas the Ninth Circuit faulted the President's prior Executive Order for lacking a finding that existing vetting procedures for foreign nationals were inadequate, the Proclamation was the product of a multi-Department worldwide review process that identified countries that do not currently provide sufficient information to assess the risk that their nationals pose to the United States. Third, preventing the President from effectuating his national-security and foreign-relations judgment will cause ongoing irreparable harm to the government and the public, especially by requiring the Executive to disregard the identified inadequacies and by undermining the Proclamation's goal of inducing cooperation by other nations. At a minimum, the injunction should be stayed to the extent it goes beyond identified aliens whose exclusion allegedly imposes concrete, irreparable injury on these particular respondents. See United States Dep't of Def. v. Meinhold, 510 U.S. 939 (1993).[1]

[1] Although the district court correctly did not extend its injunction to the President himself, Add. 3-4, the President is injured by the injunction because it prevents the Executive Branch from carrying out his Proclamation.

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., governs admission of aliens into the United States. Admission generally requires a valid visa or other valid travel document. See 8 U.S.C. 1181, 1182(a)(7)(A)(i) and (B)(i)(II), 1203. The process of applying for a visa typically includes an in-person interview and results in a decision by a State Department consular officer. 8 U.S.C. 1201(a)(1), 1202(h), 1204; 22 C.F.R. 42.62. Although a visa often 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 also has created a Visa Waiver Program, enabling nationals of certain countries to seek temporary admission without a visa. 8 U.S.C. 1182(a)(7)(B)(iv); 8 U.S.C. 1187 (2012 & Supp. IV 2016). In 2015, Congress excluded from travel under that Program aliens who are dual nationals of or recent visitors to Iraq or Syria -- where "[t]he Islamic State of Iraq and the Levant * * * maintain[s] a formidable force" -- and nationals of and recent visitors to countries designated by the Secretary of State as state sponsors of terrorism (Iran, Sudan, and Syria).[2] Congress also authorized the Department of Homeland Security (DHS) to designate additional countries of concern, considering whether

[2] U.S. Dep't of State, Country Reports on Terrorism 2015, at 6, 299-302 (June 2016), https://goo.gl/40GmOS; see 8 U.S.C. 1187(a)(12)(A)(i) and (ii) (Supp. IV 2016).

a country is a "safe haven for terrorists," "whether a foreign terrorist organization has a significant presence" in it, 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. 8 U.S.C. 1187(a)(12)(D)(i) and (ii) (Supp. IV 2016). Applying those criteria, in 2016, DHS excluded from the Program recent visitors to Libya, Somalia, and Yemen.[3]

Congress also has accorded the Executive broad discretion to suspend or restrict the entry of aliens, including aliens who might otherwise be eligible to receive a visa and be admitted to the United States. Section 1182(f) of Title 8 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.

Section 1185(a)(1) further grants the President broad authority to adopt "reasonable rules, regulations, and orders" governing entry of aliens, "subject to such limitations and exceptions as [he] may prescribe."

2. In March 2017, the President issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (EO-2), which directed the Secretary of Homeland Security to determine whether foreign governments provide adequate information to vet foreign

[3] DHS, DHS Announces Further Travel Restrictions for the Visa Waiver Program (Feb. 18, 2016), https://goo.gl/OXTqb5.

nationals applying for United States visas before they are permitted to enter. See Trump v. IRAP, 137 S. Ct. 2080, 2083 (2017) (describing EO-2). In order to ensure that dangerous individuals did not enter while the government was working to establish adequate standards, and to reduce investigative burdens on the agencies during the review, EO-2 temporarily suspended the entry of foreign nationals from six countries previously identified by Congress or the Executive as presenting terrorism-related concerns. See id. at 2083-2084.

EO-2 was challenged in multiple courts, and partially enjoined by district courts in Maryland and Hawaii. IRAP v. Trump, 241 F. Supp. 3d 539 (D. Md. 2017); Hawaii v. Trump, 245 F. Supp. 3d 1227 (D. Haw. 2017). The Fourth and Ninth Circuits upheld those injunctions in substantial part. IRAP v. Trump, 857 F.3d 554 (4th Cir. 2017) (en banc); Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017) (per curiam). This Court granted certiorari and partially stayed the injunctions pending review. IRAP, 137 S. Ct. at 2086, 2088-2089. The Court allowed EO-2's entry suspension to take effect except as to "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." Id. at 2088. And the Court stated that "the executive review directed by" EO-2 "may proceed promptly, if it is not already underway." Ibid. After EO-2's temporary entry suspension expired, this Court vacated the lower courts' rulings as moot.

Trump v. IRAP, No. 16-1436, 2017 WL 4518553 (Oct. 10, 2017); Trump v. Hawaii, No. 16-1540, 2017 WL 4782860 (Oct. 24, 2017).

3. On September 24, 2017, the President issued Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017). The Proclamation is the product of EO-2's comprehensive, worldwide review of whether foreign governments provide sufficient information and have other practices to allow the United States to properly screen their nationals before entry.

a. DHS, in consultation with the Department of State and the Office of the Director of National Intelligence, undertook "to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA * * * in order to determine that the individual is not a security or public-safety threat." Procl. § 1(c). The Acting Secretary of Homeland Security, in consultation with the Secretary of State and Director of National Intelligence, developed a "baseline" for the information required from foreign governments. Ibid. That baseline incorporated three components:

> (i) identity-management information, i.e., "information needed to determine whether individuals seeking benefits under the immigration laws are who they claim to be," which turns on criteria such as "whether the country issues electronic passports embedded with data to enable confirmation of identity, reports lost and stolen passports to appropriate entities, and makes available upon request identity-related information not included in its passports";

> (ii) national-security and public-safety information about whether a person seeking entry poses a risk, which turns on criteria such as "whether the country makes available * * * known or suspected terrorist and criminal-history information upon request," "whether the country impedes the United States Government's receipt of information about passengers and crew traveling to the United States," and "whether the country provides passport and national-identity document exemplars"; and
>
> (iii) a national-security and public-safety risk assessment of the country, which turns on criteria such as "whether the country is a known or potential terrorist safe haven, whether it is a participant in the Visa Waiver Program * * * that meets all of [the program's] requirements, and whether it regularly fails to receive its nationals subject to final orders of removal from the United States."

Ibid.

DHS, in coordination with the Department of State, collected data on, and evaluated, nearly 200 countries. Procl. § 1(d). The agencies measured each country's performance in issuing reliable travel documents and implementing adequate identity-management and information-sharing protocols and procedures. Ibid. They also evaluated terrorism-related and public-safety risks associated with each country. Ibid. The Acting Secretary of Homeland Security identified 16 countries as having "inadequate" information-sharing practices and risk factors, and another 31 countries as "at risk" of becoming "inadequate." Id. § 1(e). The Department of State then conducted a 50-day engagement period to encourage all foreign governments to improve their performance, which yielded significant improvements from many countries. Id. § 1(f). Multiple countries provided travel-document exemplars to

combat fraud, and/or agreed to share information on known or suspected terrorists. Ibid.

b. After the review concluded, on September 15, 2017, the Acting Secretary of Homeland Security identified seven countries that, even after diplomatic engagement, continue to have inadequate identity-management protocols or information-sharing practices, or whose nationals present other heightened risk factors: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen. Procl. § 1(h). The Acting Secretary therefore recommended that the President impose entry restrictions on certain nationals from these countries. The Acting Secretary also recommended entry restrictions for nationals of Somalia, which, although it generally satisfies baseline requirements for information sharing, has identity-management deficiencies and a significant terrorist presence within its territory that the Somali government is unable to control. Id. § 1(i).[4]

c. The President evaluated the Acting Secretary's recommendations in consultation with multiple Cabinet members and other government officials. Procl. § 1(h)(i) and (ii). The President considered a number of factors, including each country's "capacity, ability, and willingness to cooperate with our

[4] The Acting Secretary also assessed that Iraq does not meet the information-sharing baseline, but recommended that the President not restrict entry of Iraqi nationals in light of, among other things, the close cooperative relationship between the United States and the government of Iraq. Procl. § 1(g).

identity-management and information-sharing policies and each country's risk factors," as well as "foreign policy, national security, and counterterrorism goals." Id. § 1(h)(i).

Then, "in accordance with the recommendations," the President imposed entry restrictions on certain nationals from the eight countries that are tailored to "each country's distinct circumstances." Procl. § 1(h)(i)-(iii). The President determined that these restrictions are "necessary to prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information to assess the risks they pose to the United States," and "to elicit improved identity-management and information-sharing protocols and practices from foreign governments." Procl. § 1(h)(i).

For countries that refuse to cooperate regularly with the United States (Iran, North Korea, and Syria), Section 2 of the Proclamation suspends entry of all nationals, except for Iranians seeking nonimmigrant student (F and M) and exchange-visitor (J) visas. Procl. § 2(b)(ii), (d)(ii) and (e)(ii). For countries that are valuable counter-terrorism partners but have information-sharing deficiencies (Chad, Libya, and Yemen), the Proclamation suspends entry only of nationals seeking immigrant visas and nonimmigrant business, tourist, and business/tourist visas. Id. § 2(a)(ii), (c)(ii) and (g)(ii). For Somalia, the Proclamation suspends entry of nationals seeking immigrant visas and requires

additional scrutiny of nationals seeking nonimmigrant visas. Id. § 2(h)(ii). And for Venezuela, which refuses to cooperate in information sharing but for which alternative means are available to identify its nationals, the Proclamation suspends entry of government officials "involved in screening and vetting procedures" and "their immediate family members" on nonimmigrant business or tourist visas. Id. § 2(f)(ii).

The Proclamation provides for case-by-case waivers where a foreign national demonstrates that denying entry would cause undue hardship, entry would not pose a threat to the national security or public safety, and entry would be in the national interest. Procl. § 3(c)(i)(A)-(C). The Proclamation requires periodic reporting to the President about whether entry restrictions should be continued, modified, terminated, or supplemented. Id. § 4.

4. a. Respondents filed suit in the District of Hawaii challenging the Proclamation under the INA, various other statutes, and the Establishment and Equal Protection Clauses. The three individual plaintiff-respondents are U.S. citizens or lawful permanent residents who have relatives from Syria, Yemen, and Iran seeking immigrant or nonimmigrant visas. C.A. E.R. 137. The Muslim Association of Hawaii is a non-profit organization that operates mosques in Hawaii. Ibid. The State of Hawaii is also a plaintiff. Ibid.

b. After highly expedited briefing and without argument, the district court granted a worldwide temporary restraining order barring enforcement of Section 2 of the Proclamation, except as to nationals of Venezuela and North Korea (restrictions that respondents did not seek to enjoin). Add. 14 n.10. The court relied heavily on the Ninth Circuit's opinion in Hawaii, 859 F.3d 741, which at the time had not yet been vacated by this Court.

The district court held that respondents have standing, that they are within the zone of interests protected by the INA, that their claims are ripe, and that their claims are justiciable. Add. 26-28. On the merits, the district court held that the Proclamation likely exceeds the President's authority under 8 U.S.C. 1182(f) and 1185(a)(1) because, although the President found that entry of the targeted classes of aliens would be detrimental to the interests of the United States, the Proclamation's entry restrictions are "a poor fit" for the problems identified. Add. 29-37. The court also was of the view that the Proclamation's entry restrictions likely violate 8 U.S.C. 1152(a)(1)(A), which bars "discrimimat[ing]" or granting a "preference or priority" in the "issuance of an immigrant visa because of" an alien's "nationality." Add. 37-39. Having concluded that the Proclamation violates the INA, the court "decline[d] to reach" respondents' alternative constitutional claims. Add. 29. The government then consented to conversion of the TRO into a preliminary injunction

if the court would have reached the same conclusion absent the Ninth Circuit's decision in Hawaii, and the court so converted. Add. 28-29.

5. The government appealed the preliminary injunction, requested expedited briefing, and moved for a stay pending appeal as well as a petition for a writ of certiorari and proceedings in this Court. The Ninth Circuit stayed the injunction "except as to 'foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.'" Add. 1 (quoting IRAP, 137 S. Ct. at 2088).

6. Meanwhile, litigation over the Proclamation has proceeded in other courts. As relevant here, the District Court for the District of Maryland globally enjoined implementation of the Proclamation's suspension of entry of nationals from the designated countries (other than Venezuela and North Korea), except for persons who lack "a credible claim of a bona fide relationship with a person or entity in the United States." IRAP v. Trump, 2017 WL 4674313, at *39 (D. Md. Oct. 17, 2017) (quoting IRAP, 137 S. Ct. at 2088). The Maryland court rejected an interpretation of 8 U.S.C. 1182(f) virtually identical to the one the Hawaii court accepted, id. at *22-*23, but held (in a reversal of its prior position) that the Proclamation likely violates 8 U.S.C. 1152(a)(1)(A), id. at *19-*22. The court also stated that the Proclamation likely violates the Establishment Clause. Id. at

*27-*37. The government appealed, requested expedited briefing, and sought a stay pending appeal and further proceedings in this Court. The Fourth Circuit has not acted on the government's stay motion, and the government intends to file a stay application in that case to this Court.

ARGUMENT

Under this Court's Rule 23 and the All Writs Act, 28 U.S.C. 1651, a single Justice or the Court has authority to stay a district-court order pending appeal to a court of appeals.[5] In considering the application, the Court or Circuit Justice considers whether four Justices are likely to vote to grant certiorari if the court of appeals ultimately rules against the applicant; whether five Justices would then likely conclude that the case was erroneously decided below; and whether, on balancing the equities, the injury asserted by the applicant outweighs the harm to the other parties or the public. See San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); Hilton v. Braunskill, 481 U.S. 770, 776 (1987) (traditional stay factors). Here, all of those factors counsel strongly in favor of a stay. At a minimum, the injunction -- which bars enforcement of the Proclamation's entry suspensions worldwide as to every affected country other than North Korea and

[5] See, e.g., Trump v. Hawaii, No. 16-1540, 2017 WL 3045234 (July 19, 2017); West Virginia v. EPA, 136 S. Ct. 1000 (2016); Stephen M. Shapiro et al., Supreme Court Practice § 17.6, at 881-884 (10th ed. 2013).

Venezuela -- is vastly overbroad and should be stayed to the extent it goes beyond remedying the alleged injury to respondents from the exclusion of identified aliens.

I. THIS COURT IS LIKELY TO GRANT CERTIORARI IF THE COURT OF APPEALS AFFIRMS THE INJUNCTION

If the Ninth Circuit affirms the injunction against the Proclamation in whole or in part, this Court is likely to grant certiorari, as it did when the Fourth and Ninth Circuits upheld preliminary injunctions against EO-2. As before, this case presents exceptionally important questions concerning the President's authority to exclude aliens abroad based on his national-security and foreign-policy judgment. The Proclamation was expressly authorized by Acts of Congress, 8 U.S.C. 1182(f) and 1185(a)(1), that "implement[] an inherent executive power" regarding the "admissibility of aliens." United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950). The district court's injunction nullifies the President's exercise of that authority based on a fundamental misreading of the INA.

This Court has granted certiorari to address interference with Executive Branch determinations that are of "importance * * * to national security concerns," Department of Navy v. Egan, 484 U.S. 518, 520 (1988); see Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 12 (2008), and to address "important questions" of interference with "federal power" over "the law of immigration and alien status." Arizona v. United States, 567 U.S. 387, 394

(2012); see United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam). Both considerations are present here.

Indeed, if the Ninth Circuit were to affirm the injunction here, the need for this Court's review would be even greater than before. Whereas EO-2 was premised on the President's conclusion that uncertainty about the adequacy of other governments' information-sharing warranted a review of their protocols and cooperation, the Proclamation is based on the President's affirmative determinations -- made following a comprehensive, multi-Department review -- that particular countries' information sharing is in fact deficient. The district court's decision improperly second-guesses those findings and disables the Executive from fully responding to existing and identified national-security risks. And by invalidating entry restrictions designed in part to induce foreign governments' cooperation, the court injected itself into sensitive matters of foreign affairs, risking "what [this] Court has called in another context 'embarrassment of our government abroad' through 'multifarious pronouncements by various departments on one question.'" Sanchez-Espinoza v. Reagan, 770 F.2d 202, 209 (D.C. Cir. 1985) (Scalia, J.) (quoting Baker v. Carr, 369 U.S. 186, 217, 226 (1962)).

II. THERE IS AT LEAST A FAIR PROSPECT THAT THIS COURT WILL SET ASIDE THE INJUNCTION IN WHOLE OR IN PART

If the Ninth Circuit affirms the injunction in this case, there is at least a "fair prospect" that this Court will vacate

the injunction in whole or in part, Lucas v. Townsend, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers), because respondents' claims are not justiciable and because they fail on the merits.

A. Respondents' Statutory Claims Are Not Justiciable

1. "[T]he power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." Fiallo v. Bell, 430 U.S. 787, 792 (1977). This Court has accordingly made clear that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." Knauff, 338 U.S. at 543. The Executive's decision to exclude or deny a visa to an alien abroad therefore "is not subject to judicial review * * * unless Congress says otherwise." Saavedra Bruno v. Albright, 197 F.3d 1153, 1159 (D.C. Cir. 1999).

Congress has not authorized any judicial review of visa denials -- even when requested by the alien affected, see 6 U.S.C. 236(f) -- much less by third parties like respondents. In fact, Congress has expressly forbidden "judicial review" of the revocation of a visa even for aliens already in the United States, subject to a narrow exception for an alien in removal proceedings. 8 U.S.C. 1201(i). On the one occasion when this Court held that aliens physically present in the United States (but not aliens abroad) could seek review of their exclusion orders under the

Administrative Procedure Act (APA), 5 U.S.C. 701 et seq., see Brownell v. Tom We Shung, 352 U.S. 180, 184-186 & nn.3 and 5 (1956), Congress intervened to expressly preclude such suits and permit review only through habeas corpus, which is unavailable to aliens seeking entry from abroad. Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651-653; Saavedra Bruno, 197 F.3d at 1157-1162 (recounting history); 8 U.S.C. 1252(a) (current INA provision for judicial review only of final orders of removal). Because Congress has not authorized review of respondents' statutory claims challenging the Proclamation's entry restrictions, those claims are not judicially reviewable.

The district court, relying on the court of appeals' now-vacated decision addressing EO-2, held that respondents' statutory claims are reviewable. Add. 27-28. The Ninth Circuit had stated that the rule of nonreviewability of the exclusion of aliens abroad applies only to "an individual consular officer's decision to grant or to deny a visa," but not to the exercise of the President's authority under 8 U.S.C. 1182(f) and 1185(a)(1). Hawaii v. Trump, 859 F.3d 741, 768 (2017) (per curiam). That distinction is fundamentally flawed. The nonreviewability rule is not based on the nature of consular officers' individualized visa decisions, but rather on the separation-of-powers principle that the exclusion of aliens abroad is a foreign-policy judgment committed to the political branches. Saavedra Bruno, 197 F.3d at

1159, 1163. Thus, although the nonreviewability rule is most often applied to individual visa-adjudication decisions, it would invert the constitutional structure to deny review of decisions by consular officers -- subordinate Executive-Branch officials -- while permitting review of a statutory challenge to the President's decision to suspend entry of classes of aliens.[6]

2. Respondents argued below that review is available on two other grounds, but neither has merit. Respondents contended that, despite the general rule of nonreviewability, the APA authorizes review of their statutory claims under 5 U.S.C. 702. Resp. C.A. Stay Opp. 8-10. But far from displacing the general rule, the APA embraces it in multiple ways. The APA does not apply at all where Congress has otherwise "preclude[d] judicial review," 5 U.S.C 701(a)(1), and it is "unmistakable" from history that "the immigration laws 'preclude judicial review' of the consular visa decisions." Saavedra Bruno, 197 F.3d at 1160 (citation omitted). Moreover, the APA's cause of action expressly leaves intact other

[6] The district court also relied on the Ninth Circuit's prior decision addressing the President's first executive order on these issues, Add. 27-28, but that decision concerned review of constitutional claims, not statutory claims. Washington v. Trump, 847 F.3d 1151, 1161-1163 (2017). The district court's injunction here does not rest on constitutional claims, which are reviewable only in limited circumstances. See Kleindienst v. Mandel, 408 U.S. 753 (1972); Gov't Br. at 26-27, Trump v. IRAP, No. 16-1436 (Aug. 10 2017).

"'limitations on judicial review,'" which include the nonreviewability rule. Ibid. (quoting 5 U.S.C. 702(1)).[7]

Respondents also argued that review of the Executive's decision to exclude aliens is available in equity. Resps. C.A. Stay Opp. 8-9. But the APA governs suits in equity to challenge the actions of federal officials, 5 U.S.C. 703, and in any event the "judge-made remedy" of equitable suits to review officials' actions does not permit plaintiffs to sidestep "express and implied statutory limitations" on review of nonconstitutional claims, because "'[c]ourts of equity can no more disregard'" those limitations than "'courts of law.'" Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384-1385 (2015).

3. Even if the general rule of nonreviewability did not foreclose respondents' claims, review would remain unavailable for several other reasons. First, the APA permits review only of "final agency action." 5 U.S.C. 704. The President's Proclamation is not "agency action" at all, see Franklin v. Massachusetts, 505 U.S. 788, 800-801 (1992), and in any event there has been no "final" agency action with respect to the aliens whose entry

[7] The district court and the Ninth Circuit cited the D.C. Circuit's earlier decision in Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir. 1986), aff'd by equally divided Court, 484 U.S. 1 (1987), which held that the APA did allow review. But as the D.C. Circuit subsequently explained, Abourezk "rested in large measure" on an INA provision that was later amended to "make[] clear that district courts do not have general jurisdiction over claims arising under the immigration laws." Saavedra Bruno, 197 F.3d at 1164. Abourezk also did not address 5 U.S.C. 702(1).

respondents seek. Unless and until those aliens apply for a visa, are found by a consular officer to be otherwise eligible to receive a visa, and are then denied a visa and a waiver under the Proclamation, there is no final agency action for a court to review.

Second, for much the same reason, respondents' challenges are not ripe because they "rest[] upon 'contingent future events'" -- including that the aliens will not obtain visas -- "'that may not occur as anticipated, or indeed may not occur at all.'" Texas v. United States, 523 U.S. 296, 300 (1998).

Third, none of the statutes invoked by respondents confers on a third party in the United States a judicially cognizable interest in the denial of a visa to an alien abroad that could be the basis for an APA suit. Sections 1182(f) and 1185(a)(1) confer discretion on the President, not rights on private parties. And Section 1152(a)(1)(A) is addressed to aliens seeking visas, not their relatives or relationship partners in the United States.[8]

Finally, the APA does not permit review to the extent "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). The statutes that authorize the Proclamation here,

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[8] The statutory interest of a U.S. person who petitions for an alien's immigrant status "terminate[s]" "[w]hen [his] petition [i]s granted." Saavedra Bruno, 197 F.3d at 1164. That petitioner has no right to seek the next step, a visa, on behalf of the alien abroad. And of course, U.S. persons and entities that the INA does not permit to petition for an alien's immigration status have no enforceable statutory rights at all.

8 U.S.C. 1182(f) and 1185(a)(1), "exude[] deference" to the President and "foreclose the application of any meaningful judicial standard of review." Webster v. Doe, 486 U.S. 592, 600 (1988). These multiple barriers to review of respondents' INA claims counsel against allowing the injunction premised on those claims to disable the Proclamation during an expedited appeal.

B. Respondents' Statutory Claims Lack Merit

Even if respondents' challenges to the Proclamation are justiciable, they lack merit.

1. The Proclamation is consistent with 8 U.S.C. 1182(f) and 8 U.S.C. 1185(a)(1)

a. By its terms, Section 1182(f) grants the President exceedingly broad discretion, authorizing him to suspend "by proclamation" entry of "any" or "all" aliens "as immigrants or nonimmigrants" for such time as he "deem[s] necessary" or to restrict their entry as he "deem[s] to be appropriate," "[w]henever" he "finds" that their entry would be "detrimental to the interests of the United States." 8 U.S.C. 1182(f). Courts have recognized that this statute confers a "sweeping proclamation power" to suspend entry of aliens. Abourezk v. Reagan, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (R.B. Ginsburg, J.), aff'd by an equally divided Court, 484 U.S. 1 (1987). The breadth of the authorization reflects the fact that, "[w]hen Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power," but also "is implementing

an inherent executive power." Knauff, 338 U.S. at 542. Furthermore, 8 U.S.C. 1185(a)(1) grants an additional power to the President by making it "unlawful" for an alien to "enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe."

Consistent with these express statutory grants of authority, the President found that it is necessary and appropriate to restrict particular classes of aliens in order to advance the foreign-policy, national-security, and counterterrorism objectives of the United States. First, the restrictions "prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information to assess the risks they pose to the United States." Procl. § 1(h)(i); see id. § 1(a) and (b) (explaining that foreign governments' information sharing is critical to the vetting process because governments "manage the identity and travel documents of their nationals"). Respondents have offered no basis to second-guess that national-security judgment. Second, the entry restrictions are "needed to elicit improved identity-management and information-sharing protocols and practices from foreign governments" whose nationals are subject to the restrictions. Id. § 1(h)(i). The diplomatic engagement period described in the Proclamation yielded significant improvement in foreign governments' information sharing, id. § 1(e)-(g), and the

United States has a foreign-policy interest in continuing to encourage improvement: The Proclamation responds to specific inadequacies, identified in the agencies' review process, regarding countries for which the United States lacks sufficient information to assess the risk posed by their nationals. The government's case on the merits is thus even stronger than it was when this Court considered EO-2.

b. The district court read into the INA a requirement that, before suspending entry, the President must set forth detailed factual findings that "support the conclusion that entry of all nationals" who are suspended "would be harmful to the national interest." Add. 30 (quoting Hawaii, 859 F.3d at 770). That turns the statute's text on its head. The language authorizing the President to suspend or restrict entry -- "[w]henever [he] finds that the entry of any aliens * * * into the United States would be detrimental to the interests of the United States," 8 U.S.C. 1182(f) (emphases added) -- does not constrain his authority, but rather confirms its expansive sweep. And the statute expressly contemplates that the President may make these determinations on a broad scale, authorizing him to "suspend the entry of all aliens or any class of aliens." Ibid. Section 1185(a)(1), moreover, does not expressly require any findings by the President at all.

The President generally need not "disclose" his "reasons for deeming nationals of a particular country a special threat," Reno

v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999), which may rest on classified or sensitive material. And when the President does disclose his reasons for finding that certain classes of nationals pose a risk to national security, courts are "ill equipped to determine their authenticity and utterly unable to assess their adequacy." Ibid. The district court therefore seriously erred in holding that the INA subjects the President's assessment of the national interest to searching judicial review.

Historical practice further refutes the district court's misreading of the INA. For decades, Presidents have restricted entry pursuant to these statutes without detailed public justifications or findings; some have discussed the President's rationale in one or two sentences that broadly declare the Nation's interests.[9] Indeed, some orders have suspended or restricted entry "not because of a particular concern that entry of the individuals themselves would be detrimental, but rather, as retaliatory diplomatic measures." Hawaii, 859 F.3d at 772 n.12 (emphases added). President Reagan, for example, suspended entry of "all Cuban nationals" (with certain exceptions) based on the Cuban government's decision to suspend execution of an immigration

[9] See, e.g., Proclamation No. 8693, 76 Fed. Reg. 44,751 (July 27, 2011); Proclamation No. 8342, 74 Fed. Reg. 4093 (Jan. 22, 2009); Proclamation No. 6958, 61 Fed. Reg. 60,007 (Nov. 26, 1996); Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (June 1, 1992); Proclamation No. 5887, 53 Fed. Reg. 43,185 (Oct. 26, 1988); Proclamation No. 5829, 53 Fed. Reg. 22,289 (June 14, 1988).

agreement with the United States. See Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986). President Carter invoked Section 1185(a)(1) in 1979 in response to the Iranian Hostage Crisis to restrict entry of Iranian nationals, and in doing so he made no express findings and delegated the authority to prescribe the restrictions to lower Executive Branch officials. See Exec. Order No. 12,172, § 1-101, 44 Fed. Reg. 67,947 (Nov. 28, 1979). The Proclamation here -- which responds to certain foreign governments' ongoing unwillingness or inability to improve their information-sharing, identity-management, and other security practices -- is materially indistinguishable in this respect from the orders of President Carter and President Reagan.

c. The Proclamation expressly finds that the suspensions imposed are in the national interest. That should be the end of the matter. Regardless, the Proclamation explains in great detail the purposes that the restrictions serve and the facts on which it is based. It therefore easily satisfies any requirement that the INA conceivably imposes.

The district court dismissed the Proclamation's objectives as "aspirational justifications" that the court found "no[t] * * * satisfying" because they were not tied to "verifiable evidence." Add. 35. But the evidence was produced in the weeks-long comprehensive review conducted by multiple government agencies. The agencies set standards, reviewed nearly 200 countries, and

then obtained improvement in several countries through diplomatic engagement. Cabinet-level officials made recommendations to the President about particular countries based on their consideration of the national-security concerns associated with each individual country. These conclusions are entitled to substantial deference. The fact that some of the evidence reviewed by the President is non-public and privileged, see Add. 33 n.16, is not surprising in this context and does not remotely disable the President from exercising his authority under Section 1182(f). Especially "when it comes to collecting evidence and drawing factual inferences" in the national-security context, "'the lack of competence on the part of the courts is marked,' * * * and respect for the Government's conclusions is appropriate." Holder v. Humanitarian Law Project, 561 U.S. 1, 34 (2010) (HLP); cf. Egan, 484 U.S. at 527-529 (the President's "[p]redictive judgment[s]" on national-security questions warrant deference).

d. Rather than afford deference to the Executive Branch's national-security and foreign-relations judgments, the district court imposed a standard akin to heightened scrutiny by criticizing the "fit" between the President's findings and the restrictions in the Proclamation. Add. 31-35. That novel requirement is entirely unsupported by the discretion-granting text of 8 U.S.C. 1182(f) and 1185(a)(1). Even if some type of judicial review were appropriate, it would be sufficient that the Proclamation

articulates a rational connection between the entry restrictions imposed and the national interest, a standard the Proclamation readily satisfies. See IRAP v. Trump, 2017 WL 4674314, at *23 (D. Md. Oct. 17, 2017) ("[T]here is no requirement that a[n 8 U.S.C.] 1182(f) entry restriction meet more stringent standards found elsewhere in the law."). The district court's contrary approach would enmesh courts in the President's conduct of foreign affairs, despite the well-established principle that such matters are "'largely immune from judiciary inquiry or interference.'" Regan v. Wald, 468 U.S. 222, 242 (1984).

2. The Proclamation is consistent with 8 U.S.C. 1152(a)

The district court held that the Proclamation's entry restrictions violate 8 U.S.C. 1152(a)(1)(A), which prohibits "discriminat[ing]" or granting a "preference or priority" in the "issuance of an immigrant visa because of," inter alia, an alien's "nationality." That interpretation is incorrect, and even the court's reading of Section 1152(a)(1)(A) could not support an injunction against the Proclamation's restrictions on entry as opposed to immigrant-visa issuance.

a. The district court read Section 1152(a)(1)(A) to create a conflict with the President's authority in Section 1182(f) to suspend the entry of "any class" of aliens. There is no conflict, because the two provisions operate in different spheres. Visas are issued by consular officers, but a visa may not be issued if

the applicant "is ineligible to receive a visa * * * under [S]ection 1182." 8 U.S.C. 1201(g). Section 1182 lists many grounds for ineligibility, including criminal history, terrorist affiliation, or a Presidential determination under Section 1182(f) that the alien may not enter the United States. Section 1152(a)(1)(A) provides that, within the universe of aliens who are not disqualified from receiving a visa by a Presidential entry suspension under Section 1182(f), under Section 1185(a)(1), or by any other INA provision, consular officers and other government officials are prohibited from discriminating on the basis of nationality in issuing immigrant visas. The 1965 amendment enacting the provision codified at 8 U.S.C. 1152(a)(1)(A) was designed to eliminate the country-based quota system for immigrants that was previously in effect, not to modify the eligibility criteria for admission or limit preexisting restraints on eligibility such as those in Sections 1182(f) or 1185(a)(1). See H.R. Rep. No. 745, 89th Cong., 1st Sess. 12-13 (1965); S. Rep. No. 748, 89th Cong., 1st Sess. 11, 13 (1965).

Here again, historical practice strongly supports that reading. As discussed, President Reagan suspended immigrant entry of "all Cuban nationals" (with exceptions). 51 Fed. Reg. at 30,470. And President Carter announced that the State Department would "invalidate all visas issued to Iranian citizens" and would not reissue visas or issue new visas "except for compelling and

proven humanitarian reasons or where the national interest of our own country requires." The American Presidency Project, Jimmy Carter, Sanctions Against Iran Remarks Announcing U.S. Actions (Apr. 7, 1980), https://goo.gl/3sYHLB. Those actions would be unlawful under the decision below.

The district court's interpretation of the INA raises grave constitutional questions because it would mean that, by statute, the President cannot suspend entry of aliens from a specified country even if he is aware of a particular threat from an unidentified national of that country, or the United States is on the brink of war with it. Respondents will not go that far; they concede that the entry restrictions on North Korean nationals are lawful in light of "the current state of relations between the United States and North Korea." D. Ct. Doc. 368-1, at 10 n.4 (Oct. 10, 2017). The text of Section 1152(a)(1)(A), however, provides no standards that would enable the judiciary to assess respondents' position that the situation in North Korea justifies entry restrictions but the terrorist threat in Somalia, for example, does not. That is because Section 1152(a)(1)(A) does not prohibit the President from imposing restrictions on aliens from particular countries in order to protect the Nation in the first place.

b. Even if Section 1152(a)(1)(A) did conflict with Sections 1182(f) and 1185(a)(1), the latter provisions would govern. The district court's contrary view requires reading Section

1152(a)(1)(A) as partially "repeal[ing]" Sections 1182(f) and 1185(a)(1) by "implication," which is improper unless Congress's "intention" is "clear" and "manifest." National Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662, 664 n.8 (2007) (citation omitted). Nothing in Section 1152(a)(1)(A) -- which does not mention the President or entry -- demonstrates a "clear and manifest" congressional intent to narrow the grants of authority to the President in Sections 1182(f) and 1185(a)(1). Id. at 662 (citation omitted). Sections 1182(f) and 1185(a)(1) also control as the more specific statutes because they confer distinct powers on the President to suspend entry when he determines the national interest requires in particular circumstances, see Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 171-173 (1993), as opposed to Section 1152(a)(1)(A)'s generic prohibition on discrimination in the day-to-day issuance of immigrant visas. Moreover, Section 1185(a)(1) was enacted in its current form in 1978, after Section 1152(a)(1), and thus it prevails as the most recent statute. See Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 707(a), 92 Stat. 992-993.

c. The district court's reading of 8 U.S.C. 1152(a)(1)(A) suffers from the additional flaw that it cannot justify an injunction against the Proclamation, because the statute by its terms concerns only the "issuance of * * * immigrant visa[s]."

Even if Section 1152(a)(1)(A) prohibited the government from denying visas to immigrant applicants from particular countries, Section 1152(a)(1)(A) still would not require the government to take the additional step of allowing the entry of those aliens to the United States.[10]

III. THE BALANCE OF EQUITIES SUPPORTS A STAY

A. The injunction causes direct, irreparable injury to the interests of the government and the public, which merge here, see Nken v. Holder, 556 U.S. 418, 435 (2009). "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." Maryland v. King, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting New Motor Vehicle Bd. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)) (brackets in original). A fortiori this is true when a Proclamation of the President of the United States is enjoined.

The injunction here, moreover, is particularly harmful because it directly undermines the government's ability to safeguard national security and conduct foreign relations -- "urgent objective[s] of the highest order." Trump v. IRAP, 137 S. Ct. 2080, 2088 (2017) (quoting HLP, 561 U.S. at 28). As discussed, the Proclamation is based on a finding that certain foreign

[10] The district court recognized that Section 1152(a)(1)(A) is limited to immigrant visas. Add. 39 n.20. As a result, that provision has no bearing on the large number of aliens covered by the Proclamation who seek nonimmigrant visas.

governments have inadequate information-sharing, identity-management protocols, or other risk factors that deny the United States sufficient information to assess the risks posed by their nationals; it thus suspends entry of certain nationals from those countries and applies diplomatic pressure in order to achieve greater cooperation. As this Court previously recognized, "[t]o prevent the Government from pursuing that objective * * * would appreciably injure its interests." Ibid.

The district court was wrong to discount these harms. Add. 41-42. Despite acknowledging that "[n]ational security and the protection of our borders [are] unquestionably also of significant public interest" and are "objectives of the highest order," the court stated that the government is "not likely harmed" here because the injunction requires the government "to adhere to immigration procedures that have been in place for years." Add. 41. But the Proclamation rests on a different policy judgment by the President, informed by a just-completed, multi-agency review, that the information provided by certain foreign governments is not adequate. It is the injunction in this case that departs from the status quo by breaking with historical practice to sharply curtail the President's authority.

For the same reason, the order entered by the court of appeals is not sufficient to prevent irreparable harm to the government. That standard was designed to track the limitations that this Court

imposed on the injunctions against EO-2. But as explained, EO-2 involved temporary procedures before the review was conducted and in the absence of a Presidential determination concerning the adequacy of foreign governments' information-sharing and identity-management practices. Now that the review has been completed and identified ongoing deficiencies in the information needed to assess nationals of particular countries, additional restrictions are needed. The Proclamation found that persons traveling on immigrant visas create particular challenges, Procl. § 1(h)(ii), yet the court of appeals' order would surely undermine the Proclamation's suspensions on immigrant-visa travel, because most immigrant-visa holders have a bona fide relationship with a person or entity in the United States.

The district court also stated that national-security concerns do not outweigh "the public's harms" when "the President has wielded his authority unlawfully." Add. 41. That reasoning conflates the equities and the merits. And it mistakenly disregards the public's interest in effectuating the Executive's determination to exclude certain aliens from countries that pose a heightened threat. Cf. Nken, 556 U.S. at 436 (That "there is a public interest in preventing aliens from being wrongfully removed * * * is no basis for the blithe assertion of an 'absence of any injury to the public interest' when a stay [of a removal order] is granted."). The public has a strong interest in suspension of

entry of aliens whose admission the President has determined, in consultation with his Cabinet and pursuant to his statutory authority, would be detrimental to the Nation's interests.

B. By contrast, respondents have failed to "demonstrate that irreparable injury is likely in the absence of an injunction." Winter, 555 U.S. at 22. The only concrete harm respondents allege is that the Proclamation will prevent certain identified aliens from entering the United States. But delay in entry alone, especially for the brief period while the government's appeal of the injunction is pending (on an expedited briefing schedule), does not amount to irreparable harm.

Moreover, respondents did not demonstrate that it is likely that the entry of any of those particular aliens would actually be delayed during the pendency of the appeal. Visa-processing times can vary widely, see Mendez-Garcia v. Lynch, 840 F.3d 655, 666 (9th Cir. 2016), and thus even apart from the Proclamation, respondents can only speculate that any of those particular aliens otherwise would be permitted to enter during the brief stay period. Aliens abroad who meet otherwise-applicable visa requirements may seek a waiver, and until such a waiver is denied, the alien has not received final agency action, and respondents' claimed harms are unripe and too remote and speculative to merit injunctive relief. At the very least, respondents' speculative allegations

do not outweigh the harm caused to the Nation as a whole in protecting the national security.

IV. THE GLOBAL INJUNCTION IS OVERBROAD AND SHOULD BE STAYED TO THE EXTENT IT GRANTS RELIEF BEYOND RESPONDENTS THEMSELVES

At a minimum, a stay is warranted because the injunction is vastly overbroad, as it was in United States Department of Defense v. Meinhold, 510 U.S. 939 (1993) (unanimously granting stay of injunction pending appeal insofar as it "grant[ed] relief to persons other than" the named plaintiff). Both Article III and equitable principles require that injunctive relief must be limited to redressing a plaintiff's own injuries stemming from a violation of his own rights. Article III requires that "[t]he remedy" sought "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). If a plaintiff himself faces no prospect of imminent, cognizable injury from challenged conduct, Article III prohibits awarding that plaintiff injunctive relief. See City of Los Angeles v. Lyons, 461 U.S. 95, 101-110 (1983). Principles of equity independently require that injunctions be no broader than "necessary to provide complete relief to the plaintiff[]." Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) (citation omitted). That must be especially so for a preliminary injunction in the context of national security.

The district court's injunction contravenes this settled rule. Even under the Ninth Circuit's partial stay, the injunction

sweeps far more broadly than redressing the purported harms of the specific aliens at issue in this case. It enjoins any application of the Proclamation's restrictions to any national of six of the covered countries who has a credible claim of a bona fide relationship with a person or entity in the United States. As noted above, that would cover most individuals seeking immigrant visas, and thus many of the foreign nationals covered by the Proclamation. The district court did not explain why that sweeping injunction is necessary to afford complete relief to respondents themselves. The court addressed the scope of relief in a single sentence, stating that "[n]ationwide relief is appropriate in light of the likelihood of success on [respondents'] INA claims," Add. 42 -- in other words, because respondents' statutory claim, if valid, would render unlawful application of the Proclamation to other aliens as well. That reasoning conflates the scope of the purported legal defect that respondents assert with the extent of their alleged harm.[11]

Respondents argued below that global relief is warranted because of the importance of "uniform immigration law and policy." D. Ct. Doc. 368-1, at 36. But respect for the federal government's

[11] Moreover, as discussed above, p. 34, supra, and as the district court recognized, only the district court's holding based on Section 1182(f), if correct, could support global relief. The court's separate ruling based on Section 1152(a)(1)(A) cannot support the injunction in its entirety because that statute applies "only as to the issuance of immigrant visas"; it has no bearing on nonimmigrant visas. Add. 39 n.20 (emphasis omitted).

interest in uniform enforcement of the immigration laws requires leaving the Proclamation's global policy in place, with individualized exceptions for any respondents who have established irreparable injury from a violation of their own rights. The Proclamation's severability clause compels the same conclusion. Procl. § 8(a). Tailored relief would impose far less interference than enjoining the Proclamation categorically based on the injuries to a few individuals and organizations. As in Meinhold, this Court at a minimum should stay the injunction to the extent it affords relief beyond respondents themselves.

CONCLUSION

The injunction should be stayed in its entirety pending the disposition of the appeal in the Ninth Circuit and, if that court affirms the injunction, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. At a minimum, the injunction should be stayed as to all persons other than those aliens specifically identified by respondents whose exclusion would impose a cognizable, irreparable injury on respondents themselves.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

NOVEMBER 2017

ADDENDUM

FILED

NOV 13 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF HAWAII; et al., Plaintiffs-Appellees, STATE OF CALIFORNIA; et al., Intervenors-Pending, v. DONALD J. TRUMP, in his official capacity as President of the United States; et al., Defendants-Appellants.	No. 17-17168 D.C. No. 1:17-cv-00050-DKW-KSC District of Hawaii, Honolulu ORDER

Before: HAWKINS, GOULD, and PAEZ, Circuit Judges.

The Government's motion for an emergency stay of the district court's preliminary injunction pending hearing and resolution of the expedited appeal is granted in part and denied in part. The preliminary injunction is stayed except as to "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States," as set out below. *Trump v. Int'l Refugee Assistance Project* ("*IRAP*"), 137 S. Ct. 2080, 2088 (2017); *see also Nken v. Holder*, 556 U.S. 418, 434-35 (2009).

The injunction remains in force as to foreign nationals who have a "close familial relationship" with a person in the United States. *IRAP*, 137 S. Ct. at 2088. Such persons include grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins. *See Hawaii v. Trump*, 871 F.3d 646, 658 (9th Cir. 2017). "As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading [Proclamation 9645]." *IRAP*, 137 S. Ct. at 2088.

MOTION GRANTED IN PART; DENIED IN PART.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

STATE OF HAWAII, ISMAIL ELSHIKH, JOHN DOES 1 & 2, and MUSLIM ASSOCIATION OF HAWAII, INC., Plaintiffs, vs. DONALD J. TRUMP, *et al.*, Defendants.	Civil No. 17-00050 DKW-KSC **PRELIMINARY INJUNCTION**

The Court enters the following Preliminary Injunction pursuant to the Joint Stipulation to Convert Temporary Restraining Order to Preliminary Injunction, entered October 20, 2017:

PRELIMINARY INJUNCTION

It is hereby ADJUDGED, ORDERED, and DECREED that:

Defendant ELAINE DUKE, in her official capacity as Acting Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them who receive actual notice of

this Order, hereby are enjoined fully from enforcing or implementing Sections 2(a), (b), (c), (e), (g), and (h) of the Proclamation issued on September 24, 2017, entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats" across the Nation. Enforcement of these provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

No security bond is required under Federal Rule of Civil Procedure 65(c).

The Court declines to stay this ruling or hold it in abeyance should an appeal of this order be filed.

IT IS SO ORDERED.

Dated: October 20, 2017 at Honolulu, Hawai'i.

Derrick K. Watson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

STATE OF HAWAII, ISMAIL ELSHIKH, JOHN DOES 1 & 2, and MUSLIM ASSOCIATION OF HAWAII, INC., Plaintiffs, vs. DONALD J. TRUMP, *et al.*, Defendants.	Civil No. 17-00050 DKW-KSC **ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER**

INTRODUCTION

Professional athletes mirror the federal government in this respect: they operate within a set of rules, and when one among them forsakes those rules in favor of his own, problems ensue. And so it goes with EO-3.

On June 12, 2017, the Ninth Circuit affirmed this Court's injunction of Sections 2 and 6 of Executive Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017), entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" ("EO-2"). *Hawaii v. Trump,* 859 F.3d 741 (9th Cir. 2017). The Ninth Circuit did so because "the President, in issuing the Executive Order, exceeded the scope of the

authority delegated to him by Congress" in 8 U.S.C. § 1182(f). *Hawaii*, 859 F.3d at 755. It further did so because EO-2 "runs afoul of other provisions of the [Immigration and Nationality Act ('INA'), specifically 8 U.S.C. § 1152,] that prohibit nationality-based discrimination." *Hawaii*, 859 F.3d at 756.

Enter EO-3.[1] Ignoring the guidance afforded by the Ninth Circuit that at least this Court is obligated to follow, EO-3 suffers from precisely the same maladies as its predecessor: it lacks sufficient findings that the entry of more than 150 million nationals from six specified countries[2] would be "detrimental to the interests of the United States," a precondition that the Ninth Circuit determined must be satisfied before the Executive may properly invoke Section 1182(f). *Hawaii*, 859 F.3d at 774. And EO-3 plainly discriminates based on nationality in the manner that the Ninth Circuit has found antithetical to both Section 1152(a) and the founding principles of this Nation. *Hawaii*, 859 F.3d at 776–79.

Accordingly, based on the record before it, the Court concludes that Plaintiffs have met their burden of establishing a strong likelihood of success on the merits of their statutory claims, that irreparable injury is likely if the requested relief is not issued, and that the balance of the equities and public interest counsel in favor of

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[1]Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) [hereinafter EO-3].
[2]EO-3 § 2 actually bars the nationals of *more than* six countries, and does so indefinitely, but only the nationals from six of these countries are at issue here.

granting the requested relief. Plaintiffs' Motion for a Temporary Restraining Order (ECF No. 368) is GRANTED.

BACKGROUND

I. The President's Executive Orders

On September 24, 2017, the President signed Proclamation No. 9645, entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats." Like its two previously enjoined predecessors, EO-3 restricts the entry of foreign nationals from specified countries, but this time, it does so indefinitely. Plaintiffs State of Hawai'i ("State"), Ismail Elshikh, Ph.D., John Doe 1, John Doe 2, and the Muslim Association of Hawaii, Inc., seek a nationwide temporary restraining order ("TRO") that would prohibit Defendants[3] from enforcing and implementing Sections 2(a), (b), (c), (e), (g), and (h) before EO-3 takes effect. Pls.' Mot. for TRO 1, ECF No. 368.[4] The Court briefly recounts the history of the Executive Orders and related litigation.

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[3]Defendants in the instant action are: Donald J. Trump, in his official capacity as President of the United States; the United States Department of Homeland Security ("DHS"); Elaine Duke, in her official capacity as Acting Secretary of DHS; the United States Department of State; Rex Tillerson, in his official capacity as Secretary of State; and the United States of America.

[4]On October 14, 2017, the Court granted Plaintiffs' unopposed Motion for Leave to File Third Amended Complaint (ECF. No. 367), and, on October 15, 2017, Plaintiffs filed their Third Amended Complaint ("TAC"; ECF No. 381).

A. The Executive Orders and Related Litigation

On January 27, 2017, the President signed an Executive Order entitled "Protecting the Nation From Foreign Terrorist Entry into the United States." Exec. Order 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter EO-1]. EO-1's stated purpose was to "protect the American people from terrorist attacks by foreign nationals admitted to the United States." *Id*. EO-1 took immediate effect and was challenged in several venues shortly after it issued. On February 3, 2017, a federal district court granted a nationwide TRO enjoining EO-1. *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). On February 9, 2017, the Ninth Circuit denied the Government's emergency motion for a stay of that injunction. *Washington v. Trump*, 847 F.3d 1151, 1161–64 (9th Cir. 2017) (per curiam), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017). As described by a subsequent Ninth Circuit panel, "[r]ather than continue with the litigation, the Government filed an unopposed motion to voluntarily dismiss the underlying appeal [of EO-1] after the President signed EO2. On March 8, 2017, this court granted that motion, which substantially ended the story of EO1." *Hawaii*, 859 F.3d at 757.

On March 6, 2017, the President issued EO-2, which was designed to take effect on March 16, 2017. 82 Fed. Reg. 13209 (Mar. 6, 2017). Among other

things, EO-2 directed the Secretary of Homeland Security to conduct a global review to determine whether foreign governments provide adequate information about their nationals seeking entry into the United States. *See* EO-2 § 2(a). EO-2 directed the Secretary to report those findings to the President, after which nations identified as "deficient" would have an opportunity to alter their practices, prior to the Secretary recommending entry restrictions. *Id*. §§ 2(d)–(f).

During this global review, EO-2 contemplated a temporary, 90-day suspension on the entry of certain foreign nationals from six countries—Iran, Libya, Somalia, Sudan, Syria, and Yemen. *Id*. § 2(c). That 90-day suspension was challenged in multiple courts and was preliminarily enjoined by this Court and by a federal district court in Maryland. *See Hawaii v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017)[5]; *Int'l Refugee Assistance Project* ("*IRAP*") *v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017). Those injunctions were affirmed in relevant part by the respective courts of appeals. *See Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam); *IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc), *as amended* (May 31, 2017). The Supreme Court granted certiorari in both cases and left the injunctions in place pending its review, except as to persons who lacked a "credible

[5]This Court also enjoined the 120-day suspension on refugee entry under Section 6. *Hawaii v. Trump*, 245 F. Supp. 3d at 1238.

claim of a bona fide relationship with a person or entity in the United States." *Trump v. IRAP*, 137 S. Ct. 2080, 2088 (2017).[6]

B. EO-3

The President signed EO-3 on September 24, 2017. EO-3's stated policy is to protect United States "citizens from terrorist attacks and other public-safety threats," by preventing "foreign nationals who may . . . pose a safety threat . . . from entering the United States."[7] EO-3 pmbl. EO-3 declares that "[s]creening and vetting protocols and procedures associated with visa adjudications and other immigration processes play a critical role in implementing that policy." EO-3 § 1(a). Further, because "[g]overnments manage the identity and travel documents of their nationals and residents," it is "the policy of the United States to take all necessary and appropriate steps to encourage foreign governments to improve their information-sharing and identity-management protocols and practices and to regularly share identity and threat information with our immigration screening and vetting systems." *Id.* § 1(b).

[6]After EO-2's 90-day entry suspension expired, the Supreme Court vacated the *IRAP* injunction as moot. *See Trump v. IRAP*, No. 16-1436, --- S. Ct. ---, 2017 WL 4518553 (Oct. 10, 2017).
[7]EO-3 is founded in Section 2 of EO-2. *See* EO-2 § 2(e) (directing that the Secretary of Homeland Security "shall submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of [specified] countries").

As a result of the global reviews undertaken by the Secretary of Homeland Security in consultation with the Secretary of State and the Director of National Intelligence, and following a 50-day "engagement period" conducted by the Department of State, the Acting Secretary of Homeland Security submitted a September 15, 2017 report to the President recommending restrictions on the entry of nationals from specified countries. *Id.* § 1(c)–(h). The President found that, "absent the measures set forth in [EO-3], the immigrant and nonimmigrant entry in the United States of persons described in section 2 of [EO-3] would be detrimental to the interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions." EO-3 pmbl.

Section 2 of EO-3 indefinitely bans immigration into the United States by nationals of seven countries: Iran, Libya, Syria, Yemen, Somalia, Chad, and North Korea. EO-3 also imposes restrictions on the issuance of certain nonimmigrant visas to nationals of six of those countries. It bans the issuance of all nonimmigrant visas except student (F and M) and exchange (J) visas to nationals of Iran, and it bans the issuance of business (B-1), tourist (B-2), and business/tourist (B-1/B-2) visas to nationals of Chad, Libya, and Yemen. EO-3 §§ 2(a)(ii), (c)(ii), (g)(ii). EO-3 suspends the issuance of business, tourist, and business-tourist visas to specific Venezuelan government officials and their families, and bars the receipt of

nonimmigrant visas by nationals of North Korea and Syria. *Id.* §§ 2(d)(ii), (e)(ii), (f)(ii).

EO-3, like its predecessor, provides for discretionary case-by-case waivers. *Id*. § 3(c). The restrictions on entry became effective immediately for foreign nationals previously restricted under EO-2 and the Supreme Court's stay order, but for all other covered persons, the restrictions become effective on October 18, 2017 at 12:01 a.m. eastern daylight time. EO-3 §§ 7(a), (b).

II. Plaintiffs' Motion For TRO

Plaintiffs' Third Amended Complaint (ECF No. 381) and Motion for TRO (ECF No. 368) contend that portions of the newest entry ban suffer from the same infirmities as the enjoined provisions of EO-2 § 2.[8] They note that the President "has never renounced or repudiated his calls for a ban on Muslim immigration." TAC ¶ 88. Plaintiffs observe that, in the time since this Court examined EO-2, the

[8]Plaintiffs assert the following causes of action in the TAC: (1) violation of 8 U.S.C. § 1152(a)(1)(a) (Count I); (2) violation of 8 U.S.C. §§ 1182(f) and 1185(a) (Count II); (3) violation of 8 U.S.C. § 1157(a) (Count III); (4) violation of the Establishment Clause of the First Amendment (Count IV); (5) violation of the Free Exercise Clause of the First Amendment (Count V); (6) violation of the equal protection guarantees of the Fifth Amendment's Due Process Clause on the basis of religion, national origin, nationality, or alienage (Count VI); (7) substantially burdening the exercise of religion in violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 200bb-1(a) (Count VII); (8) substantive violation of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 706(2)(A)–(C), through violations of the Constitution, INA, and RFRA (Count VIII); and (9) procedural violation of the APA, 5 U.S.C. § 706(2)(D) (Count IX).

record has only gotten worse. *See* Pls.' Mem. in Supp. 31, ECF. No. 368-1; TAC ¶¶ 84–88.[9]

The State asserts that EO-3 inflicts statutory and constitutional injuries upon its residents, employers, and educational institutions, while Dr. Elshikh alleges injuries on behalf of himself, his family, and members of his Mosque. TAC ¶¶ 14–32. Additional Plaintiffs John Doe 1 and John Doe 2 have family members who will not be able to travel to the United States. TAC ¶¶ 33–41. The Muslim Association of Hawaii is a non-profit entity that operates mosques on three islands in the State of Hawai'i and includes members from Syria, Somalia, Iran, Yemen, and Libya who are naturalized United States citizens or lawful permanent residents. TAC ¶¶ 42–45.

[9]For example, on June 5, 2017, "the President endorsed the 'original Travel Ban' in a series of tweets in which he complained about how the Justice Department had submitted a 'watered down, politically correct version'" to the Supreme Court. TAC ¶ 86 (quoting Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 3:29 AM EDT) https://goo.gl/dPiDBu). He further tweeted: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!" TAC ¶ 86 (quoting Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 3:25 AM EDT), https://goo.gl/9fsD9K). He later added: "That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!" TAC ¶ 86 (quoting Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 6:20 PM EDT), https://goo.gl/VGaJ7z). Plaintiffs also point to "remarks made on the day that EO-3 was released, [in which] the President stated: 'The travel ban: The tougher, the better.'" TAC ¶ 94 (quoting The White House, Office of the Press Sec'y, *Press Gaggle by President Trump, Morristown Municipal Airport, 9/24/2017* (Sept. 24, 2017), https://goo.gl/R8DnJq).

Plaintiffs ask the Court to temporarily enjoin on a nationwide basis the implementation and enforcement of EO-3 Sections 2(a), (b), (c), (e), (g), and (h) before EO-3 takes effect.[10] For the reasons that follow, the Court orders exactly that.

DISCUSSION

I. Plaintiffs Satisfy Standing and Justiciability

A. Article III Standing

Article III, Section 2 of the Constitution permits federal courts to consider only "cases" and "controversies." *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

"At this very preliminary stage of the litigation, the [Plaintiffs] may rely on the allegations in their Complaint and whatever other evidence they submitted in

[10]Plaintiffs do not seek to enjoin the entry ban with respect to North Korean or Venezuelan nationals. *See* Mem. in Supp. 10 n.4; ECF. No. 368-1.

support of their TRO motion to meet their burden." *Washington*, 847 F.3d at 1159 (citing *Lujan*, 504 U.S. at 561).

1. The State Has Standing

The State alleges standing based upon injuries to its proprietary and quasi-sovereign interests, *i.e.*, in its role as *parens patriae*. Just as the Ninth Circuit previously concluded in reviewing this Court's order enjoining EO-2, 859 F.3d 741, and a different Ninth Circuit panel found on a similar record in *Washington*, 847 F.3d 1151, the Court finds that the alleged harms to the State's proprietary interests are sufficient to support standing.[11]

The State, as the operator of the University of Hawai'i system, will suffer proprietary injuries stemming from EO-3.[12] The University is an arm of the State. *See* Haw. Const. art. 10, §§ 5, 6; Haw. Rev. Stat. ("HRS") § 304A-103. Plaintiffs allege that EO-3 will hinder the University from recruiting and retaining a

[11]The Court does not reach the State's alternative standing theory based on the protection of the interests of its citizens as *parens patriae*. *See Washington*, 847 F.3d at 1168 n.5 ("The States have asserted other proprietary interests and also presented an alternative standing theory based on their ability to advance the interests of their citizens as *parens patriae*. Because we conclude that the States' proprietary interests as operators of their public universities are sufficient to support standing, we need not reach those arguments.").

[12]The State has asserted other proprietary interests including the loss of tourism revenue, a leading economic driver in the State. The Court does not reach this alternative argument because it concludes that the State's proprietary interests, as an operator of the University of Hawai'i, are sufficient to confer standing. *See Hawaii*, 859 F.3d at 766 n.6 (concluding that the interests, as an operator of the University of Hawai'i, and its sovereign interests in carrying out its refugee programs and policies, are sufficient to confer standing (citing *Washington*, 847 F.3d at 1161 n.5)).

world-class faculty and student body. TAC ¶¶ 99–102; Decl. of Donald O. Straney ¶¶ 8–15, ECF. No. 370-6. The University has 20 students from the eight countries designated in EO-3, and has already received five new graduate applications from students in those countries for the Spring 2018 Term. Straney Decl. ¶ 13. It also has multiple faculty members and scholars from the designated countries and uncertainty regarding the entry ban "threatens the University's recruitment, educational programming, and educational mission." Straney Decl. ¶ 8. Indeed, in September 2017, a Syrian journalist scheduled to speak at the University was denied a visa and did not attend a planned lecture, another lecture series planned for November 2017 involving a Syrian national can no longer go forward, and another Syrian journalist offered a scholarship will not likely be able to attend the University if EO-3 is implemented. Decl. of Nandita Sharma ¶¶ 4–9, ECF No. 370-8.

These types of injuries are nearly indistinguishable from those found to support standing in the Ninth Circuit's controlling decisions in *Hawaii* and *Washington*. *See Hawaii*, 859 F.3d at 765 ("The State's standing can thus be grounded in its proprietary interests as an operator of the University. EO2 harms the State's interests because (1) students and faculty suspended from entry are deterred from studying or teaching at the University; and (2) students who are unable to attend the University will not pay tuition or contribute to a diverse student

body."); *Washington*, 847 F.3d at 1161 ("The necessary connection can be drawn in at most two logical steps: (1) the Executive Order prevents nationals of seven countries from entering Washington and Minnesota; (2) as a result, some of these people will not enter state universities, some will not join those universities as faculty, some will be prevented from performing research, and some will not be permitted to return if they leave.").

As before, the Court "ha[s] no difficulty concluding that the [Plaintiffs'] injuries would be redressed if they could obtain the relief they ask for: a declaration that the Executive Order violates the [law] and an injunction barring its enforcement." *Washington*, 847 F.3d at 1161. For purposes of the instant Motion for TRO, the State has preliminarily demonstrated that: (1) its universities will suffer monetary damages and intangible harms; (2) such harms can be sufficiently linked to EO-3; and (3) the State would not suffer the harms to its proprietary interests in the absence of implementation of EO-3. Accordingly, at this early stage of the litigation, the State has satisfied the requirements of Article III standing.

2. <u>The Individual Plaintiffs Have Standing</u>

The Court next turns to the three individual Plaintiffs and concludes that they too have standing with respect to the INA-based statutory claims.

a. Dr. Elshikh

Dr. Elshikh is an American citizen of Egyptian descent and has been a resident of Hawai‘i for over a decade. Decl. of Ismail Elshikh ¶ 1, ECF No. 370-9. He is the Imam of the Muslim Association of Hawaii and a leader within the State's Islamic community. Elshikh Decl. ¶ 2. Dr. Elshikh's wife is of Syrian descent, and their young children are American citizens. Dr. Elshikh and his family are Muslim. Elshikh Decl. ¶¶ 1, 3. His Syrian mother-in-law recently received an immigrant visa and, in August 2017, came to Hawai‘i to live with his family. Elshikh Decl. ¶ 5. His wife's four brothers are Syrian nationals, currently living in Syria, with plans to visit his family in Hawai‘i in March 2018 to celebrate the birthdays of Dr. Elshikh's three sons. Elshikh Decl. ¶ 6. On October 5, 2017, one of his brothers-in-law filed an application for a nonimmigrant visitor visa. Elshikh Decl. ¶ 6. Dr. Elshikh attests that as a result of EO-3, his family will be denied the company of close relatives solely because of their nationality and religion, which denigrates their faith and makes them feel they are second-class citizens in their own country. Elshikh Decl. ¶ 7.

Dr. Elshikh seeks to reunite his family members.

> By suspending the entry of nationals from the [eight] designated countries, including Syria, [EO-3] operates to delay or prevent the issuance of visas to nationals from those countries, including Dr. Elshikh's [brother]-in-law. Dr. Elshikh has alleged a

> concrete harm because [EO-3] . . . is a barrier to reunification with his [brother]-in-law.

Hawaii, 859 F.3d at 763. It is also clear that Dr. Elshikh has established causation and redressability. His injuries are fairly traceable to EO-3, satisfying causation, and enjoining EO-3 will remove a barrier to reunification, satisfying redressability. Dr. Elshikh has standing to assert his claims, including statutory INA violations.

b. <u>John Doe 1</u>

John Doe 1 is a naturalized United States citizen who was born in Yemen and has lived in Hawai‘i for almost 30 years. Decl. of John Doe 1 ¶ 1, ECF No. 370-1. His wife and four children, also United States citizens, are Muslim and members of Dr. Elshikh's mosque. Doe 1 Decl. ¶¶ 2–3. One of his daughters, who presently lives in Hawai‘i along with her own child, is married to a Yemeni national who fled the civil war in Yemen and is currently living in Malaysia. Doe 1 Decl. ¶¶ 4-6. In September 2015, his daughter filed a petition to allow Doe 1's son-in-law to immigrate to the United States as the spouse of a United States citizen, and in late June 2017, she learned that her petition had successfully passed through the clearance stage. Doe 1 Decl. ¶¶ 7–9. She has filed a visa application with the National Visa Center and estimates that, under normal visa processing procedures, he would receive a visa within the next three to twelve months. However, in light of EO-3, the issuance of immigrant visas to nationals of Yemen will be effectively

barred, which creates uncertainty for the family. Doe 1 Decl. ¶¶ 9–10. Doe 1's family misses the son-in law and wants him to be able to live in Hawai'i with Doe 1's daughter and grandchild. Doe 1 Decl. ¶¶ 11, 12 ("By singling our family out for special burdens, [EO-3] denigrates us because of our faith and sends a message that Muslims are outsiders and are not welcome in this country.").

Doe 1 alleges a sufficient injury-in-fact. He and his family seek to reunite with his son-in-law and avoid a prolonged separation from him. *See Hawaii*, 859 F.3d at 763 (finding standing sufficient where "Dr. Elshikh seeks to reunite his mother-in-law with his family and similarly experiences prolonged separation from her"); *see also id.* ("This court and the Supreme Court have reviewed the merits of cases brought by U.S. residents with a specific interest in the entry of a foreigner." (collecting authority)). Likewise, Doe 1 satisfies the requirements of causation and redressability. His injuries are fairly traceable to EO-3, and enjoining its implementation will remove a barrier to reunification and redress that injury.

c. <u>John Doe 2</u>

John Doe 2 is a lawful permanent resident of the United States, born in Iran, currently living in Hawai'i and working as a professor at the University of Hawai'i. Decl. of John Doe 2 ¶¶ 1–3, ECF. No. 370-2. His mother is an Iranian national with a pending application for a tourist visa, filed several months ago. Doe 2 Decl. ¶ 4.

Several other close relatives—also Iranian nationals living in Iran—similarly submitted applications for tourist visas a few months ago and recently had interviews in connection with their applications. They intend to visit Doe 2 in Hawai‘i as soon as their applications are approved. Doe 2 Decl. ¶ 5. If implemented, EO-3 will block the issuance of tourist visas from Iran and separate Doe 2 from his close relatives. If EO-3 persists, Doe 2 is less likely to remain in the United States because he will be indefinitely deprived of the company of his family. Doe 2 Decl. ¶ 8. Because his family cannot visit him in the United States, Doe 2's life has been more difficult, and he feels like an outcast in his own country. Doe 2 Decl. ¶ 8.

Like Dr. Elshikh and Doe 1, Doe 2 sufficiently alleges a concrete harm because EO-3 is a barrier to visitation or reunification with his mother and other close relatives. It prolongs his separation from his family members due to their nationality. The final two aspects of Article III standing—causation and redressability—are also satisfied. Doe 2's injuries are traceable to EO-3, and if Plaintiffs prevail, a decision enjoining portions of EO-3 would redress that injury.

3. The Muslim Association of Hawaii Has Standing

The Muslim Association of Hawaii is the only formal Muslim organization in Hawai‘i and serves 5,000 Muslims statewide. Decl. of Hakim Ouansafi ¶¶ 4–5,

ECF. No. 370-1. The Association draws upon new arrivals to Hawai‘i to add to its membership and "community of worshippers, including persons immigrating as lawful permanent residents and shorter-term visitors coming to Hawaii for business, professional training, university studies, and tourism." Ouansafi Decl. ¶ 11. Current members of the Association include "foreign-born individuals from Syria, Somalia, Iran, Yemen, and Libya who are now naturalized U.S. citizens or lawful permanent residents." Ouansafi Decl. ¶ 12. EO-3 will decrease the Association's future membership from the affected countries and deter current members from remaining in Hawai‘i. Ouansafi Decl. ¶¶ 13, 18; *see also id.* at ¶ 14 ("EO-3 will deter our current members from remaining . . . because they cannot receive visits from their family members and friends from the affected countries if they do. I personally know of at least one family who made that difficult choice and left Hawaii and I know others who have talked about doing the same.").

According to the Association's Chairman, EO-3 will likely result in a decrease in the Association's membership and in visitors to its mosques, which in turn, will directly harm the Association's finances. Ouansafi Decl. ¶¶ 18–19. Members of the Association have experienced fear and feelings of national-origin discrimination because of the prior and current entry bans. Ouansafi Decl. ¶¶ 21–22 ("That fear has led to, by way of example, children wanting to change their

Muslim names and parents wanting their children not to wear head coverings to avoid being victims of violence. Some of our young people have said they want to change their names because they are afraid to be Muslims. There is real fear within our community especially among our children and American Muslims who were born outside the United States."); *id.* ¶ 23 ("Especially because it is permanent, EO-3 has—even more so than its predecessor bans—caused tremendous fear, anxiety, and grief for our members.").

The Association, by its Chairman Hakim Oaunsafi, has sufficiently demonstrated standing in its own right, at this stage. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975) ("[A]n association may have standing [to sue] "in its own right . . . to vindicate whatever rights and immunities the association itself may enjoy[, and in doing so,] [m]ay assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties." (citations omitted)). In order to establish organizational standing, the Association must "meet the same standing test that applies to individuals." *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 813 (N.D. Cal. 2007) (citation omitted). The Association satisfies the injury-in-fact requirement. It alleges a "concrete and demonstrable injury to the organization's activities—with a consequent drain on the organization's resources—constituting more than simply a setback to the

organization's abstract social interests." *Envtl. Prot. Info. Ctr.*, 469 F. Supp. 2d at 813 (quoting *Common Cause v. Fed. Election Comm'n*, 108 F.3d 413, 417 (D.C. Cir. 1997)). The Association further satisfies the causation and redressability prongs. *See* Ouansafi Decl. ¶¶ 18–22.

Having determined that Plaintiffs each satisfy Article III's standing requirements, the Court turns to whether Plaintiffs are within the "zone of interests" protected by the INA.

B. Statutory Standing

Because Plaintiffs allege statutory claims based on the INA, the Court examines whether they meet the requirement of having stakes that "fall within the zone of interests protected by the law invoked." *Hawaii*, 859 F.3d at 766 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014)). Like the Ninth Circuit, this Court has little trouble determining that Dr. Elshikh, Doe 1 and Doe 2 do so. *Hawaii*, 859 F.3d at 766. Each sufficiently asserts that EO-3 prevents them from reuniting with close family members. *See Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 45 F.3d 469, 471–72 (D.C. Cir. 1995) ("In originally enacting the INA, Congress implemented the underlying intention of our immigration laws regarding the preservation of the family unit. Given the nature and purpose of the

statute, the resident appellants fall well within the zone of interest Congress intended to protect." (citations, alterations, and internal quotation marks omitted)), *vacated on other grounds*, 519 U.S. 1 (1996). Similarly, the Association and its members are "at least *arguably* with in the zone of interests that the INA protects." *See Hawaii*, 859 F.3d at 767 (quoting *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1303 (2017)). The Association's interest in facilitating the religious practices of its members "to visit each other to connect [and] for the upholding of kinship ties," which are negatively impacted by EO-3, Ouansafi Decl. ¶ 10, and its interest in preventing harm to members who "cannot receive visits from family members from the affected countries," Ouansafi Decl. ¶ 15, fall within the same zone of interests.

Equally important, "the State's efforts to enroll students and hire faculty members who are nationals from [the list of] designated countries fall within the zone of interests of the INA." *Hawaii*, 859 F.3d at 766 (citing relevant INA provisions relating to nonimmigrant students, teachers, scholars, and aliens with extraordinary abilities). Thus, the "INA leaves no doubt that the State's interests in student- and employment-based visa petitions for its students and faculty are related to the basic purposes of the INA." *Hawaii*, 859 F.3d at 766.

In sum, Plaintiffs fall within the zone of interests and have standing to challenge EO-3 based on their INA claims.

C. Ripeness

Plaintiffs' claims are also ripe for review. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co*., 473 U.S. 568, 580–81 (1985)). The Government advances that assertion here because none of the aliens abroad identified by Plaintiffs has yet been refused a visa based on EO-3. Mem. in Opp'n 14–15, ECF No. 378.

The Government's premise is not true. Plaintiffs allege current, concrete injuries to themselves and their close family members, injuries that have already occurred and that will continue to occur once EO-3 is fully implemented and enforced.[13] Moreover, the Ninth Circuit has previously rejected materially identical ripeness contentions asserted by the Government. *Hawaii*, 859 F.3d at 767–68 ("declin[ing] the Government's invitation to wait until Plaintiffs identify a visa applicant who was denied a discretionary waiver," and instead, "conclud[ing] that the claim is ripe for review").

[13] *See, e.g.*, Sharma Decl. ¶¶ 4–9, ECF No. 370-8 (describing denial of visa to Syrian journalist and cancellation of University lecture since signing of EO-3)

Plaintiffs' INA-based statutory claims are therefore ripe for review on the merits.

D. Justiciability

Notwithstanding the Ninth Circuit's recent rulings to the contrary, the Government persists in its contention that Plaintiffs' statutory claims are not reviewable. "[C]ourts may not second-guess the political branches' decisions to exclude aliens abroad where Congress has not authorized review, which it has not done here." Mem. in Opp'n 4. In doing so, the Government again invokes the doctrine of consular nonreviewability in an effort to circumvent judicial review of seemingly any Executive action denying entry to an alien abroad. *See* Mem. in Opp'n 12–13 (citing *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999)).

The Government's contentions are troubling. Not only do they ask this Court to overlook binding precedent issued in the specific context of the various executive immigration orders authored since the beginning of 2017, but they ask this Court to ignore its fundamental responsibility to ensure the legality and constitutionality of EO-3. Following the Ninth Circuit's lead, this Court declined such an invitation before and does so again. *See Washington*, 847 F.3d at 1163 (explaining that courts are empowered to review statutory and constitutional

"challenges to the substance and implementation of immigration policy" (quoting *Alperin v. Vatican Bank*, 410 F.3d 532, 559 n.17 (9th Cir. 2005)); *Hawaii*, 859 F.3d 768–69 ("We reject the Government's argument that [EO-2] is not subject to judicial review. Although '[t]he Executive has broad discretion over the admission and exclusion of aliens, [] that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie.'" (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987)).

Because Plaintiffs have standing and present a justiciable controversy, the Court turns to the merits of the Motion for TRO.

II. Legal Standard: Preliminary Injunctive Relief

The underlying purpose of a TRO is to preserve the status quo and prevent irreparable harm before a preliminary injunction hearing is held. *Granny Goose Foods*, 415 U.S. 423, 439 (1974); *see also Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1130–31 (9th Cir. 2006).

The standard for issuing a temporary restraining order is substantially identical to the standard for issuing a preliminary injunction. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A

"plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citation omitted).

For the reasons that follow, Plaintiffs have met this burden here.

III. Analysis of TRO Factors: Likelihood of Success on the Merits

Following the Ninth Circuit's direction, the Court begins with Plaintiffs' statutory claims. *Hawaii*, 859 F.3d at 761. Finding that Plaintiffs are likely to prevail on the merits because EO-3 violates multiple provisions of the INA, the Court declines to reach the constitutional claims alternatively relied on by Plaintiffs.

A. Plaintiffs Are Likely to Succeed on the Merits of Their Section 1182(f) and 1185(a) Claims

EO-3 indefinitely suspends the entry of nationals from countries the President and Acting Secretary of Homeland Security identified as having "inadequate identity-management protocols, information sharing practices, and risk factors." EO-3 § 1(g). As discussed herein, because EO-3's findings are inconsistent with and do not fit the restrictions that the order actually imposes, and because EO-3 improperly uses nationality as a proxy for risk, Plaintiffs are likely to prevail on the merits of their statutory claims.

Section 1182(f) provides, in relevant part—

> 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.

8 U.S.C. § 1182(f). Section 1185(a)(1) similarly provides that "[u]nless otherwise ordered by the President, it shall be unlawful for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." 8 U.S.C. § 1185(a)(1).

Under the law of this Circuit, these provisions do not afford the President unbridled discretion to do as he pleases. An Executive Order promulgated pursuant to INA Sections 1182(f) and 1185(a) "requires that the President *find* that the entry of a class of aliens into the United States *would be detrimental* to the interests of the United States." *Hawaii*, 859 F.3d at 770. Further, the INA "*requires* that the President's *findings support the conclusion* that entry of all nationals from the [list of] designated countries . . . would be harmful to the national interest."[14] *Id.*

[14]The Government insists that, consistent with historical practice, the President may "restrict[] entry pursuant to §§ 1182(f) and 1185(a)(1) without detailed public justifications or findings," citing to prior Executive Orders that "have discussed the President's rationale in one or two

(emphasis added) (footnote omitted); *see also id.* at 783 ("the President must exercise his authority under § 1182(f) lawfully by making sufficient findings justifying that entry of certain classes of aliens would be detrimental to the national interest"); *id.* at 770 n.11 (defining "detrimental" as "causing loss or damage, harmful, injurious, hurtful"). While EO-3 certainly contains findings, they fall short of the Ninth Circuit's articulated standards for several reasons.

First, EO-3, like its predecessor, makes "no finding that nationality *alone* renders entry of this broad class of individuals a heightened security risk to the United States." *Hawaii*, 859 F.3d at 772 (emphasis added) (citation omitted). EO-3 "does not tie these nationals in any way to terrorist organizations within the six designated countries," find them "responsible for insecure country conditions," or provide "any link between an individual's nationality and their propensity to commit terrorism or their inherent dangerousness."[15] *Id.* at 772.

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sentences." Mem. in Opp'n 20–21 (citing Exec. Order No. 12,807, pmbl. pt. 4, 57 Fed. Reg. 23133 (May 24, 1992); Exec. Order No. 12,172, § 1-101, 44 Fed. Reg. 67947 (Nov. 26, 1979)). Its argument is misplaced. The Government both ignores the plain language of Section 1182 and infers the absence of a prerequisite from historical orders that were not evidently challenged on that basis. Its examples therefore have little force. By contrast, plainly aware of these historical orders, *see Hawaii*, 859 F.3d at 779, the Ninth Circuit has held otherwise, *e.g.*, *id.* at 772–73 (explaining that Section 1182(f) requires the President to "provide a rationale explaining why permitting entry of nationals from the six designated countries . . . would be detrimental to the interests of the United States").

[15]In fact, "the only concrete evidence to emerge from the Administration on this point to date has shown just the opposite—that country-based bans are ineffective. A leaked DHS Office of Intelligence and Analysis memorandum analyzing the ban in EO-1 found that 'country of

The generalized findings regarding each country's performance, *see* EO-3 §§ 1(d)–(f), do not support the vast scope of EO-3—in other words, the categorical restrictions on entire populations of men, women, and children, based upon nationality, are a poor fit for the issues regarding the sharing of "public-safety and terrorism-related information" that the President identifies. *See* EO-3 §§ 2(a)(i), (c)(i), (e)(i), (g)(i). Indeed, as the Ninth Circuit already explained with respect to EO-2 in words that are no less applicable here, the Government's "use of nationality as the sole basis for suspending entry means that nationals without significant ties to the six designated countries, such as those who left as children or those whose nationality is based on parentage alone," are suspended from entry. *Hawaii*, 859 F.3d at 773. "Yet, nationals of *other* countries who do have meaningful ties to the six designated countries—[and whom the designated countries may or may not have useful threat information about]—fall outside the scope of [the entry restrictions]." *Id*. (emphasis added). This leads to absurd results. EO-3 is simultaneously overbroad *and* underinclusive. *See id*.

Second, EO-3 does not reveal why existing law is insufficient to address the President's described concerns. As the Ninth Circuit previously explained with

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citizenship is unlikely to be a reliable indicator of potential terrorist activity.'" Joint Decl. of Former Nat'l Sec. Officials ¶ 10, ECF. 383-1 (quoting *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States*, *available at* https://assets.documentcloud.org/documents/3474730/DHS-intelligence-document-on-President-Donald.pdf).

respect to EO-2, "[a]s the law stands, a visa applicant bears the burden of showing that the applicant is eligible to receive a visa . . . and is not inadmissible." *Hawaii*, 859 F.3d at 773 (citing 8 U.S.C. § 1361). "The Government already can exclude individuals who do not meet that burden" on the basis of many criteria, including safety and security. Because EO-2 did not find that such "current screening processes are inadequate," the Ninth Circuit determined that the President's findings offered an insufficient basis to conclude that the "individualized adjudication process is flawed such that permitting entry of an entire class of nationals is injurious to the interests of the United States." *Id*. at 773. The Ninth Circuit's analysis applies no less to EO-3, where the "findings" cited in Section 1(h) and (i) similarly omit any explanation of the inadequacy of individual vetting sufficient to justify the categorical, nationality-based ban chosen by the Executive.

Third, EO-3 contains internal incoherencies that markedly undermine its stated "national security" rationale.[16] Numerous countries fail to meet one or more of the global baseline criteria described in EO-3, yet are not included in the ban.

[16]As an initial matter, the explanation for how the Administration settled on the list of eight countries is obscured. For example, Section 1 describes 47 countries that Administration officials identified as having an "inadequate" or "at risk" baseline performance, EO-3 §§ 1(e)–(f), but does not detail how the President settled on the eight countries actually subject to the ban in Section 2—the majority of which carried over from EO-2. While the September 15, 2017 DHS report cited in EO-3 might offer some insight, the Government objected (ECF. No. 376) to the Court's consideration or even viewing of that classified report, making it impossible to know.

For example, the President finds that Iraq fails the "baseline" security assessment but then omits Iraq from the ban for policy reasons. EO-3 § 1(g) (subjecting Iraq to "additional scrutiny" in lieu of the ban, citing diplomatic ties, positive working relationship, and "Iraq's commitment to combating the Islamic State"). Similarly, after failing to meet the information-sharing baseline, Venezuela also received a pass, other than with respect to certain Venezuelan government officials. EO-3 § 2(f). On the other end, despite meeting the information-sharing baseline that Venezuela failed, Somalia and its nationals were rewarded by being included in the ban. EO-3 § 2(h).

Moreover, EO-3's individualized country findings make no effort to explain why some *types* of visitors from a particular country are banned, while others are not. *See, e.g.*, EO-3 §§ 2(c) (describing Libya as having "significant inadequacies in its identity-management protocols" and therefore deserving of a ban on all tourist and business visitors, but without discussing why student visitors did not meet the same fate); *id.* § 2(g) (describing the same for Yemen); *cf. id.* § 2(b) (describing Iran as "a state sponsor of terrorism," which "regularly fails to cooperate with the United States Government in identifying security risks [and] is the source of significant terrorist threats," yet allowing "entry by [Iranian] nationals under valid student (F

and M) and exchange visitor (J) visas").[17] The nature and scope of these types of inconsistencies and unexplained findings cannot lawfully justify an exercise of Section 1182(f) authority, particularly one of indefinite duration. *See Hawaii*, 859 F.3d at 772–73 (proper exercise of Section 1182(f) authority must "provide a rationale" and "bridge the gap" between the findings and ultimate restrictions).

EO-3's scope and provisions also contradict its stated rationale. As noted above, many of EO-3's structural provisions are unsupported by verifiable evidence, undermining any claim that its findings "support the conclusion" to categorically ban the entry of millions.[18] *Cf. Hawaii*, 859 F.3d at 770. EO-3's aspirational justifications—*e.g.*, fostering a "willingness to cooperate and play a substantial role in combatting terrorism" and encouraging additional information-sharing—are no more satisfying. EO-3 § 1(h)(3); *see also* Mem. in Opp'n 22–23 ("The utility of entry restrictions as a foreign-policy tool is confirmed by the results of the diplomatic engagement period described in [EO-3] . . . These foreign-relations efforts independently justify [EO-3] and yet they are almost wholly ignored by

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[17] *See also* Joint Decl. of Former Nat'l Sec. Officials ¶ 12 ("[A]lthough for some of the countries, the Ban applies only to certain non-immigrant visas, together those visas are far and away the most frequently used non-immigrant visas from these nations.").

[18] For example, although the order claims a purpose "to protect [United States] citizens from terrorist attacks," EO-3 § 1(a), "the Ban targets a list of countries whose nationals have committed no deadly terrorist attacks on U.S. soil in the last forty years." Joint Decl. of Former Nat'l Sec. Officials ¶ 11 (citing Alex Nowrasteh, *President Trump's New Travel Executive Order Has Little National Security Justification*, Cato Institute: Cato at Liberty, September 25, 2017).

Plaintiffs."). However laudatory they may be, these foreign policy goals do not satisfy Section 1182(f)'s requirement that the President actually "find" that the "entry of any aliens" into the United States "*would be detrimental*" to the interests of the United States, and are thus an insufficient basis on which to invoke his Section 1182(f) authority.

The Government reads in Sections 1182(f) and 1185(a) a grant of limitless power and absolute discretion to the President, and cautions that it would "be inappropriate for this Court to second-guess" the "Executive Branch's national-security judgements," Mem. in Opp'n 22, or to engage in "unwarranted judicial interference in the conduct of foreign policy," Mem. in Opp'n 23 (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115–16 (2013)). The Government counsels that deference is historically afforded the President in the core areas of national security and foreign relations, "which involve delicate balancing in the face of ever-changing circumstances, such that the Executive must be permitted to act quickly and flexibly." Mem. in Opp'n 28 (citing *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 348 (2005)).

These concerns are not insignificant. There is no dispute that national security is an important objective and that errors could have serious consequences. Yet, "[n]ational security is not a 'talismanic incantation' that, once invoked, can

support any and all exercise of executive power under § 1182(f)." *Hawaii*, 859 F.3d at 774 (citation omitted). The Ninth Circuit itself rejected the Government's arguments that it is somehow injured "by nature of the judiciary limiting the President's authority." *Id.* at 783 n.22 (quoting *United States v. Robel*, 389 U.S. 258, 264 (1967) ("[The] concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of . . . power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart.")).

The actions taken by the President in the challenged sections of EO-3 require him to "first [] make sufficient findings that the entry of nationals from the six designated countries . . . would be detrimental to the interests of the United States." *Hawaii*, 859 F.3d at 776. Because the President has not satisfied this precondition in the manner described by the Ninth Circuit before exercising his delegated authority, Plaintiffs have demonstrated a likelihood of success on the merits of their claim that the President exceeded his authority under Sections 1182(f) and 1185(a).

B. Plaintiffs Are Likely to Succeed on the Merits of Their Section 1152(a) Claim

It is equally clear that Plaintiffs are likely to prevail on their claim that EO-3 violates the INA's prohibition on nationality-based discrimination with respect to the issuance of immigrant visas. Section 1152(a)(1)(A) provides that "[e]xcept as

specifically provided" in certain subsections not applicable here, "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."

By indefinitely and categorically suspending immigration from the six countries challenged by Plaintiffs,[19] EO-3 attempts to do exactly what Section 1152 prohibits. EO-3, like its predecessor, thus "runs afoul" of the INA provision "that prohibit[s] nationality-based discrimination" in the issuance of immigrant visas. *Hawaii*, 859 F.3d at 756.

For its part, the Government contends that Section 1152 cannot restrict the President's Section 1182(f) authority because "the statutes operate in two different spheres." "Sections 1182(f) and 1185(a)(1), along with other grounds in Section 1182(a), limit the universe of individuals eligible to receive visas, and then §1152(a)(1)(A) prohibits discrimination on the basis of nationality *within* that universe of eligible individuals." Mem. in Opp'n 29.

In making this argument, however, the Government completely ignores *Hawaii*. *See* Mem. in Opp'n 29–32. In *Hawaii*, the Ninth Circuit reached the

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[19]EO-3 § 2(a)(ii) ("The entry into the United States of nationals of Chad, as immigrants . . . is hereby suspended."); *id.* §§ 2(b)(ii) (dictating the same for Iran), (c)(ii) (Libya), (e)(ii) (Syria), (g)(ii) (Yemen), (h)(ii) (Somalia).

opposite conclusion: Section "1152(a)(1)(A)'s non-discrimination mandate cabins the President's authority under § 1182(f) [based on several] canons of statutory construction" and that "in suspending the issuance of immigrant visas and denying entry based on nationality, [EO-2] exceeds the restriction of § 1152(a)(1)(A) and the overall statutory scheme intended by Congress." *Hawaii*, 859 F.3d at 778–79. Although asserted now with respect to EO-3, the Government's position untenably contradicts the Ninth's Circuit's holding.

In short, EO-3 plainly violates Section 1152(a) by singling out immigrant visa applicants seeking entry to the United States on the basis of nationality. Having considered the scope of the President's authority under Section 1182(f) and the non-discrimination requirement of Section 1152(a)(1)(A), the Court determines that Plaintiffs have shown a likelihood of success on the merits of their claim that EO-3 "exceeds the restriction of Section 1152(a)(1)(A) and the overall statutory scheme intended by Congress."[20] *Hawaii*, 859 F.3d at 779.

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[20]The Court finds that Plaintiffs have shown a likelihood of success on the merits of their claim that EO-3 violates Section 1152(a), *but only as to the issuance of immigrant visas*. To the extent Plaintiffs ask the Court to enjoin EO-3's "nationality-based restrictions . . . in their entirety," as violative of Section 1152(a)(1)(A), Mem. in Supp. 16–17, the Court declines to do so. *See* Mem. in Supp. 16–17; *see also Hawaii*, 859 F.3d 779 (applying holding to immigrant visas). Such an extension is not consistent with the face of Section 1152. Moreover, the primary case relied upon by Plaintiffs, *Olsen v. Albright*, 990 F. Supp. 31 (D.D.C. 1997), does not support extending the plain text of the statute to encompass nonimmigrant visas. First, *Olsen*'s statutory analysis is thin—beyond reciting the text of Section 1152(a), which specifically references only "immigrant visas"—the order does not parse the text of Section 1152(a)(1)(A) or acknowledge the distinction

IV. Analysis of TRO Factors: Irreparable Harm

Plaintiffs identify a multitude of harms that are not compensable with monetary damages and that are irreparable—among them, prolonged separation from family members, constraints to recruiting and retaining students and faculty members to foster diversity and quality within the University community, and the diminished membership of the Association, which impacts the vibrancy of its religious practices and instills fear among its members. *See, e.g.*, *Hawaii*, 859 F.3d at 782–83 (characterizing similar harms to many of the same actors); *Washington*, 847 F.3d at 1169 (identifying harms such as those to public university employees and students, separated families, and stranded residents abroad); *Regents of Univ. of Cal. v. Am. Broad. Cos., Inc.*, 747 F.2d 511, 520 (9th Cir. 1984) (crediting intangible harms such as the "impairment of their ongoing recruitment programs [and] the dissipation of alumni and community goodwill and support garnered over the years"). The Court finds that Plaintiffs have made a sufficient showing of such irreparable harm in the absence of preliminary relief.

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between immigrant and nonimmigrant visas. 990 F. Supp. at 37–39. Second, *Olsen* is factually distinct, involving review of a grievance board's decision to uphold a foreign service officer's termination because he refused to strictly adhere to a local consular-level policy of determining which visa applicants received interviews based upon "fraud profiles" and to "adjudicate [nonimmigrant] visas on the basis of the applicant's race, ethnicity, national origin, economic class, and physical appearance." *Id.* at 33. The district court in *Olsen* found that the grievance board erred by failing to "address the question of the Consulate's visa policies when it reviewed Plaintiff's termination," and remanded the matter for reconsideration of its decision. *Id.* Thus, the Court does not find its analysis to be particularly relevant or persuasive.

Defendants, on the other hand, are not likely harmed by having to adhere to immigration procedures that have been in place for years—that is, by maintaining the status quo. *See Washington*, 847 F.3d at 1168.

V. Analysis of TRO Factors: The Balance of Equities and Public Interest Weigh in Favor of Granting Emergency Relief

The final step in determining whether to grant the Plaintiffs' Motion for TRO is to assess the balance of equities and examine the general public interests that will be affected. Here, the substantial controversy surrounding this Executive Order, like its predecessors, illustrates that important public interests are implicated by each party's positions. *See Washington*, 847 F.3d at 1169. The Ninth Circuit has recognized that Plaintiffs and the public have a vested interest in the "free flow of travel, in avoiding separation of families, and in freedom from discrimination." *Washington*, 847 F.3d at 1169–70.

National security and the protection of our borders is unquestionably also of significant public interest. *See Haig v. Agee*, 453 U.S. 280, 307 (1981). Although national security interests are legitimate objectives of the highest order, they cannot justify the public's harms when the President has wielded his authority unlawfully. *See Hawaii*, 859 F.3d at 783.

In carefully weighing the harms, the equities tip in Plaintiffs' favor. "The public interest is served by 'curtailing unlawful executive action.'" *Hawaii*, 859

F.3d at 784 (quoting *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016)). When considered alongside the statutory injuries and harms discussed above, the balance of equities and public interests justify granting the Plaintiffs' TRO.

Nationwide relief is appropriate in light of the likelihood of success on Plaintiffs' INA claims. *See Washington*, 847 F.3d at 1166–67 (citing *Texas*, 809 F.3d at 187–88); *see also Hawaii*, 859 F.3d at 788 (finding no abuse of discretion in enjoining on a nationwide basis Sections 2(c) and 6 of EO-2, "which in all applications would violate provisions of the INA").

CONCLUSION

Plaintiffs have satisfied all four *Winter* factors, warranting entry of preliminary injunctive relief. Based on the foregoing, Plaintiffs' Motion for TRO (ECF No. 368) is hereby GRANTED.

TEMPORARY RESTRAINING ORDER

It is hereby ADJUDGED, ORDERED, and DECREED that:

Defendant ELAINE DUKE, in her official capacity as Acting Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them who receive actual notice of

this Order, hereby are enjoined fully from enforcing or implementing Sections 2(a), (b), (c), (e), (g), and (h) of the Proclamation issued on September 24, 2017, entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats" across the Nation. Enforcement of these provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

No security bond is required under Federal Rule of Civil Procedure 65(c).

Pursuant to Federal Rule of Civil Procedure 65(b)(2), the Court intends to set an expedited hearing to determine whether this Temporary Restraining Order should be extended. The parties shall submit a stipulated briefing and hearing schedule for the Court's approval forthwith, or promptly indicate whether they jointly consent to the conversion of this Temporary Restraining Order to a Preliminary Injunction without the need for additional briefing or a hearing.

The Court declines to stay this ruling or hold it in abeyance should an emergency appeal of this order be filed.

IT IS SO ORDERED.

Dated: October 17, 2017 at Honolulu, Hawai‘i.

Derrick K. Watson
United States District Judge

Federal Register
Vol. 82, No. 45
Thursday, March 9, 2017

Presidential Documents

Title 3—

The President

Executive Order 13780 of March 6, 2017

Protecting the Nation From Foreign Terrorist Entry Into the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and section 301 of title 3, United States Code, and to protect the Nation from terrorist activities by foreign nationals admitted to the United States, it is hereby ordered as follows:

Section 1. *Policy and Purpose.* (a) It is the policy of the United States to protect its citizens from terrorist attacks, including those committed by foreign nationals. The screening and vetting protocols and procedures associated with the visa-issuance process and the United States Refugee Admissions Program (USRAP) play a crucial role in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States. It is therefore the policy of the United States to improve the screening and vetting protocols and procedures associated with the visa-issuance process and the USRAP.

(b) On January 27, 2017, to implement this policy, I issued Executive Order 13769 (Protecting the Nation from Foreign Terrorist Entry into the United States).

(i) Among other actions, Executive Order 13769 suspended for 90 days the entry of certain aliens from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. These are countries that had already been identified as presenting heightened concerns about terrorism and travel to the United States. Specifically, the suspension applied to countries referred to in, or designated under, section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), in which Congress restricted use of the Visa Waiver Program for nationals of, and aliens recently present in, (A) Iraq or Syria, (B) any country designated by the Secretary of State as a state sponsor of terrorism (currently Iran, Syria, and Sudan), and (C) any other country designated as a country of concern by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence. In 2016, the Secretary of Homeland Security designated Libya, Somalia, and Yemen as additional countries of concern for travel purposes, based on consideration of three statutory factors related to terrorism and national security: ''(I) whether the presence of an alien in the country or area increases the likelihood that the alien is a credible threat to the national security of the United States; (II) whether a foreign terrorist organization has a significant presence in the country or area; and (III) whether the country or area is a safe haven for terrorists.'' 8 U.S.C. 1187(a)(12)(D)(ii). Additionally, Members of Congress have expressed concerns about screening and vetting procedures following recent terrorist attacks in this country and in Europe.

(ii) In ordering the temporary suspension of entry described in subsection (b)(i) of this section, I exercised my authority under Article II of the Constitution and under section 212(f) of the INA, which provides in relevant part: ''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.''

8 U.S.C. 1182(f). Under these authorities, I determined that, for a brief period of 90 days, while existing screening and vetting procedures were under review, the entry into the United States of certain aliens from the seven identified countries—each afflicted by terrorism in a manner that compromised the ability of the United States to rely on normal decision-making procedures about travel to the United States—would be detrimental to the interests of the United States. Nonetheless, I permitted the Secretary of State and the Secretary of Homeland Security to grant case-by-case waivers when they determined that it was in the national interest to do so.

(iii) Executive Order 13769 also suspended the USRAP for 120 days. Terrorist groups have sought to infiltrate several nations through refugee programs. Accordingly, I temporarily suspended the USRAP pending a review of our procedures for screening and vetting refugees. Nonetheless, I permitted the Secretary of State and the Secretary of Homeland Security to jointly grant case-by-case waivers when they determined that it was in the national interest to do so.

(iv) Executive Order 13769 did not provide a basis for discriminating for or against members of any particular religion. While that order allowed for prioritization of refugee claims from members of persecuted religious minority groups, that priority applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion. That order was not motivated by animus toward any religion, but was instead intended to protect the ability of religious minorities—whoever they are and wherever they reside—to avail themselves of the USRAP in light of their particular challenges and circumstances.

(c) The implementation of Executive Order 13769 has been delayed by litigation. Most significantly, enforcement of critical provisions of that order has been temporarily halted by court orders that apply nationwide and extend even to foreign nationals with no prior or substantial connection to the United States. On February 9, 2017, the United States Court of Appeals for the Ninth Circuit declined to stay or narrow one such order pending the outcome of further judicial proceedings, while noting that the ''political branches are far better equipped to make appropriate distinctions'' about who should be covered by a suspension of entry or of refugee admissions.

(d) Nationals from the countries previously identified under section 217(a)(12) of the INA warrant additional scrutiny in connection with our immigration policies because the conditions in these countries present heightened threats. Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States. Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents.

(e) The following are brief descriptions, taken in part from the Department of State's *Country Reports on Terrorism 2015* (June 2016), of some of the conditions in six of the previously designated countries that demonstrate why their nationals continue to present heightened risks to the security of the United States:

(i) *Iran.* Iran has been designated as a state sponsor of terrorism since 1984 and continues to support various terrorist groups, including Hizballah, Hamas, and terrorist groups in Iraq. Iran has also been linked to support

for al-Qa'ida and has permitted al-Qa'ida to transport funds and fighters through Iran to Syria and South Asia. Iran does not cooperate with the United States in counterterrorism efforts.

(ii) *Libya.* Libya is an active combat zone, with hostilities between the internationally recognized government and its rivals. In many parts of the country, security and law enforcement functions are provided by armed militias rather than state institutions. Violent extremist groups, including the Islamic State of Iraq and Syria (ISIS), have exploited these conditions to expand their presence in the country. The Libyan government provides some cooperation with the United States' counterterrorism efforts, but it is unable to secure thousands of miles of its land and maritime borders, enabling the illicit flow of weapons, migrants, and foreign terrorist fighters. The United States Embassy in Libya suspended its operations in 2014.

(iii) *Somalia.* Portions of Somalia have been terrorist safe havens. Al-Shabaab, an al-Qa'ida-affiliated terrorist group, has operated in the country for years and continues to plan and mount operations within Somalia and in neighboring countries. Somalia has porous borders, and most countries do not recognize Somali identity documents. The Somali government cooperates with the United States in some counterterrorism operations but does not have the capacity to sustain military pressure on or to investigate suspected terrorists.

(iv) *Sudan.* Sudan has been designated as a state sponsor of terrorism since 1993 because of its support for international terrorist groups, including Hizballah and Hamas. Historically, Sudan provided safe havens for al-Qa'ida and other terrorist groups to meet and train. Although Sudan's support to al-Qa'ida has ceased and it provides some cooperation with the United States' counterterrorism efforts, elements of core al-Qa'ida and ISIS-linked terrorist groups remain active in the country.

(v) *Syria.* Syria has been designated as a state sponsor of terrorism since 1979. The Syrian government is engaged in an ongoing military conflict against ISIS and others for control of portions of the country. At the same time, Syria continues to support other terrorist groups. It has allowed or encouraged extremists to pass through its territory to enter Iraq. ISIS continues to attract foreign fighters to Syria and to use its base in Syria to plot or encourage attacks around the globe, including in the United States. The United States Embassy in Syria suspended its operations in 2012. Syria does not cooperate with the United States' counterterrorism efforts.

(vi) *Yemen.* Yemen is the site of an ongoing conflict between the incumbent government and the Houthi-led opposition. Both ISIS and a second group, al-Qa'ida in the Arabian Peninsula (AQAP), have exploited this conflict to expand their presence in Yemen and to carry out hundreds of attacks. Weapons and other materials smuggled across Yemen's porous borders are used to finance AQAP and other terrorist activities. In 2015, the United States Embassy in Yemen suspended its operations, and embassy staff were relocated out of the country. Yemen has been supportive of, but has not been able to cooperate fully with, the United States in counterterrorism efforts.

(f) In light of the conditions in these six countries, until the assessment of current screening and vetting procedures required by section 2 of this order is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high. Accordingly, while that assessment is ongoing, I am imposing a temporary pause on the entry of nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen, subject to categorical exceptions and case-by-case waivers, as described in section 3 of this order.

(g) Iraq presents a special case. Portions of Iraq remain active combat zones. Since 2014, ISIS has had dominant influence over significant territory in northern and central Iraq. Although that influence has been significantly

reduced due to the efforts and sacrifices of the Iraqi government and armed forces, working along with a United States-led coalition, the ongoing conflict has impacted the Iraqi government's capacity to secure its borders and to identify fraudulent travel documents. Nevertheless, the close cooperative relationship between the United States and the democratically elected Iraqi government, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combat ISIS justify different treatment for Iraq. In particular, those Iraqi government forces that have fought to regain more than half of the territory previously dominated by ISIS have shown steadfast determination and earned enduring respect as they battle an armed group that is the common enemy of Iraq and the United States. In addition, 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. Decisions about issuance of visas or granting admission to Iraqi nationals should be subjected to additional scrutiny to determine if applicants have connections with ISIS or other terrorist organizations, or otherwise pose a risk to either national security or public safety.

(h) Recent history shows that some of those who have entered the United States through our immigration system have proved to be threats to our national security. Since 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States. They have included not just persons who came here legally on visas but also individuals who first entered the country as refugees. For example, in January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses. And in October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon. The Attorney General has reported to me that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation.

(i) Given the foregoing, the entry into the United States of foreign nationals who may commit, aid, or support acts of terrorism remains a matter of grave concern. In light of the Ninth Circuit's observation that the political branches are better suited to determine the appropriate scope of any suspensions than are the courts, and in order to avoid spending additional time pursuing litigation, I am revoking Executive Order 13769 and replacing it with this order, which expressly excludes from the suspensions categories of aliens that have prompted judicial concerns and which clarifies or refines the approach to certain other issues or categories of affected aliens.

Sec. 2. *Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period.* (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat. The Secretary of Homeland Security may conclude that certain information is needed from particular countries even if it is not needed from every country.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the worldwide review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed from each country for adjudications and a list of countries that do not provide adequate information, within 20 days of the effective date of this order. The Secretary of Homeland Security

shall provide a copy of the report to the Secretary of State, the Attorney General, and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

(d) Upon submission of the report described in subsection (b) of this section regarding the information needed from each country for adjudications, the Secretary of State shall request that all foreign governments that do not supply such information regarding their nationals begin providing it within 50 days of notification.

(e) After the period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, shall submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means. The Secretary of State, the Attorney General, or the Secretary of Homeland Security may also submit to the President the names of additional countries for which any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States.

(f) At any point after the submission of the list described in subsection (e) of this section, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, may submit to the President the names of any additional countries recommended for similar treatment, as well as the names of any countries that they recommend should be removed from the scope of a proclamation described in subsection (e) of this section.

(g) The Secretary of State and the Secretary of Homeland Security shall submit to the President a joint report on the progress in implementing this order within 60 days of the effective date of this order, a second report within 90 days of the effective date of this order, a third report within 120 days of the effective date of this order, and a fourth report within 150 days of the effective date of this order.

Sec. 3. *Scope and Implementation of Suspension.*

(a) *Scope.* Subject to the exceptions set forth in subsection (b) of this section and any waiver under subsection (c) of this section, the suspension of entry pursuant to section 2 of this order shall apply only to foreign nationals of the designated countries who:

(i) are outside the United States on the effective date of this order;

(ii) did not have a valid visa at 5:00 p.m., eastern standard time on January 27, 2017; and

(iii) do not have a valid visa on the effective date of this order.

(b) *Exceptions.* The suspension of entry pursuant to section 2 of this order shall not apply to:

(i) any lawful permanent resident of the United States;

(ii) any foreign national who is admitted to or paroled into the United States on or after the effective date of this order;

(iii) any foreign national who has a document other than a visa, valid on the effective date of this order or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission, such as an advance parole document;

(iv) any dual national of a country designated under section 2 of this order when the individual is traveling on a passport issued by a non-designated country;

(v) any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C–2 visa for travel to the United Nations, or G–1, G–2, G–3, or G–4 visa; or

(vi) any foreign national who has been granted asylum; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

(c) *Waivers.* Notwithstanding the suspension of entry pursuant to section 2 of this order, a consular officer, or, as appropriate, the Commissioner, U.S. Customs and Border Protection (CBP), or the Commissioner's delegee, may, in the consular officer's or the CBP official's discretion, decide on a case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest. Unless otherwise specified by the Secretary of Homeland Security, any waiver issued by a consular officer as part of the visa issuance process will be effective both for the issuance of a visa and any subsequent entry on that visa, but will leave all other requirements for admission or entry unchanged. Case-by-case waivers could be appropriate in circumstances such as the following:

(i) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the effective date of this order, seeks to reenter the United States to resume that activity, and the denial of reentry during the suspension period would impair that activity;

(ii) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of this order for work, study, or other lawful activity;

(iii) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;

(iv) the foreign national seeks to enter the United States to visit or reside with a close family member (*e.g.,* a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship;

(v) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

(vi) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government;

(vii) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 *et seq.,* traveling for purposes of conducting meetings or business with the United States Government, or traveling

to conduct business on behalf of an international organization not designated under the IOIA;

(viii) the foreign national is a landed Canadian immigrant who applies for a visa at a location within Canada; or

(ix) the foreign national is traveling as a United States Government-sponsored exchange visitor.

Sec. 4. *Additional Inquiries Related to Nationals of Iraq.* An application by any Iraqi national for a visa, admission, or other immigration benefit should be subjected to thorough review, including, as appropriate, consultation with a designee of the Secretary of Defense and use of the additional information that has been obtained in the context of the close U.S.-Iraqi security partnership, since Executive Order 13769 was issued, concerning individuals suspected of ties to ISIS or other terrorist organizations and individuals coming from territories controlled or formerly controlled by ISIS. Such review shall include consideration of whether the applicant has connections with ISIS or other terrorist organizations or with territory that is or has been under the dominant influence of ISIS, as well as any other information bearing on whether the applicant may be a threat to commit acts of terrorism or otherwise threaten the national security or public safety of the United States.

Sec. 5. *Implementing Uniform Screening and Vetting Standards for All Immigration Programs.* (a) The Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence shall implement a program, as part of the process for adjudications, to identify individuals who seek to enter the United States on a fraudulent basis, who support terrorism, violent extremism, acts of violence toward any group or class of people within the United States, or who present a risk of causing harm subsequent to their entry. This program shall include the development of a uniform baseline for screening and vetting standards and procedures, such as in-person interviews; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that applicants are who they claim to be; a mechanism to assess whether applicants may commit, aid, or support any kind of violent, criminal, or terrorist acts after entering the United States; and any other appropriate means for ensuring the proper collection of all information necessary for a rigorous evaluation of all grounds of inadmissibility or grounds for the denial of other immigration benefits.

(b) The Secretary of Homeland Security, in conjunction with the Secretary of State, the Attorney General, and the Director of National Intelligence, shall submit to the President an initial report on the progress of the program described in subsection (a) of this section within 60 days of the effective date of this order, a second report within 100 days of the effective date of this order, and a third report within 200 days of the effective date of this order.

Sec. 6. *Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017.* (a) The Secretary of State shall suspend travel of refugees into the United States under the USRAP, and the Secretary of Homeland Security shall suspend decisions on applications for refugee status, for 120 days after the effective date of this order, subject to waivers pursuant to subsection (c) of this section. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication processes 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, and shall implement such additional procedures. The suspension described in this subsection shall not apply to refugee applicants who, before the effective date of this order, have been formally scheduled for transit by the Department of State. The Secretary of State shall resume travel of refugees into the

United States under the USRAP 120 days after the effective date of this order, and the Secretary of Homeland Security shall resume making decisions on applications for refugee status only for stateless persons and nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that the additional procedures implemented pursuant to this subsection are adequate to ensure the security and welfare of the United States.

(b) Pursuant to section 212(f) of the INA, I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any entries in excess of that number until such time as I determine that additional entries would be in the national interest.

(c) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretary of State and the Secretary of Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the entry of such individuals as refugees is in the national interest and does not pose a threat to the security or welfare of the United States, including in circumstances such as the following: the individual's entry would enable the United States to conform its conduct to a preexisting international agreement or arrangement, or the denial of entry would cause undue hardship.

(d) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of State shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

Sec. 7. *Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility.* The Secretary of State and the Secretary of Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority permitted by section 212(d)(3)(B) of the INA, 8 U.S.C. 1182(d)(3)(B), relating to the terrorism grounds of inadmissibility, as well as any related implementing directives or guidance.

Sec. 8. *Expedited Completion of the Biometric Entry-Exit Tracking System.* (a) The Secretary of Homeland Security shall expedite the completion and implementation of a biometric entry-exit tracking system for in-scope travelers to the United States, as recommended by the National Commission on Terrorist Attacks Upon the United States.

(b) The Secretary of Homeland Security shall submit to the President periodic reports on the progress of the directive set forth in subsection (a) of this section. The initial report shall be submitted within 100 days of the effective date of this order, a second report shall be submitted within 200 days of the effective date of this order, and a third report shall be submitted within 365 days of the effective date of this order. The Secretary of Homeland Security shall submit further reports every 180 days thereafter until the system is fully deployed and operational.

Sec. 9. *Visa Interview Security.* (a) The Secretary of State shall immediately suspend the Visa Interview Waiver Program and ensure compliance with section 222 of the INA, 8 U.S.C. 1202, which requires that all individuals seeking a nonimmigrant visa undergo an in-person interview, subject to specific statutory exceptions. This suspension shall not apply to any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C–2 visa for travel to the United Nations, or G–1, G–2, G–3, or G–4 visa; traveling for purposes related to an international organization designated under the IOIA; or traveling for purposes of conducting meetings or business with the United States Government.

(b) To the extent permitted by law and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program, including by substantially increasing the number of Fellows, lengthening or making permanent the period of service, and making language training at the Foreign Service Institute available to Fellows for assignment to posts outside of their area of core linguistic ability, to ensure that nonimmigrant visa-interview wait times are not unduly affected.

Sec. 10. *Visa Validity Reciprocity.* The Secretary of State shall review all nonimmigrant visa reciprocity agreements and arrangements to ensure that they are, with respect to each visa classification, truly reciprocal insofar as practicable with respect to validity period and fees, as required by sections 221(c) and 281 of the INA, 8 U.S.C. 1201(c) and 1351, and other treatment. If another country does not treat United States nationals seeking nonimmigrant visas in a truly reciprocal manner, the Secretary of State shall adjust the visa validity period, fee schedule, or other treatment to match the treatment of United States nationals by that foreign country, to the extent practicable.

Sec. 11. *Transparency and Data Collection.* (a) To be more transparent with the American people and to implement more effectively policies and practices that serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General, shall, consistent with applicable law and national security, collect and make publicly available the following information:

(i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation with or provision of material support to a terrorism-related organization, or any other national-security-related reasons;

(ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and who have engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States;

(iii) information regarding the number and types of acts of gender-based violence against women, including so-called ''honor killings,'' in the United States by foreign nationals; and

(iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security or the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

(b) The Secretary of Homeland Security shall release the initial report under subsection (a) of this section within 180 days of the effective date of this order and shall include information for the period from September 11, 2001, until the date of the initial report. Subsequent reports shall be issued every 180 days thereafter and reflect the period since the previous report.

Sec. 12. *Enforcement.* (a) The Secretary of State and the Secretary of Homeland Security shall consult with appropriate domestic and international partners, including countries and organizations, to ensure efficient, effective, and appropriate implementation of the actions directed in this order.

(b) In implementing this order, the Secretary of State and the Secretary of Homeland Security shall comply with all applicable laws and regulations, including, as appropriate, those providing an opportunity for individuals to claim a fear of persecution or torture, such as the credible fear determination for aliens covered by section 235(b)(1)(A) of the INA, 8 U.S.C. 1225(b)(1)(A).

(c) No immigrant or nonimmigrant visa issued before the effective date of this order shall be revoked pursuant to this order.

(d) Any individual whose visa was marked revoked or marked canceled as a result of Executive Order 13769 shall be entitled to a travel document confirming that the individual is permitted to travel to the United States and seek entry. Any prior cancellation or revocation of a visa that was solely pursuant to Executive Order 13769 shall not be the basis of inadmissibility for any future determination about entry or admissibility.

(e) This order shall not apply to an individual who has been granted asylum, to a refugee who has already been admitted to the United States, or to an individual granted withholding of removal or protection under the Convention Against Torture. Nothing in this order shall be construed to limit the ability of an individual to seek asylum, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States.

Sec. 13. *Revocation.* Executive Order 13769 of January 27, 2017, is revoked as of the effective date of this order.

Sec. 14. *Effective Date.* This order is effective at 12:01 a.m., eastern daylight time on March 16, 2017.

Sec. 15. *Severability.* (a) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its other provisions to any other persons or circumstances shall not be affected thereby.

(b) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid because of the lack of certain procedural requirements, the relevant executive branch officials shall implement those procedural requirements.

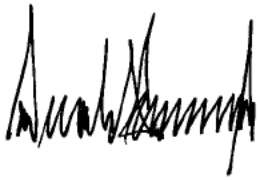
Sec. 16. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
March 6, 2017.

[FR Doc. 2017–04837
Filed 3–8–17; 11:15 am]
Billing code 3295–F7–P

Presidential Documents

Proclamation 9645 of September 24, 2017

Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats

By the President of the United States of America

A Proclamation

In Executive Order 13780 of March 6, 2017 (Protecting the Nation from Foreign Terrorist Entry into the United States), on the recommendations of the Secretary of Homeland Security and the Attorney General, I ordered a worldwide review of whether, and if so what, additional information would be needed from each foreign country to assess adequately whether their nationals seeking to enter the United States pose a security or safety threat. This was the first such review of its kind in United States history. As part of the review, the Secretary of Homeland Security established global requirements for information sharing in support of immigration screening and vetting. The Secretary of Homeland Security developed a comprehensive set of criteria and applied it to the information-sharing practices, policies, and capabilities of foreign governments. The Secretary of State thereafter engaged with the countries reviewed in an effort to address deficiencies and achieve improvements. In many instances, those efforts produced positive results. By obtaining additional information and formal commitments from foreign governments, the United States Government has improved its capacity and ability to assess whether foreign nationals attempting to enter the United States pose a security or safety threat. Our Nation is safer as a result of this work.

Despite those efforts, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, has determined that a small number of countries—out of nearly 200 evaluated—remain deficient at this time with respect to their identity-management and information-sharing capabilities, protocols, and practices. In some cases, these countries also have a significant terrorist presence within their territory.

As President, I must act to protect the security and interests of the United States and its people. I am committed to our ongoing efforts to engage those countries willing to cooperate, improve information-sharing and identity-management protocols and procedures, and address both terrorism-related and public-safety risks. Some of the countries with remaining inadequacies face significant challenges. Others have made strides to improve their protocols and procedures, and I commend them for these efforts. But until they satisfactorily address the identified inadequacies, I have determined, on the basis of recommendations from the Secretary of Homeland Security and other members of my Cabinet, to impose certain conditional restrictions and limitations, as set forth more fully below, on entry into the United States of nationals of the countries identified in section 2 of this proclamation.

NOW, THEREFORE, I, DONALD J. TRUMP, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(f) and 1185(a), and section 301 of title 3, United States Code, hereby find that, absent the measures set forth in this proclamation, the immigrant and nonimmigrant entry into the United States of persons described in section 2 of this proclamation would be detrimental to the

interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions. I therefore hereby proclaim the following:

Section 1. *Policy and Purpose.* (a) It is the policy of the United States to protect its citizens from terrorist attacks and other public-safety threats. Screening and vetting protocols and procedures associated with visa adjudications and other immigration processes play a critical role in implementing that policy. They enhance our ability to detect foreign nationals who may commit, aid, or support acts of terrorism, or otherwise pose a safety threat, and they aid our efforts to prevent such individuals from entering the United States.

(b) Information-sharing and identity-management protocols and practices of foreign governments are important for the effectiveness of the screening and vetting protocols and procedures of the United States. Governments manage the identity and travel documents of their nationals and residents. They also control the circumstances under which they provide information about their nationals to other governments, including information about known or suspected terrorists and criminal-history information. It is, therefore, the policy of the United States to take all necessary and appropriate steps to encourage foreign governments to improve their information-sharing and identity-management protocols and practices and to regularly share identity and threat information with our immigration screening and vetting systems.

(c) Section 2(a) of Executive Order 13780 directed a ''worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat.'' That review culminated in a report submitted to the President by the Secretary of Homeland Security on July 9, 2017. In that review, the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, developed a baseline for the kinds of information required from foreign governments to support the United States Government's ability to confirm the identity of individuals seeking entry into the United States as immigrants and nonimmigrants, as well as individuals applying for any other benefit under the immigration laws, and to assess whether they are a security or public-safety threat. That baseline incorporates three categories of criteria:

(i) *Identity-management information*. The United States expects foreign governments to provide the information needed to determine whether individuals seeking benefits under the immigration laws are who they claim to be. The identity-management information category focuses on the integrity of documents required for travel to the United States. The criteria assessed in this category include whether the country issues electronic passports embedded with data to enable confirmation of identity, reports lost and stolen passports to appropriate entities, and makes available upon request identity-related information not included in its passports.

(ii) *National security and public-safety information.* The United States expects foreign governments to provide information about whether persons who seek entry to this country pose national security or public-safety risks. The criteria assessed in this category include whether the country makes available, directly or indirectly, known or suspected terrorist and criminal-history information upon request, whether the country provides passport and national-identity document exemplars, and whether the country impedes the United States Government's receipt of information about passengers and crew traveling to the United States.

(iii) *National security and public-safety risk assessment.* The national security and public-safety risk assessment category focuses on national security risk indicators. The criteria assessed in this category include whether the country is a known or potential terrorist safe haven, whether it is

a participant in the Visa Waiver Program established under section 217 of the INA, 8 U.S.C. 1187, that meets all of its requirements, and whether it regularly fails to receive its nationals subject to final orders of removal from the United States.

(d) The Department of Homeland Security, in coordination with the Department of State, collected data on the performance of all foreign governments and assessed each country against the baseline described in subsection (c) of this section. The assessment focused, in particular, on identity management, security and public-safety threats, and national security risks. Through this assessment, the agencies measured each country's performance with respect to issuing reliable travel documents and implementing adequate identity-management and information-sharing protocols and procedures, and evaluated terrorism-related and public-safety risks associated with foreign nationals seeking entry into the United States from each country.

(e) The Department of Homeland Security evaluated each country against the baseline described in subsection (c) of this section. The Secretary of Homeland Security identified 16 countries as being ''inadequate'' based on an analysis of their identity-management protocols, information-sharing practices, and risk factors. Thirty-one additional countries were classified ''at risk'' of becoming ''inadequate'' based on those criteria.

(f) As required by section 2(d) of Executive Order 13780, the Department of State conducted a 50-day engagement period to encourage all foreign governments, not just the 47 identified as either ''inadequate'' or ''at risk,'' to improve their performance with respect to the baseline described in subsection (c) of this section. Those engagements yielded significant improvements in many countries. Twenty-nine countries, for example, provided travel document exemplars for use by Department of Homeland Security officials to combat fraud. Eleven countries agreed to share information on known or suspected terrorists.

(g) The Secretary of Homeland Security assesses that the following countries continue to have ''inadequate'' identity-management protocols, information-sharing practices, and risk factors, with respect to the baseline described in subsection (c) of this section, such that entry restrictions and limitations are recommended: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen. The Secretary of Homeland Security also assesses that Iraq did not meet the baseline, but that entry restrictions and limitations under a Presidential proclamation are not warranted. The Secretary of Homeland Security recommends, however, that nationals of Iraq who seek to enter the United States be subject to additional scrutiny to determine if they pose risks to the national security or public safety of the United States. In reaching these conclusions, the Secretary of Homeland Security considered the close cooperative relationship between the United States and the democratically elected government of Iraq, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combating the Islamic State of Iraq and Syria (ISIS).

(h) Section 2(e) of Executive Order 13780 directed the Secretary of Homeland Security to ''submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means.'' On September 15, 2017, the Secretary of Homeland Security submitted a report to me recommending entry restrictions and limitations on certain nationals of 7 countries determined to be ''inadequate'' in providing such information and in light of other factors discussed in the report. According to the report, the recommended restrictions would help address the threats that the countries' identity-management protocols, information-sharing inadequacies, and other risk factors pose to the security and welfare of the United

States. The restrictions also encourage the countries to work with the United States to address those inadequacies and risks so that the restrictions and limitations imposed by this proclamation may be relaxed or removed as soon as possible.

(i) In evaluating the recommendations of the Secretary of Homeland Security and in determining what restrictions to impose for each country, I consulted with appropriate Assistants to the President and members of the Cabinet, including the Secretaries of State, Defense, and Homeland Security, and the Attorney General. I considered several factors, including each country's capacity, ability, and willingness to cooperate with our identity-management and information-sharing policies and each country's risk factors, such as whether it has a significant terrorist presence within its territory. I also considered foreign policy, national security, and counterterrorism goals. I reviewed these factors and assessed these goals, with a particular focus on crafting those country-specific restrictions that would be most likely to encourage cooperation given each country's distinct circumstances, and that would, at the same time, protect the United States until such time as improvements occur. The restrictions and limitations imposed by this proclamation are, in my judgment, necessary to prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information to assess the risks they pose to the United States. These restrictions and limitations are also needed to elicit improved identity-management and information-sharing protocols and practices from foreign governments; and to advance foreign policy, national security, and counterterrorism objectives.

(ii) After reviewing the Secretary of Homeland Security's report of September 15, 2017, and accounting for the foreign policy, national security, and counterterrorism objectives of the United States, I have determined to restrict and limit the entry of nationals of 7 countries found to be ''inadequate'' with respect to the baseline described in subsection (c) of this section: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen. These restrictions distinguish between the entry of immigrants and nonimmigrants. Persons admitted on immigrant visas become lawful permanent residents of the United States. Such persons may present national security or public-safety concerns that may be distinct from those admitted as nonimmigrants. The United States affords lawful permanent residents more enduring rights than it does to nonimmigrants. Lawful permanent residents are more difficult to remove than nonimmigrants even after national security concerns arise, which heightens the costs and dangers of errors associated with admitting such individuals. And although immigrants generally receive more extensive vetting than nonimmigrants, such vetting is less reliable when the country from which someone seeks to emigrate exhibits significant gaps in its identity-management or information-sharing policies, or presents risks to the national security of the United States. For all but one of those 7 countries, therefore, I am restricting the entry of all immigrants.

(iii) I am adopting a more tailored approach with respect to nonimmigrants, in accordance with the recommendations of the Secretary of Homeland Security. For some countries found to be ''inadequate'' with respect to the baseline described in subsection (c) of this section, I am restricting the entry of all nonimmigrants. For countries with certain mitigating factors, such as a willingness to cooperate or play a substantial role in combatting terrorism, I am restricting the entry only of certain categories of nonimmigrants, which will mitigate the security threats presented by their entry into the United States. In those cases in which future cooperation seems reasonably likely, and accounting for foreign policy, national security, and counterterrorism objectives, I have tailored the restrictions to encourage such improvements.

(i) Section 2(e) of Executive Order 13780 also provided that the ''Secretary of State, the Attorney General, or the Secretary of Homeland Security may also submit to the President the names of additional countries for which

any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States.'' The Secretary of Homeland Security determined that Somalia generally satisfies the information-sharing requirements of the baseline described in subsection (c) of this section, but its government's inability to effectively and consistently cooperate, combined with the terrorist threat that emanates from its territory, present special circumstances that warrant restrictions and limitations on the entry of its nationals into the United States. Somalia's identity-management deficiencies and the significant terrorist presence within its territory make it a source of particular risks to the national security and public safety of the United States. Based on the considerations mentioned above, and as described further in section 2(h) of this proclamation, I have determined that entry restrictions, limitations, and other measures designed to ensure proper screening and vetting for nationals of Somalia are necessary for the security and welfare of the United States.

(j) Section 2 of this proclamation describes some of the inadequacies that led me to impose restrictions on the specified countries. Describing all of those reasons publicly, however, would cause serious damage to the national security of the United States, and many such descriptions are classified.

Sec. 2. *Suspension of Entry for Nationals of Countries of Identified Concern.* The entry into the United States of nationals of the following countries is hereby suspended and limited, as follows, subject to categorical exceptions and case-by-case waivers, as described in sections 3 and 6 of this proclamation:

(a) *Chad.*

(i) The government of Chad is an important and valuable counterterrorism partner of the United States, and the United States Government looks forward to expanding that cooperation, including in the areas of immigration and border management. Chad has shown a clear willingness to improve in these areas. Nonetheless, Chad does not adequately share public-safety and terrorism-related information and fails to satisfy at least one key risk criterion. Additionally, several terrorist groups are active within Chad or in the surrounding region, including elements of Boko Haram, ISIS-West Africa, and al-Qa'ida in the Islamic Maghreb. At this time, additional information sharing to identify those foreign nationals applying for visas or seeking entry into the United States who represent national security and public-safety threats is necessary given the significant terrorism-related risk from this country.

(ii) The entry into the United States of nationals of Chad, as immigrants, and as nonimmigrants on business (B–1), tourist (B–2), and business/tourist (B–1/B–2) visas, is hereby suspended.

(b) *Iran.*

(i) Iran regularly fails to cooperate with the United States Government in identifying security risks, fails to satisfy at least one key risk criterion, is the source of significant terrorist threats, and fails to receive its nationals subject to final orders of removal from the United States. The Department of State has also designated Iran as a state sponsor of terrorism.

(ii) The entry into the United States of nationals of Iran as immigrants and as nonimmigrants is hereby suspended, except that entry by such nationals under valid student (F and M) and exchange visitor (J) visas is not suspended, although such individuals should be subject to enhanced screening and vetting requirements.

(c) *Libya.*

(i) The government of Libya is an important and valuable counterterrorism partner of the United States, and the United States Government looks forward to expanding on that cooperation, including in the areas of immigration and border management. Libya, nonetheless, faces significant challenges in sharing several types of information, including public-safety

and terrorism-related information necessary for the protection of the national security and public safety of the United States. Libya also has significant inadequacies in its identity-management protocols. Further, Libya fails to satisfy at least one key risk criterion and has been assessed to be not fully cooperative with respect to receiving its nationals subject to final orders of removal from the United States. The substantial terrorist presence within Libya's territory amplifies the risks posed by the entry into the United States of its nationals.

(ii) The entry into the United States of nationals of Libya, as immigrants, and as nonimmigrants on business (B–1), tourist (B–2), and business/tourist (B–1/B–2) visas, is hereby suspended.

(d) *North Korea.*

(i) North Korea does not cooperate with the United States Government in any respect and fails to satisfy all information-sharing requirements.

(ii) The entry into the United States of nationals of North Korea as immigrants and nonimmigrants is hereby suspended.

(e) *Syria.*

(i) Syria regularly fails to cooperate with the United States Government in identifying security risks, is the source of significant terrorist threats, and has been designated by the Department of State as a state sponsor of terrorism. Syria has significant inadequacies in identity-management protocols, fails to share public-safety and terrorism information, and fails to satisfy at least one key risk criterion.

(ii) The entry into the United States of nationals of Syria as immigrants and nonimmigrants is hereby suspended.

(f) *Venezuela.*

(i) Venezuela has adopted many of the baseline standards identified by the Secretary of Homeland Security and in section 1 of this proclamation, but its government is uncooperative in verifying whether its citizens pose national security or public-safety threats. Venezuela's government fails to share public-safety and terrorism-related information adequately, fails to satisfy at least one key risk criterion, and has been assessed to be not fully cooperative with respect to receiving its nationals subject to final orders of removal from the United States. There are, however, alternative sources for obtaining information to verify the citizenship and identity of nationals from Venezuela. As a result, the restrictions imposed by this proclamation focus on government officials of Venezuela who are responsible for the identified inadequacies.

(ii) Notwithstanding section 3(b)(v) of this proclamation, the entry into the United States of officials of government agencies of Venezuela involved in screening and vetting procedures—including the Ministry of the Popular Power for Interior, Justice and Peace; the Administrative Service of Identification, Migration and Immigration; the Scientific, Penal and Criminal Investigation Service Corps; the Bolivarian National Intelligence Service; and the Ministry of the Popular Power for Foreign Relations—and their immediate family members, as nonimmigrants on business (B–1), tourist (B–2), and business/tourist (B–1/B–2) visas, is hereby suspended. Further, nationals of Venezuela who are visa holders should be subject to appropriate additional measures to ensure traveler information remains current.

(g) *Yemen.*

(i) The government of Yemen is an important and valuable counterterrorism partner, and the United States Government looks forward to expanding that cooperation, including in the areas of immigration and border management. Yemen, nonetheless, faces significant identity-management challenges, which are amplified by the notable terrorist presence within its territory. The government of Yemen fails to satisfy critical identity-management requirements, does not share public-safety and terrorism-related information adequately, and fails to satisfy at least one key risk criterion.

(ii) The entry into the United States of nationals of Yemen as immigrants, and as nonimmigrants on business (B–1), tourist (B–2), and business/tourist (B–1/B–2) visas, is hereby suspended.

(h) *Somalia.*

(i) The Secretary of Homeland Security's report of September 15, 2017, determined that Somalia satisfies the information-sharing requirements of the baseline described in section 1(c) of this proclamation. But several other considerations support imposing entry restrictions and limitations on Somalia. Somalia has significant identity-management deficiencies. For example, while Somalia issues an electronic passport, the United States and many other countries do not recognize it. A persistent terrorist threat also emanates from Somalia's territory. The United States Government has identified Somalia as a terrorist safe haven. Somalia stands apart from other countries in the degree to which its government lacks command and control of its territory, which greatly limits the effectiveness of its national capabilities in a variety of respects. Terrorists use under-governed areas in northern, central, and southern Somalia as safe havens from which to plan, facilitate, and conduct their operations. Somalia also remains a destination for individuals attempting to join terrorist groups that threaten the national security of the United States. The State Department's 2016 Country Reports on Terrorism observed that Somalia has not sufficiently degraded the ability of terrorist groups to plan and mount attacks from its territory. Further, despite having made significant progress toward formally federating its member states, and its willingness to fight terrorism, Somalia continues to struggle to provide the governance needed to limit terrorists' freedom of movement, access to resources, and capacity to operate. The government of Somalia's lack of territorial control also compromises Somalia's ability, already limited because of poor record-keeping, to share information about its nationals who pose criminal or terrorist risks. As a result of these and other factors, Somalia presents special concerns that distinguish it from other countries.

(ii) The entry into the United States of nationals of Somalia as immigrants is hereby suspended. Additionally, visa adjudications for nationals of Somalia and decisions regarding their entry as nonimmigrants should be subject to additional scrutiny to determine if applicants are connected to terrorist organizations or otherwise pose a threat to the national security or public safety of the United States.

Sec. 3. *Scope and Implementation of Suspensions and Limitations.* (a) *Scope.* Subject to the exceptions set forth in subsection (b) of this section and any waiver under subsection (c) of this section, the suspensions of and limitations on entry pursuant to section 2 of this proclamation shall apply only to foreign nationals of the designated countries who:

(i) are outside the United States on the applicable effective date under section 7 of this proclamation;

(ii) do not have a valid visa on the applicable effective date under section 7 of this proclamation; and

(iii) do not qualify for a visa or other valid travel document under section 6(d) of this proclamation.

(b) *Exceptions.* The suspension of entry pursuant to section 2 of this proclamation shall not apply to:

(i) any lawful permanent resident of the United States;

(ii) any foreign national who is admitted to or paroled into the United States on or after the applicable effective date under section 7 of this proclamation;

(iii) any foreign national who has a document other than a visa—such as a transportation letter, an appropriate boarding foil, or an advance parole document—valid on the applicable effective date under section 7 of this proclamation or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission;

(iv) any dual national of a country designated under section 2 of this proclamation when the individual is traveling on a passport issued by a non-designated country;

(v) any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C–2 visa for travel to the United Nations, or G–1, G–2, G–3, or G–4 visa; or

(vi) any foreign national who has been granted asylum by the United States; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

(c) *Waivers.* Notwithstanding the suspensions of and limitations on entry set forth in section 2 of this proclamation, a consular officer, or the Commissioner, United States Customs and Border Protection (CBP), or the Commissioner's designee, as appropriate, may, in their discretion, grant waivers on a case-by-case basis to permit the entry of foreign nationals for whom entry is otherwise suspended or limited if such foreign nationals demonstrate that waivers would be appropriate and consistent with subsections (i) through (iv) of this subsection. The Secretary of State and the Secretary of Homeland Security shall coordinate to adopt guidance addressing the circumstances in which waivers may be appropriate for foreign nationals seeking entry as immigrants or nonimmigrants.

(i) A waiver may be granted only if a foreign national demonstrates to the consular officer's or CBP official's satisfaction that:

(A) denying entry would cause the foreign national undue hardship;

(B) entry would not pose a threat to the national security or public safety of the United States; and

(C) entry would be in the national interest.

(ii) The guidance issued by the Secretary of State and the Secretary of Homeland Security under this subsection shall address the standards, policies, and procedures for:

(A) determining whether the entry of a foreign national would not pose a threat to the national security or public safety of the United States;

(B) determining whether the entry of a foreign national would be in the national interest;

(C) addressing and managing the risks of making such a determination in light of the inadequacies in information sharing, identity management, and other potential dangers posed by the nationals of individual countries subject to the restrictions and limitations imposed by this proclamation;

(D) assessing whether the United States has access, at the time of the waiver determination, to sufficient information about the foreign national to determine whether entry would satisfy the requirements of subsection (i) of this subsection; and

(E) determining the special circumstances that would justify granting a waiver under subsection (iv)(E) of this subsection.

(iii) Unless otherwise specified by the Secretary of Homeland Security, any waiver issued by a consular officer as part of the visa adjudication process will be effective both for the issuance of a visa and for any subsequent entry on that visa, but will leave unchanged all other requirements for admission or entry.

(iv) Case-by-case waivers may not be granted categorically, but may be appropriate, subject to the limitations, conditions, and requirements set forth under subsection (i) of this subsection and the guidance issued under subsection (ii) of this subsection, in individual circumstances such as the following:

(A) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the applicable effective date under section 7 of this proclamation, seeks to reenter the United States to resume that activity, and the denial of reentry would impair that activity;

(B) the foreign national has previously established significant contacts with the United States but is outside the United States on the applicable effective date under section 7 of this proclamation for work, study, or other lawful activity;

(C) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry would impair those obligations;

(D) the foreign national seeks to enter the United States to visit or reside with a close family member (*e.g.,* a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry would cause the foreign national undue hardship;

(E) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

(F) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee), and the foreign national can document that he or she has provided faithful and valuable service to the United States Government;

(G) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 *et seq.,* traveling for purposes of conducting meetings or business with the United States Government, or traveling to conduct business on behalf of an international organization not designated under the IOIA;

(H) the foreign national is a Canadian permanent resident who applies for a visa at a location within Canada;

(I) the foreign national is traveling as a United States Government–sponsored exchange visitor; or

(J) the foreign national is traveling to the United States, at the request of a United States Government department or agency, for legitimate law enforcement, foreign policy, or national security purposes.

Sec. 4. *Adjustments to and Removal of Suspensions and Limitations.* (a) The Secretary of Homeland Security shall, in consultation with the Secretary of State, devise a process to assess whether any suspensions and limitations imposed by section 2 of this proclamation should be continued, terminated, modified, or supplemented. The process shall account for whether countries have improved their identity-management and information-sharing protocols and procedures based on the criteria set forth in section 1 of this proclamation and the Secretary of Homeland Security's report of September 15, 2017. Within 180 days of the date of this proclamation, and every 180 days thereafter, the Secretary of Homeland Security, in consultation with the Secretary of State, the Attorney General, the Director of National Intelligence, and other appropriate heads of agencies, shall submit a report with recommendations to the President, through appropriate Assistants to the President, regarding the following:

(i) the interests of the United States, if any, that continue to require the suspension of, or limitations on, the entry on certain classes of nationals of countries identified in section 2 of this proclamation and whether the restrictions and limitations imposed by section 2 of this proclamation should be continued, modified, terminated, or supplemented; and

(ii) the interests of the United States, if any, that require the suspension of, or limitations on, the entry of certain classes of nationals of countries not identified in this proclamation.

(b) The Secretary of State, in consultation with the Secretary of Homeland Security, the Secretary of Defense, the Attorney General, the Director of National Intelligence, and the head of any other executive department or agency (agency) that the Secretary of State deems appropriate, shall engage the countries listed in section 2 of this proclamation, and any other countries that have information-sharing, identity-management, or risk-factor deficiencies as practicable, appropriate, and consistent with the foreign policy, national security, and public-safety objectives of the United States.

(c) Notwithstanding the process described above, and consistent with the process described in section 2(f) of Executive Order 13780, if the Secretary of Homeland Security, in consultation with the Secretary of State, the Attorney General, and the Director of National Intelligence, determines, at any time, that a country meets the standards of the baseline described in section 1(c) of this proclamation, that a country has an adequate plan to provide such information, or that one or more of the restrictions or limitations imposed on the entry of a country's nationals are no longer necessary for the security or welfare of the United States, the Secretary of Homeland Security may recommend to the President the removal or modification of any or all such restrictions and limitations. The Secretary of Homeland Security, the Secretary of State, or the Attorney General may also, as provided for in Executive Order 13780, submit to the President the names of additional countries for which any of them recommends any lawful restrictions or limitations deemed necessary for the security or welfare of the United States.

Sec. 5. *Reports on Screening and Vetting Procedures.* (a) The Secretary of Homeland Security, in coordination with the Secretary of State, the Attorney General, the Director of National Intelligence, and other appropriate heads of agencies shall submit periodic reports to the President, through appropriate Assistants to the President, that:

(i) describe the steps the United States Government has taken to improve vetting for nationals of all foreign countries, including through improved collection of biometric and biographic data;

(ii) describe the scope and magnitude of fraud, errors, false information, and unverifiable claims, as determined by the Secretary of Homeland Security on the basis of a validation study, made in applications for immigration benefits under the immigration laws; and

(iii) evaluate the procedures related to screening and vetting established by the Department of State's Bureau of Consular Affairs in order to enhance the safety and security of the United States and to ensure sufficient review of applications for immigration benefits.

(b) The initial report required under subsection (a) of this section shall be submitted within 180 days of the date of this proclamation; the second report shall be submitted within 270 days of the first report; and reports shall be submitted annually thereafter.

(c) The agency heads identified in subsection (a) of this section shall coordinate any policy developments associated with the reports described in subsection (a) of this section through the appropriate Assistants to the President.

Sec. 6. *Enforcement.* (a) The Secretary of State and the Secretary of Homeland Security shall consult with appropriate domestic and international partners, including countries and organizations, to ensure efficient, effective, and appropriate implementation of this proclamation.

(b) In implementing this proclamation, the Secretary of State and the Secretary of Homeland Security shall comply with all applicable laws and regulations, including those that provide an opportunity for individuals to enter the United States on the basis of a credible claim of fear of persecution or torture.

(c) No immigrant or nonimmigrant visa issued before the applicable effective date under section 7 of this proclamation shall be revoked pursuant to this proclamation.

(d) Any individual whose visa was marked revoked or marked canceled as a result of Executive Order 13769 of January 27, 2017 (Protecting the Nation from Foreign Terrorist Entry into the United States), shall be entitled to a travel document confirming that the individual is permitted to travel to the United States and seek entry under the terms and conditions of the visa marked revoked or marked canceled. Any prior cancellation or revocation of a visa that was solely pursuant to Executive Order 13769 shall not be the basis of inadmissibility for any future determination about entry or admissibility.

(e) This proclamation shall not apply to an individual who has been granted asylum by the United States, to a refugee who has already been admitted to the United States, or to an individual granted withholding of removal or protection under the Convention Against Torture. Nothing in this proclamation shall be construed to limit the ability of an individual to seek asylum, refugee status, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States.

Sec. 7. *Effective Dates.* Executive Order 13780 ordered a temporary pause on the entry of foreign nationals from certain foreign countries. In two cases, however, Federal courts have enjoined those restrictions. The Supreme Court has stayed those injunctions as to foreign nationals who lack a credible claim of a bona fide relationship with a person or entity in the United States, pending its review of the decisions of the lower courts.

(a) The restrictions and limitations established in section 2 of this proclamation are effective at 3:30 p.m. eastern daylight time on September 24, 2017, for foreign nationals who:

(i) were subject to entry restrictions under section 2 of Executive Order 13780, or would have been subject to the restrictions but for section 3 of that Executive Order, and

(ii) lack a credible claim of a bona fide relationship with a person or entity in the United States.

(b) The restrictions and limitations established in section 2 of this proclamation are effective at 12:01 a.m. eastern daylight time on October 18, 2017, for all other persons subject to this proclamation, including nationals of:

(i) Iran, Libya, Syria, Yemen, and Somalia who have a credible claim of a bona fide relationship with a person or entity in the United States; and

(ii) Chad, North Korea, and Venezuela.

Sec. 8. *Severability.* It is the policy of the United States to enforce this proclamation to the maximum extent possible to advance the national security, foreign policy, and counterterrorism interests of the United States. Accordingly:

(a) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this proclamation and the application of its other provisions to any other persons or circumstances shall not be affected thereby; and

(b) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid because of the lack of certain procedural requirements, the relevant executive branch officials shall implement those procedural requirements to conform with existing law and with any applicable court orders.

Sec. 9. *General Provisions.* (a) Nothing in this proclamation shall be construed to impair or otherwise affect:

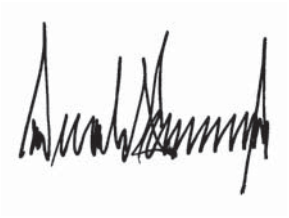
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This proclamation shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fourth day of September, in the year of our Lord two thousand seventeen, and of the Independence of the United States of America the two hundred and forty-second.



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