The Honorable William M. Conley

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN DOE,

Plaintiff,

v.

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

Defendants.

Case No. 3:17-cv-112-WMC

DEFENDANTS' OPPOSITION TO PLAINTIFF'S RENEWED APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Hearing Scheduled 3/21/2017 3:00 pm

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

EXECUTIVE ORDERS AND PROCLAMATIONS

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INTRODUCTION

Consistent with the Executive's broad constitutional authority over foreign affairs and national security, sections 1182(f) and 1185(a) of Title 8 expressly authorize the President to restrict or suspend entry of any class of aliens when in the national interest. Exercising that authority, the President issued Executive Order No. 13,780 (Order), which, *inter alia*, temporarily suspends entry of certain foreign nationals from six countries that Congress and the previous Administration determined pose a heightened terrorism risk. 82 Fed. Reg. 13,209 (2017). Those suspensions apply only for a short period, to enable the new Administration to review the Nation's screening and vetting procedures to ensure that they adequately detect terrorists. For the past thirty years, every President has invoked his power to protect the Nation by suspending entry of categories of aliens. As a legal matter, the Order is no different.

The Order took effect on March 16, 2017, and revoked Executive Order No. 13,769 ("Revoked Order"), which was issued on January 27, 2017. After the Ninth Circuit declined to stay a nationwide injunction against the Revoked Order, the President decided to issue a new Order to address the Court's concerns rather than engage in protracted litigation. The Order applies only to aliens outside the United States who do not have a visa, and even as to those aliens, the Order contains a comprehensive waiver process to mitigate any undue hardship. The Order also eliminates any preference for religious minorities.

Despite these revisions Plaintiff asks this Court for extraordinary relief at an extraordinary pace. Such relief, at the pace requested, is particularly unnecessary now that the Order that plaintiff challenges has been enjoined by two courts on a nationwide basis, *see Hawaii v. Trump*, No. 1:17-cv-00050-DKW-KSC (D. Hi. Mar. 15, 2017 (entering nationwide restraining order as to sections 2 and 6 of the Order; *Int'l Refugee Assistance Project v. Trump*, No. 8:17-cv-00361-TDC (D. Md. March 16, 2017) (entering nationwide preliminary injunction barring enforcement of 2(c), Plaintiff seeks a preliminary injunction enjoining the Order to prohibit Defendants from delaying or denying Plaintiff's derivative asylum petitions. But emergency relief is not warranted. Plaintiff's family members have already been waiting for months for travel documents. Even if section 2(c) of the Order were not enjoined, Plaintiff's derivative petitions would continue being processed on an expedited basis, just as they were before the Order took effect. Even assuming that the Order's temporary suspension on entry would apply to Plaintiff's family members and their request for derivative asylum, it would only apply when they reach that stage of the process where they have an interview, and the Order provides a robust system of case-by-case waivers whereby waivers are considered as part of processing. Accordingly, because there would be no immediate impact on these applications

even if the Order applied in these circumstances and were not already enjoined, Plaintiff's request that the Court take the extraordinary step of enjoining an exercise of the President's authority to make determinations regarding national security and admissibility can and should await more deliberate presentation by the parties and less hurried consideration by the Court.

Plaintiff has not and cannot meet the heavy burden to justify the extraordinary remedy he seeks. As an initial matter, Plaintiff's claims are not justiciable because he cannot demonstrate any cognizable injury fairly traceable to the Order where that Order is enjoined nationwide, processing of his derivative asylum petitions is ongoing and would continue even if the Order were not enjoined, and the Order explicitly provides for case-by-case waivers. Finally Plaintiff's claims fail on the merits. Two separate provisions of the immigration laws grant the President broad authority plainly encompassing the Order's temporary entry suspension. The Order is completely neutral with respect to religion. Accordingly, the proper course of action here is for Plaintiff to await the ongoing expedited processing of these petitions. For these reasons, Plaintiff's request for emergency relief should be denied.

BACKGROUND

I. STATUTORY BACKGROUND

The Immigration and Nationality Act, 8 U.S.C. §§1101 *et seq.*, governs admission of aliens into the United States. Admission (accepting certain individuals, such as some lawful permanent residents) generally requires a valid immigrant or nonimmigrant visa (or another entry document, such as a refugee travel document). *Id.* §§1181, 1182(a)(7)(A)(i), (B)(i)(II), 1203. Congress, however, established a Visa Waiver Program (Program) that enables certain nationals of participating countries to seek temporary admission for tourism or certain business purposes without a visa. 8 U.S.C. §§1182(a)(7)(B)(iv), 1187. In 2015, however, Congress excluded from the Program individuals from Program-participating countries who have connections with

specific non-Program countries. *Id.* §1187(a)(12). Congress itself specifically excluded nationals of countries participating in the Program who are dual nationals of or had recently visited Iraq or Syria, where "[t]he Islamic State of Iraq and the Levant (ISIL) . . . maintain[s] a formidable force," and nationals of and recent visitors to countries designated by the Secretary of State as state sponsors of terrorism (currently Iran, Sudan, and Syria).[1] 8 U.S.C. § 1187(a)(12)(A)(i)-(ii). Congress also authorized the Department of Homeland Security (DHS) to designate additional countries of concern, considering whether a country is a "safe haven for terrorists," "whether a foreign terrorist organization has a significant presence" in the country, and "whether the presence of an alien in the country . . . increases the likelihood that the alien is a credible threat to the national security of the United States." *Id.* §1187(a)(12)(D)(i)-(ii). Under this authority, in February 2016 DHS excluded from the Program recent visitors to Libya, Somalia, and Yemen, noting that the designation was "indicative of the Department's continued focus on the threat of foreign fighters."[2] In short, Congress and the prior Administration determined that the conditions in these seven countries warranted individualized review in admitting aliens into our Nation's borders.

Critically, although Congress created various avenues to admission, it accorded the Executive broad discretion to restrict or suspend admission of aliens. First, section 1182(f) provides:

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

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

[2] https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program

entry of aliens any restrictions he may deem to be appropriate.

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

II. THE REVOKED ORDER

On January 27, 2017, the President issued Executive Order No. 13,769 (the "Revoked Order"), which was revoked by Executive Order No. 13,780 effective at 12:01 a.m. on March 16, 2017. The Revoked Order directed the Secretaries of Homeland Security and State to assess current screening procedures to determine whether they were sufficient to detect individuals who were seeking to enter this country to do it harm. Revoked Order § 3(a)-(b). While that review was ongoing, the Revoked Order suspended for ninety days entry of foreign nationals of the seven countries already identified as posing heightened terrorism-related concerns in the context of the Visa Waiver Program. *Id.* § 3(c). It authorized the Secretaries, however, to make case-by-case exceptions to the suspension. *Id.* § 3(g).

The Revoked Order similarly directed a review of the Refugee Program, and, pending that review, suspended entry under the Refugee Program for 120 days, subject to case-by-case waivers. Revoked Order §5(a), (c). It also suspended admission of Syrian refugees until the President determined "that sufficient changes have been made to the [Refugee Program] to ensure that admission of Syrian refugees is consistent with the national interest." *Id.* §5(c). Finally, it sought to assist victims of religious persecution by directing agencies to prioritize refugee claims premised on religious-based persecution, provided the religion at issue was "a minority religion in the individual's country of nationality." *Id.* §5(b).

III. LITIGATION CHALLENGING THE REVOKED ORDER

The Revoked Order was challenged in multiple courts. The State of Washington sought a TRO against sections 3(c), 5(a)-(c), and 5(e). *Washington v. Trump*, No. 17-41 (W.D. Wash.). On February 3, 2017, the U.S. District Court for the Western District of Washington enjoined those provisions nationwide. 2007 WL 462040 (W.D. Wash. Feb. 3, 2017). On February 9, after accelerated briefing and argument, the Ninth Circuit declined to stay the injunction pending appeal. *Washington v. Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017) (per curiam). Although acknowledging that the injunction may have been "overbroad," the court declined to narrow it, concluding that "[t]he political branches are far better equipped" to do so. *Id.* at 1166-67.

On February 13, 2017, following entry of the nationwide injunction and affirmance by the Ninth Circuit, Plaintiff filed the instant Complaint. On the same day, Plaintiff sought a temporary restraining order and preliminary injunction. In view of the nationwide injunction, on February 16, 2017, following a conference with the Court, Plaintiff's request for emergency relief was denied.

IV. THE ORDER

Responding to the Ninth Circuit's invitation, on March 6, 2017—at the joint urging of the Attorney General and the Secretary of Homeland Security[3]—the President issued the Order. The Order took effect on March 16, 2017, at which time it cancelled the Revoked Order, and replaced it with substantially revised provisions that address the Ninth Circuit's concerns. As noted above, sections 2 and 6 of the Order are currently enjoined nationwide.

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

The Order's central, explicit purpose is to enable the President and his Administration to assess whether current screening and vetting procedures are sufficient to detect terrorists seeking to infiltrate the Nation. Order § 1(f). To facilitate that important review, the President ordered a temporary, ninety-day pause on entry of certain foreign nationals from six nations previously "identified as presenting heightened concerns about terrorism and travel to the United States" by Congress or the prior Administration: Iran, Libya, Somalia, Sudan, Syria, and Yemen. *Id.* § 1(a), (d)-(f).

A. Temporary Suspension of Entry by Certain Aliens From Six Countries

As the Order explains, each of those countries "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones," which is why Congress and the Secretary of Homeland Security previously designated them "countries of concern." Order § 1(d). The Order details the circumstances of each country that give rise to "heightened risk[s]" that terrorists from those countries would attempt to enter the United States and that those countries' governments may lack the "willingness or ability to share or validate important information about individuals seeking to travel to the United States" to screen them properly. Order § 1(d)-(e).

The Order "suspend[s] for 90 days" the "entry into the United States of nationals of those six countries." Order § 2(c). In response to the Ninth Circuit's ruling, however, the Order clarifies that the suspension applies only to aliens who: (1) are outside the United States on the Order's effective date, (2) do not have a valid visa on that date, and (3) did not have a valid visa on the effective date of the Revoked Order. Order § 3(a). It expressly excludes other categories of aliens that concerned the Ninth Circuit, including (among others) any lawful permanent resident; any foreign national admitted to or paroled into the United States; any individual with a document other than a visa permitting travel to the United States; and any foreign national

granted asylum, any refugee already admitted to the United States, or any individual granted certain protections from removal. *See id.* § 3(b).

B. Case-By-Case Waivers

The Order also contains a detailed waiver provision. Order § 3(c). Case-by-case waivers may be granted where denying entry "would cause undue hardship" and "entry would not pose a threat to national security and would be in the national interest." *Id*. Moreover, the Order lists circumstances where waivers could be considered, including for (among others):

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

Id.

V. DISMISSAL OF THE NINTH CIRCUIT APPEAL, AND RENEWED MOTION FOR RELIEF

In light of the Order, on March 7, 2017, Defendants filed a motion to dismiss the appeal of the preliminary injunction in *Washington v. Trump*, which the Ninth Circuit granted on March 8, 2017. Plaintiff, who initially filed suit on February 13, 2017, amended the Complaint on March 10, 2017, and renewed his request for a temporary restraining order and preliminary injunction.[4] On the same day, the Court granted a temporary restraining order and scheduled a hearing to take place on March 21, 2017, to address the motion for preliminary injunction.

[4] Although Plaintiff included a claim for violation of the Administrative Procedure Act (APA) in his Complaint, those claims are not addressed in his memorandum in support of injunctive relief, accordingly, the court need not consider his APA claims for the purpose of resolving his motion. *See* Complaint at ¶¶ 71-74; Memo. (generally).

VI. DERIVATIVE ASYLUM PETITIONS

Pursuant to 8 U.S.C. § 1158(b)(3), an alien in the United States who is granted asylum, like Plaintiff, may file a derivative petition for a Refugee/Asylee Relative with USCIS using Form I-730. 8 C.F.R. § 208.21(d). If all the relevant requirements are satisfied, a beneficiary of an approved petition who is overseas may apply for a valid travel document. 8 C.F.R. § 208.21(d); 9 FAM 203.6-8. If all requirements are met, they are provided with a transportation letter, which is a travel document similar to a visa that permits travel to the United States. (Ex. B).

Where, however, the derivatives are Syrian nationals, special processing procedures for visa petitions apply irrespective of the Order at issue.[5] All I-730 Refugee/Asylee following-to-join petitions for beneficiaries located in Syria are now processed at the U.S. Embassy in Amman, Jordan. Ex. B. Beneficiaries who are able to travel to and remain in Jordan may be processed by the USCIS Amman Field Office. Consistent with these procedures, Plaintiff's derivative petitions are currently being processed by USCIS Amman, and Defendants have informed Jordanian authorities that the applicants are slated to travel to Jordan for an interview on the next available rotation beginning April 15, 2017.

[5] For detailed information on visa processing for Syrians, *see* https://jo.usembassy.gov/special-information-for-syrian-applicants/ (last visited March 15, 2017). All I-730 Refugee/Asylee following-to-join petitions (Visas 92/93 beneficiaries) have been transferred to Embassy Amman for safekeeping pending a decision concerning where these petitions will be processed. Beneficiaries who are able to travel to and remain in Jordan may be processed by the USCIS Amman Field Office. I-730 beneficiaries may also choose to have their files sent to a different location other than Jordan for processing. I-730 beneficiaries and petitioners may email the USCIS Amman Field Office at USCIS.Amman@DHS.gov with requests to transfer their files to another consular post. Additional information will be posted online as it becomes available.

ARGUMENT

I. STANDARD OF REVIEW

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

II. PLAINTIFF'S CHALLENGES TO THE ORDER ARE NOT JUSTICIABLE

Plaintiff's claims fail because they are not yet ripe. "The doctrine[] of . . . ripeness . . . originate[s] in Article III's 'case' or 'controversy' language, no less than standing does." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 351 (2006). Ripeness ensures that courts "avoid[] . . . premature adjudication," particularly where future agency decision-making or factual determinations may change the character of the controversy or obviate the need for judicial relief altogether. *Nat'l Park Hosp. Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003).

Here, Plaintiff's claimed injury is that section 2(c) of the Order will prevent his wife and daughter from entering this country. *See* Complaint. The government, however, is currently enjoined from enforcing section 2(c) of the Order nationwide. In any event, no such injury could happen unless and until USCIS completes processing Plaintiff's I-730 petitions, his wife and daughter are scheduled for interviews with USCIS officers, they travel to Jordan for the interviews, they are approved and provided with a travel document permitting travel to the

United States, and then they are denied entry pursuant to section 2(c). (Ex. B). The Order does not halt or delay the processing of Plaintiff's I-730 petitions, and it would not prevent Plaintiff's wife and daughter from being scheduled for interviews. (Ex. B).

To be clear, as Syrian nationals, Plaintiff's wife and daughter are potentially subject to the Order's temporary, ninety-day suspension of entry, depending on whether their travel document qualifies for the exemption to the Order for foreign nationals who have "a document other than a visa, valid . . . on any date [after the effective date of this order]." Order § 2(b)(iii).[6]

But the Order also provides a system of case-by-case waivers, which are integrated into processing. And the Order specifically identifies, as one example of circumstances in which a waiver may be appropriate, cases where a "foreign national seeks to enter the United States to visit or reside with a close family member (e.g., spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted." *Id.* § 3(c)(iv). It is therefore entirely possible that Plaintiff's wife and daughter—if they are otherwise admissible—would obtain such a waiver. Unless and until Plaintiff's relatives are denied a waiver, their ability or inability to enter—and thus Plaintiff's claimed injury—"rests upon 'contingent future events.'" *Texas v. United States*, 523 U.S. 296, 300 (1998). Accordingly, these claims are not ripe.

Further, Plaintiff's attempt to demonstrate Article III standing based on alleged injury under the Establishment Clause, fails to meet his burden. (Memo. at 23-26). Although "the concept of injury for standing purposes is particularly elusive in Establishment Clause cases," a

[6] The government is currently studying the applicability of the Order to V92/93 transportation letters pursuant to this provision, but the Court need not address the issue at this time given the existing injunctions entered in Hawaii and Virginia and the government's argument that the Order is legal even if it applies to Plaintiff's derivative beneficiaries.

plaintiff cannot establish standing without showing a personal injury resulting from the alleged violation of the Establishment Clause. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 485-86 (1982) (plaintiffs lacked standing because they "fail[ed] to identify any personal injury suffered by them . . . other than the psychological consequence presumably produced by observation of conduct with which one disagrees"). Plaintiff, rather, must demonstrate a "particular and concrete injury to a personal constitutional right." *Id.* at 482. This, for example, could include a "direct harm of what is claimed to be an establishment of religion, such as a mandatory prayer in a public school classroom," or that Plaintiff "incurred a cost or [was] denied a benefit on account of [ ] religion," which, for example, "can result from alleged discrimination in the tax code, such as when the availability of a tax exemption is conditioned on religious affiliation." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133-34 (2011); *see also Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815, 820-21 (7th Cir. 2014); *Catholic League for Religious & Civ. Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1049-50 (9th Cir. 2010) (*en banc*).

Plaintiff makes neither showing here. First, he cannot demonstrate "direct harm" because the Order does not require Plaintiff to "see or do anything." *Lew*, 773 F.3d at 820; s*ee Newdow v. Lefevre*, 598 F.3d 638, 641 (9th Cir. 2010); *see also Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1016 (9th Cir. 2010) (same plaintiff lacked standing to challenge the pledge of allegiance because he had sustained no personal injury where "nothing in the Pledge [or the statute codifying it] actually requires anyone to recite it"). In other words, the Order does not "convey[] a government message of disapproval and hostility toward their religious beliefs" that causes Plaintiff to change behavior. *Catholic League*, 624 F.3d at 1053. Indeed, Plaintiff "is covered by the rule of *Valley Forge* . . . that offense at the behavior of the [federal] government,

and a desire to have [the President] comply with (the [Plaintiff's] view of) the Constitution, differs from a legal injury." *Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011) (Easterbrook, C.J.). Here, Plaintiff has not altered his conduct at all and none of his alleged harms relate to the Establishment Clause. Plaintiff merely has a disagreement with the President's actions. But disagreement—especially on behalf of others—is not a direct injury in fact. *See Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 604-05 (4th Cir. 2012).

Likewise, Plaintiff cannot show he incurred a cost or has been denied a benefit on account of religion. No benefit has been denied as a result of the Order—indeed, Plaintiff's wife and child applications are still in process, which would continue even if section 2(c) of the Order were not enjoined. *See*, e.g., *Lew*, 773 F.3d at 821 (rejecting standing where "the plaintiffs were never denied the parsonage exemption because they never asked for it"). And, given the comprehensive waiver process established by section 3(c) of the Order, even if the Order applies to these applications, Plaintiff's claims with respect to aliens seeking entry or a travel documents in the future are entirely speculative and therefore not ripe under Article III in the first place. *See, e.g.*, *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1090 (4th Cir. 1997) (discussing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-06 (1983) and rejecting Establishment Clause injury premised on "untenable assumptions" about future events); *Lew*, 773 F.3d at 821 ("A plaintiff cannot establish standing to challenge such a provision without having personally claimed and been denied the [religious] exemption.").

III. PLAINTIFF IS NOT LIKELY TO SUCCEED ON THE MERITS

A. The Order Is A Valid Exercise Of The President's Authority

Even if Plaintiff's challenges to the Order were justiciable, they would not warrant emergency relief because none are likely to succeed. The Order's temporary suspension of entry of certain classes of aliens during a review of the Nation's screening and vetting procedures is a

valid exercise of the President's broad statutory authority to "suspend the entry of any aliens or of any class of aliens" (section 1182(f)) and to prescribe the terms on which aliens may enter (section 1185(a)(1)).

i. The Order falls squarely within the President's broad authority under sections 1182(f) and 1185(a)

"[T]he power to exclude aliens is 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of the government'. . . . " *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972). Congress, moreover, has conferred expansive authority on the President, including in two statutory provisions that the Order expressly invokes. Order § 2(c).

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

restrict entry of certain classes of aliens.[7]

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

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

ii. Section 1152 does not restrict the President's broad authority under sections 1182(f) and 1185(a)

Plaintiff contends (Memo. at 12-17) that section 1152(a)(1)(A), which prohibits discrimination on the basis of nationality in the allocation of immigrant visas, bars the President from drawing nationality-based distinctions under sections 1182(f) and 1185(a), notwithstanding the fact that Presidents have done just that for decades. Plaintiff is wrong.

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

As a threshold matter, derivative asylum applicants overseas do not receive immigrant visas. (Ex. B). Rather, approved I-730 beneficiaries receive a travel permission only, colloquially referred to as a "transportation letter." The transportation letter and approved I-730 permits the applicants to travel to a port of entry in the United States and seek admission. Once the I-730 is used for this purpose, the "Form I-730 will cease to confer immigration benefits after it has been used by the beneficiary for admission to the United States as a derivative of an asylee." 8 C.F.R. § 208.21(d). Accordingly, since section 1152(a)(1)(A) applies to "immigrant visas," instead of travel documents, that provision is inapplicable here. *See* 8 U.S.C. § 1152(a)(1)(A).

Further, section 1152(a)(1)(A) does not restrict the President's authority to draw nationality-based distinctions under sections 1182(f) and 1185(a). Section 1152(a)(1)(A) was enacted in 1965 to abolish the prior system of nationality-based quotas for immigrant visas. Congress replaced that system with uniform, per-country percentage limits. Section 1152(a)(1)(A) addresses the subject of relative "preference" or "priority" (and reciprocal disadvantage or "discrimination") in the allocation of immigrant visa numbers by making clear that the uniform percentage limits are the only limits that may be placed on the number of immigrant visas issued to nationals of any country. Section 1152(a)(1)(A) thus governs the ordinary process of allocating and granting immigrant visas. Its plain text governs only "the issuance of an immigrant visa"; it does not purport to restrict the President's antecedent, longstanding authority to suspend entry of "any class of aliens" or to prescribe reasonable "rules, regulations, and orders" regarding entry as he deems appropriate. And it has never been understood to prohibit the President from drawing nationality-based distinctions under section 1182(f). For example, President Reagan invoked section 1182(f) to "suspend entry into the

United States as immigrants by all Cuban nationals," subject to exceptions. Proclamation No. 5517 (1986). *See also* Proclamation 6958 (1996) (members of Sudanese government and armed forces); Proclamation 5829 (1988) (certain Panamanian nationals); Proclamation 5887 (1988) (Nicaraguan government officers and employees).

Section 1185(a), too, has long been understood to authorize nationality-based distinctions. In 1979, the Office of Legal Counsel construed it as authorizing the President to "declare that the admission of Iranians or certain classes of Iranians would be detrimental to the interests of the United States." *Immigration Laws and Iranian Students*, 4A Op. O.L.C. 133, 140 (Nov. 11, 1979). Two weeks later, President Carter invoked section 1185(a) to direct "limitations and exceptions" regarding "entry" of certain "Iranians." Exec. Order No. 12,172 (1979). It is thus simply incorrect that past Presidents have not drawn nationality-based distinctions in administering the immigration laws. *See also*, *e.g.*, *Narenji v. Civiletti*, 617 F.2d 745, 746-748 (D.C. Cir. 1979) (upholding regulation that required nonimmigrant-alien post-secondary-school students who were Iranian natives or citizens to provide residence and immigration status to former INS).

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

Plaintiff offers no sound reason to adopt that constitutionally-dubious interpretation or to upset the long-settled understanding of the President's statutory authority. Plaintiff cites a decision applying section 1152(a)(1)(A) to nationality-based distinctions in the processing of immigrant visas, but that case did not involve an exercise of the President's authority under sections 1182(f) or 1185(a).[8] *See* Memo. at 14; *see also Legal Assistance for Vietnamese Asylum Seekers*, 45 F.3d at 472-73. And Plaintiff is wrong to suggest that there is a general bar on nationality-based distinctions in immigration. In fact, "given the importance to immigration law of, *inter alia*, national citizenship, passports, treaties, and relations between nations, the use of such classifications is commonplace and almost inevitable." *Rajah v. Mukasey*, 544 F.3d 427, 435 (2d Cir. 2008).

Plaintiff contends (Memo. at 14-17) that the President's authority under section 1182(f) is inconsistent with section 1152(a)(1)(A). To read section 1152(a)(1)(A) as narrowing the President's section 1182(f) authority, however, would be to treat it as a partial "'repeal[] by implication,'" which courts will not do unless Congress's "'intention'" is "'clear and manifest.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife (NAHB)*, 551 U.S. 644, 662, 664 n.8 (2007); *see Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). Sections 1152(a)(1)(A) and 1182(f) can, and therefore must, be reconciled by sensibly reading section

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[8] *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 472-73 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996). Plaintiff also cites *Olsen v. Albright*, 990 F. Supp. 31 (D.D.C. 1997), but that case is distinguishable on numerous grounds. First, it discussed section 1152(a)(1)(A) only in passing, in describing the legal background. *Id.* at 37. Second, it primarily addressed claims of discrimination based on race and national origin, not nationality—a term that refers to present country of citizenship and allegiance, which is relevant to the immigration laws in ways that race and national origin are not. *Id.* at 33-34, 37-38. Third, and most importantly, it did not involve any general policy established by the Executive Branch—much less an exercise of the President's authority under section 1182(f). Instead, it involved claims that individual consular officers were discriminating on the basis of race and national origin in applying neutral policies. *Id.*

1152(a)(1)(A)'s general, default provisions as not affecting the President's authority to suspend entry under section 1182(f) based on a specific finding about the national interest. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2070-71 (2012) ("'[I]t is a commonplace of statutory construction that the specific governs the general.'").

Finally, even if section 1152(a)(1)(A) could be construed to narrow section 1182(f), it cannot be read to narrow section 1185(a)—which was substantially amended in 1978, *after* section 1152(a)(1)(A)'s enactment. Nothing in section 1185(a)'s current text or post-1978 history limits the President's authority to restrict entry by nationals of particular countries.

B. The Order Does Not Violate The Due Process Clause

i. Plaintiff's Procedural Due Process Claims are Premature

The Order applies only to aliens who have no due-process rights in connection with their entry into this country. Plaintiff asserts a purported due-process claim as an asylee in the United States with respect to the entry of aliens abroad. His claims fail for numerous reasons, including because the Order provides whatever individualized process the Constitution may require.

First, the Due Process Clause confers no entitlement on persons in the United States regarding the entry of others. *See Kerry v. Din*, 135 S. Ct. 2129, 2131 (2015) (plurality opinion) ("There is no such constitutional right."); *see also, e.g.*, *Bangura v. Hansen*, 434 F.3d 487, 495-496 (6th Cir. 2006).[9]

[9] Before *Din*, some courts of appeals held that U.S. *citizens* had protected liberty interests in their alien spouses' entry. *See, e.g.*, *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008). But the *Din* plurality rejected that view, 135 S. Ct. at 2131, and Justice Kennedy's concurring opinion merely assumed, without deciding, that the plaintiff in that case had a protected liberty interest, *id.* at 2139 (Kennedy, J., concurring in judgment).

Second, assuming the Due Process Clause applies, Plaintiff's procedural due-process claim fails because he does not explain what further process the Constitution could possibly require. Of course, as we have explained, one reason for this is that Plaintiff's claims are premature, filed in advance of any agency decisions rather than after them, as was the case in *Din* and *Mandel*. And unlike the plaintiff in *Din*,[10] Plaintiff here does not seek additional explanation for an individualized immigration decision or contend that officials misapplied a legal standard to a particular case. Instead, he broadly challenges the President's decision to suspend the entry of certain nationals of six countries. Plaintiff cannot claim that due process requires notice or individualized hearings where, as here, the government acts through categorical judgments rather than individual adjudications. *See Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 446 (1915); *Yassini v. Crosland*, 618 F.2d 1356, 1363 (9th Cir. 1980).

Third, even if some individualized process were required, the Order more than provides it through the review of waiver requests (part of application processing), including for foreign nationals seeking to "visit or reside with a close family member." Order § 3(c)(iv); *see id.* § 3(c)(i)-(ix). Plaintiff does not identify any deficiency in this individualized waiver consideration, which provides at least as much process as Justice Kennedy found to be sufficient in *Din*. 135 S. Ct. at 2140–41. At an absolute minimum, Plaintiff cannot claim that the Due Process Clause entitles him to emergency injunctive relief where he has not availed himself of the process the Order provides.

[10] To be clear, the limited judicial review described in *Din* applied to United States citizens petitioning on behalf of their spouses, and no court has extended it to others.

ii. Plaintiff's Substantive Due Process Arguments are Unmeritorious

Plaintiff separately contends (Mot. 17-21) that the Order violates an asserted substantive due process right to live together with his family. But Plaintiff cites no decision, by any court, acknowledging a "fundamental right to family integrity" in the immigration context. Indeed, precedent dictates that there is simply no such fundamental constitutional right. As the United States Court of Appeals for the Third Circuit has observed, "[t]he Constitution 'does not recognize the right of a citizen spouse to have his or her alien spouse remain in the country.'" *Fasano v. United States*, 230 Fed.Appx. 239, 240 (3d Cir. 2007) (quoting *Bangura*, 434 F.3d at 496, and citing *Burrafato v. U.S. Dep't of State*, 523 F.2d 554, 555 (2d Cir. 1975)). Moreover, district courts that have specifically considered whether an immigration statute restricting the filing of family-based immigration petitions infringes upon the right to marry and family unity have concluded that it does not. *See Burbank v. Johnson*, No. 2:14-CV-292-RMP, 2015 WL 4591643, at *7 (E.D. Wash. July 29, 2015) (rejecting substantive due process claim that the Adam Walsh Act contravenes plaintiff's "fundamental right to marry and live with his spouse," because "it is undisputed that [plaintiff] has married his wife, such that Defendants have not violated any fundamental right to marry" (citations omitted)); S*uhail v. U.S. Attorney Gen.*, No. 15-CV-12595, 2015 WL 7016340, at *10 (E.D. Mich. Nov. 12, 2015) (rejecting claim that Adam Walsh Act "unreasonably restricts [p]laintiffs' marital rights and their constitutionally protected liberty interest in 'establishing a home' in the United States," because "U.S. citizens do not have a protected liberty interest in residing in the United States with their noncitizen spouses" (citations omitted)). Furthermore, the Supreme Court's decision in *Din*, 135 S.Ct. 2128, solidifies the correctness of these decisions. In *Din*, the Supreme Court addressed a procedural due process claim by a United States citizen whose alien spouse's visa application was denied.

Din argued that "the Government denied her due process of law when, without adequate explanation of the reason for the visa denial, it deprived her of her constitutional right to live in the United States with her spouse." *Id.* at 2131. In a plurality opinion, Justice Scalia, joined by Justices Roberts and Thomas, unequivocally opined that there is no constitutional right to live with one's spouse. *Id.* ("There is no such constitutional right."). *Din*, therefore, did not recognize a fundamental constitutional right to live with one's spouse giving rise to the substantive due process protections Plaintiff seeks to enforce here.

Further, Plaintiff is quite wrong to assert (Mot. 19) that the Order must be subjected to strict scrutiny because it prevents him from living together with his family. Generally, a plaintiff adequately alleges a substantive due process claim where the plaintiff pleads that a statute or government action burdens a fundamental right and cannot withstand strict scrutiny. *Montgomery v. Carr*, 101 F.3d 1117, 1124 (6th Cir. 1996) (holding that government actions interfering with marriage are subject to strict scrutiny). In *immigration* cases, however, federal courts apply a much more deferential standard of review to substantive due process challenges even where the immigration law interferes with a plaintiff's fundamental rights. *Fiallo v. Bell*, 430 U.S. 787, 798–99, 97 (1977). As numerous cases have recognized, *Fiallo* establishes that the strict scrutiny standard does not apply to the evaluation of constitutional challenges to immigration legislation. *Marin-Garcia v. Holder*, 647 F.3d 666, 673 (7th Cir. 2011); *Canto v. Holder*, 593 F.3d 638, 641 (7th Cir. 2010); *Lara–Ruiz v. I.N.S.*, 241 F.3d 934, 946 (7th Cir. 2001); *see also, e.g.*, *Bangura v. Hansen*, 434 F.3d 487, 494–95 (6th Cir. 2006); *Azizi v. Thornburgh*, 908 F.2d 1130, 1133 (2d Cir. 1990) ("While we recognize the fundamental nature of the right to marry, we also must consider that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature," such that

"our review of legislation involving matters of immigration and naturalization is limited.") (internal quotes omitted). As the Sixth Circuit has explained, "[i]n immigration cases * * * federal courts apply a much more deferential standard to substantive due process challenges even where the immigration law interferes with a plaintiff's fundamental rights." *Bangura*, 434 F.3d at 494-495; *see id.* (collecting cases). That standard is akin to, or "even lower than rational basis review." *Id.* Plaintiff does not attempt to argue that the Order fails to satisfy that deferential standard.

C. The Order Does Not Discriminate Based On Religion

The Order does not discriminate on the basis of religion. It applies to six countries that Congress and the prior Administration determined posed special risks of terrorism. It applies to *all* individuals in those countries, regardless of their religion. And it excludes numerous individuals with ties to this country, while providing a comprehensive waiver process for others. Plaintiff nevertheless attempts to impugn the Order using campaign statements. As the Supreme Court has made clear, official action must be adjudged by its "'text, legislative history, and implementation of the statute or comparable official act[ion],'" not through "judicial psychoanalysis of a drafter's heart of hearts." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). Measured against these standards, the Order falls well within the President's lawful authority.

i. The Order draws distinctions on the basis of risk of terrorism, not religion

Plaintiff correctly does not contend that the Order draws "explicit and deliberate distinctions" based on religion. *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982). The only language in the Revoked Order touching on religion—a neutral provision intended to assist victims of religious persecution—has been removed. And the Order's temporary suspensions are expressly premised on the President's finding that a temporary pause in entry was necessary to

"prevent infiltration by foreign terrorists" while the review of screening and vetting procedures is ongoing. Order § 2(c). The six countries covered were previously designated by Congress and the Executive Branch as presenting particular risks, and the risk of continued entry from those countries during the review was, in the President's view, unacceptably high.

The Order's stated "secular purpose" is entitled to "deference" so long as it is "genuine," *i.e.*, "not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864. Courts judge the genuineness of the government's true "object" by considering the "operation" of its action, as "the effect of a law in its real operation is strong evidence of its object." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993). The "Establishment Clause analysis does not look to the veiled psyche of government officers," but rather to "the 'text, legislative history, and implementation of the statute,' or comparable official act." *McCreary*, 545 U.S. at 862-63. Here, the operation of both suspensions confirms the Order's stated purpose. The suspensions apply irrespective of any alien's religion, and Plaintiff does not contend otherwise.

The fact that the six countries covered by the entry suspension are predominantly Muslim in no way establishes that the suspension's object is to single out Islam. The six countries covered were previously selected by Congress and the Executive through a process that Plaintiff does not contend was motivated by religious animus. In addition, those countries represent only a small fraction of the world's fifty Muslim-majority nations, and are home to less than the global Muslim population.[11] And the suspension covers *every* national of those countries, including millions of non-Muslim individuals in those countries, unless they are either excluded

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

from its scope or entitled to a waiver based on the religiously neutral exclusion and waiver provisions. Consequently, these facts undercut the allegation that the Order targets Muslims in that it is completely inadequate to accomplish the impermissible motive for which Plaintiff contends it was specifically designed.

ii. The Order cannot be restrained on the basis of campaign statements or the Revoked Order

Plaintiff argues that the Order targets Islam not because of what it says or does, but because of statements by the President, mostly before he assumed office, and his surrogates. Memo. at 4, 13, 29. Plaintiff cannot use either type of parol evidence to evade the Order's secular purpose.

As a threshold matter, the Supreme Court has made clear in the immigration context that courts may not "look behind the exercise of [Executive] discretion" taken "on the basis of a facially legitimate and bona fide reason." *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972); *see Fiallo*, 430 U.S. at 796.[12] As those cases recognize, Plaintiff's approach would thrust courts into the untenable position of probing the Executive's judgments on foreign affairs and national security. And it would invite impermissible intrusion on Executive Branch deliberations, which are constitutionally "privilege[d]" against such inquiry, *United States v. Nixon*, 418 U.S. 683, 708 (1974), as well as litigant-driven discovery that would disrupt the President's ongoing execution of the laws, *see, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). Searching for governmental purpose outside official pronouncements and the operative terms of governmental

[12] Contrary to Plaintiff's submission (Mot. 21), the *Mandel* standard is not limited to "individual exercises of Executive discretion" and does not exclude broad policies like the one adopted in the Order. To the contrary, the Supreme Court has applied exactly the same standard to a "broad congressional policy choice" reflected in an immigration *statute*. *Fiallo*, 430 U.S. at 794-95 ("We can see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in * * * *Mandel*.").

action is fraught with practical "pitfalls" and "hazards" that courts should avoid. *Palmer v. Thompson*, 403 U.S. 217, 224 (1971).

Even if the Court could look behind the President's facially legitimate reasons for suspending the entry of certain foreign nationals and refugees, informal statements by the President or his surrogates that do not directly concern the Order are irrelevant. The Supreme Court has declined to rely even on press statements and other informal communications by *incumbent* government officials, recognizing that they may not accurately reflect the government's position. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 623-24 & n.52 (2006); *see also Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592, 599 (5th Cir. 1995). *A fortiori*, statements by private persons cannot reveal "the government's ostensible object." *McCreary*, 545 U.S. at 859-60; *see Modrovich v. Allegheny County*, 385 F.3d 397, 411-12 (3d Cir. 2004) (declining to rely on position of non-government parties); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1031 (10th Cir. 2008) (same); *Glassman v. Arlington County*, 628 F.3d 140, 147 (4th Cir. 2010) (same); *see also Peck v. Upshur Cty. Bd. of Educ.*, 155 F.3d 274, 281-82 (4th Cir. 1998) (observing that the government's affirmative action or statements countering allegation that its action has a religious purpose can negate objective observer finding of religious intent); *ACLU of Kentucky v. Mercer County*, 432 F.3d 624, 631 (6th Cir. 2005) ("[t]he only history the objective observer would incorporate into this display is the statement of Judge McGinnis [filed after the litigation was instituted] that the purpose of the display is to recognize American legal traditions").

Using comments by political candidates to question the stated purpose of later action is particularly problematic. Candidates are not government actors, and statements of what they might attempt to achieve if elected, which are often simplified and imprecise, are not "official

act[s]." *McCreary*, 545 U.S. at 862. They generally are made without the benefit of advice from an as-yet-unformed Administration, and cannot bind elected officials who later conclude that a different course is warranted. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002). Permitting campaign statements to contradict official pronouncements of the government's objectives would inevitably "chill political debate during campaigns." *Phelps v. Hamilton*, 59 F.3d 1058, 1068 (10th Cir. 1995) (declining to rely on campaign statements). It also would be unworkable, requiring the "judicial psychoanalysis" that *McCreary* repudiated. 545 U.S. at 862; *see also Bd. of Educ. of Westside Cmty. Sch. v. Mergens By & Through Mergens*, 496 U.S. 226, 249 (1990) ("[W]hat is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law . . . .") (emphasis in original); *United States v. O'Brien*, 391 U.S. 367, 383 (1968) (noting that "[i]nquiries into congressional motives or purposes are a hazardous matter").

Even considering Plaintiff's proffered extrinsic evidence, none of it demonstrates that *this Order*—adopted after the President took office, in response to specific, identifiable national security objectives that are not tied to religion—was driven by religious animus. Plaintiff's marquee statement proves the point: they cite a 15-month-old campaign press release advocating a "complete shutdown" on Muslims' entering the country. Memo. at 4. That release and other proffered statements reveal nothing about the Order's aim, because the Order does no such thing. Far from banning Muslims indefinitely, the Order pauses for a limited period of ninety days entry from just six countries previously identified as posing particular risks, subject to religion-neutral exceptions and case-by-case waivers. Consequently, there is a complete disconnect between Plaintiff's imputed purpose and the Order's actual effect.

Plaintiff contends (Memo. at 24-26) that *McCreary* requires looking behind the Order's

text and legal effects to speculate at its aims. In fact, *McCreary* says the opposite. *McCreary* makes clear that what matters is not a government official's subjective motive, but only the "official objective" drawn from "readily discoverable fact." 545 U.S. at 862. As *McCreary* explained, the Supreme Court's previous cases rested on analysis of objective facts directly related to the law at issue: "In each case, the government's action was held unconstitutional only because openly available data"—a law's text or obvious effects, the policy it replaced, official public statements of the law's purpose, or "comparable *official* act[s]"—"supported a commonsense conclusion that a religious objective permeated the government's action." *Id.* at 862-63 (emphasis added); *see Lukumi*, 508 U.S. at 534-35 (gleaning purpose from ordinances' "text" and "operation"). *McCreary*'s analysis of the counties' purpose therefore centered on the text of the resolutions that serially authorized Ten Commandments displays and the features of those displays. *See* 545 U.S. at 868-74. Although the Court referred to other sources (*e.g.*, official statements made during legislative meetings) in describing the facts, *e.g.*, *id.* at 851, *McCreary*'s reasoning and holding rested on the actions the counties took and inferences fairly drawn from them, *id.* at 868-74. The Court emphatically rejected suggestions that it "look to the veiled psyche of government officers." *Id.* at 863.

The contrast between this case and *McCreary* could not be more stark. There, the religious purpose of the original resolution authorizing the Ten Commandments display was readily evident from the outset. 545 U.S. at 868-69. The counties' second resolution compounded the problem, making the religious aim *explicit*. *Id.* at 870. The counties' third and final display still showed a "sectarian spirit," since it included a different version of the Ten Commandments that "quoted more of the purely religious language of the Commandments than the first two displays had done," and, significantly, was created "without a new resolution or

repeal of the old one." *Id.* at 870, 872.

Here, in contrast, the Order does not convey any religious message; indeed, it does not reference religion at all. The Revoked Order contained provisions addressing religious minorities, but—as the new Order takes care to explain—those provisions did not and never were intended to discriminate along denominational lines. Order §1(b)(iv). Regardless, the current Order responded to concerns about the Revoked Order's aims by removing the provisions that purportedly drew religious distinctions—erasing any doubt that national security, not religion, is the focus. The Order also reflects the considered views of the Secretary of State, the Secretary of Homeland Security, and the Attorney General, who announced the Order and whose motives have not been impugned. Informatively, in *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 770-72 (7th Cir. 2001), the Seventh Circuit declined to rely on the impermissible purpose of an earlier courthouse monument in assessing the purpose of a new replacement monument. Instead, the court focused on the "stated purpose" of the new monument, as reflected in the governor's official statements, and on the "content and context" of the monument itself. *Id.* at 771 (declining to consider the purpose motivating the construction of the replaced, earlier monument). Pursuant to *Indiana Civil*, the Court here should not focus on the pre-election statements of a political candidate or the perceived purpose of the replaced Executive Order, but on the "stated purpose" of the Order as reflected by the official statements of the President and his cabinet, as well as the religiously neutral content of the Order itself. In short, the President's efforts to accommodate the courts' concerns while simultaneously fulfilling his constitutional duty to protect the Nation only confirms that the Order's intention most emphatically is not to discriminate along religious lines.

D. Plaintiff's Equal Protection Claim is Unavailing

Plaintiff claims that the Order violates the equal protection component of the Fifth Amendment's Due Process Clause. Plaintiff's claims, however, are accorded review under the "facially legitimate and bona fide" standard, not strict scrutiny as he contends (Memo at 27). *See Fiallo*, 430 U.S. at 796. Where an equal protection claim is made to an immigration law, at most rational basis review applies. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 83 (1976) (considering whether a law that made distinctions based on alien status was "wholly irrational"); *Jimenez–Angeles v. Ashcroft*, 291 F.3d 594, 603 (9th Cir. 2002) (reasoning that nationality-based classification of noncitizens satisfies equal protection if it is rationally related to a legitimate government interest).

Under highly deferential rational basis scrutiny, a classification must be upheld so long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *see also See Yao v. I.N.S.*, 2 F.3d 317, 321 (9th Cir. 1993). Equal protection is satisfied so long as there is "a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992).

The Order easily satisfies this relevant standard. Indeed, Courts have repeatedly held that the Executive Branch is permitted to draw distinctions based on nationality in the context of immigration and entry into the United States. *See, e.g., Jean v. Nelson*, 727 F.2d 957, 978 n.30 (11th Cir. 1984) (en banc), ("[T]here is little question that the Executive has the power to draw distinctions among aliens on the basis of nationality."), *aff'd on non-constitutional grounds*,

472 U.S. 846 (1985); *Narenji*, 617 F.2d at 748 ("[C]lassifications among aliens based upon nationality are consistent with due process and equal protection if supported by a rational basis."); *Rajah*, 544 F.3d at 435 (2d Cir. 2008) (similar); *Appiah v. INS*, 202 F.3d 704, 710 (4th Cir. 2000) (similar). Here, the President's determination that nationals from the six countries identified are associated with a heightened risk of terrorism creates a rational basis for the Order.[13]

E. PLAINTIFF HAS NOT SHOWN IMMEDIATE, IRREPARABLE HARM

Plaintiff's request for emergency injunctive relief independently fails because he cannot show "irreparable harm." *Winter*, 555 U.S. at 20. Plaintiff's first threshold requirement for obtaining a preliminary injunction is to demonstrate that he will suffer irreparable harm in the absence of the relief sought. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am.*, Inc., 549 F.3d 1079, 1086 (7th Cir. 2008). The irreparable harm must be "real," "substantial," and "immediate." *Lyons*, 461 U.S. at 111. To secure an injunction, Plaintiff "must do more than merely allege imminent harm sufficient to establish standing"; they "must *demonstrate* immediate threatened injury" that only "preliminary injunctive relief" can prevent. *Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988) (emphasis in original); *see Girl Scouts of Manitou Council, Inc.*, 549 F.3d at 1086.

Given that section 2(c) of the Order is currently enjoined nationwide, Plaintiff can show no irreparable harm. But even were the Order not enjoined, plaintiff could still not demonstrate the requisite harm: Plaintiff's wife and daughter have not yet completed the steps necessary to be placed into the queue for application interview scheduling, they have not yet obtained a visa

[13] Plaintiff also alleges that the Order violates the Equal Protection Clause because it stems from "religious animus against Islam." (Memo at 28) But that argument is equivalent to Plaintiff's religious-discrimination claim under the Establishment Clause, and it fails for the same reason.

to enter Jordan or traveled to another location where they may be interviewed, or provided proof of travel booked to Jordan or another location. Even assuming that section 2(c) of the Order would apply to Plaintiff's wife and daughter, none of these requirements are affected by the Order's suspension of entry provision, and Plaintiff thus has not shown the type of immediate, irreparable harm ensuing from the Order as necessary to obtain a temporary restraining order or preliminary injunction.

F. THE BALANCE OF EQUITIES AND PUBLIC INTEREST WEIGH STRONGLY AGAINST EMERGENCY RELIEF

The government and the public's interest—which merge here, *see Nken v. Holder*, 556 U.S. 418, 435 (2009)—counsel strongly in favor of leaving the Order in effect. The President, in consultation with the Attorney General and the Secretaries of State and Homeland Security, determined that, while the review of screening and vetting procedures is ongoing, the "risk of erroneously permitting entry" of an individual who intends to commit terrorist acts "is unacceptably high." Order §1(f). That risk assessment provides more than sufficient basis to leave the Order's temporary, precautionary safeguards in place.

Experience and empirical data already demonstrate the ability of would-be terrorists to infiltrate the country through cracks in screening and vetting processes; some 300 persons who entered as refugees are currently under investigation, and hundreds of foreign-born persons have been convicted of terrorism-related crimes. Order §1 (h). Given that reality, the Executive's obligation, and the Order's aim, is to predict where the greatest risk exists *going forward*. The Order reflects such prediction, identifying six countries that Congress and the prior Administration had found present a "heightened risk" that possibly inadequate screening could enable terrorist infiltration. Order § 1(e). The Order further details the specific concerns with each of the six countries (and why Iraq now presents a different circumstance). *Id.* § 1(e), (g).

The Order thus reflects the Executive's "[p]redictive judgment," which is entitled to the greatest possible degree of judicial deference. *Dep't of the Navy v. Egan*, 484 U.S. 518, 527-29 (1988). Such judgments "have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry," as they "are delicate, complex, and involve large elements of prophecy," and are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). "[W]hen it comes to collecting evidence and drawing factual inferences in this area, 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* (*HLP*), 561 U.S. 1, 34 (2010) (internal citation omitted).

The "evaluation of the facts by the Executive" to support predictive judgments is especially "entitled to deference" when "litigation implicates sensitive and weighty interest of national security and foreign affairs." *HLP*, 561 U.S. at 33-35. When the Executive adopts "a preventive measure" in order "to prevent imminent harms in the context of international affairs and national security," the government "is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions." *Id.* at 35. Thus, where "[t]he Executive … deem[s] nationals of a particular country a special threat," "a court would be ill equipped to determine the[] authenticity and utterly unable to assess the[] adequacy" of that determination. *Reno v. American-Arab Discrimination Committee*, 525 U.S. 471, 491 (1999).

Plaintiff offers nothing that could plausibly justify disregarding the considerable deference historically due to the Executive's analysis and predictive judgments. The best they muster is a leaked draft report asserting that "not a single fatal terrorist attack" has already been carried out by a foreign national of one of the six countries subject to the suspension. Memo. at

19. That single draft document could not possibly overcome the final assessment of the President and multiple Cabinet Secretaries. Joint Ltr. to President (Mar. 6, 2017); *see NAHB*, 551 U.S. at 658-59. More fundamentally, Plaintiff misses the point: the Order's objective is to prevent future terrorist attacks *before* they occur. And that is precisely why the Order focuses on six countries that Congress and the prior Administration recently determined pose the greatest risk of terrorist infiltration in the future.

CONCLUSION

Plaintiff's motion for emergency injunctive relief should be denied.

DATED this 16th day of March 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorneys of record for Plaintiff.

DATED this 16th day of March, 2017.

_/s/ Yamileth G. Davila__
Yamileth G. Davila
Senior Litigation Counsel

March 6, 2017

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

Dear Mr. President,

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

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

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

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

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

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

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

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

Sincerely,

Jefferson B. Sessions III
Attorney General

John Francis Kelly
Secretary of Homeland Security

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN DOE Plaintiff, v. DONALD J. TRUMP, President of the United States, *et al.* Defendants.	Case No. 3:17-cv-112-WMC

DECLARATION OF ROMAN GINZBURG

I, Roman Ginzburg, hereby make the following declaration with respect to the above captioned matter.

1. I am a headquarters adjudications officer within the International Operations Division of the United States Citizenship and Immigration Services (USCIS), a component of the Department of Homeland Security. I am the program manager for Form I-730, Refugee/Asylee Relative Petition, that are processed by USCIS International Operations Division. The International Operations Divisions is comprised of a Headquarters component as well as USCIS's International Field Offices.

2. I make this declaration on the basis of my personal knowledge and information made available to me in the course of my official duties.

3. On March 14, 2017, the USCIS Amman Field Office received case packets LIN1619450142 and LIN1619450153 for interview, adjudication, and travel document processing. These case packets include the Form I-730 petition and any supporting documents filed by the plaintiff in this case on behalf of his wife and daughter, the beneficiaries. The

USCIS Amman Field Office forwarded to the consular section at the U.S. Embassy in Amman, Jordan, a request for assistance with the beneficiaries' entry into Jordan.

4. The USCIS, Refugee, Asylum, and International Operations Standard Operating Procedure for Form I-730 Adjudications, directs the field office to issue a Notice of Receipt or Notice of Receipt and Interview within 10 business days of receiving the case packet. USCIS Amman Field Office will comply with this internal processing requirement prior to March 28, 2017.

5. If, after evaluating case-specific information, the USCIS Amman Field Office determines that it is likely to complete Form I-730 processing within two weeks of interview, then it plans to issue Notices of Receipt and Interview to schedule the beneficiaries' interviews for April 20, 2017.

6. If it is determined that due to required security vetting the cases are unlikely to be completed within two weeks of interview, the USCIS Amman Field Office will issue a Notice of Receipt and inform all parties to the petitions that an interview can be scheduled only after the beneficiaries are able to arrive in Jordan. The reason for this is that the Government of Jordan only grants visas with a 2-week validity period to applicant/beneficiaries arriving for visa interviews. Thus, cases that are not likely to be completed within two-weeks are not referred by the U.S. Embassy in Amman to Jordanian authorities for assistance with visa issuance, and, instead, the beneficiaries must secure visa to enter Jordan without the assistance of the U.S. Embassy in Amman. If unable to secure a visa to enter Jordan, beneficiaries may request to transfer case processing to the U.S. Embassy in Beirut.

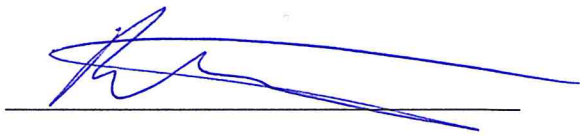
7. Following interviews of the beneficiaries, and completion of all security vetting, if the USCIS Amman Field Office determines that the petitioner is eligible to file I-730 petitions on

behalf of the beneficiaries, that the beneficiaries are eligible to receive follow to join benefits as derivative asylees, and that a favorable exercise of discretion is warranted, the USCIS Amman Field Office will approve the I-730 petitions, and issue transportation letters, which authorize their travel to the United States to apply for admission as derivative asylees.

behalf of the beneficiaries, that the beneficiaries are eligible to receive follow to join benefits as derivative asylees, and that a favorable exercise of discretion is warranted, the USCIS Amman Field Office will approve the I-730 petitions, and issue transportation letters, which authorize their travel to the United States to apply for admission as derivative asylees.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16 day of March of 2016.



Roman Ginzburg