DEPARTMENT OF THE ATTORNEY GENERAL

DAVID Y. IGE
GOVERNOR

DOUGLAS S. CHIN
ATTORNEY GENERAL

For Immediate Release
March 8, 2017

News Release 2017-28

HAWAII ASKS FEDERAL COURT TO BLOCK IMPLEMENTATION OF NEW TRAVEL BAN ORDER

HONOLULU – Hawaii Attorney General Doug Chin announced today that the state of Hawaii has filed a motion for a temporary restraining order in its federal lawsuit against President Donald Trump, following the new executive order banning travel from six Muslim-majority nations issued earlier this week.

Today's filings ask the court to declare that sections 2 and 6 of the March 6, 2017 Executive Order signed by President Trump are contrary to the Constitution and laws of the United States. The complaint asks for a nationwide injunction preventing the implementation of these sections of the Executive Order. The Executive Order restricts immigration from Iran, Syria, Somalia, Sudan, Libya, and Yemen. It suspends all refugee admission for 120 days. It is scheduled to become effective on March 16, 2017.

Attorney General Chin said, "We all want safety and security in our state. But discrimination against people based on national origin or religion is a very dark path we must never accept. Respectfully, the new order fails to fix the initial defect."

In today's filings, Hawaii argues the following:

> "[W]hile the President signed a revised version on March 6 . . . we still know exactly what it means. It is another attempt by the Administration to enact a discriminatory ban that goes against the fundamental teachings of our Constitution and our immigration laws, even if it is cloaked in ostensibly neutral terms. Strikingly, the Executive Order even admits that these changes were designed to 'avoid * * * litigation.'
>
> Nothing of substance has changed: There is the same blanket ban on entry from Muslim-majority countries (minus one), the same sweeping shutdown of refugee admissions (absent one exception), and the same lawless warren of exceptions and waivers. The courts did not tolerate the

> Administration's last attempt to hoodwink the judiciary, and they should not countenance this one."

The second amended complaint alleges the following causes of action:

- Defendants have violated the establishment clause of the First Amendment.
- Defendants have violated the equal protection, substantive due process, and procedural due process guarantees of the Fifth Amendment.
- Sections 2 and 6 of the March 6, 2017 Executive Order violate the Immigration and Nationality Act by discriminating on the basis of nationality, ignoring and modifying the statutory criteria for determining terrorism-related inadmissibility, and exceeding the President's authority under the Immigration and Nationality Act.
- Defendants have violated the Religious Freedom Restoration Act by imposing a substantial burden on the exercise of religion.
- Defendants have violated the substantive and procedural requirements of the Administrative Procedure Act.

Copies of the second amended complaint, motion for a temporary restraining order, and memorandum in support of the motion for a temporary restraining order are attached.

# # #

For more information, contact:
Joshua A. Wisch
Special Assistant to the Attorney General
Phone: (808) 586-1284
Email: Joshua.A.Wisch@hawaii.gov
Web: http://ag.hawaii.gov
Twitter: @ATGHIgov

DOUGLAS S. CHIN (Bar No. 6465)
Attorney General of the State of Hawai‘i
CLYDE J. WADSWORTH (Bar No. 8495)
Solicitor General of the State of Hawai‘i
DEIRDRE MARIE-IHA (Bar No. 7923)
DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI‘I
425 Queen Street
Honolulu, HI 96813
Telephone: (808) 586-1500
Fax: (808) 586-1239
Email: deirdre.marie-iha@hawaii.gov
Attorneys for Plaintiff, State of Hawai‘i

NEAL K. KATYAL*
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: (202) 637-5600
Fax: (202) 637-5910
Email: neal.katyal@hoganlovells.com

**Admitted Pro Hac Vice*

Attorneys for Plaintiffs, State of Hawai‘i and Ismail Elshikh

(See Next Page For Additional Counsel)

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

STATE OF HAWAI‘I and ISMAIL ELSHIKH,

Plaintiffs,

v.

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

Defendants.

Civil Action No. 1:17-cv-00050-DKW-KJM

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

ADDITIONAL COUNSEL

DONNA H. KALAMA (Bar No. 6051)
KIMBERLY T. GUIDRY (Bar No. 7813)
ROBERT T. NAKATSUJI (Bar No. 6743)
Deputy Attorneys General
DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI'I
425 Queen Street
Honolulu, HI 96813
Telephone: (808) 586-1500
Fax: (808) 586-1239

Attorneys for Plaintiff, State of Hawai'i

COLLEEN ROH SINZDAK*
MITCHELL P. REICH*
ELIZABETH HAGERTY*
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: (202) 637-5600
Fax: (202) 637-5910

THOMAS P. SCHMIDT*
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
Telephone: (212) 918-3000
Fax: (212) 918-3100

SARA SOLOW*
ALEXANDER B. BOWERMAN*
HOGAN LOVELLS US LLP
1835 Market St., 29th Floor
Philadelphia, PA 19103
Telephone: (267) 675-4600
Fax: (267) 675-4601

**Admitted Pro Hac Vice*

Attorneys for Plaintiffs, State of Hawai'i and Ismail Elshikh

INTRODUCTION

1. The State of Hawai‘i (the "State") brings this action to protect its residents, its employers, its educational institutions, and its sovereignty against illegal actions of President Donald J. Trump and the federal government, specifically: President Trump's March 6, 2017 Executive Order, "Protecting the Nation From Foreign Terrorist Entry into the United States" (the "Executive Order").[1] Plaintiff Ismail Elshikh, PhD, the Imam of the Muslim Association of Hawai‘i, joins the State in its challenge because the Executive Order inflicts a grave injury on Muslims in Hawai‘i, including Dr. Elshikh, his family, and members of his Mosque.

2. President Trump's original Executive Order dated January 27, 2017 blocked the entry into the United States, including Hawai‘i, of any person from seven Muslim-majority countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.[2] His new Executive Order also blocks the entry into the United States, including Hawai‘i, of nationals from six of the same countries—all except for Iraq—as long as those individuals do not have a valid U.S. visa as of the effective date of the Executive Order, or did not have one as of 5:00 p.m. EST on January 27, 2017. In other words, the Executive Order means that no prospective visa holder from the six designated countries will be able to enter the United States. This second Executive Order is infected with the same legal problems as the first Order—undermining bedrock constitutional and statutory guarantees.

3. The Executive Order means that thousands of individuals across the United States and in Hawai‘i who have immediate family members living in the

[1] As of this filing, President Trump's March 6, 2017 has not yet been published in the Federal Register. A copy of the Executive Order published on the White House website is attached as Exhibit 1, and is available at https://goo.gl/rnecqx.
[2] *See* Executive Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017). A copy of the first Executive Order is attached as Exhibit 2.

affected countries will now be unable to receive visits from those persons or to be reunited with them in the United States. It means that universities, employers, and other institutions throughout the United States and in Hawai‘i will be unable to recruit or to welcome qualified individuals from the six designated countries. It threatens certain non-citizens within the United States and in Hawai‘i with the possibility that they will be unable to travel abroad and return—for instance, because their visa only permits them one entry, or because their visa will have expired during the time the Executive Order is still in place.

4. President Trump's Executive Order is subjecting a portion of Hawaii's population, including Dr. Elshikh, his family, and members of his Mosque, to discrimination and second-class treatment, in violation of both the Constitution and the Immigration and Nationality Act. The Order denies them their right to associate with family members overseas on the basis of their religion and national origin. And it results in their having to live in a country and in a State where there is the perception that the Government has established a disfavored religion.

5. The Executive Order bars students, tourists, family members, and other visitors from the State on grounds that Congress and the Constitution have expressly prohibited. It is damaging Hawaii's institutions, harming its economy, and eroding Hawaii's sovereign interests in maintaining the separation between church and state as well as in welcoming persons from all nations around the world into the fabric of its society.

6. Plaintiffs accordingly seek an Order invalidating the portions of President Trump's Executive Order challenged here.

JURISDICTION AND VENUE

7. This Court has Federal Question Jurisdiction under 28 U.S.C. § 1331 because this action arises under the U.S. Constitution, the Administrative

Procedure Act ("APA"), the Immigration and Nationality Act ("INA"), and other Federal statutes.

8. The Court is authorized to award the requested declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and the APA, 5 U.S.C. § 706.

9. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) and (e)(1). A substantial part of the events giving rise to this claim occurred in this District, and each Defendant is an officer of the United States sued in his official capacity.

PARTIES

10. Plaintiffs are the State of Hawai‘i and Ismail Elshikh, PhD.

11. Hawai‘i is the nation's most ethnically diverse State, and is home to more than 250,000 foreign-born residents. More than 100,000 of Hawaii's foreign-born residents are non-citizens.[3]

12. Estimates from the Fiscal Policy Institute show that as of 2010, Hawai‘i had the fifth-highest percentage of foreign-born workers of any State (20% of the labor force). And 22.5% of Hawai‘i business owners were foreign-born.[4]

13. Thousands of people living in Hawai‘i obtain lawful permanent resident status each year, including over 6,500 in 2015.[5] That includes numerous

[3] United States Census Bureau, *2015 American Community Survey 1-Year Estimates*, *available at* https://goo.gl/IGwJyf. A collection of the relevant data for Hawai‘i is attached as Exhibit 3.

[4] The Fiscal Policy Institute, *Immigrant Small Business Owners*, at 24 (June 2012), *available at* https://goo.gl/vyNK9W.

[5] U.S. Department of Homeland Security, *Lawful Permanent Residents Supplemental Table 1: Persons Obtaining Lawful Permanent Resident Status by State or Territory of Residence and Region and Country of Birth Fiscal Year 2015*, *available at* https://goo.gl/ELYIkn. Copies of these tables for fiscal years 2005 through 2015 are attached as Exhibit 4.

individuals from the seven countries designated in the original Executive Order. According to DHS statistics, over 100 Hawai‘i residents from Iran, Iraq, and Syria have obtained lawful permanent resident status since 2004 (DHS has withheld data pertaining to additional residents from the seven designated countries).[6]

14. Hawai‘i is also home to 12,000 foreign students.[7] That includes numerous individuals from the seven originally-designated countries. At the University of Hawai‘i, there are at least 27 graduate students from the seven countries studying pursuant to valid visas issued by the U.S. government.

15. In 2016, Hawaii's foreign students contributed over $400 million to Hawaii's economy through the payment of tuition and fees, living expenses, and other activities. These foreign students supported 7,590 jobs and generated more than $43 million in state tax revenues.[8]

16. In 2009, foreign residents (i.e., non-citizens who had not obtained lawful permanent resident status) made up 42.9% of doctorate students, and 27.7% of master's students in science, technology, engineering, and mathematics ("STEM") programs in Hawai‘i.[9]

17. Hawaii's educational institutions have diverse faculties. At the University of Hawai‘i, there are approximately 477 international faculty members legally present in the United States. There are at least 10 faculty members at the University who are lawful permanent residents from one of the seven designated

---

[6] *See* Exhibit 4.

[7] Hawaii Department of Business, Economic Development & Tourism, *The Economic Impact of International Students in Hawaii – 2016 Update*, at 8 (June 2016), *available at* https://goo.gl/mogNMA.

[8] *The Economic Impact of International Students in Hawaii – 2016 Update*, *supra*, at 10-11.

[9] U.S. Chamber of Commerce et al., *Help Wanted: The Role of Foreign Workers in the Innovation Economy*, at 21 (2013), *available at* https://goo.gl/c3BYBu.

countries in the original Executive Order, and 30 visiting faculty members with valid visas who are from one of the seven designated countries.

18. Tourism is Hawaii's "lead economic driver."[10] In 2015 alone, Hawai‘i welcomed 8.7 million visitors accounting for $15 billion in spending.[11]

19. Hawai‘i is home to several airports, including Honolulu International Airport and Kona International Airport.

20. David Yutaka Ige is the Governor of Hawai‘i, the chief executive officer of the State of Hawai‘i. The Governor is responsible for overseeing the operations of the state government, protecting the welfare of Hawaii's citizens, and ensuring that the laws of the State are faithfully executed.

21. Douglas S. Chin is the Attorney General of Hawai‘i, the chief legal officer of the State. The Attorney General is charged with representing the State in Federal Court on matters of public concern.

22. The Constitution of the State of Hawai‘i provides that "[n]o law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof." Haw. Const. art. I, § 4. And the State has declared that the practice of discrimination "because of race, color, religion, age, sex, including gender identity or expression, sexual orientation, marital status, national origin, ancestry, or disability" is against public policy. Haw. Rev. Stat. Ann. § 381-1; *accord id.* §§ 489-3 & 515-3.

23. The State has an interest in protecting the health, safety, and welfare of its residents and in safeguarding its ability to enforce state law. The State also has an interest in "assuring that the benefits of the federal system," including the

[10] Hawai‘i Tourism Authority, *2016 Annual Report to the Hawai‘i State Legislature*, at 20, *available at* https://goo.gl/T8uiWW.

[11] Hawai‘i Tourism Authority, *2015 Annual Visitor Research Report*, at 2, *available at* https://goo.gl/u3RQmX. A copy of the table of contents and executive summary of this report is attached as Exhibit 5.

rights and privileges protected by the United States Constitution and Federal statutes, "are not denied to its general population." *Alfred L. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 608 (1982). The State's interests extend to all of the State's residents, including individuals who suffer indirect injuries and members of the general public.

24. Plaintiff Ismail Elshikh, PhD, is an American citizen of Egyptian descent. He has been a resident of Hawai'i for over a decade.

25. Dr. Elshikh is the Imam of the Muslim Association of Hawai'i. He is a leader within Hawaii's Islamic community.

26. Dr. Elshikh's wife is of Syrian descent and is also a resident of Hawai'i.

27. Dr. Elshikh's mother-in-law is a Syrian national, living in Syria. Dr. Elshikh's wife filed an I-130 Petition for Alien Relative on behalf of her mother in September 2015. The I-130 Petition was approved in February 2016. Dr. Elshikh's mother-in-law does not currently hold a visa to enter the United States.

28. Dr. Elshikh and his wife have five children. They are all American citizens and residents of Hawai'i.

29. Defendant Donald J. Trump is the President of the United States. He issued both the original January 27, 2017 Executive Order, as well as the new March 6, 2017 Executive Order that is the subject of this Complaint.

30. Defendant U.S. Department of Homeland Security ("DHS") is a federal cabinet agency responsible for implementing and enforcing the Immigration and Nationality Act ("INA") and the Executive Order that is the subject of this Complaint. DHS is a Department of the Executive Branch of the United States Government, and is an agency within the meaning of 5. U.S.C. § 552(f). United States Customs and Border Protection ("CBP") is an Operational and Support Component agency within DHS, and is responsible for detaining and

removing non-citizens from Iran, Syria, Somalia, Sudan, Libya, and Yemen who arrive at air, land, and sea ports across the United States, including Honolulu International Airport and Kona International Airport.

31. Defendant John F. Kelly is the Secretary of Homeland Security. He is responsible for implementing and enforcing the INA and the Executive Order that is the subject of this Complaint, and he oversees CBP. He is sued in his official capacity.

32. Defendant U.S. Department of State is a federal cabinet agency responsible for implementing the U.S. Refugee Admissions Program and the Executive Order that is the subject of this Complaint. The Department of State is a department of the Executive Branch of the United States Government, and is an agency within the meaning of 5 U.S.C. § 552(f).

33. Defendant Rex Tillerson is the Secretary of State. He oversees the Department of State's implementation of the U.S. Refugee Admissions Program and the Executive Order that is the subject of this Complaint. The Secretary of State has authority to determine and implement certain visa procedures for non-citizens. Secretary Tillerson is sued in his official capacity.

34. Defendant United States of America includes all government agencies and departments responsible for the implementation of the INA, and for detention and removal of non-citizens from Iran, Syria, Somalia, Sudan, Libya, and Yemen who arrive at air, land, and sea ports across the United States, including Honolulu International Airport and Kona International Airport.

ALLEGATIONS

A. President Trump's Campaign Promises.

35. President Trump repeatedly campaigned on the promise that he would ban Muslim immigrants and refugees from entering the United States, particularly from Syria, and maintained the same rhetoric after he was elected.

36. On July 11, 2015, Mr. Trump claimed (falsely) that Christian refugees from Syria are blocked from entering the United States. In a speech in Las Vegas, Mr. Trump said, "If you're from Syria and you're a Christian, you cannot come into this country, and they're the ones that are being decimated. If you are Islamic . . . it's hard to believe, you can come in so easily."[12]

37. On September 30, 2015, while speaking in New Hampshire about the 10,000 Syrian refugees the Obama Administration had accepted for 2016, Mr. Trump said "if I win, they're going back!" He said "they could be ISIS," and referred to Syrian refugees as a "200,000-man army."[13]

38. On December 7, 2015, shortly after the terror attacks in Paris, Mr. Trump issued a press release entitled: "Donald J. Trump Statement on Preventing Muslim Immigration."[14] The press release stated: "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States . . . ." The release asserted that "there is great hatred towards Americans by large segments of the Muslim population." The press release remains accessible on www.donaldjtrump.com as of this filing.

39. The next day, when questioned about the proposed "shutdown," Mr. Trump compared his proposal to President Franklin Roosevelt's internment of Japanese Americans during World War II, saying, "[Roosevelt] did the same

[12] Louis Jacobson, *Donald Trump says if you're from Syria and a Christian, you can't come to the U.S. as a refugee*, Politifact (July 20, 2015 10:00 AM ET), https://goo.gl/fucYZP.

[13] Ali Vitali, *Donald Trump in New Hampshire: Syrian Refugees Are 'Going Back*, NBC News (Oct. 1, 2015, 7:33 AM ET), https://goo.gl/4XSeGX.

[14] Press Release, Donald J. Trump for President, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), *available at* https://goo.gl/D3OdJJ. A copy of this press release is attached as Exhibit 6.

thing."[15] When asked what the customs process would look like for a Muslim non-citizen attempting to enter the United States, Mr. Trump said, "[T]hey would say, are you Muslim?" The interviewer responded: "And if they said 'yes,' they would not be allowed into the country." Mr. Trump said: "That's correct."[16]

40. During a Republican primary debate in January 2016, Mr. Trump was asked about how his "comments about banning Muslims from entering the country created a firestorm," and whether he wanted to "rethink this position." He said, "No."[17]

41. A few months later, in March 2016, Mr. Trump said, during an interview, "I think Islam hates us." Mr. Trump was asked, "Is there a war between the West and radical Islam, or between the West and Islam itself?" He replied: "It's very hard to separate. Because you don't know who's who."[18]

42. Later, as the presumptive Republican nominee, Mr. Trump began using facially neutral language, at times, to describe the Muslim ban. Following the mass shootings at an Orlando nightclub in June 2016, Mr. Trump gave a speech promising to "suspend immigration from areas of the world where there's a proven history of terrorism against the United States, Europe or our allies until we fully understand how to end these threats." But he continued to link that idea to the need to stop "importing radical Islamic terrorism to the West through a failed

---

[15] Jenna Johnson, *Donald Trump says he is not bothered by comparisons to Hitler*, The Washington Post (Dec. 8, 2015), https://goo.gl/6G0oH7.
[16] Nick Gass, *Trump not bothered by comparisons to Hitler*, Politico (Dec. 8, 2015 7:51 AM ET), https://goo.gl/IkBzPO.
[17] The American Presidency Project, *Presidential Candidates Debates: Republican Candidates Debate in North Charleston, South Carolina* (January 14, 2016), https://goo.gl/se0aCX.
[18] *Anderson Cooper 360 Degrees: Exclusive Interview With Donald Trump* (CNN television broadcast Mar. 9, 2016, 8:00 PM ET), *transcript available at* https://goo.gl/y7s2kQ.

immigration system." He said that "to protect the quality of life for all Americans—women and children, gay and straight, Jews and Christians and all people then we need to tell the truth about radical Islam." And he criticized Hillary Clinton for, as he described it, "her refusal to say the words 'radical Islam,'" stating: "Here is what she said, exact quote, 'Muslims are peaceful and tolerant people, and have nothing whatsoever to do with terrorism.' That is Hillary Clinton." Mr. Trump further stated that the Obama administration had "put political correctness above common sense," but said that he "refuse[d] to be politically correct."

43. Mr. Trump's June 2016 speech also covered refugees. He said that "[e]ach year the United States permanently admits 100,000 immigrants from the Middle East and many more from Muslim countries outside of the Middle East. Our government has been admitting ever-growing numbers, year after year, without any effective plan for our own security."[19] He issued a press release stating: "We have to stop the tremendous flow of Syrian refugees into the United States."[20]

44. Later, on July 24, 2016, Mr. Trump was asked: "The Muslim ban. I think you've pulled back from it, but you tell me." Mr. Trump responded: "I don't think it's a rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use

[19] Ryan Teague Beckwith, *Read Donald Trump's Speech on the Orlando Shooting*, Time (June 13, 2016, 4:36 PM ET), https://goo.gl/kgHKrb.

[20] Press Release, Donald J. Trump for President, *Donald J. Trump Addresses Terrorism, Immigration, and National Security* (June 13, 2016), *available at* https://goo.gl/GcrFhw.

the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim."[21]

45. During an October 9, 2016 Presidential Debate, Mr. Trump was asked: "Your running mate said this week that the Muslim ban is no longer your position. Is that correct? And if it is, was it a mistake to have a religious test?" Mr. Trump replied: "The Muslim ban is something that in some form has morphed into a[n] extreme vetting from certain areas of the world." When asked to clarify whether "the Muslim ban still stands," Mr. Trump said, "It's called extreme vetting."[22]

46. Then, on December 21, 2016, following terror attacks in Berlin, Mr. Trump was asked whether he had decided "to rethink or re-evaluate [his] plans to create a Muslim registry or ban Muslim immigration to the United States." Mr. Trump replied: "You know my plans. All along, I've been proven to be right."[23]

B. President Trump's First Executive Order.

47. Within a week of being sworn in, President Trump acted upon his ominous campaign promises to restrict Muslim immigration, curb refugee admissions, and prioritize non-Muslim refugees.

48. In an interview on January 25, 2017, Mr. Trump discussed his plans to implement "extreme vetting" of people seeking entry into the United States. He remarked: "[N]o, it's not the Muslim ban. But it's countries that have tremendous terror. . . . [I]t's countries that people are going to come in and cause us tremendous problems."[24]

---

[21] *Meet the Press* (NBC television broadcast July 24, 2016), *transcript available at* https://goo.gl/jHc6aU. A copy of this transcript is attached as Exhibit 7.
[22] The American Presidency Project, *Presidential Debates: Presidential Debate at Washington University in St. Louis, Missouri* (Oct. 9, 2016), https://goo.gl/iIzf0A.
[23] *President-Elect Trump Remarks in Palm Beach, Florida*, C-SPAN (Dec. 21, 2016), https://goo.gl/JlMCst.
[24] *Transcript: ABC News Anchor David Muir Interviews President Trump*, ABC News (Jan. 25, 2017, 10:25 PM ET), https://goo.gl/NUzSpq.

49. Two days later, on January 27, 2017, President Trump signed an Executive Order entitled, "Protecting the Nation From Foreign Terrorist Entry into the United States."

50. The first Executive Order was issued without a notice and comment period and without interagency review. Moreover, the first Executive Order was issued with little explanation of how it could further its stated objective.

51. When signing the first Executive Order, President Trump read the title, looked up, and said: "We all know what that means."[25] President Trump said he was "establishing a new vetting measure to keep radical Islamic terrorists out of the United States of America," and that: "We don't want them here."[26]

52. Section 3 of the first Executive Order was entitled "Suspension of Issuance of Visas and Other Immigration Benefits to Nationals of Countries of Particular Concern." Section 3(c) "suspend[ed] entry into the United States, as immigrants and nonimmigrants" of persons from countries referred to in Section 217(a)(12) of the INA [8 U.S.C. § 1187(a)(12)], that is: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. The majority of the population in each of these seven countries is Muslim.

53. According to one report, not a single fatal terrorist attack has been perpetrated in the United States by a national of one of these seven countries since at least 1975.[27] Other countries whose nationals have perpetrated fatal terrorist

[25] *Trump Signs Executive Orders at Pentagon*, ABC News (Jan. 27, 2017), https://goo.gl/7Jzird.
[26] Sarah Pulliam Bailey, *Trump signs order limiting refugee entry, says he will prioritize Christian refugees*, The Washington Post (Jan. 27, 2017), https://goo.gl/WF2hmS.
[27] Alex Nowrasteh, *Little National Security Benefit to Trump's Executive Order on Immigration*, Cato Institute Blog (Jan. 25, 2017, 3:31 PM ET), https://goo.gl/BCv6rQ.

attacks in the United States are not part of either the original or the revised immigration ban.[28]

54. Section 3(c) of the first Executive Order meant that Lawful Permanent Residents, foreign students enrolled in U.S. universities (including in Hawai‘i), individuals employed in the United States on temporary work visas, and others were to be halted at the border if they arrived in the United States (in Hawai‘i or elsewhere) from one of the seven designated countries, including if the individual left the country and tried to return. Section 3(g) of the first Executive Order allowed the Secretaries of State and Homeland Security to make exceptions when they determined that doing so was "in the national interest."

55. The first Executive Order also provided for an expansion of its immigration ban to nationals from additional countries in the future. Section 3(d) directed the Secretary of State to (within about 30 days) "request [that] all foreign governments" provide the United States with information to determine whether a person is a security threat. Section 3(e) directed the Secretaries of Homeland Security and State to "submit to the President a list of countries recommended for inclusion" in the ban from among any countries that did not provide the information requested. Section 3(f) of the first Executive Order gave the Secretaries of State and Homeland Security further authority to "submit to the President the names of any additional countries recommended for similar treatment" in the future.

56. Section 5 of the first Executive Order was entitled "Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017." Section 5(a) directed the Secretary of State to "suspend the U.S. Refugee Admissions Program (USRAP) for 120 days." Section 5(e) permitted the Secretaries of State and

[28] Scott Schane, *Immigration Ban Is Unlikely to Reduce Terrorist Threat, Experts Say*, N.Y. Times (Jan. 28, 2017), https://goo.gl/MBvOTk.

Homeland Security to admit individuals as refugees on a case-by-case basis, but only if they determined that admission of the refugee was in the "national interest," including "when the person is a religious minority in his country of nationality facing religious persecution."

57. Section 5(b) directed the Secretaries of State and Homeland Security, "[u]pon resumption of USRAP admissions," to "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." In Section 5(c), President Trump "proclaim[ed] that the entry of nationals of Syria as refugees is detrimental to the interests of the United States and thus suspend[ed] any such entry" indefinitely.

58. In a January 27, 2017 interview with Christian Broadcasting Network, President Trump said that persecuted Christians would be given priority under the first Executive Order. He said (once again, falsely): "Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them."[29]

59. The day after signing the first Executive Order, President Trump's advisor, Rudolph Giuliani, explained on television how the Executive Order came to be. He said: "When [Mr. Trump] first announced it, he said, 'Muslim ban.' He

[29] *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority as Refugees*, Christian Broadcasting Network (Jan. 27, 2017), https://goo.gl/2GLB5q.

called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"[30]

60. The President and his spokespersons defended the rushed nature of their issuance of the first Executive Order on January 27, 2017, by saying that their urgency was imperative to stop the inflow of dangerous persons to the United States. On January 30, 2017, President Trump tweeted: "If the ban were announced with a one week notice, the 'bad' would rush into our country during that week."[31] In a forum on January 30, 2017 at George Washington University, White House spokesman Sean Spicer said: "At the end of the day, what was the other option? To rush it out quickly, telegraph it five days so that people could rush into this country and undermine the safety of our nation?"[32] On February 9, 2017, President Trump claimed he had sought a one-month delay between signing and implementation, but was told by his advisors that "you can't do that because then people are gonna pour in before the toughness."[33]

61. On February 24, 2017, a draft report published by the Department of Homeland Security—and obtained by the Associated Press—concluded that citizenship was an "unlikely indicator" of terrorism threats against the United States. The draft report also found that very few persons from the seven countries included in President Trump's first Executive Order had carried out or attempted to

---

[30] Amy B. Wang, *Trump asked for a 'Muslim ban,' Giuliani says – and ordered a commission to do it 'legally'*, The Washington Post (Jan. 29, 2017), https://goo.gl/Xog80h. A copy of this article is attached as Exhibit 8.

[31] *See* Donald J. Trump (@realDonaldTrump), Twitter (Jan. 30, 2017, 5:31 AM ET), https://goo.gl/FAEDTd.

[32] *See* Videotape: *WATCH: White House Press Secretary Sean Spicer joins forum at George Washington University to discuss the Trump Administration's "war" with the media and the access journalists should have covering the White House*, at 1:00, Fox 5 DC (Jan. 30, 2017), *available at* https://goo.gl/cpNUjT.

[33] Kevin Liptak, *Trump: I wanted month delay before travel ban, was told no*, CNN Politics (Feb. 9, 2017, 6:31 AM ET), https://goo.gl/EOez3k.

carry out terrorism activities in the United States since 2011. Specifically, the DHS report determined that 82 people were inspired by a foreign terrorist group to carry out or attempt to carry out an attack in the United States. Half were U.S. citizens born in the United States, and the remaining persons were from 26 countries—with the most individuals originating from Pakistan, followed by Somalia, Bangladesh, Cuba, Ethiopia, Iraq and Uzbekistan. Of the seven countries originally included in the travel ban, only Somalia and Iraq were identified as being among the "top" countries-of-origin for the terrorists analyzed in the report.[34] The draft report related that three offenders (in the time period covered) had been from Somalia, two were from Iraq, one was from Iran, Sudan, and Yemen, and none were from Syria or Libya.[35] The draft report also found that terrorist groups in three of the original seven countries posed a threat to the United States (Iraq, Yemen, and Syria), while groups in the other four named countries in the original Executive Order were regionally focused.[36]

C. Implementation and Judicial Enjoinment of the First Executive Order.

62. Upon the issuance of the first Executive Order, Defendants began detaining people at U.S. airports who, but for the first Executive Order, were

[34] Vivian Salama & Alicia A. Caldwell, *AP Exclusive: DHS report disputes threat from banned nations*, Associated Press (Feb. 24, 2017), https://goo.gl/91to90. A copy of the Associated Press article is attached as Exhibit 9. A copy of the draft DHS report is available at https://goo.gl/0yfXpZ and attached as Exhibit 10. A final version of the report, entitled *Intelligence Assessment: Most Foreign-born, US-based Violent Extremists Radicalized after Entering Homeland; Opportunities for Tailored CVE Programs Exist*, was later obtained by CNN, and is attached as Exhibit 11. *See* Tammy Kupperman, *DHS assessment: Individuals radicalized once in US*, CNN Politics (Mar. 4, 2017, 3:02 PM ET), https://goo.gl/Q6OVTd.
[35] Phil Helsel, *DHS Draft Report Casts Doubt on Extra Threat from 'Travel Ban' Nationals in U.S.*, NBC News (Feb. 24, 2017, 9:26 PM ET), https://goo.gl/gDHq6i. A copy of this NBC News article is attached as Exhibit 12.
[36] *Id.*

legally entitled to enter the United States. Some were also removed from the United States. Estimates indicate that over 100 people were detained upon arrival at U.S. airports.[37]

63. Among others, Defendants detained and/or removed:

a. Lawful permanent residents, including dozens at Dulles International Airport in Virginia,[38] and others at Los Angeles International Airport who were pressured to sign Form I-407 to *relinquish* their green cards;[39]

b. People with special immigrant visas, including an Iraqi national at John F. Kennedy International Airport who worked as an interpreter for the U.S. Army in Iraq;[40]

c. A doctor at the Cleveland Clinic with a valid work visa who was trying to return home from vacation;[41]

d. People with valid visas to visit family in the United States, including a Syrian woman sent to Saudi Arabia after being convinced by officials at O'Hare International Airport to sign paperwork cancelling her visa.[42]

---

[37] Michael D. Shear et al., *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide*, N.Y. Times (Jan. 28, 2017), https://goo.gl/OrUJEr.
[38] *See, e.g.*, Petition ¶ 2, *Aziz v. Trump*, No. 1:17-cv-116 (E.D. Va. Jan. 28, 2017).
[39] Leslie Berestein Rojas et al., *LAX immigration agents asks detainees to sign away their legal residency status, attorneys say*, Southern California Public Radio News (Jan. 30, 2017), https://goo.gl/v6JoUC; Brenda Gazzar & Cynthia Washicko, *Thousands protest Trump's immigration order at LAX*, Los Angeles Daily News (Jan. 29, 2017), https://goo.gl/1vA37M.
[40] *See, e.g.*, Petition 2, *Darweesh v. Trump*, No. 1:17-cv-00480 (E.D.N.Y. Jan. 28, 2017).
[41] Jane Morice, *Two Cleveland Clinic doctors vacationing in Iran detained in New York, then released*, Cleveland.com (Jan. 29, 2017), https://goo.gl/f0EGV3.
[42] John Rogers, *Longtime US residents, aspiring citizens caught up in ban*, StarTribune (Jan. 30, 2017, 1:45 AM ET), https://goo.gl/eEPAuE.

64. People overseas were blocked from boarding flights to the United States or told they could no longer come here. The State Department released information verifying that 60,000 visas were revoked between January 27, 2017, when the first Executive Order was signed, and February 3, 2017.[43]

65. Confusion, backlash, and habeas corpus litigation arose in the wake of the first Executive Order, including with regard to whether it applied to lawful permanent residents. Within the first 72 hours that the first Executive Order was in effect, Defendants reportedly changed their minds three times about whether it did.[44]

66. Hundreds of State Department officials signed a memorandum circulated through the State Department's "Dissent Channel" stating that the Executive Order "runs counter to core American values" including "nondiscrimination," and that "[d]espite the Executive Order's focus on them, a vanishingly small number of terror attacks on U.S. soil have been committed by foreign nationals" here on visas.[45]

67. Likewise, Senators John McCain (R-AZ) and Lindsey Graham (R-SC) stated: "This executive order sends a signal, intended or not, that America does not want Muslims coming into our country."[46]

---

[43] Adam Kelsey et al., *60,000 Visas Revoked Since Immigration Executive Order Signed: State Department*, ABC News (Feb. 3, 2017, 6:32 PM ET), https://goo.gl/JwPDEa.

[44] Evan Perez et al., *Inside the confusion of the Trump executive order and travel ban*, CNN Politics (Jan. 30, 2017 11:29 AM ET), https://goo.gl/Z3kYEC.

[45] Jeffrey Gettleman, *State Department Dissent Cable on Trump's Ban Draws 1,000 Signatures*, N.Y. Times (Jan. 31, 2017), https://goo.gl/svRdIw. A copy of the Dissent Channel memorandum is attached as Exhibit 13.

[46] Press Release, Senator John McCain, *Statement By Senators McCain & Graham On Executive Order On Immigration* (Jan. 29, 2017), *available at* https://goo.gl/EvHvmc.

68. DHS Secretary Kelly issued a press release on Sunday, January 29, 2017, stating that: "In applying the provisions of the president's executive order, I hereby deem the entry of lawful permanent residents to be in the national interest. Accordingly, absent the receipt of significant derogatory information indicating a serious threat to public safety and welfare, lawful permanent resident status will be a dispositive factor in our case-by-case determinations."[47]

69. Secretary Kelly's statement thus indicated that the first Executive Order *did* apply to lawful permanent residents from the designated countries, and only the Secretary's determination under Section 3(g) that admission of lawful permanent residents, absent certain information reviewed on a case-by-case basis, is in the national interest, allows them to enter.

70. Then, on February 1, 2017, White House Counsel Donald McGahn issued a Memorandum taking yet another position on green-card holders, now purporting to "clarify" that such persons were never covered by Sections 3 and 5 of the first Executive Order.

71. On February 3, 2017, the District Court for the Western District of Washington entered a temporary restraining order, enjoining President Trump and his Administration from enforcing the first Executive Order. On February 9, 2017, the Court of Appeals for the Ninth Circuit issued a *per curiam* opinion denying the Government's emergency motion for a stay of the District Court's order. On February 16, 2017, the Government filed a brief in the Ninth Circuit advising the court that "the President intends in the near future to rescind the [first Executive] Order and replace it with a new, substantially revised Executive Order"; accordingly, the Government requested that the court "hold its consideration of the

[47] Press Release, U.S. Department of Homeland Security, *Statement By Secretary John Kelly On The Entry Of Lawful Permanent Residents Into The United States* (Jan. 29, 2017), *available at* https://goo.gl/6krafi.

case until the President issues the new Order and then vacate the panel's preliminary decision."[48] On February 24, 2017, the Government filed another motion requesting that the Ninth Circuit hold its proceedings in abeyance. On February 27, 2017, the Ninth Circuit panel denied the motion to hold appellate proceedings in abeyance and set forth a new briefing schedule. Under that schedule, the Government's opening brief is due March 10, 2017.

D. President Trump's New Executive Order.

72. On March 6, 2017—a full month after the District Court for the Western District of Washington enjoined the first Executive Order—President Trump issued the new Executive Order that is the subject of this Complaint. The new Order is entitled "Protecting the Nation from Foreign Terrorist Entry into the United States."

73. Also on March 6, 2017, the Department of Homeland Security published a "Q&A" document with answers to thirty-seven questions about the new Executive Order.[49]

74. For several weeks before its release, members of the Administration had foreshadowed the arrival of the revised Executive Order.

a. On February 21, Senior Advisor to the President, Stephen Miller, told Fox News that the new travel ban would have the same effect as the old one. He said: "Fundamentally, you're still going to have the same basic policy outcome for the country, but you're going to be responsive to a lot of very technical issues that were brought up by the court and those will

[48] Appellants' Supplemental Brief On *En Banc* Consideration at 4, *Washington v. Trump*, No. 17-35105 (Feb. 16, 2017), ECF No. 154.

[49] *See* Department of Homeland Security, Q&A: Protecting the Nation from Foreign Terrorist Entry to the United States (March 6, 2017, 11:30 AM ET), https://goo.gl/zFtFg8. A copy of this Q&A document is attached as Exhibit 14.

be addressed. But in terms of protecting the country, those basic policies are still going to be in effect."[50]

b. The White House originally indicated it would sign the new Executive Order on Wednesday, March 1, 2017, but then postponed the announcement. One Administration official told a news outlet on February 28 that a reason for President Trump's delay in signing an updated Executive Order was "the busy news cycle," and the desire of the President that the new order "get plenty of attention."[51]

c. A senior Administration official told a different news outlet on March 1, 2017, that a related reason for the delay in releasing the updated Executive Order was the "positive reaction" to President Trump's "first address to Congress" on the evening of Tuesday, February 28, 2017. That article reported that "[s]igning the executive order Wednesday, as originally indicated by the White House, would have undercut the favorable coverage," and the senior Administration official "didn't deny the positive reception was part of the [A]dministration's calculus in pushing back the travel ban announcement."[52]

---

[50] *Miller: New order will be responsive to the judicial ruling; Rep. Ron DeSantis: Congress has gotten off to a slow start* (Fox News television broadcast Feb. 21, 2017), *transcript available at* https://goo.gl/wcHvHH.

[51] Shane Goldmacher & Nahal Toosi, *Trump delays signing new travel ban order, officials say*, Politico (Feb. 28, 2017, 11:51 PM ET), https://goo.gl/5UJIFz.

[52] Laura Jarrett et al., *Trump delays new travel ban after well-reviewed speech*, CNN Politics (Mar. 1, 2017, 6:01 AM ET), https://goo.gl/McqMm5.

75. Section 1 of the new Executive Order states that its purpose is to "protect [the United States'] citizens from terrorist attacks, including those committed by foreign nationals." Section 1(h) identifies two concrete examples of persons who have committed terrorism-related crimes in the United States, after either entering the country "legally on visas" or entering "as refugees": "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[.]" Iraq is no longer included in the ambit of the travel ban.

76. Section 2(c) of the new Executive Order suspends the "entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen"—six of the seven countries that were designated in the first Order, with Iraq now omitted—for a period of "90 days from the effective date of this order."

77. Section 3 provides for various "exceptions" and potential "waivers" to Section 2's travel ban. Under Section 3(a), "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." *See* Executive Order § 3(a)(i)-(iii).

78. Section 3(b) lists categorical "exceptions" from Section 2: lawful permanent residents; foreign nationals who are admitted or paroled into the United States "on or after the effective date of this order"; foreign nationals with "a document other than a visa . . . that permits him or her to travel to the United States

and seek entry or admission, such as an advance parole document"; dual nationals traveling on passports issued by a non-designated country; foreign nationals traveling on certain diplomatic visas; and foreign nationals who have been granted asylum as well as refugees who have been admitted to the United States. *Id.* at § 3(b)(i)-(iv).

79. Section 3(c) provides that "a consular officer, or as appropriate, the Commissioner, U.S. Customs and Border Protection (CBP) . . . 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 he or she determines that "denying entry during the suspension period would cause undue hardship . . . [and the individual's] entry would not pose a threat to national security and would be in the national interest." *Id.* § 3(c).

80. Like the first Executive Order, the new Executive Order provides for an expansion of its immigration ban to nationals from additional countries in the future. Section 2(a) directs the Secretary of Homeland Security, in consultation with the Secretary of State as well as the Director of National Intelligence, to "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 . . . to determine that the individual is not a security or public safety threat." *Id.* § 2(a). Those officials are instructed to submit a report on "the results of the worldwide review" to the President, as well as "a list of countries that do not provide adequate information," within 20 days of the effective date of the Executive Order. *Id.* § 2(b). The Secretary of State shall then "request that all foreign governments that do not supply [the necessary] information regarding their nationals begin providing it within 50 days of notification." *Id.* § 2(d). After that

50-day period, 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 the travel ban. *Id.* § 2(e). Those officials are also authorized to "submit to the President," at "any point after the submission of the list" of countries recommended for inclusion, "the names of additional countries recommended for similar treatment." *Id.* § 2(f).

81. Section 6 of the Executive Order suspends the "travel" of all refugees to the United States for a period of 120 days, and suspends all "decisions" by the Secretary of Homeland Security on applications for refugee status for 120 days. *Id.* § 6(a). After those 120 days are over, "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 "additional procedures"—identified by those officials as being necessary "to ensure that individuals seeking admission as refugees do not pose a threat" to the United States—have been "implemented" and "are adequate to ensure the security and welfare of the United States." *Id.* § 6(a).

82. Under Section 14, the revised Executive Order takes effect on March 16, 2017.

83. In the Department of Homeland Security's Q&A document about the Executive Order, DHS relates that nationals from one of the six designated countries who are presently in the United States, and "in possession of a valid single entry visa," will have to obtain "a valid visa or other document permitting [them] to travel to and seek admission to the United States" in order to leave and obtain "subsequent entry to the United States."[53]

[53] *See* Exhibit 14, at Q4.

84. In the Department of Homeland Security's Q&A document about the Executive Order, DHS also relates that international students, exchange visitors and their dependents from the six designated countries—who are in the United States presently but whose visas "expire[] while the Executive Order is in place"—will have to "obtain a new, valid visa to return to the United States" if they have to "depart the country."[54]

E. Effects of the New Executive Order on Individual Plaintiff Dr. Elshikh.

85. The new Executive Order will prevent Dr. Elshikh's mother-in-law from obtaining a visa to visit or reunite with her family in Hawai'i. That is so even though Dr. Elshikh, his wife, and their children are all American citizens, and even though Dr. Elshikh's wife's I-130 Petition was granted.

86. Dr. Elshikh's mother-in-law last visited the family in 2005, when she stayed for one month. She has not met two of Dr. Elshikh's children, and only Dr. Elshikh's oldest child remembers meeting her grandmother.

87. On January 31, 2017—after the first Executive Order was put in place—Dr. Elshikh was notified by an individual from the National Visa Center that his mother-in-law's application for an immigrant visa had been put on hold. Then, on March 2, 2017—after the first Executive Order was enjoined—Dr. Elshikh and his family were notified by the National Visa Center that his mother-in-law's visa application had progressed to the next stage of the process and that her interview would be scheduled at an embassy overseas. Under the new Executive Order, however, Dr. Elshikh fears that his mother-in-law will, once again, be unable to "enter" the country under Section 2(c) of the Executive Order. The family is devastated.

[54] *See id.* at Q25.

88. Dr. Elshikh's children, all twelve years of age or younger, are deeply affected by the new Executive Order. It conveys to them a message that their own country would discriminate against individuals who share their ethnicity, including members of their own family, and who hold the same religious beliefs.

89. Members of Dr. Elshikh's Mosque are also affected by the new Executive Order. Muslims in the Hawai'i Islamic community feel that the new Executive Order targets Muslim citizens because of their religious views and national origin. Dr. Elshikh believes that, as a result of the new Executive Order, he and members of the Mosque will not be able to associate as freely with those of other faiths.

90. Dr. Elshikh feels that, as a result of the new Executive Order, there is now a favored and disfavored religion in Hawai'i and the United States, i.e., that a religion has been established.

91. Many members of Dr. Elshikh's Mosque have family and friends living in the countries listed in the new Executive Order. Because of the new Executive Order, they live in forced separation from those family and friends.

F. Effects of the New Executive Order on Plaintiff State of Hawai'i.

92. The new Executive Order also has profound effects on the State as a whole. It prevents nationals of the six designated countries from relocating to, or even visiting, Hawai'i for educational, family, religious, or business reasons.

93. Hawai'i currently has 27 graduate students, 10 permanent faculty members, and 30 visiting faculty members from the seven countries originally designated in the first Executive Order. This demonstrates the extent to which the University of Hawai'i draws on talent from around the world, including from Muslim-majority countries, to enrich its student body and educational environment. In the wake of the new Executive Order, Hawai'i will no longer be able to recruit,

accept, enroll, or welcome similar individuals from the six countries designated in the new Executive Order.

94. The University of Hawai‘i and other state learning institutions depend on the collaborative exchange of ideas, including among people of different religions and national backgrounds. For this reason, the University of Hawai‘i has study abroad or exchange programs in over thirty countries, and international agreements for faculty collaboration with over 350 international institutions spanning forty different countries. The new Executive Order threatens such educational collaboration and harms the ability of the University of Hawai‘i to fulfill its educational mission.

95. Hawai‘i is also home to numerous non-citizens from the six designated countries—foreign students, persons on exchange, visitors, and temporary workers—whose lives may be directly affected by the new Executive Order. Some of these non-citizens may be unable to travel abroad to their home countries, for fear that they will be unable to return—for instance, if they have only a single entry visa, or if their visa will expire while the new Executive Order is in place.

96. In addition, the new Executive Order blocks all of Hawaii’s residents—including U.S. citizens—from receiving visits from, and/or reunifying with, their family members who live in these six designated countries. In 2016, approximately 8% of Hawaii’s visitors (in total) came to visit family and friends, and approximately 12% of Hawaii’s visitors from the areas of the globe including the Middle East and Africa came to visit family and friends. Under the new Executive Order, these individuals, to the extent that they live in the six designated countries, will no longer be able to travel to Hawai‘i to visit family and friends.

97. More broadly, the new Executive Order means that Hawai‘i will be unable to honor the commitments to nondiscrimination and diversity embodied in

the State's Constitution, laws, and policies. For example, state agencies and universities cannot accept qualified applicants for open positions if they are residents of one of the six designated countries. This contravenes policies at the State's universities and agencies that are designed to promote diversity and recruit talent from abroad.[55]

98. Given that the new Executive Order began life as a "Muslim ban," its implementation also means that the State will be forced to tolerate a policy that disfavors one religion and violates the Establishment Clauses of both the federal and state constitutions.

99. Beyond these severe intangible harms, the new Executive Order has a detrimental effect on Hawaii's economy as a whole. It is not only governmental entities that are barred from recruiting and/or hiring workers from the six designated countries. Private employers within the State are similarly burdened.

100. Further, both the first Executive Order and the new Executive Order have the effect of depressing international travel to and tourism in Hawai‘i. Under the new Executive Order, Hawai‘i can no longer welcome tourists from the six designated countries. This directly harms Hawaii's businesses and, in turn, the State's revenue. In 2015 alone, Hawai‘i welcomed over 6,800 visitors from the Middle East and over 2,000 visitors from Africa. Data from Hawaii's Tourism Authority suggests that even during the short period of time that the first Executive Order was in place, the number of visitors to Hawai‘i from the Middle East

[55] *See, e.g.*, State of Hawai‘i, Department of Human Resources Development, Policy No. 601.001: Discrimination / Harassment-Free Workplace Policy (revised Nov. 16, 2016), *available at* https://goo.gl/7q6yzJ; University of Hawai‘i, Mānoa, Policy M1.100: Non-Discrimination and Affirmative Action Policy, *available at* https://goo.gl/6YqVl8 (last visited Mar. 7, 2017 8:27 PM ET); *see also, e.g.*, *Campus Life: Diversity*, University of Hawai‘i, Mānoa, https://goo.gl/3nF5C9 (last visited Mar. 7, 2017 8:27 PM ET).

(including Iran, Iraq, Syria and Yemen) fell—namely, Hawai‘i had 278 visitors from the Middle East in January 2017, compared to 348 visitors from that same region in January 2016. This depressed effect on travel and tourism from the Middle East and Africa is likely to continue under the new Executive Order.

101. According to reports from travel companies and research firms, travel to the United States more broadly "took a nosedive" following President Trump's issuance of the first Executive Order.[56] For instance, an airfare prediction company found that flight search demand from 122 countries to the United States dropped 17% between January 26 and February 1, after the first Executive Order was signed.[57]

102. Even with respect to countries not currently targeted by the new Executive Order, there is a likely "chilling effect" on tourism to the United States, including Hawai‘i. The new Executive Order contemplates an expansion of the immigration ban and in fact authorizes the Secretaries of State and Homeland Security to recommend additional countries for inclusion in the near future. This likely instills fear and a disinclination to travel to the United States among foreigners in other countries that President Trump has been hostile towards—i.e., residents of other Muslims countries, China, and Mexico. The new Executive Order gives rise to a global perception that the United States is an exclusionary country, and it dampens the appetite for international travel here generally.

103. A decrease in national and international tourism would have a severe impact on Hawaii's economy.

104. The new Executive Order also hinders the efforts of the State and its residents to resettle and assist refugees. Refugees from numerous countries have

[56] Shivani Vora, *After Travel Ban, Interest in Trips to U.S. Declines*, N.Y. Times (Feb. 20, 2017), https://goo.gl/Mz9o5T.
[57] *Id.*

resettled in Hawai‘i in recent years.[58] While the State's refugee program is small, it is an important part of the State's culture, and aiding refugees is central to the mission of private Hawai‘i organizations like Catholic Charities Hawai‘i and the Pacific Gateway Center.[59] In late 2015, as other States objected to the admission of Syrian refugees, Governor Ige issued a statement that "slamming the door in their face would be a betrayal of our values." Governor Ige explained: "Hawai‘i and our nation have a long history of welcoming refugees impacted by war and oppression. Hawai‘i is the Aloha State, known for its tradition of welcoming all people with tolerance and mutual respect."[60] But as long as the new Executive Order prohibits refugee admissions, the State and its residents are prevented from helping refugees resettle in Hawai‘i.

105. President Trump's new Executive Order is antithetical to Hawaii's State identity and spirit. For many in Hawai‘i, including State officials, the Executive Order conjures up the memory of the Chinese Exclusion Acts and the imposition of martial law and Japanese internment after the bombing of Pearl Harbor. As Governor Ige observed two days after President Trump issued the first Executive Order, "Hawai‘i has a proud history as a place immigrants of diverse backgrounds can achieve their dreams through hard work. Many of our people also know all too well the consequences of giving in to fear of newcomers. The remains of the internment camp at Honouliuli are a sad testament to that fear. We

[58] U.S. Department of Health & Human Servs., Office of Refugee Resettlement, *Overseas Refugee Arrival Data: Fiscal Years 2012-2015, available at* https://goo.gl/JcgkDM.
[59] *See About: Our History*, Catholic Charities Hawai‘i, https://goo.gl/deVBla (last visited Mar. 7, 2017, 11:35 AM ET); *About: Mission*, Pacific Gateway Center, https://goo.gl/J8bN5k (last visited Mar. 7, 2017, 11:35 AM ET).
[60] Press Release, Governor of the State of Hawai‘i, *Governor David Ige's Statement On Syrian Refugees* (Nov. 16, 2015), *available at* https://goo.gl/gJcMIv.

must remain true to our values and be vigilant where we see the worst part of history about to be repeated."[61]

CAUSES OF ACTION

COUNT I

(First Amendment – Establishment Clause)

106. The foregoing allegations are realleged and incorporated by reference herein.

107. The Establishment Clause of the First Amendment prohibits the Federal Government from officially preferring one religion over another.

108. Sections 2 and 6 of President Trump's March 6, 2017 Executive Order, as well as Defendants' statements regarding the Executive Order and their actions to implement it, are intended to disfavor Islam.

109. Sections 2 and 6 of the Executive Order, as well as Defendants' statements regarding the Executive Order and their actions to implement it, have the effect of disfavoring Islam.

110. Through their actions described in this Complaint, Defendants have violated the Establishment Clause. Defendants' violation inflicts ongoing harm upon Dr. Elshikh, his family, and members of his Mosque, as well as other Hawai‘i residents and the sovereign interests of the State of Hawai‘i.

COUNT II

(Fifth Amendment – Equal Protection)

111. The foregoing allegations are realleged and incorporated by reference herein.

[61] Press Release, Governor of the State of Hawai‘i, *Statement of Governor David Ige On Immigration To The United States* (Jan. 29, 2017), *available at* https://goo.gl/62w1fh.

112. The Due Process Clause of the Fifth Amendment prohibits the Federal Government from denying equal protection of the laws, including on the basis of religion and/or national origin, nationality, or alienage.

113. The March 6, 2017 Executive Order was motivated by animus and a desire to discriminate on the basis of religion and/or national origin, nationality, or alienage.

114. The Executive Order differentiates between people based on their religion and/or national origin, nationality, or alienage and is accordingly subject to strict scrutiny. It fails that test, because it is over- and under-inclusive in restricting immigration for security reasons. The statements of President Trump and his advisors also provide direct evidence of the Executive Order's discriminatory motivations.

115. For the same reasons, the Executive Order is not rationally related to a legitimate government interest.

116. Sections 2 and 6 of the Executive Order, as well as Defendants' statements regarding the Executive Order and their actions to implement it, discriminate against individuals based on their religion and/or national origin, nationality, or alienage without lawful justification.

117. Through their actions described in this Complaint, Defendants have violated the Equal Protection guarantees of the Fifth Amendment. Defendants' violation inflicts ongoing harm upon Dr. Elshikh, his family, and members of his Mosque, as well as other Hawai‘i residents and the sovereign interests of the State of Hawai‘i.

COUNT III

(Fifth Amendment – Substantive Due Process)

118. The foregoing allegations are realleged and incorporated by reference herein.

119. The right to international travel is protected by the Due Process Clause of the Fifth Amendment. Moreover, citizens may have a constitutionally protected interest in specific non-citizens' ability to travel to the United States.

120. The March 6, 2017 Executive Order curtails those rights for numerous individuals, without any legal justification.

121. Through their actions described in this Complaint, Defendants have violated the Substantive Due Process guarantees of the Fifth Amendment. Defendants' violation inflicts ongoing harm upon Dr. Elshikh, his family, and members of his Mosque, as well as other Hawai'i residents and the sovereign interests of the State of Hawai'i.

COUNT IV

(Fifth Amendment – Procedural Due Process)

122. The foregoing allegations are realleged and incorporated by reference herein.

123. The Due Process Clause of the Fifth Amendment prohibits the Federal Government from depriving individuals of liberty interests without due process of law.

124. Non-citizens, including lawful permanent residents and non-immigrants holding valid visas, have a liberty interest in leaving and entering the country, and in being free from unlawful detention. Moreover, citizens may assert cognizable liberty interests with respect to noncitizen relatives who are deprived of due process.

125. The Due Process Clause establishes a minimum level of procedural protection before those liberty interests can be deprived. A non-citizen must be given an opportunity to present her case effectively, which includes a hearing and some consideration of individual circumstances.

126. Through their actions described in this Complaint, Defendants have violated the Procedural Due Process guarantees of the Fifth Amendment. Defendants' violation inflicts ongoing harm upon Dr. Elshikh, his family, and members of his Mosque, as well as other Hawai‘i residents and the sovereign interests of the State of Hawai‘i.

COUNT V

(Immigration and Nationality Act)

127. The foregoing allegations are realleged and incorporated by reference herein.

128. The INA provides that "[e]xcept as specifically provided" in certain subsections, "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." 8 U.S.C. § 1152(a)(1)(A).

129. The INA also establishes specific criteria for determining terrorism-related inadmissibility.

130. Sections 2 and 6 of the March 6, 2017 Executive Order violate the INA by discriminating on the basis of nationality, ignoring and modifying the statutory criteria for determining terrorism-related inadmissibility, and exceeding the President's authority under the INA, including under 8 U.S.C. §§ 1182(f) and 1185(a).

131. Defendants' violation inflicts ongoing harm upon Dr. Elshikh, his family, and members of his Mosque, as well as other Hawai‘i residents and the sovereign interests of the State of Hawai‘i.

COUNT VI

(Religious Freedom Restoration Act)

132. The foregoing allegations are realleged and incorporated by reference herein.

133. The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1(a), prohibits the Federal Government from substantially burdening the exercise of religion, even if the burden results from a rule of general applicability.

134. Section 2 of the March 6, 2017 Executive Order and Defendants' actions to implement the Executive Order impose a substantial burden on the exercise of religion.

135. Among other injuries, some non-citizens currently outside the United States cannot enter the United States to reunite with their families or religious communities. Religious communities in the United States cannot welcome visitors, including religious workers, from designated countries. And some non-citizens currently in the United States may be prevented from travelling abroad on religious trips, including pilgrimages or trips to attend religious ceremonies overseas, if they do not have the requisite travel documents or multiple-entry visas.

136. Through their actions described in this Complaint, Defendants have violated the RFRA. Defendants' violation inflicts ongoing harm upon Dr. Elshikh, his family, and members of his Mosque, as well as other Hawai‘i residents and the sovereign interests of the State of Hawai‘i.

COUNT VII
(Substantive Violation of the Administrative Procedure Act through Violations of the Constitution, Immigration and Nationality Act, and Arbitrary and Capricious Action)

137. The foregoing allegations are realleged and incorporated by reference herein.

138. The APA requires courts to hold unlawful and set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right, power, privilege, or

immunity"; or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A)-(C).

139. In enacting and implementing Sections 2 and 6 of the March 6, 2017 Executive Order, Defendants have acted contrary to the Establishment Clause and Fifth Amendment of the United States Constitution.

140. In enacting and implementing Sections 2 and 6 of the Executive Order, Defendants have acted contrary to the INA and RFRA. Defendants have exceeded their statutory authority, engaged in nationality- and religion-based discrimination, and failed to vindicate statutory rights guaranteed by the INA.

141. Further, in enacting and implementing Sections 2 and 6 of the Executive Order, Defendants have acted arbitrarily and capriciously. Among other arbitrary actions and omissions, Defendants have not offered a satisfactory explanation for the countries that are and are not included within the scope of the Executive Order. The Executive Order purports to protect the country from terrorism, but sweeps in millions of people who have absolutely no connection to terrorism. Through their actions described in this Complaint, Defendants have violated the substantive requirements of the APA. Defendants' violation inflicts ongoing harm upon Dr. Elshikh, his family, and members of his Mosque, as well as other Hawai'i residents and the sovereign interests of the State of Hawai'i.

COUNT VIII

(Procedural Violation of the Administrative Procedure Act)

142. The foregoing allegations are realleged and incorporated by reference herein.

143. The APA requires courts to hold unlawful and set aside any agency action taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

144. The Departments of State and Homeland Security are "agencies" under the APA. *See* 5 U.S.C. § 551(1).

145. The APA requires that agencies follow rulemaking procedures before engaging in action that impacts substantive rights. *See* 5 U.S.C. § 553.

146. In implementing Sections 2 and 6 of the March 6, 2017 Executive Order, federal agencies have changed the substantive criteria by which individuals from the six designated countries may enter the United States. This, among other actions by Defendants, impacts substantive rights.

147. Defendants did not follow the rulemaking procedures required by the APA in enacting and implementing the Executive Order.

148. Through their actions described in this Complaint, Defendants have violated the procedural requirements of the APA. Defendants' violation inflicts ongoing harm upon Dr. Elshikh, his family, and members of his Mosque, as well as other Hawai'i residents and the sovereign interests of the State of Hawai'i.

PRAYER FOR RELIEF

149. WHEREFORE, Plaintiffs pray that the Court:

a. Declare that Sections 2 and 6 of President Trump's Executive Order of March 6, 2017 are unauthorized by, and contrary to, the Constitution and laws of the United States;

b. Enjoin Defendants from implementing or enforcing Sections 2 and 6 across the nation;

c. Pursuant to Federal Rule of Civil Procedure 65(b)(2), set an expedited hearing within fourteen (14) days to determine whether the Temporary Restraining Order should be extended; and

d. Award such additional relief as the interests of justice may require.

DATED: Honolulu, Hawai‘i, March 8, 2017.

Respectfully submitted,

/s/ Neal K. Katyal

DOUGLAS S. CHIN (Bar No. 6465)
Attorney General of the State of Hawai‘i
CLYDE J. WADSWORTH (Bar No. 8495)
Solicitor General of the State of Hawai‘i
DEIRDRE MARIE-IHA (Bar No. 7923)
DONNA H. KALAMA (Bar No. 6051)
KIMBERLY T. GUIDRY (Bar No. 7813)
ROBERT T. NAKATSUJI (Bar No. 6743)
Deputy Attorneys General
DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI‘I

Attorneys for Plaintiff, State of Hawai‘i

NEAL K. KATYAL*
COLLEEN ROH SINZDAK*
MITCHELL P. REICH*
ELIZABETH HAGERTY*
THOMAS P. SCHMIDT*
SARA SOLOW*
ALEXANDER B. BOWERMAN*
HOGAN LOVELLS US LLP

**Admitted Pro Hac Vice*

Attorneys for Plaintiffs, State of Hawai‘i and Ismail Elshikh

DOUGLAS S. CHIN (Bar No. 6465)
Attorney General of the State of Hawai‘i
CLYDE J. WADSWORTH (Bar No. 8495)
Solicitor General of the State of Hawai‘i
DEIRDRE MARIE-IHA (Bar No. 7923)
DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI‘I
425 Queen Street
Honolulu, HI 96813
Telephone: (808) 586-1500
Fax: (808) 586-1239
Email: deirdre.marie-iha@hawaii.gov
Attorneys for Plaintiff, State of Hawai‘i

NEAL K. KATYAL*
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: (202) 637-5600
Fax: (202) 637-5910
Email: neal.katyal@hoganlovells.com

**Admitted Pro Hac Vice*

Attorneys for Plaintiffs, State of Hawai‘i and Ismail Elshikh

(See Next Page For Additional Counsel)

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

STATE OF HAWAI‘I and ISMAIL ELSHIKH, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Acting Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No. 1:17-cv-00050-DKW-KJM

PLAINTIFFS’ MOTION FOR TEMPORARY RESTRAINING ORDER

ADDITIONAL COUNSEL

DONNA H. KALAMA (Bar No. 6051)
KIMBERLY T. GUIDRY (Bar No. 7813)
ROBERT T. NAKATSUJI (Bar No. 6743)
Deputy Attorneys General
DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI'I
425 Queen Street
Honolulu, HI 96813
Telephone: (808) 586-1500
Fax: (808) 586-1239

Attorneys for Plaintiff, State of Hawai'i

COLLEEN ROH SINZDAK*
MITCHELL P. REICH*
ELIZABETH HAGERTY*
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: (202) 637-5600
Fax: (202) 637-5910

THOMAS P. SCHMIDT*
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
Telephone: (212) 918-3000
Fax: (212) 918-3100

SARA SOLOW*
ALEXANDER B. BOWERMAN*
HOGAN LOVELLS US LLP
1835 Market St., 29th Floor
Philadelphia, PA 19103
Telephone: (267) 675-4600
Fax: (267) 675-4601

**Admitted Pro Hac Vice*

Attorneys for Plaintiffs, State of Hawai'i and Ismail Elshikh

PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

Pursuant to Rules 7 and 65 of the Federal Rules of Civil Procedure and Local Rule 7.2 for the U.S. District Court for the District of Hawaii, Plaintiffs, the State of Hawai'i and Ismail Elshikh, by and through counsel, hereby move this Honorable Court for a temporary restraining order prohibiting Defendants from enforcing and implementing key portions of the March 6, 2017 Executive Order issued by Defendant Donald J. Trump (the "Executive Order"), which imposes a nationwide ban on the "entry" of foreign nationals from six Muslim-majority countries.

The State previously moved for a temporary restraining order prohibiting the enforcement of a January 27, 2017 iteration of the Executive Order. Portions of that previous order were enjoined by other courts, leading President Trump to issue the March 6 Executive Order. But despite revisions, the Executive Order violates federal law as well as the Constitution of the United States. Sections 2 and 6 of the Executive Order violate the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, by discriminating on the basis of national origin and by contravening the INA's finely reticulated system of immigration controls. Sections 2 and 6 of the Executive Order also violate individuals' Due Process Clause rights under the Fifth Amendment of the U.S. Constitutions, while inflicting state-sanctioned disfavor

toward Muslims in violation of both the Equal Protection Clause of the Fifth Amendment and the Establishment Clause of the First Amendment.

These discriminatory and unlawful provisions of the Executive Order have no place in the State of Hawai‘i, where Defendants' actions have caused, and continue to cause, irreparable injury to Plaintiffs. As an immediate remedy, and to maintain the status quo while more permanent solutions may be considered, Plaintiffs ask that the Court enter a temporary restraining order enjoining Defendants from enforcing or implementing Sections 2 and 6 of the Executive Order nationwide. Plaintiff further requests that the Court set an expedited hearing to determine whether such order should remain in place.

This motion is supported by the attached Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order, accompanying declarations, and the records and files in this action, as well as any additional submissions and oral argument that may be considered by the Court.

DATED: Washington, D.C., March 8, 2017.

Respectfully submitted,

/s/ Neal K. Katyal

DOUGLAS S. CHIN (Bar No. 6465)
Attorney General of the State of Hawai‘i
CLYDE J. WADSWORTH (Bar No. 8495)
Solicitor General of the State of Hawai‘i
DEIRDRE MARIE-IHA (Bar No. 7923)
DONNA H. KALAMA (Bar No. 6051)

NEAL K. KATYAL*
COLLEEN ROH SINZDAK*
MITCHELL P. REICH*
ELIZABETH HAGERTY*
THOMAS P. SCHMIDT*
SARA SOLOW*

KIMBERLY T. GUIDRY (Bar No. 7813)
ROBERT T. NAKATSUJI (Bar No. 6743)
Deputy Attorneys General

DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI‘I

Attorneys for Plaintiff, State of Hawai‘i

ALEXANDER B. BOWERMAN*

HOGAN LOVELLS US LLP

**Admitted Pro Hac Vice*

Attorneys for Plaintiffs, State of Hawai‘i and Ismail Elshikh

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

STATE OF HAWAI‘I and ISMAIL ELSHIKH, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No. 1:17-cv-00050-DKW-KJM

MEMORANDUM IN SUPPORT OF PLAINTIFFS’ MOTION FOR TEMPORARY RESTRAINING ORDER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

FACTUAL BACKGROUND 3

A. Candidate Trump Calls For A Muslim Ban 3

B. President Trump Implements His First Discriminatory Ban 5

C. Courts Enjoin The President's First Executive Order 8

D. The President Issues A Second Executive Order 10

E. The New Executive Order Harms Hawaii and Its Citizens 14

F. The New Executive Order Harms Ismail Elshikh 19

STANDARD OF REVIEW 22

ARGUMENT 22

A. Hawai'i Is Likely To Succeed On The Merits Of Its Claims 23

1. The Revised Order Violates The Immigration And Nationality Act 24

a. The revised Executive Order violates the INA's prohibition on nationality-based discrimination 25

b. The revised Executive Order exceeds the President's authority under 8 U.S.C. § 1182(f) 29

2. The Revised Order Is Unconstitutional 37

a. The revised Executive Order violates Due Process 38

b. The revised Executive Order violates the Constitution's protections against religious discrimination 40

TABLE OF CONTENTS—Continued

Page

B. The Plaintiffs Will Suffer Irreparable Harm If Relief Is Not Granted 45

C. The Balance Of The Equities And Public Interest Favor Relief 49

D. The Court Should Issue A Nationwide Injunction 50

CONCLUSION 51

TABLE OF AUTHORITIES

Page(s)

CASES:

Abdullah v. *I.N.S.*,
184 F.3d 158 (2d Cir. 1999) 27

Abourezk v. *Reagen*,
785 F.2d 1043 (D.C. Cir. 1986), *aff'd mem.*, 484 U.S. 1 (1987).....32, 33, 35

Access Fund v. *U.S. Dep't of Agriculture*,
499 F.3d 1036 (9th Cir. 2007) 41

Alfred L. Snapp & Son v. *Puerto Rico*,
458 U.S. 592 (1982).....48

Ali v. *Fed. Bureau of Prisons*,
552 U.S. 214 (2008).....37

Allende v. *Shultz*,
845 F.2d 1111 (1st Cir. 1988).....33

Am. Foreign Serv. Ass'n v. *Garfinkel*,
490 U.S. 153 (1989).....24

Arizona v. *United States*,
132 S. Ct. 2492 (2012).....25

Aziz v. *Trump*,
No. 1:17-cv-116, 2017 WL 580855 (E.D. Va., Feb. 13, 2017).....9, 10, 41

Bertrand v. *Sava*,
684 F.2d 204 (2d Cir. 1982) 27, 28, 29

Bond v. *United States*,
134 S. Ct. 2077 (2014).....24

Chaplaincy of Full Gospel Churches v. *England*,
454 F.3d 290 (D.C. Cir. 2006).....46

Circuit City Stores, Inc. v. *Adams*,
532 U.S. 105 (2001).....37

TABLE OF AUTHORITIES—Continued

Page(s)

Clinton v. *City of New York*,
524 U.S. 417 (1998).....35

Earth Island Inst. v. *Ruthenbeck*,
490 F.3d 687 (9th Cir. 2006), *rev'd in part on other grounds*,
555 U.S. 488 (2009).....50

Edwards v. *Aguillard*,
482 U.S. 578 (1987).....41, 44

Elk Grove Unified School Dist. v. *Newdow*,
542 U.S. 1 (2004).....46

Farris v. *Seabrook*,
677 F.3d 858 (9th Cir. 2012).....23, 46

FDA v. *Brown & Williamson Tobacco Corp.*,
529 U.S. 120 (2000).....34

Freytag v. *Commissioner*,
501 U.S. 868 (1991).....25

Galvan v. *Press*,
347 U.S. 522 (1954).....25

Judulang v. *Holder*,
565 U.S. 42 (2011).....27

Kent v. *Dulles*,
358 U.S. 116 (1958).....36

Kerry v. *Din*,
135 S. Ct. 2128 (2015).....*passim*

Kim Ho Ma v. *Ashcroft*,
257 F.3d 1095 (9th Cir. 2001).....36

Kleindienst v. *Mandel*,
408 U.S. 753 (1972).....39

TABLE OF AUTHORITIES—Continued

Page(s)

Kwai Fun Wong v. *United States*,
373 F.3d 952 (9th Cir. 2004) 40

Legal Assistance for Vietnamese Asylum Seekers v. *Dep't of State*,
45 F.3d 469 (D.C. Cir. 1995), *vacated on other grounds*,
519 U.S. 1 (1996).....26

Loughrin v. *United States*,
134 S. Ct. 2384 (2014).....34

Marbury v. *Madison*,
5 U.S. (1 Cranch) 137 (1803) 2

McCreary County v. *Am. Civil Liberties Union*,
545 U.S. 867 (2005).....40, 41, 42, 43, 44

Medellín v. *Texas*,
552 U.S. 491 (2008).....34

Morrison v. *Olson*,
487 U.S. 654 (1988).....43

New Motor Vehicle Bd. v. *Orrin W. Fox Co.*,
434 U.S. 1345 (1977).....47

Olsen v. *Albright*,
990 F. Supp. 31 (D.D.C. 1997).....27, 29

Oracle USA, Inc. v. *Rimini St., Inc.*,
2016 WL 5213917 (9th Cir. Sept. 21, 2016) 47

Romero v. *I.N.S.*,
39 F.3d 977 (9th Cir. 1994) 36

Tashima v. *Admin. Office of U.S. Courts*,
967 F.2d 1264 (9th Cir. 1992) 36

TABLE OF AUTHORITIES—Continued

Page(s)

Texas v. *United States*,
809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*,
136 S. Ct. 2271 (2016).....47, 50

United Dominion Indus. v. *United States*,
532 U.S. 822 (2001).....29

United States v. *Juvenile Male*,
670 F.3d 999 (9th Cir. 2012).....29

United States v. *Windsor*,
133 S. Ct. 2675 (2013).....47

United States v. *Witkovich*,
353 U.S. 194 (1957).....35, 36, 37

Village of Arlington Heights v. *Metro. Housing Dev. Corp.*,
429 U.S. 252 (1977).....40

Washington v. *Trump*,
No. 17-35105 (9th Cir. Feb. 4, 2017).....2, 9

Washington v. *Trump*,
847 F.3d 1151 (9th Cir. 2017).....*passim*

Whitman v. *Am. Trucking Ass'ns*,
531 U.S. 457 (2001).....34, 35

Winter v. *Nat. Res. Def. Council*,
555 U.S. 7 (2008).....23

Wong Wing Hang v. *Immigration & Naturalization Serv.*,
360 F.2d 715 (2d Cir. 1966).....27, 29

Wyoming v. *Oklahoma*,
502 U.S. 437 (1992).....47

Youngstown Sheet & Tube Co. v. *Sawyer*,
343 U.S. 579 (1952).....26

TABLE OF AUTHORITIES—Continued

Page(s)

Zadvydas v. *Davis*,
533 U.S. 678 (2001).....36

Zivotofsky v. *Clinton*,
566 U.S. 189 (2012).....25

STATUTES:

8 U.S.C. § 1152(a)(1).....28

8 U.S.C. § 1152(a)(1)(A).....25, 26, 28

8 U.S.C. § 1153(a).....33

8 U.S.C. § 1182(a).....32, 33, 37

8 U.S.C. § 1182(a)(1).....33

8 U.S.C. § 1182(a)(3)(B).....30

8 U.S.C. § 1182(a)(3)(B)(i)(I)-(II).....30

8 U.S.C. § 1182(a)(3)(B)(i)(V)-(VI).....30

8 U.S.C. § 1182(a)(4)(D)(i).....33

8 U.S.C. § 1182(a)(27).....32

8 U.S.C. § 1182(a)(28).....32, 33

8 U.S.C. § 1182(f).....*passim*

8 U.S.C. § 1184(a).....35

8 U.S.C. § 1185(a).....28, 29, 35, 49

22 U.S.C. § 2691(a).....33

Administrative Procedure Act.....50

Chinese Exclusion Acts.....22, 51

TABLE OF AUTHORITIES—Continued

Page(s)

Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. O, § 203 (2015) (codified at 8 U.S.C. § 1187(a)(12)(D)(ii)) 31

Immigration and Naturalization Act 24, 25, 37

Religious Freedom Restoration Act 40

USA PATRIOT Act, Pub. L. No. 107-56, § 411 (2001) 31

Voting Rights Act 26

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. I 25, 35, 46, 50

U.S. Const. amend. I 46

U.S. Const. amend. V 38

STATE STATUTES

Haw. Rev. Stat. § 378-2(1) 46

Haw. Rev. Stat. Ann. § 381-1 16

Haw. Rev. Stat. Ann. § 489-3 ..... 16, 46

Haw. Rev. Stat. Ann. § 515-3 ..... 16, 46

OTHER AUTHORITIES:

H.R. Rep. No. 89-745 (1965) 26

H.R. Rep. No. 104-469 (1996) 31

OTHER AUTHORITIES:

Cong. Research Serv., Executive Authority to Exclude Aliens: In Brief 6-10 (Jan. 23, 2017) 29, 35

INTRODUCTION

One week after taking office, President Donald Trump fulfilled his campaign promise—made openly in speeches, in interviews, and through surrogates—to implement a "Muslim ban." He issued an Executive Order that barred every national of seven Muslim-majority countries from entering the United States and shut down all refugee admissions, with any exceptions entrusted to standardless executive discretion. During the televised signing of that Order, President Trump read the Order's title, looked up at the camera and remarked: "We all know what that means."

We do. Courts across the country swiftly concluded that the thinly veiled Muslim ban was unlikely to pass constitutional muster. And while the President signed a revised version on March 6—this time in private—we still know exactly what it means. It is another attempt by the Administration to enact a discriminatory ban that goes against the fundamental teachings of our Constitution and our immigration laws. Although it is cloaked in ostensibly neutral terms, the new Executive Order admits, strikingly, that it was altered for the purpose of "avoid[ing] * * * litigation."

Nothing of substance has changed. There is the same blanket ban on entry from Muslim-majority countries (minus one), the same sweeping shutdown of refugee admissions (absent one exception), and the same lawless warren of

exceptions and waivers. The courts did not tolerate the Administration's last attempt to hoodwink the judiciary, and they should not countenance this one.

The Government has said that the President's power in this area must be "unreviewable"—indeed, that "[j]udicial second-guessing of the President's national security determination *in itself* imposes substantial harm." Mot. for Administrative Stay 2, 21, *Washington* v. *Trump*, No. 17-35105, 2017 WL 655437 (9th Cir. Feb. 4, 2017) (emphasis added). But denying the judicial role in saying "what the law is" conflicts with one of our most venerated constitutional precedents. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). In these circumstances, it is also disingenuous at best. Congress has considered and addressed the precise concerns of the Order through legislation; the Order relies on decades-old information and examples of terrorist acts planned by nationals of a country the ban no longer covers; and the U.S. Department of Homeland Security itself has acknowledged that the targeted countries are not the source of the majority of the terror threat.

The confluence of factors surrounding this Executive Order is unique. To find that the immigration laws and the Constitution bar this particular presidential action means only this: In the immigration context, where a President has pointed to no changed circumstances, *and* where Congress has legislated a different response to the threat to which he has pointed, *and* where the fit between the

President's stated purposes and the announced policy is so poor that his own Administration has questioned it, *and* where the President himself has repeatedly and publicly espoused an improper motive for his actions, the President's action must be invalidated.

FACTUAL BACKGROUND

A. Candidate Trump Calls For A Muslim Ban.

Then-candidate Donald Trump made it crystal clear throughout his presidential campaign that if elected, he planned to bar Muslims from the United States. Shortly after the Paris attacks in December 2015, Mr. Trump issued a press release calling for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." Compl. ¶ 38 & Ex. 6. When questioned about the idea shortly thereafter, he compared it to President Roosevelt's race-based internment of the Japanese during World War II, saying, "[Roosevelt] did the same thing." Compl. ¶ 39. And when asked what the customs process would look like for a Muslim non-citizen attempting to enter the United States, Mr. Trump said: "[T]hey would say, are you Muslim?" An interviewer responded: "And if they said 'yes,' they would not be allowed into the country." Mr. Trump said: "That's correct." *Id.* In March of 2016, Mr. Trump discussed his motivations. During an interview he said, "I think Islam hates us." Compl. ¶ 41.

Later, as the presumptive Republican nominee, Mr. Trump began using facially neutral language to describe the Muslim ban. He described his proposal as stopping immigration from countries "where there's a proven history of terrorism." Compl. ¶ 42. Lest he appear to be backing down, Mr. Trump also made clear that his country-based plan was simply a repackaging of his proposed Muslim ban. Asked in July of 2016 whether he was retracting his call for "a total and complete shut-down of Muslim[]" immigration, he said: "I actually don't think it's a rollback. In fact, you could say it's an expansion." Compl. ¶ ¶ 38, 44 & Exs. 6, 7. He explained: "People were so upset when I used the word Muslim. 'Oh, you can't use the word Muslim * * *.' And I'm okay with that, because I'm talking territory instead of Muslim." *Id.*

Throughout the campaign, Mr. Trump also made clear that his plans extended to disfavoring Muslim refugees while favoring their Christian counterparts. In July 2015, he said: "If you're * * * a Christian, you cannot come into this country, and they're the ones that are being decimated. If you are Islamic * * * it's hard to believe, you can come in so easily." Compl. ¶ 36.

After his election, the President-Elect signaled that he would not retreat from his Muslim ban. On December 21, 2016, he was asked whether he had decided "to rethink or re-evaluate [his] plans to create a Muslim registry or ban Muslim

immigration to the United States." He replied: "You know my plans. All along, I've been proven to be right." Compl. ¶ 46.

B. President Trump Implements His First Discriminatory Ban.

A week after being sworn in as President, Donald Trump fulfilled his ominous campaign promise. On January 27, 2017, he signed an Executive Order entitled "Protecting the Nation From Foreign Terrorist Entry into the United States." Compl. ¶¶ 2, 49 & Ex. 2. During the public signing of the Order, President Trump read its title, looked up, and said: "We all know what that means." Compl. ¶ 51.

On the day the first Executive Order was released, the President made his intentions even more explicit. He informed the Christian Broadcasting Network that the Order's refugee provision was designed to prioritize Christian over Muslim refugees: "If you were a Muslim you could come in, but if you were a Christian, it was almost impossible. * * * And I thought it was very, very unfair. So we are going to help them." Compl. ¶ 58. In a television interview the next day, one of the President's surrogates, Rudolph Giuliani, was even more explicit : "So when [Donald Trump] first announced it, *he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'*" Compl. ¶ 59 & Ex. 8 (emphasis added).

The first version of President Trump's Executive Order imposed two sweeping restrictions. *First*, it banned nationals of seven Muslim-majority countries— Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen—from entering the United States for a period of 90 days. Compl. ¶ 52. The first Executive Order permitted the Secretaries of State and Homeland Security to make exceptions to this ban where they deemed it "in the national interest." Compl. ¶ 54. And it instructed the Secretaries to "submit to the President the names of any additional countries recommended for similar treatment" in the future. Compl. ¶ 55.

Second, the original Executive Order directed the Secretary of State to suspend the U.S. Refugee Admissions Program for 120 days. Compl. ¶ 56. Immigration officials could make exceptions to this ban, too, on a case-by-case basis, where they determined that the refugees' admission was in the "national interest." Compl. ¶ 56. The first Executive Order provided an example of such a case: where "the person is a religious minority in his country of nationality facing religious persecution." Compl. ¶ 56. The Order also indefinitely suspended refugee admissions from Syria. Compl. ¶ 57.

The first Executive Order immediately spurred widespread confusion, chaos, and outrage. The application of the travel ban was sweeping: Over 100 individuals were immediately detained at U.S. airports, and the Government revoked 60,000 visas within a period of a week. Compl. ¶ 64. Its precise scope, however, was ill-

defined. At first the Government said that the Order applied to lawful permanent residents ("LPRs"); then the Secretary of Homeland Security said that LPRs were exempt from the travel ban; then, days later, the White House Counsel "clarif[ied]" that the Order did not apply to LPRs in the first place. Compl. ¶¶ 65, 68-70.

Meanwhile, thousands of diplomats, former diplomats, and legislators from both parties spoke out against the ban, calling it inhumane and discriminatory. Hundreds of State Department officials signed a memo stating that the Executive Order "r[an] counter to core American values," including "nondiscrimination," and that "[d]espite the Executive Order's focus on them, a vanishingly small number of terror attacks on U.S. soil have been committed by foreign nationals" here on visas. Compl. ¶ 66 & Ex. 13. Senators John McCain (R-AZ) and Lindsey Graham (R-SC) stated: "This executive order sends a signal, intended or not, that America does not want Muslims coming into our country." Compl. ¶ 67.

Critics also questioned the abrupt nature of the roll out, but the President defended the timing as a national security necessity. On January 30, 2017, President Trump tweeted: "If the ban were announced with a one week notice, the 'bad' would rush into our country during that week." Compl. ¶ 60. On February 9, 2017, President Trump reiterated the point. He claimed he had sought a one-month delay between signing and implementation, but was told by his advisors that

"you can't do that because then people are gonna pour in before the toughness." *Id.*

C. Courts Enjoin The President's First Executive Order.

Within hours of the first Executive Order's issuance, individuals and entities began filing lawsuits and habeas corpus actions challenging the Order as unlawful. On January 30, 2017, the State of Washington (later joined by Minnesota) filed suit in the Western District of Washington, arguing that the Order violated the Due Process Clause and the Establishment Clause, along with a host of other constitutional and statutory provisions. A few days later, the State of Hawai'i brought the present action.

On February 3, 2017, the District Court for the Western District of Washington entered a nationwide temporary restraining order enjoining President Trump and his Administration from enforcing the January 27 Executive Order. Compl. ¶ 71. The Government immediately sought an emergency stay of that injunction in the Ninth Circuit, arguing that the President has "unreviewable authority to suspend the admission of any class of aliens," and that "[j]udicial second-guessing of the President's national security determination in itself imposes substantial harm." Mot. for Administrative Stay 2, 21, *Washington, supra*, No. 17-35105 (emphasis added).

On February 9, 2017, the Ninth Circuit denied the Government's request for a stay. Compl. ¶ 71. The Court of Appeals held that "[t]here is no precedent to support" the Government's claim that the Order was "unreviewab[le]"; this contention, it said, "runs contrary to the fundamental structure of our constitutional democracy." *Washington* v. *Trump*, 847 F.3d 1151, 1161 (9th Cir. 2017) (per curiam). The court also held that the Government was unlikely to succeed on the merits of the States' due process claim. It was "obvious," the court explained, that the first Executive Order impinged on the "due process rights" of several classes of individuals, including "persons who are in the United States, even if unlawfully"; "refugees"; and foreign nationals located abroad "who have a relationship with a U.S. resident or an institution." *Id.* at 1166. The court also noted "the serious nature of the allegations the States have raised with respect to their religious discrimination claims," but found it unnecessary to resolve those claims at this stage of the proceedings. *Id.* at 1164.

On February 13, 2017, the District Court for the Eastern District of Virginia temporarily enjoined the Order on religious-discrimination grounds. *Aziz* v. *Trump*, No. 1:17-cv-116, 2017 WL 580855 (E.D. Va. Feb. 13, 2017). Closely examining the President's past statements and the " 'sequence of events' leading up to the adoption of" the first Executive Order, the court concluded that the Order appeared to be "animated by * * * the impermissible motive of * * * disfavoring

one religious group." *Id.* at *8. It thus held that the plaintiffs in that case were therefore "likely to succeed on an Establishment Clause claim." *Id.* at *8-*9.

D. The President Issues A Second Executive Order.

Following its multiple defeats in the courts, the Government sought a stay of appellate proceedings so that the President could "rescind the [first] Order and replace it with a new, substantially revised" version. Compl. ¶ 71. Meanwhile, the President ensured that his supporters would not doubt his continued commitment to his campaign promises. On February 21, Stephen Miller, a Senior Advisor to the President, explained during a televised interview that the revised Executive Order would "have the same basic policy outcome" as the original version, and that any changes would address "very technical issues that were brought up by the court." Compl. ¶ 74.

A few days later, a memo prepared by President Trump's own Administration severely undermined the purported national security rationale for the original—and soon-to-be revised—Executive Order. On February 25, 2017, a draft report published by the Department of Homeland Security ("DHS") concluded that citizenship was an "unlikely indicator" of terrorism threats against the United States. Compl. ¶ 61. The draft DHS report also found that very few individuals from the seven countries included in President Trump's first Executive Order had carried out or attempted to carry out terrorism activities in the United

States since 2011. *Id.* Specifically, the DHS report determined that 82 people had been inspired by a foreign terrorist group to carry out or attempt to carry out an attack in the United States during the time surveyed. *Half* were U.S. citizens born in the United States, and the remaining persons were from 26 other countries. *Id.* The country at the top of that list, Pakistan, was not included within the travel ban. *Id.* Some of the countries included in the original and revised Executive Order's travel ban, such as Syria and Libya, were not countries-of-origin for *any* of the 82 individuals who had committed or attempted to commit terrorism crimes in the United States since 2011. *Id.*

The DHS report did not alter the President's course, but the demands of public relations did. According to the President's aides, the White House initially planned to release the revised Order on March 1, but delayed the announcement to avoid "undercut[ting] the favorable coverage" the President was receiving for a recent speech to Congress. Compl. ¶ 74.

The President finally issued a revised Executive Order on March 6, 2017. Compl. ¶ 72 & Ex. 1. Consistent with Mr. Miller's forecast, the substance of the revised Order, entitled "Protecting the Nation From Foreign Terrorist Entry into the United States," does not differ from the original. It contains both of the bans the President had initially imposed—the sweeping travel ban on nationals of

several Muslim-majority countries, and the blanket suspension of the refugee program—subject to a handful of changes designed to "avoid * * * litigation." *Id.*

First, Section 2 of the new Executive Order once again suspends "nationals of" several Muslim-majority countries from "entry into the United States" for a period of 90 days. Order § 2(c). As revised, the Order includes one fewer country than the original: Because of the "close cooperative relationship" between the United States and the Iraqi government, the Order says, Iraq no longer merits inclusion on the list. *Id.* § 1(g). The Order also expressly exempts individuals who are already present in the United States, or who have already been granted visas or other lawful status. *Id.* § 3(a)-(b). Otherwise, the Order bars entry by nationals of the six designated Muslim-majority countries unless they qualify for a "[c]ase-by-case waiver" deemed to be "in the national interest." *Id.* § 3(c); *see id.* (offering examples of cases in which waivers "could be appropriate").

Second, Section 6 of the new Executive Order again suspends the U.S. Refugee Admissions Program for a period of 120 days. *Id.* § 6(a). As in the original Order, individuals may be exempted from this prohibition if the Secretaries of State and Homeland Security determine, "on a case-by-case basis," that admission would be "in the national interest." *Id.* § 6(c). Unlike the original, this Order does not expressly list an individual's status as a "religious minority" as

a circumstance justifying such a waiver, and it does not include a Syria-specific ban on refugees.

The March 6 Executive Order also elaborates on the justification for its restrictions. It states that its aim is to prevent "the entry into the United States of foreign nationals who may commit, aid, or support acts of terrorism." *Id.* § 1(j). It describes the ban on entry by nationals of the six designated countries as a step intended "to prevent infiltration by foreign terrorists. *Id.* §§ 1(d)-(e), 2(c). Likewise, the Order justifies its refugee ban on the ground that "individuals seeking admission as refugees" may "pose a threat to the security and welfare of the United States." *Id.* § 6(a).

Section 1(h) of the revised Executive Order identifies two concrete examples of persons who have committed terrorism-related crimes in the United States, after either entering the country "legally on visas" or entering "as refugees": "[I]n 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." *Id.* § 1(h). "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[.]" *Id.* Iraq is no longer included in the ambit

of the travel ban, *id.*, and the Order states that a waiver could be granted for a foreign national that is a "young child." *Id.* § 3(c)(v).

E. The New Executive Order Harms Hawai‘i and Its Citizens.

The revised Executive Order inflicts numerous injuries on the State of Hawai‘i and its citizens.

First, the Order harms the State's university system. The University of Hawai‘i depends on talent from around the world, including from Muslim-majority countries, to enrich its student body and educational environment. The University currently has twenty-three graduate students, several permanent faculty members, and twenty-nine visiting faculty members from the six countries designated in the revised March 6 Executive Order. Ex. D-1, Supp. Dec. of R. Dickson ¶ 7.

In the wake of the new Executive Order, Hawai‘i will no longer be able to recruit, accept, enroll, or welcome individuals from the six designated countries to its student body or faculty. This will impair the University's ability to "recruit and accept the most qualified students and faculty," *id.*, undermine its commitment to being "one of the most diverse institutions of higher education" in the world, *id.* ¶ 11, and grind to a halt certain academic programs, including the Persian Language and Culture program, *id.* ¶ 8. The Executive Order also risks "dissuad[ing] some of [the University's] current professors or scholars from continuing their scholarship in the United States" and at the University. *Id.* ¶ 9.

By virtue of the Executive Order, these individuals' spouses, parents, and children are now presumptively unable to obtain a visa and join them in the United States. These persons will have to choose between continuing their work or studies in the United States and being with their family members overseas, and some will likely chose the latter course.

In addition, the new Order threatens the collaborative exchange of ideas—including among people of different religions and national backgrounds—on which the State's educational institutions depend. *Id.* ¶ 10; *see also* Compl. ¶ 94. Notably, the University of Hawaii has study abroad or exchange programs in over thirty countries, and international agreements for faculty collaboration with over 350 international institutions spanning forty different countries. *Id.* The new Executive Order will prevent the University from continuing such programs in several countries going forward.

Second, the new Executive Order prevents Hawai'i from honoring the commitments to nondiscrimination and diversity embodied in the State's Constitution, laws, and policies. Compl. ¶ 97. The Constitution of the State of Hawai'i provides that "[n]o law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof." Haw. Const. art. I, § 4. And the State has declared that the practice of discrimination "because of race, color, religion, age, sex, including gender identity or expression, sexual orientation,

marital status, national origin, ancestry, or disability" is against public policy. Haw. Rev. Stat. Ann. § 368-1; *accord id.* §§ 489-3 and 515-3.

Because of the new Executive Order, however, the State is denied its sovereign right to implement this policy. State agencies and universities, for example, cannot accept qualified applicants for open positions if they are residents of one of the six designated countries because they will be unable to enter the country, thwarting specific policies designed to promote diversity and recruit talent from abroad. Compl. ¶ 97. Further, given that the Order began life as a "Muslim ban," its implementation means that the State will be forced to tolerate a policy that disfavors one religion and violates the Establishment Clauses of both the federal and State constitutions.

Third, the new Executive Order hinders the efforts of the State and its residents to resettle and assist refugees. Compl. ¶ 104. Refugees from numerous countries have resettled in Hawai'i in recent years. *Id.* While the State's refugee program is small, it is an important part of the State's culture. In late 2015, as other States objected to the admission of Syrian refugees, Governor David Yutaka Ige issued a statement that "slamming the door in their face would be a betrayal of our values." Governor Ige explained that "Hawai'i is the Aloha State, known for its tradition of welcoming all people with tolerance and mutual respect." *Id.* As

long as the new Executive Order is in place, the State is forced to retreat on this important part of its culture and traditions.

Fourth, the new Executive Order harms Hawaii's economy and, by extension, the State's tax revenue. In particular, the Order will harm Hawaii's "lead economic driver," tourism. Compl. ¶ 18. In 2015 alone, Hawai'i welcomed over 6,800 visitors from the Middle East and over 2,000 visitors from Africa. Compl. ¶ 100. Data from Hawaii's Tourism Authority suggests that during the short period of time that the first Executive Order was in place, the number of visitors to Hawai'i from the Middle East (including Iran, Iraq, Syria and Yemen) fell. Ex. B-1, Supp. Dec. of G. Szigeti, ¶¶ 5-8. For instance, Hawai'i had 278 visitors from the Middle East in January 2017, compared to 348 visitors from that same region in January 2016. Compl. ¶ 100.

Even with respect to countries not currently targeted by the new Executive Order, there is a likely "chilling effect" on tourism to the United States, including Hawai'i. Ex. C-1, Supp. Dec. of L. Salaveria ¶¶ 6-10; Compl. ¶ 102. The new Executive Order contemplates an expansion of the immigration ban to more countries; it directs the Secretaries of State and Homeland Security to "conduct a worldwide review" of every country's immigration-related information systems, Order § 2(a), and to recommend additional countries for inclusion in the travel ban in the near future, *id.* § 2(b)-(f). These provisions of the new Order will instill

"uncertainty" and deter travel to the United States, Supp. Dec. Salaveria ¶ 8, particularly among foreigners in other countries towards which the current Administration has expressed hostility, such as other Muslim countries, China, and Mexico. Compl. ¶ 102. This chilling effect is compounded by the Executive Order's creation of a global perception that the United States is an exclusionary country. *Id.*

Empirical evidence already bears out this international chilling effect. According to reports from travel companies and research firms, travel to the United States more broadly "took a nosedive" following President Trump's issuance of the first Executive Order. Compl. ¶ 101. For instance, an airfare prediction company found that flight search demand from 122 countries to the United States dropped 17% between January 26 and February 1, after the first Executive Order was signed. *Id.*

Fifth, and last, Hawaii's residents will be severely harmed by the new Order. Hawai'i is home to numerous non-citizens from the six designated countries—foreign students, persons on exchange, visitors, and temporary workers—whose lives may be directly affected by the new Executive Order. Compl. ¶ 95; *see* Ex. E, Dec. of Ouansafi ¶¶ 8-12. Some of these non-citizens may be unable to travel abroad to their home countries, for fear that they will be unable to return—for

instance, if they have only a single entry visa, or if their visa will expire while the new Executive Order is in place. *Id.*

The new Executive Order also blocks all of Hawaii's residents—including U.S. citizens—from receiving visits from, or reunifying with, their family members who live in these six designated countries. Compl. ¶ 96. In 2016, approximately 8% of Hawaii's visitors came to see family and friends, and approximately 12% of Hawaii's visitors from the Middle East and Africa came for family and friends. Supp. Dec. Szigeti ¶ 11. Under the new Executive Order, these individuals, to the extent that they live in the six designated countries and lack a current visa, will no longer be able to travel to Hawai‘i.

F. The New Executive Order Harms Ismail Elshikh.

The situation of Plaintiff Ismail Elshikh exemplifies the harms the new Executive Order inflicts on Hawaii's citizens. Dr. Elshikh is an American citizen of Egyptian descent. Compl. ¶ 24. He has been a resident of Hawai‘i for over a decade, and is the Imam of the Muslim Association of Hawai‘i. Ex. A, Dec. of Elshikh ¶¶ 1-2. He is a leader within Hawaii's Islamic community. *Id.*

Dr. Elshikh has a wife and several children under the age of twelve, all of whom are also American citizens. *Id.* ¶ 3. Dr. Elshikh's wife is of Syrian descent and is also a resident of Hawai‘i. *Id.* ¶ 1. His mother-in-law is a Syrian national, living in Syria. *Id.* ¶ 4. She last visited the family in 2005. *Id.* ¶ 5. She has never

met two of her grandchildren, and only Dr. Elshikh's oldest child remembers meeting her. *Id*.

In September of 2015, Dr. Elshikh's wife filed an I-130 Petition for Alien Relative on behalf of her mother. On January 31, 2017—after the first Executive Order was put in place—Dr. Elshikh was notified by the National Visa Center that his mother-in-law's application for an immigrant visa had been put on hold. *Id.* ¶ 4. Then, on March 2, 2017—after the first Executive Order was enjoined—Dr. Elshikh and his family were notified by the National Visa Center that his mother-in-law's visa application had progressed to the next stage of the process and that her interview would be scheduled at an embassy overseas. *Id.* Under the new Executive Order, however, Dr. Elshikh fears that his mother-in-law will, once again, be unable to "enter" the country. *Id.* Even though Dr. Elshikh's mother-in-law has a pending visa application, she is now barred from entering the United States under the terms of Section 2(c) of the Executive Order unless she is granted a waiver, because she is not a current visa holder. The family is devastated. *Id.* ¶ 6.

Many members of Dr. Elshikh's Mosque have family and friends living in the countries listed in the new Executive Order. *Id.* ¶ 8. Indeed, Dr. Elshikh personally knows of "more than 20 individuals who are members of [his] community and mosque, who have immediate relatives in the six designated

countries" in the new Order. *Id.* Because of the new Executive Order, these residents of Hawai‘i live in forced separation from those family and friends.

The deprivation of contact with loved ones is only one of the profound effects of the new Executive Order on Dr. Elshikh, his family, and his community. Dr. Elshikh's children are deeply affected because the Order conveys to them a message that their own country would discriminate against individuals who share their ethnicity and who hold their religious beliefs. *Id.* ¶¶ 3, 7. Dr. Elshikh's oldest child recently asked him, "Dad, how come we can't have our grandmother like our friends; is it because we are Muslims?" *Id.* ¶ 3. Members of his Mosque feel that the new Executive Order targets Muslim citizens because of their religious views and their national origins. *Id.* ¶ 7. Dr. Elshikh believes that, as a result of the new Executive Order, he and members of the Mosque will not be able to associate as freely with those of other faiths. Compl. ¶ 89. He feels that in the United States, there is now a favored and a disfavored religion. Compl. ¶ 90.

President Trump's new Executive Order is antithetical to Hawaii's State identity and spirit. For many in Hawai‘i, including state officials, the Executive Order conjures up the memory of the Chinese Exclusion Acts and the imposition of martial law and Japanese internment after the bombing of Pearl Harbor. As Governor Ige observed two days after President Trump issued the first Executive Order, "Hawai‘i has a proud history as a place immigrants of diverse backgrounds

can achieve their dreams through hard work. Many of our people also know all too well the consequences of giving in to fear of newcomers. The remains of the internment camp at Honouliuli are a sad testament to that fear. We must remain true to our values and be vigilant where we see the worst part of history about to be repeated." Compl. ¶ 105.

STANDARD OF REVIEW

To obtain a temporary restraining order or a preliminary injunction, a plaintiff must demonstrate that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit has "also articulated an alternate formulation of the *Winter* test, under which 'serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.' " *Farris* v. *Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012) (internal quotation marks omitted).

ARGUMENT

The Ninth Circuit upheld a preliminary injunction barring enforcement of the first Executive Order because the unlawful pronouncement irreparably harmed

the States, their citizens, and the public in general. The new Executive Order should be enjoined for the same reasons.

A. Plaintiffs Are Likely To Succeed On The Merits Of Their Claims.

The Ninth Circuit held that the first Executive Order was properly enjoined because the States had "viable claims based on the due process rights of persons" who are in the United States "unlawfully; non-immigrant visaholders who have been in the United States but [have] temporarily departed or wish to temporarily depart; refugees; and applicants who have a relationship with a U.S. resident or an institution that might have rights of its own to assert." *Washington*, 847 F.3d at 1166 (internal citations omitted). The Court of Appeals also held that the States' claims of unconstitutional religious discrimination "raise[d] serious allegations and present[ed] significant constitutional questions." *Id.* at 1168.

The current Order transgresses the same constitutional boundaries as the first. *See* Part A.2, *infra*. But the most salient fact about the new Executive Order is that this Court does not even need to go that far. As the Supreme Court has held time and again, "courts should be extremely careful not to issue unnecessary constitutional rulings." *Am. Foreign Serv. Ass'n* v. *Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam); *see also Bond* v. *United States*, 134 S. Ct. 2077, 2087 (2014) ("[T]he Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.").

Here, a constitutional holding is unnecessary because Plaintiffs can demonstrate the requisite likelihood of success based purely on statutory grounds. Despite its efforts to "avoid * * * litigation," the Government has not only failed to camouflage the Order's constitutional flaws, but has thrown the Order's conflict with the Immigration and Nationality Act (INA) into sharp relief. Because the President's revised policy runs contrary to the Act's clear bar on nationality based discrimination, as well as the INA's finely reticulated system of immigration controls, the Order's implementation must be enjoined.

1. The Revised Order Violates The Immigration And Nationality Act.

Our Founders could not have been clearer. Article I vests Congress with the power to "establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. Those who built this Nation, fleeing religious persecution, "entrust[ed] exclusively to Congress"—the people's elected representatives—the power to set "[p]olicies pertaining to the entry of aliens and their right to remain here." *Arizona* v. *United States*, 132 S. Ct. 2492, 2507 (2012) (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)). To be sure, Congress has delegated some of that power to the President through the INA. But it has set important limits—as it must—on that delegation. The President cannot exceed the authority Congress gave him without unlawfully "aggrandizing [his] power at the expense of another branch."

Zivotofsky v. *Clinton*, 566 U.S. 189, 196-197 (2012) (quoting *Freytag* v. *Commissioner*, 501 U.S. 868, 878 (1991)).

The revised Executive Order strays far beyond the statute's limits. It contravenes the statute's clear prohibition on "discriminat[ion] * * * because of * * * nationality," 8 U.S.C. § 1152(a)(1)(A), and it flouts the scheme Congress established "for determining terrorism-related inadmissibility," *Kerry* v. *Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring in the judgment). In both respects, the Order is "incompatible with the expressed * * * will of Congress," where the President's power is at "its lowest ebb." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring in the judgment).

a. The revised Executive Order violates the INA's prohibition on nationality-based discrimination.

In 1965, Congress abolished the "national origins system" that had governed immigration law for decades by enacting 8 U.S.C. § 1152(a)(1)(A). *See* H.R. Rep. No. 89-745, at 9 (1965) (describing the national origins system as "racially biased, statistically incorrect, and a clumsy instrument of selection based on discrimination"). This landmark civil rights law—passed nearly contemporaneously with the Voting Rights Act—provides that "[e]xcept as specifically provided" in certain subsections, "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." 8 U.S.C. § 1152(a)(1)(A). As Judge Sentelle has written, "Congress could hardly have chosen more explicit language": It "unambiguously directed that no nationality-based discrimination shall occur." *Legal Assistance for Vietnamese Asylum Seekers* v. *Dep't of State*, 45 F.3d 469, 473 (D.C. Cir. 1995) ("*LAVAS*"), *vacated on other grounds*, 519 U.S. 1 (1996).

Courts have applied this prohibition broadly. In addition to barring the Executive from discrimination in issuing immigrant visas, they have held that Congress made race and nationality "an impermissible basis" for *any* admission or deportation decision. *Wong Wing Hang* v. *INS*, 360 F.2d 715, 719 (2d Cir. 1966) (Friendly, J.). Executive officials, after all, may not exercise their discretion under the immigration laws based on "considerations that Congress could not have intended to make relevant." *United States ex rel. Kaloudis*, 180 F.2d 489, 491 (2d Cir. 1950) (L. Hand, J.); *see, e.g.*, *Judulang* v. *Holder*, 565 U.S. 42, 53 (2011) (immigration decisions must be based on "relevant factors" that have bearing on an alien's "fitness to reside in the country"). And since 1965, it has been clear that Congress considers "invidious discrimination against a particular race or group" an invalid consideration in making entry decisions. *Wong Wing Hang*, 360 F.2d at 719; *see, e.g.*, *Bertrand* v. *Sava*, 684 F.2d 204, 213 n.12 (2d Cir. 1982) (immigration officials may not "discriminate on * * * the basis of race and national origin"); *Abdullah* v. *INS*, 184 F.3d 158, 166 (2d Cir. 1999) (same). Accordingly,

in *Olsen* v. *Albright*, 990 F. Supp. 31 (D.D.C. 1997), the D.C. District Court had little difficulty concluding that consular officials "must not discriminate against particular individuals because of the color of their skin or the place of their birth" even in issuing "*non*immigrant visa[s]." *Id.* at 38-39 (emphasis added).

The Order violates this clear antidiscrimination mandate. It prohibits "nationals of" six listed "countries" from "entry into the United States." Order § 2(c). Furthermore, it states that the President may "prohibit the entry of * * * foreign nationals" from additional "countries," *id.* § 2(e), and authorizes preferential treatment for any "Canadian immigrant who applies for a visa," *id.* § 3(c)(viii). Tracking the words of Section 1152(a)(1)(A) almost verbatim, the Order also provides that immigration officers may "authorize *the issuance of a visa* to * * * a foreign *national* for whom entry is otherwise suspended" *only* if the officers "decide on a case-by-case basis" to waive the Order's restrictions. *Id.* § 3(c) (emphases added). In words too plain to mistake, these provisions direct that aliens should "receive * * * preference or priority [and] be discriminated against in the issuance of an immigrant visa because of * * * nationality," 8 U.S.C. § 1152(a)(1)(A), and they authorize "discriminat[ion] on * * * the basis of * * * national origin," *Bertrand*, 684 F.2d at 212 n.12. The Order flatly violates the statute.

The Government claims that Sections 1182(f) and 1185(a) authorize the President to openly discriminate in this manner. *See* Order § 2(c). Not so. Those provisions, both enacted in 1952, state in general terms that the President may suspend the entry of "any class of aliens" and prescribe "limitations and exceptions" on entry. 8 U.S.C. §§ 1152(a)(1), 1182(f). Section 1152(a)(1)(A), in contrast, contains a specific prohibition on discrimination, was enacted later in time, and exempts several provisions—but not Section 1182(f) or Section 1185(a)—from its scope. Congress thus made plain that the President cannot ignore Section 1152(a)(1)(A)'s antidiscrimination command when invoking those provisions. *See United States* v. *Juvenile Male*, 670 F.3d 999, 1008 (9th Cir. 2012) (recognizing that "[w]here two statutes conflict, the later-enacted, more specific provision generally governs"); *United Dominion Indus.* v. *United States*, 532 U.S. 822, 836 (2001) (describing *expressio unius* canon). Moreover, for decades courts have held that facially neutral grants of discretion in the immigration laws, like Sections 1182(f) and 1185(a), do not authorize "discriminat[ion] on * * * the basis of race and national origin." *Bertrand*, 684 F.2d at 213 n.12; *see Wong Wing Hang*, 360 F.2d at 719 (Friendly, J.); *Olsen*, 990 F. Supp. at 38-39.

Until now, Presidents accepted this limit. Since Congress enacted Sections 1182(f) and 1185(a) in 1952, Presidents have invoked the provisions (either singly or together) over forty times. *See* Cong. Research Serv., *Executive*

Authority to Exclude Aliens: In Brief 6-10 (Jan. 23, 2017) ("CRS Report"), https://fas.org/sgp/crs/homesec/R44743.pdf. No President in these years has ever engaged in rank nationality-based discrimination without legislative authorization. This sweeping Order is a first, and the Court cannot allow it to stand.

b. The revised Executive Order exceeds the President's authority under 8 U.S.C. § 1182(f).

In addition to discriminating on the basis of nationality, the Order flouts the criteria Congress established for denying aliens entry on terrorism-related grounds.

Congress has "establish[ed] specific criteria for determining terrorism-related inadmissibility." *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring in the judgment). Section 1182(a)(3)(B) states that an alien may be denied admission if, among other things, that alien "has engaged in a terrorist activity"; there is "reasonable ground to believe" that the alien "is engaged in or is likely to engage after entry in any terrorist activity"; or the alien is "a member of a terrorist organization." 8 U.S.C. § 1182(a)(3)(B)(i)(I)-(II), (V)-(VI). The decision to deny an alien entry under the Act's "terrorism bar" is "legitimate," Justice Kennedy explained in his controlling opinion in *Din*, only if it "rest[s] on a determination that [the alien] d[oes] not satisfy the statute's requirements." 135 S. Ct. at 2140.

The Order disobeys that straightforward instruction. It deems millions of aliens inadmissible on the ground that they may be "foreign terrorists." Order §§ 2(c), 6(a). But it does not claim—nor could it—that there is "reasonable ground

to believe" that every covered national of six countries and every applicant for refugee status is "likely to engage" in terrorism, or that any other provision of the Act's terrorism bar is satisfied. 8 U.S.C. § 1182(a)(3)(B)(i)(II). Instead, the Order finds merely that there is an "increase[d] * * * chance" and a "heightened risk[]" that refugees and aliens from the banned countries will include *some* "terrorists operatives or sympathizers." Order § 1(d)-(e). And based on that finding, the Order establishes an entirely new set of admission rules: *All* aliens covered by the Order—including refugees who are themselves seeking to escape violence—are presumptively excluded as potential terrorists. *Id.* §§ 2(c), 6(a). They must seek admission based on an intricate scheme of categorical exemptions and case-by-case waivers. *See id.* §§ 3, 6(c).

That cannot be lawful. The President cannot direct immigration officers to ignore the criteria Congress established for excluding aliens as potential terrorists and set up new rules that the President prefers. Congress painstakingly devised and calibrated the limits on the terrorism bar over a period of decades. *See, e.g.*, H.R. Rep. No. 104-469, at 166 (1996) (explaining that Congress was establishing a "slightly less strict standard" for members of terrorist organizations, under which they are not inadmissible if "innocent of involvement with or knowledge of terrorist activity"). Congress altered these limits in the wake of 9/11, *see, e.g.*, USA PATRIOT Act, Pub. L. No. 107-56, § 411 (2001), and only two years ago, it

specifically considered the risks the Order identifies, and chose to address them in a far more limited manner: by authorizing the Government to prohibit persons who had *recently visited* the listed countries from traveling to the United States *without a visa*. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. O, § 203 (2015) (codified at 8 U.S.C. § 1187(a)(12)(D)(ii)) (authorizing the Secretary of State to require an alien to possess a visa if he recently traveled to a country in which the alien's "presence * * * increases the likelihood that the alien is a credible threat to the national security"). The President violates Congress's will by plowing over the system Congress designed and replacing it with one (or two) he likes more.

Section 1182(f) does not permit the President to ignore Congress's judgments in this manner. In sixty-five years, that provision has never been understood to authorize the President to alter or augment the criteria for excluding the "[c]lasses of aliens" that Congress itself addressed in 8 U.S.C. § 1182(a). Rather, Section 1182(f) permits the President to exclude *additional* "class[es] of aliens" on which the statute is silent. *Id.* § 1182(f). As the D.C. Circuit explained, it authorizes the President to exclude a "class of [aliens] that *is not* covered by one of the [inadmissibility] categories in Section 1182(a)." *Abourezk* v. *Reagen*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (emphasis added), *aff'd mem.*, 484 U.S. 1 (1987).

Any other interpretation would impermissibly allow Section 1182(f) to "swallow[]" the other categories of inadmissibility in Section 1182. *Id.* at 1056. In *Abourezk*, the D.C. Circuit confronted a similar problem. The Government contended that then-Section 1182(a)(27), which broadly prohibited admission of aliens who might "engage in activities which would be prejudicial to the public interest," could be invoked to exclude certain aliens "simply because of their membership in Communist organizations." *Id.* at 1047, 1057 (quoting 8 U.S.C. § 1182(a)(27) (1982)). Yet an adjacent provision of the immigration laws, 8 U.S.C. § 1182(a)(28) (1982), set specific criteria for excluding members of Communist organizations, and authorized the President to deem aliens inadmissible because of membership in a Communist party only if "the admission of such alien would be contrary to the security interests of the United States." 785 F.2d at 1048 (quoting 8 U.S.C. § 1182(a)(28) (1982); 22 U.S.C. § 2691(a) (1982)). The court held that "[t]he Executive [could] not use subsection (27) to evade the limitations Congress appended to subsection (28)" by setting new criteria that would exclude a broader range of Communists. *Id.* at 1057. That would make subsection (28) "superfluous," and "nullif[y]" "the congressional will expressed" in that provision. *Id.* Considering the same question in *Allende* v. *Shultz*, 845 F.2d 1111 (1st Cir. 1988), the First Circuit agreed, holding that "[e]ach subsection" of

Section 1182 "creates a different and distinct ground for exclusion," and none should be interpreted to render another one "duplicative." *Id.* at 1118.

The President's interpretation of Section 1182(f), however, would permit him to effectively "nullif[y]" any subsection of section 1182(a) and "evade the limitations" Congress elsewhere imposed. He could, if he wished, block aliens from entering the country because of ailments lacking any "public health significance," *id.* § 1182(a)(1); require victims of domestic violence to obtain sponsorship from their spouses, *cf. id.* § 1182(a)(4)(D)(i) (exempting such victims from this requirement); or ban entry of any immediate relatives of U.S. citizens unless they satisfied criteria of the President's choosing, *cf. id.* § 1153(a) (allotting visas to immediate relatives). No statute should be interpreted in a manner that would render another provision "superfluous," or "a mere subset" of the first. *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014). And it is well-established, for that matter, that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions"—it does not, as Justice Scalia wrote, "hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Enabling the President to rewrite vast swathes of the immigration laws would surely be an elephant; and the vague terms of Section 1182(f), buried at the end of a list of express statutory limits, are a quintessential

mousehole. *See FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-160 (2000).

Moreover, the President's understanding of the scope of section 1182(f) flies in the face of historical practice. Of course, "[p]ast practice does not, by itself, create power." *Medellín* v. *Texas*, 552 U.S. 491, 532 (2008). Therefore, it would not be significant if past presidents had inappropriately expanded their authority through a misreading of Section 1182(f). But it is significant that past presidents have not tried. Presidents have repeatedly relied on Section 1182(f) to deny entry to classes of aliens who are subject to U.S. sanctions, *e.g.*, Proc. No. 8693 (July 27, 2011), who have sought to undermine foreign democracies, *e.g.*, Proc. No. 8015 (May 16, 2006), or who engaged in war crimes or similar atrocities, *e.g.*, Proc. No. 6749 (Oct. 27, 1994). *See generally* CRS Report 6-10. Each of these classes is "not covered" by Section 1182(a), *Abourezk*, 785 F.2d at 1049 n.2, and so the President has a free hand to "suspend the[ir] entry" as he sees fit, 8 U.S.C. § 1182(f). No President, until now, has attempted to use Section 1182(f) (or Section 1185(a)) to alter or override the categories Congress established.

Indeed, it is doubtful that Congress *could* delegate such breathtaking authority to the President. The Constitution vests Congress, not the President, with the responsibility to "establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. Congress cannot abdicate that role by giving the President unfettered

authority to write (and rewrite) the rules of admission. *See Whitman*, 531 U.S. at 472; *see also Clinton* v. *City of New York*, 524 U.S. 417, 443 (1998) (holding that the Congress may not give the President "the power to cancel portions of a duly enacted statute").

The Government suggests that Section 1182(f) must be read to grant the President this vast power because it says that the President may suspend entry of "*any* class of aliens." 8 U.S.C. § 1182(f) (emphasis added). But this is not the first time that courts have encountered—and rejected—the Government's claim that a broadly-worded immigration statute gives it "unbounded authority." *United States* v. *Witkovich*, 353 U.S. 194, 199 (1957). In *Witkovich*, the Government argued that a statute requiring aliens to provide "such * * * information * * * as the Attorney General may deem fit and proper" vested the Attorney General with essentially "limitless" authority to request information as he saw fit. *Id.* at 198, 200. The Court rejected that claim; although the statute contained no limits when "read in isolation and literally," in "the context of th[e] [statutory] scheme" it was clearly intended to authorize only those questions relevant to determining deportability. *Id.* at 199, 200-202; *see also*, *Zadvydas* v. *Davis*, 533 U.S. 678, 682, 689 (2001) (statute stating that aliens "may be detained beyond the removal period" must be read to "contain an implicit 'reasonable time' limitation."); *Kent* v. *Dulles*, 357

U.S. 116, 129-130 (1958) (similarly adopting limiting construction of broadly worded passport statute).

Similar cases proliferate: As the Ninth Circuit has explained, "[i]n the immigration context, courts have often read limitations into statutes that appeared to confer broad power on immigration officials in order to avoid constitutional problems." *Kim Ho Ma* v. *Ashcroft*, 257 F.3d 1095, 1106 (9th Cir. 2001); *see Romero* v. *INS*, 39 F.3d 977 (9th Cir. 1994) (adopting limiting construction); *Tashima* v. *Admin. Office of U.S. Courts*, 967 F.2d 1264, 1271 (9th Cir. 1992) (similar).

The same course is appropriate here. The phrase "any class of aliens" cannot possibly vest the President with unbounded authority to discard the rules of entry Congress designed. Rather, as in many circumstances, the surrounding statutory provisions "counteract the effect" of the "expansive modifier[] * * * 'any.' " *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 220 n.4 (2008); *see Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 109 (2001) (imposing limiting construction on the phrase "any other class of workers" in light of the surrounding context). The "legislative scheme," and the severe and constitutionally suspect consequences of a broad reading, *Witkovich*, 353 U.S. at 200-202, make clear that the President may not use his authority under Section 1182(f) to modify the criteria for denying entry to a class of aliens Congress already addressed in Section

1182(a). Because the Order does just that—instructing immigration officers to apply "criteria for determining terrorism-related inadmissibility" that Congress did not establish, *Din*, 135 S. Ct. at 2140—it is unlawful, and cannot stand.

2. The Revised Order Is Unconstitutional.

The Order's obvious conflict with the INA is more than enough to establish the Plaintiffs' likelihood of success on the merits. But if this Court does reach Plaintiffs' constitutional claims, it should have little trouble holding that they are meritorious. The Government's constitutional defense of the prior Order was predicated almost exclusively on an assertion of unreviewable Executive power that the Ninth Circuit resoundingly repudiated: "[A]lthough courts owe considerable deference to the President's policy determinations with respect to immigration and national security, it is *beyond question* that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action." 847 F.3d at 1164 (emphasis added). Stripped of that claim of absolute power, the Government has nothing with which to shield itself from the conclusion that the revised Order violates the Constitution's core due process and religious freedom guarantees.

a. The revised Executive Order violates Due Process.

The Fifth Amendment prohibits the Government from depriving individuals of their "life, liberty, or property, without due process of law." U.S. Const. amend. V. The new Order, like the old, runs contrary to this command.

The Ninth Circuit affirmed the injunction of the prior Order based on the strength of the States' due process claims. In doing so, it specifically declined the Government's request to narrow the preliminary injunction to apply only to "lawful permanent residents" and "previously admitted aliens who are temporarily abroad now or who wish to travel and return to the United States in the future." *Washington*, 847 F.3d at 1166. That limitation, the Ninth Circuit held, would "leave[] out at least some who" have "viable due process claims," including "aliens who are in the United States unlawfully," "refugees," and "citizens who have an interest in specific non-citizens' ability to travel to the United States." *Id.*

Flouting that holding, the Government has promulgated a new Order that imposes the same underinclusive limitation the Ninth Circuit rejected. The Government touts the fact that the new Order will not "affect the ability of individuals * * * who are lawfully in the United States on the effective date to leave the country to travel and return later." Notice of Filing of Executive Order at 9 (Mar. 6, 2017) ("Notice"), ECF No. 56. But there was nothing qualified about the Ninth Circuit's holding that "aliens who are in the United States *unlawfull*y"

also "have due process rights." 847 F.3d at 1166 (emphasis added). The Government also assures this Court that the new Order will "*not* result in the revocation or cancellation of valid visas or create an emergent situation whereby visaholders abroad are prevented from entering the United States." Notice at 9 (emphasis in original). But the Ninth Circuit's opinion covered more than just restrictions on the entry of visaholders. The Court of Appeals explained that barring the entry of non-citizens in general creates "viable due process claims" for "citizens who have an interest in specific non-citizens' ability to travel to the United States," 847 F.3d at 1166.—such as a citizen whose spouse or parent is seeking admission, *Din*, 135 S. Ct. at 2139 (Kennedy, J., concurring in the judgment), or a university deprived of the "debates" and "discussion" provided by a visiting scholar, *Kleindienst* v. *Mandel*, 408 U.S. 753, 764 (1972); *see generally Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (recognizing the Due Process Clause protects family integrity); *Troxel* v. *Granville*, 530 U.S. 57 (2000) (same).

The Government also asserts that the new Order contains "a robust and self-executing waiver provision" that avoids any due process concerns. Notice at 9. That cannot be true. The prior Order also contained waiver provisions, *see* January 27 Order §§ 3(g), 5(e), but that was not enough for it to pass constitutional muster.

The revised Order offers more detail as to who "*could*" be eligible for a waiver, but it does not guarantee appropriate process to anyone. Compl. ¶ 77. [1]

b. The revised Executive Order violates the Constitution's protections against religious discrimination.

The Ninth Circuit also determined that there were "significant constitutional questions" with regard to the prior Order's compliance with the Establishment Clause and the religious discrimination bar found in the Equal Protection Clause.[2] *Washington*, 847 F.3d at 1168. That is hardly surprising. "A law that has a religious, not secular, purpose" violates the Constitution. *Id.* at 1167. "It is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims." *Id.*

[1] The revised Executive Order may limit the due process rights of other individuals, as well. Section 3(a)(i) purports to limit the "entry" ban in Section 2 "to foreign nationals of the designated countries who are outside the United States on the effective date of this order." But the Department of Homeland Security's accompanying Q&A document suggests that foreign nationals of the six designated countries who are in the United States with "single entry visas," student visas, or visas due to expire during the duration of the Order will be prohibited from leaving and reentering the country. Compl. ¶¶ 83-84. If so, persons with those visas would also suffer an impairment to their due process rights and their fundamental right to travel under the Fifth Amendment.

[2] For the reasons described above, *see supra* Part A.1.a, the Order also violates the constitutional bar on discrimination based on nationality. *See Kwai Fun Wong* v. *United States*, 373 F.3d 952, 968-975 (9th Cir. 2004) (holding that the Constitution protects both admitted and non-admitted aliens from discrimination on the basis of national origin). In addition, its obvious discrimination against those of the Muslim faith burdens free-exercise in violation of the Religious Freedom Restoration Act and the Free Exercise Clause. Compl. ¶¶ 132-36.

And that evidence may include "the historical background of the decision and statements by decisionmakers." *Id.* (describing the holding of *Village of Arlington Heights* v. *Metro. Housing Dev. Corp.*, 429 U.S. 252, 266-68(1977)).

In analyzing this evidence, the key question is whether "a reasonable observer[]" with a "reasonable memor[y]" would infer a religious purpose from the Government's actions. *McCreary County* v. *Am. Civil Liberties Union*, 545 U.S. 844, 867 (2005). The Ninth Circuit has explained that regardless of "the government's *actual* purpose," a constitutional violation occurs if "the practice under review in fact conveys a message of endorsement or disapproval." *Access Fund* v. *U.S. Dep't of Agriculture*, 499 F.3d 1036, 1045 (9th Cir. 2007) (internal quotation marks omitted) (emphasis added).

The history of the initial Order and the statements by the President and his surrogates make it patently obvious that a "reasonable observer" with a "reasonable memory" would recognize that the original Order conveyed a "message of [religious] disapproval." As another district court held, there is ample "unrebutted evidence" demonstrating that challenges to the original Order were "likely to succeed on the Establishment Clause claim." *Aziz*, 2017 WL 580855 at *8.

The new Order seeks to change that conclusion by announcing a series of secular purposes for the policy, and by asserting that the original Order "did not

provide a basis for discriminating for or against members of any particular religion." Order § 1(b)(4). Given the Order's origins and the context of its release, these hollow recitations are not nearly enough to avoid a constitutional violation.

"[A]lthough a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864; *see also, e.g.*, *Edwards* v. *Aguillard*, 482 U.S. 578, 586-587 (1987) (stated secular purpose must be "sincere and not a sham"). Here, there can be little doubt that the stated secular purposes are a "sham," or at the very least "secondary to [the] religious objective" of banning Muslims. The President's senior policy advisor, and one of the Order's architects, has himself stated that the revised Order is designed to accomplish "the same basic policy outcome for the country" as the first, while merely correcting "a lot of very technical issues that were brought up by the court." Compl. ¶ 74.

In fact, the Government seems to be taking a page from the book of the counties that unsuccessfully defended against an Establishment Clause challenge in *McCreary*. In that case, two counties posted public displays of the Ten Commandments. One did so in a ceremony aided by a priest who spoke about God, such that "[t]he reasonable observer could only think that the Counties meant to emphasize and celebrate" the "religious message." 545 U.S. at 868-869. After they were sued, the Counties posted a new display that made their religious

purposes *more* explicit, before changing course and installing a third display that situated the Ten Commandments as part of the "Foundations of American Law and Government." *Id.* The Counties informed the courts that this third display had several secular purposes and that the purposes behind the prior displays were "dead and buried." *Id.* at 870-871. The courts were not fooled.

In a holding that was almost made for this case, the Supreme Court stated that "the world is not made brand new every morning." *Id.* at 866. Courts may not "ignore perfectly probative evidence" as to the "history of the government's actions" and what it "has to show." *Id.* Nor may they "turn a blind eye to the context in which [the] policy arose." *Id.* (quoting *Santa Fe Ind. School Dist.* v. *Doe*, 530 U.S. 290, 315 (2000)).

That, of course, is exactly what the Government asks this Court to do. It wants this Court to ignore the President's repeated pronouncements of a desire to enact a Muslim ban, ignore his statements that he intended to shield that ban from judicial review by cloaking it in secular garb, ignore his surrogate's statement that the first Order was intended to serve as the ban, ignore his own statements that the original Order was intended to favor Christian over Muslim refugees, and ignore the Administration's subsequent assurance that the new Order does nothing more than resolve "technical issues." *See supra* pp. 3-8 (recounting the Order's history). And the Government wants the Court to turn a blind eye to the copious evidence

undermining the avowed national security purpose of the Order. *See Aziz*, 2017 WL 580855, at *9 (concluding that the original Order "was not motivated by rational national security concerns"). That ranges from the gross mismatch between the Order's avowed goal of fighting terrorism and its failure to include the countries from which the 9/11 attackers came, to the cognitive dissonance of insisting that the Nation's safety depends on the Order being implemented immediately and then delaying the roll out of a revised Order to take advantage of a favorable news cycle. Compl. ¶ 74. As Justice Scalia once remarked in another context, "this wolf comes as a wolf," *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia J, dissenting)—and it cannot disguise that fact by throwing on an article or two of sheep's clothing.

To recognize as much is *not* to hold that the past statements of the President and his Administration have "forever taint[ed] any effort on their part to deal with the subject matter" of immigration. *McCreary*, 545 U.S. at 874. "[D]istrict courts are fully capable of adjusting preliminary relief to take account of genuine changes in constitutionally significant conditions." *Id.* at 874. The President, however, has pointed to none. He has pointed to no alteration in the global landscape beyond his own inauguration, and no evidence that his motives have changed beyond self-serving statements in the Order and in the course of litigation.

Recognizing this wolf is perfectly consistent with the deference owed to the Executive in the national security and immigration context. Enjoining this Order will not open the door to a slew of future challenges of executive orders. The unique and unprecedented context means that a constitutional decision in this case will only foreclose future presidents from announcing a nakedly discriminatory intent and then—in the absence of any changed circumstances—carrying out that purpose by effecting a dramatic alteration of Congress's carefully constructed immigration scheme. That is no more than the Constitution demands.

B. The Plaintiffs Will Suffer Irreparable Harm If Relief Is Not Granted.

The injuries inflicted by this unlawful Order are legion. Both the State and Dr. Elshikh are already suffering and will continue to suffer myriad irreparable harms. These injuries not only satisfy the irreparable harm element of the temporary injunction standard, but also easily demonstrate the Plaintiffs' standing. That is particularly true with respect to Hawai'i because, under *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), States are due "special solicitude in [the] standing analysis" when they assert "sovereign prerogatives." *Id.* at 520.

First, the Order severely damages the State's schools and universities. In performing its standing analysis, the Ninth Circuit found it obvious that "as a result [of the prior Order], some [nationals of the designated countries] 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." *Washington*, 847 F.3d at 1161. The current Order has almost precisely the same effect. As a result, the State has suffered "a concrete and particularized injury to [its] public universities." *Id.* at 1159. The new Order detracts from the University of Hawaii's diversity and impedes the State's commitment to international scholarship and global exchange—inflicting the very harms Congress's prohibition on nationality-based discrimination was designed to prevent. *Id.* at 1160. Those harms are already occurring and will be extremely difficult to undo if the Order is not stayed.

Second, the Executive Order will irreparably harm Hawaii's sovereign interest in preventing the unconstitutional "establishment" of religion in the State. This harm alone is sufficient to warrant injunctive relief because in Establishment Clause cases, irreparable harm is presumed. *See, e.g.*, *Chaplaincy of Full Gospel Churches* v. *England*, 454 F.3d 290, 303 (D.C. Cir. 2006) (if a movant demonstrates a likelihood of success on an Establishment Clause claim, "this is sufficient, without more, to satisfy the irreparable harm prong"); *see also Farris*, 677 F.3d at 868 (9th Cir. 2012) (adopting the same rule for First Amendment claims generally). The history of the Establishment Clause demonstrates that the harm is particularly acute with respect to States. *See Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring).

Third, the Order irreparably harms the State because it prevents Hawai‘i from fully enforcing its antidiscrimination laws and policies. Hawaii's Constitution protects religious freedom and the equal rights of all persons. Hawai‘i Const. art. 1, §§ 2, 4. Its statutes and policies bar discrimination and further diversity. Haw. Rev. Stat. §§ 378-2(1); 489-3; 515-3; Compl. ¶ 72. The Executive Order commands Hawai‘i to abandon these sovereign prerogatives by requiring the State, and therefore its universities, its agencies, and its instrumentalities, to exclude individuals based on their nationality and religion. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). The same is true when it is an Executive Order that prevents effectuation of the State's laws.

Fourth, the Executive Order will inflict irreparable harm on Hawaii's economy and tax revenues. As the "state's lead[ing] economic driver," tourism is crucial to Hawaii's economy. Compl. ¶ 15. In 2015 alone, Hawai‘i had 8.7 million visitor arrivals, accounting for $15 billion in spending. *Id*. The Order prevents nationals of the designated countries from visiting the State, and chills tourism from many other countries, resulting in considerable lost revenues. *See Texas* v. *United States*, 809 F.3d 134, 155-156 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (holding that the "financial loss[es]" that

Texas would bear, due to having to grant drivers licenses to deferred action recipients, constituted a concrete and immediate injury for standing purposes); *see also United States* v. *Windsor*, 133 S. Ct. 2675 (2013) (standing to appeal an order to pay a tax refund); *Wyoming* v. *Oklahoma*, 502 U.S. 437, 448 (1992) (standing to sue for "direct injury in the form of a loss of specific tax revenues"). The Order will also inflict incalculable and lasting harm on Hawaii's hard-won reputation as a place of welcome. *See Oracle USA, Inc.* v. *Rimini St., Inc.*, 2016 WL 5213917, at *2 (D. Nev. Sept. 21, 2016). And it will force the State to abandon the refugee program that embodies the State's tradition of openness.

Fifth, the Order irreparably harms Dr. Elshikh, in particular, because it deprives him and his family of the company of Dr. Elshikh's mother-in-law. *See Din*, 135 S. Ct. at 2139 (Kennedy, J., concurring in the judgment) (recognizing potential constitutional harm inflicted when a loved one is prohibited from entering the country); *id.* at 2142-43 (Breyer, J., concurring) (same). The Order prolongs the separation of Dr. Elshikh's family, and causes him severe emotional turmoil. Even the Government has acknowledged the standing of a person that asserts an "independent constitutionally protected interest in [a] third-party's admission to the country." 9th Circuit Govt. Reply Br. at 4. Further, Dr. Elshikh is irreparably harmed by the infringement of his rights to be free from governmental discrimination based on religion and nationality.

Finally, the Order irreparably harms the State by inflicting similar injuries on its population as a whole. The new Order subjects citizens of Hawai‘i like Dr. Elshikh to discrimination and marginalization while denying all residents of the State the benefits of a pluralistic and inclusive society. Hawai‘i has a quasi-sovereign interest in "securing [its] residents from the harmful effects of discrimination." *Alfred L. Snapp & Son* v. *Puerto Rico*, 458 U.S. 592, 609 (1982). The Order also harms Hawai‘i by debasing its culture and tradition of ethnic diversity and inclusion.

C. The Balance Of The Equities And Public Interest Favor Relief.

The public interest plainly favors a stay of this Order. It is not only Hawai‘i but the *country* that has a rich and storied tradition of welcoming immigrants and celebrating differences. The Order badly encroaches on this core element of America's history and culture, all the while marginalizing minorities, sowing discord in the population, and violating congressional and constitutional commands. Against all this, the Government pleads only an urgent national security rationale that it has itself undercut in numerous ways. The Administration's own decision to delay the Order's roll out for publicity purposes establishes that there is no urgency. Compl. ¶ 74. Its own DHS memorandum establishes that the Order will not make the country safer. Compl. ¶ 61. And the President's own statements regarding the Order's true purpose establish that the

Order is designed to hurt members of a minority religion, not help the American citizenry as a whole. All a stay will do is preserve a status quo that has existed *for decades*.

D. The Court Should Issue A Nationwide Injunction.

Because the factors for issuing a temporary restraining order are easily satisfied, the Court should enter a nationwide injunction prohibiting the enforcement of sections 2 and 6 of the Order. Both of these sections are unlawful in all of their applications: Section 2 discriminates on the basis of nationality, *see supra* Part A.1.a, Sections 2 and 6 exceed the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a), *see supra* Part A.1.b, and both provisions are motivated by anti-Muslim animus, *see supra* Part A.2.a. Furthermore, each provision infringes on the "due process rights" of numerous U.S. citizens and institutions by barring the entry of non-citizens with whom they have close relationships. 847 F.3d at 1166; *see supra* Part A.2.b. As the Ninth Circuit explained last month, there is no practicable way to "limit the scope of the TRO" that would not "leave[] out at least some" of those protected individuals. *Washington*, 847 F.3d at 1166.

Moreover, as the Ninth Circuit also held, the court should not "limit the geographic scope of the TRO." *Id.* "[S]uch a fragmented immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and policy." *Id.* at 1166-67 (citing *Texas*, 809 F.3d at 187-188);

see U.S. Const. art. I, § 8, cl. 4 (requiring "an *uniform* Rule of Naturalization" (emphasis added)). In addition, the Ninth Circuit has held that a "nationwide injunction * * * is compelled by the text of the Administrative Procedure Act," one of the causes of action under which the Plaintiffs have brought their statutory and constitutional claims. *Earth Island Inst.* v. *Ruthenbeck,* 490 F.3d 687, 699 (9th Cir. 2006), *rev'd in part on other grounds*, 555 U.S. 488 (2009). And in light of "the nation's multiple ports of entry and interconnected transit system," and the State's geographic remoteness, limiting the injunction to Hawai'i would not adequately prevent the State and its citizens from suffering the irreparable harms described above. *Washington*, 847 F.3d at 1167.

CONCLUSION

For decades Hawai'i has endeavored to consign to history the memories of Japanese internment and the Chinese Exclusion Acts. It has tried to build a society of openness and inclusion, and to welcome visitors of all nations and religions to its shores, its universities, and its economy. The State and its citizens, including Dr. Elshikh, should not be compelled to endure discrimination and mistreatment at the hands of their own Government. The Constitution and laws of this country stand as a bulwark against such Executive acts. The Order should be enjoined.

DATED: Washington, D.C., March 8, 2017.

Respectfully submitted,

/s/ Neal K. Katyal

DOUGLAS S. CHIN (Bar No. 6465)
Attorney General of the State of Hawai‘i
CLYDE J. WADSWORTH (Bar No. 8495)
Solicitor General of the State of Hawai‘i
DEIRDRE MARIE-IHA (Bar No. 7923)
DONNA H. KALAMA (Bar No. 6051)
KIMBERLY T. GUIDRY (Bar No. 7813)
ROBERT T. NAKATSUJI (Bar No. 6743)
Deputy Attorneys General

DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI‘I
425 Queen Street
Honolulu, HI 96813
Telephone: (808) 586-1500
Fax: (808) 586-1239
Email: deirdre.marie-iha@hawaii.gov

Attorneys for Plaintiff, State of Hawai‘i

NEAL K. KATYAL*
COLLEEN ROH SINZDAK*
MITCHELL P. REICH*
ELIZABETH HAGERTY*
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: (202) 637-5600
Fax: (202) 637-5910
Email:
neal.katyal@hoganlovells.com

THOMAS P. SCHMIDT*
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
Telephone: (212) 918-3000
Fax: (212) 918-3100

SARA SOLOW*
ALEXANDER B. BOWERMAN*
HOGAN LOVELLS US LLP
1835 Market St., 29th Floor
Philadelphia, PA 19103
Telephone: (267) 675-4600
Fax: (267) 675-4601

**Admitted Pro Hac Vice*

Attorneys for Plaintiffs, State of Hawai‘i and Ismail Elshikh