UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

IRANIAN ALLIANCES ACROSS BORDERS; et al.

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; et al.

Defendants.

Civil Action No.: 17-CV-2921
Judge Chuang

REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The President's recent Proclamation is his third attempt to deliver on his campaign promise to ban Muslims from the United States. The Government urges the Court to disregard the two failed Executive Orders and all of the President's statements calling for a "total and complete shutdown on Muslims entering the United States." First Am. Compl. ¶ 30. The Government also urges the Court to ignore the statements by the President and his advisors explaining how they could impose a "Muslim ban" "legally" by focusing on "territories." *Id.* ¶¶ 36-41. In the Government's view, all of the evidence that led courts to enjoin the prior travel bans can be ignored because the Proclamation was based on a multiagency "worldwide review" that analyzed countries' vetting practices and scored them on a new "baseline" test.

The baseline test is yet another post-hoc rationalization designed to produce results that would fulfill the President's promise to ban Muslims from the United States. The Government also attempted to justify the last Executive Order ("EO-2") based on national security concerns. Specifically, EO-2 relied on the fact that it applied to six countries identified as security risks under the Visa Waiver Program ("VWP"). Courts refused to accept this national-security justification and enjoined the travel ban because it was likely unconstitutional and violated the Immigration and Nationality Act ("INA"). The Proclamation's baseline test should fare no better, as it uses the same VWP criteria to achieve similar results. To make matters worse, the President did not even accept what the baseline test produced. Instead, he arbitrarily accepted the results he wanted and rejected those he did not to arrive at a Proclamation that—just like the first two iterations of the travel ban—imposes onerous and unjustified travel restrictions on six Muslim-majority countries, now for an indefinite period of time.

The Proclamation should be enjoined for the same reasons as the Executive Orders. It exceeds the President's statutory authority, violates the Constitution, and causes irreparable harm.

ARGUMENT

I. Plaintiffs' Claims Are Justiciable.

A. Plaintiffs Have Standing And Their Claims Are Ripe.

1. The Government does not challenge the Article III standing of the Doe Plaintiffs, who will be separated indefinitely from their family members and are made to feel like outsiders in the community. The Government instead contends that the Doe Plaintiffs' claims will not be ripe until their family members are denied a visa and a waiver. Opp. 17. The Fourth Circuit correctly rejected this argument, explaining that the "ripeness doctrine is clearly not implicated" where, as here, "Plaintiffs … alleg[e] that [the Order] violates the Establishment Clause regardless of whether their relatives secure waivers." *IRAP v. Trump*, 857 F.3d 554, 587 (4th Cir. 2017), *vacated as moot by* 2017 WL 4518553; *see also Jackson v. Okaloosa Cty.*, 21 F.3d 1531, 1541 (11th Cir. 1994) (claim is ripe where discriminatory "hurdle itself is illegal whether or not it might have been surmounted"); *Hawaii v. Trump*, 859 F.3d 741, 767 (9th Cir. 2017).

2. The Government challenges Iranian Alliances Across Border's ("IAAB") standing, arguing that IAAB could not establish injury based on interference with its conferences unless IAAB provided the name of a "specific scholar or student who has concrete plans to attend an event." Opp. 17. The Government cites no authority that supports this disclosure requirement. IAAB's declaration states that almost half the speakers at their events come from countries outside the United States, including Iran. Kharrazi Decl. ¶ 18 (ECF No. 26, Ex. 1). That uncontroverted evidence is sufficient to demonstrate that IAAB's conferences will be harmed.[1]

[1] The Government also claims that IAAB's events will not be harmed because Iranians can still apply for F, M, and J visas. But IAAB's speakers and attendees do not rely solely on those visas. They also travel on B1 or B2 visas, which are subject to the ban. In any event, visas from Iran are subject to enhanced vetting, which may discourage application and impede attendance.

In any event, IAAB suffers an injury-in-fact based on the time and resources it spends responding to concerns about the travel ban and the anti-Muslim sentiment it has generated. The Government disputes this, *see* Opp. 17-18, arguing the injury is nothing more than "a setback to the organization's abstract social interests." Opp. 18. But IAAB's complaint is not about "abstract social interests"; it is about the "drain on [its] resources" directly attributable to the travel ban. *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 799 (D.C. Cir. 1987). That injury is sufficient to establish standing. *Id.*; *see also Hawaii v. Trump*, 871 F.3d 646, 662 (9th Cir. 2017).

The Government also contends that an organization can establish third-party standing only if "both the third party and the litigant itself … have suffered an injury." Opp. 18. Even if that were the test, the Iranian Student Foundation ("ISF")—which was added as a party in the First Amended Complaint—qualifies because the travel ban will reduce its membership, its members will be separated indefinitely from their families, and the Proclamation sends a message that its members are outsiders. Pashai Decl. ¶¶ 9-13 (ECF No. 38, Ex. A). In any event, ISF can establish associational standing by showing: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). That standard is easily satisfied here. Pashai Decl. ¶¶ 8-14.

B. The Government's Additional Justiciability Challenges Also Lack Merit.

The Government raises several reviewability arguments that have been consistently rejected in previous challenges to the travel ban. *See Hawaii*, 859 F.3d at 768-69; *IRAP*, 857 F.3d at 587-88. They should fare no better here.

1. The Government contends that Plaintiffs' Establishment Clause claims are not reviewable because Plaintiffs do not allege that their own rights are violated. Opp. 14-15. That is

incorrect. The Proclamation directly injures Plaintiffs by making them feel "personally attacked, targeted, and disparaged" and "show[ing] hostility to Iranians generally and to Muslims in particular." John Doe #6 Decl. ¶ 9 (ECF No. 26, Ex. 6); *see also, e.g.*, Jane Doe #2 Decl. ¶ 9 (ECF No. 26, Ex. 3). These "[f]eelings of marginalization and exclusion are cognizable forms of injury" under the Establishment Clause. *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012).[2]

2. The Government asserts that the doctrine of consular nonreviewability bars Plaintiffs' statutory claims. Opp. 10. But Plaintiffs seek review of the Proclamation itself, not individual consular visa decisions. Courts regularly adjudicate statutory challenges to immigration policies, even when these implicate national-security and foreign-policy concerns. *See, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187-88 (1993) (reaching the merits of a claim that President exceeded his authority under § 1182(f)); *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544-47 (1950) (involving statutory claims against a Presidential proclamation).

The Government's reliance on *Saavedra Bruno v. Albright*, 197 F.3d 1153 (D.C. Cir. 1999), is misplaced. *Saavedra Bruno* involved a challenge by a noncitizen to the denial of a visa. The D.C. Circuit held that the noncitizen's claims were not subject to judicial review under the doctrine of consular nonreviewability, while specifically noting that the doctrine is "inapplicable . . . [to] 'claims by United States citizens'" that involve both statutory and constitutional

[2] This case "bears little resemblance to" *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 487 (1982). *IRAP*, 857 F.3d at 585. Far from "roam[ing] the country in search of governmental wrongdoing," Plaintiffs have been "forced to assume special burdens" as a result of the Proclamation. *Valley Forge*, 454 U.S. at 487, 486 n.22. For example, Jane Doe #5, who is 79-years old, wheelchair bound, and has health issues, has a pending immigrant visa petition for her son whom she may never be able to see again. Jane Doe #5 Decl. ¶ 6-7.

causes of action such as the claims Plaintiffs bring in this case. *Saavedra*, 197 F.3d at 1163 (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1051 n.6 (1981)).

3. The Government further contends that neither the INA nor the Administrative Procedure Act ("APA") provide Plaintiffs with a right of action. Opp. 11-13. Their argument fails.

Although the President is not an "agency" under the APA, a "long history of judicial review of illegal executive action" shows that courts may enjoin "violations of federal law by federal officials." *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1385 (2015); *see also INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (noting "strong presumption in favor of judicial review of administrative action"); *Sale*, 509 U.S. at 187-88 (reaching merits of claim that Executive Order issued under § 1182(f) violated another INA provision). Courts have also allowed plaintiffs to challenge Executive actions that violated a statute placing limitations on those actions. *See, e.g.*, *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327-29 (D.C. Cir. 1996). Here, § 1182(f) and § 1152(a)(1)(A) place limits on Executive action, *see infra* at 6-11, and thus executive actions exceeding those limits are reviewable.

The Government also contends incorrectly that Plaintiffs have no statutory rights to enforce because they are not aggrieved by agency action. Opp. 13. Plaintiffs are injured by the Proclamation's anti-Muslim message and the prolonged familial separation it will cause them. As visa sponsors, Plaintiffs are within the zone of interest the INA protects. *See, e.g.*, *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 45 F.3d 469, 471-72 (D.C. Cir. 1995) (*LAVAS*), *vacated on other grounds by* 519 U.S. 1 (1996) (U.S. residents applying for visas for family members "fall well within the zone of interest Congress intended to protect"); *Hawaii*, 859 F.3d at 766 (plaintiff fell "within the zone of interests of the INA" when mother-in-law could not travel to the U.S. under EO-2).

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

A. The Proclamation Violates The INA.

Contrary to the Government's contention, the INA does not provide limitless authority for the President to ignore the federal immigration statutory framework and replace it with his own. That would be inconsistent with separation of powers and with the text of the INA.

1. The Proclamation exceeds the scope of the President's authority.

Sections 1182(f) and 1185(a) do not give the President unbridled authority to restrict entry, as the Government contends, nor could they. The Constitution vests the legislative power, including the power to make "[p]olicies pertaining to the entry of aliens[,] … exclusively to Congress." *Arizona v. United States*, 567 U.S. 387, 409 (2012); *see also Galvan v. Press*, 347 U.S. 522, 531 (1954) ("[T]hat the formulation of [entry policies] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."). By entrusting this power to Congress—a "deliberate and deliberative" body, *INS v. Chadha*, 462 U.S. 919, 959 (1983)—the Framers avoided the sort of unreviewable "prerogative" over immigration "exercised by George III," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

The Supreme Court repeatedly has refused to read federal immigration law to make sweeping, unbounded delegations of Congress's authority to the Executive. In *Kent v. Dulles*, 357 U.S. 116, 128 (1958), the Court considered the meaning of a passport statute and refused to "impute to Congress … a purpose to give [an executive official] unbridled discretion." *See also United States v. Witkovich*, 353 U.S. 194, 199-200 (1957) (holding that the Attorney General's apparently "unbounded authority to require whatever information he deems desirable of aliens" authorized only those demands consistent with the "purpose of the legislative scheme").

The Government overlooks these decisions and instead suggests that *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950), supports its position. *See* Opp. 26. *Knauff* does not support the broad delegation authority the Government asserts. Rather, the Court acknowledged the more limited proposition that "Congress may in broad terms authorize the executive to exercise the [exclusion] power … for the best interests of the country *during a time of national emergency*." *Knauff*, 338 U.S. at 543 (emphasis added). The Government points to no national emergency justifying the broad power to rewrite immigration law the President has seized.

Nor does The Supreme Court's decision in *Sale* justify the Proclamation's indefinite ban on entry of nationals from certain countries. The Court explained in *Sale* that § 1182(f) "grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores." 509 U.S. at 187. The case involved the use of military forces beyond the territorial United States to prevent entry of people who did not satisfy eligibility criteria that Congress had established by statute. *Sale* does not authorize the President to rewrite those criteria and impose a ban against all nationals of certain countries.

2. The President has not made the finding required by § 1182(f).

The Government claims that § 1182(f) "permit[s] the President to make his determinations on a categorical basis." Opp. 24 n.12. But § 1182(f) makes clear that the President can suspend entry only if he "*finds* that the entry of any aliens or of any class of aliens … *would be* detrimental to the interests of the United States." *Id.* (emphasis added). It is not enough for the President to find that entry of *some* individuals in a group would be detrimental, or that entry of a group *might be* detrimental.

The Proclamation, which indefinitely bans entry of more than 157 million individuals, is not supported by any finding of classwide detrimental effect, and is far in excess of the President's statutory authorization to suspend entry of a "class of aliens" for a particular "period" of

time. *Id.* The Proclamation "makes no finding that nationality alone renders entry of this broad class of individuals a heightened security risk to the United States," *Hawaii v. Trump*, 859 F.3d 741, 772 (9th Cir. 2017), and a DHS report refutes that claim. *See* First Amended Complaint ¶ 51 (ECF No. 37). Nor does the Proclamation "tie these nationals in any way to terrorist organizations within the … designated countries" or "provide any link between an individual's nationality and their propensity to commit terrorism." *Id.*

The Government's assertion that the targeted countries do not adequately share information with the United States, *see* Opp. 23-25, does not justify the sweeping ban imposed. A visa applicant already "bears the burden of showing that the applicant is eligible to receive a visa or other document for entry and is not inadmissible." *See Hawaii*, 859 F.3d at 773 (citing 8 U.S.C. § 1361). If an applicant cannot produce sufficient records, that person is denied a visa under the statutory scheme enacted by Congress. Congress deemed those vetting procedures sufficient for both travelers and immigrants from the designated countries. *See IRAP* Br. 15-17; *infra* at 12-13. The Proclamation usurps that legislative authority and should be enjoined because it purports to impose contrary "policies as rules of conduct to be followed" by federal agencies and, "like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed." *See Youngstown*, 343 U.S. at 588.

As a fallback to its pretextual justifications for the Proclamation, the Government claims that the President does not need to provide *any* rationale for his actions. *See* Opp. 20-21. That claim is contrary to the plain text of § 1182(f), which requires the President to "*find[]* that the entry … would be detrimental." 8 U.S.C. § 1182(f) (emphasis added). The government's reliance on *Sale* for this point is misplaced. *See* Opp. 21. *Sale* dealt with thousands of Haitian nationals—most of whom were not eligible, even as refugees, for entry to the United States—

embarking on a dangerous voyage to the United States only to be detained in facilities when they arrived. 509 U.S. at 163. The President, in consultation with the Haitian government, used military forces to prevent their entry to the United States, and the Supreme Court chose not to question that *methodology* for preventing entry of people Congress had not authorized to enter the United States. The President there did not attempt—and the Supreme Court did not approve—a rewrite of the immigration statute regarding *who* is not admissible.

As a last resort, the Government suggests that the Court can ignore the limits of § 1182(f) because a different provision, § 1185(a), "does not require any predicate findings whatsoever." Opp. 20. But that interpretation would render § 1182(f) meaningless, in violation of well-established rules of statutory construction. *See Dada v. Mukasey*, 554 U.S. 1, 16 (2008). Further, any such reading of § 1185(a) would raise serious separation of powers concerns. *See supra* at 6-7. Accordingly, § 1185(a) should not be construed as an independent grant of unfettered authority. Instead, it simply recognizes that non-citizens cannot violate limitations imposed under other constitutional or statutory grants of authority. *See Hawaii*, 859 F.3d at 770 n.10.

3. The Proclamation impermissibly discriminates based on nationality.

The Government does not dispute that the Proclamation discriminates on the basis of nationality. Such discrimination violates § 1152(a)(1)(A), which prohibits discrimination "in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." Congress enacted this provision contemporaneously with the Civil Rights Act of 1964 to eliminate the "national origins system as the basis for the selection of immigrants to the United States." H.R. Rep. No. 89-745, at 8 (1965). "Congress could not have used more explicit language in unambiguously direct[ing] that no nationality-based discrimination shall occur." *Hawaii*, 859 F.3d at 777. The Government's attempts to reconcile the Proclamation with § 1152(a)(1)(A) are unconvincing and should be rejected.

First, the Government claims that the Proclamation bars entry, not the issuance of visas, so § 1152(a)(1)(A) does not apply. *See* Opp. 31-32. But the Proclamation's direct effect is to bar the issuance of visas to groups of people based on their nationality. *See* Proclamation § 3(c)(iii) (specifying that nationals of the targeted countries must obtain a waiver from agency officials in order to secure the "issuance of a visa."). In fact, the Proclamation specifically allows individuals with preexisting valid visas to enter the United States, making even clearer that it functions as a ban on visa issuance, and not on entry of individuals who already have visas.

Second, the Government claims that it can "harmonize" the statutory provisions by reading §§ 1182(f) and 1185(a)(1) to give the President limitless authority to narrow the individuals eligible for visas so that consular officials need not discriminate on the basis of nationality when they deny visas for all nationals of a certain country. Opp. 32. This proposed reading renders § 1152(a)(1)(A) a "nullity." *Dada*, 554 U.S. at 16. It would allow the Executive to discriminate in whatever way he wished, including on the basis of race or gender. Congress provided no authority to the Executive to upend the entire statutory scheme in this way. *See Hawaii*, 859 F.3d at 779 (EO-2 "exceed[ed] the restriction of § 1152(a)(1)(A) and the overall statutory scheme" by "suspending the issuance of immigrant visas and denying entry based on nationality").[3]

Third, the Government claims that § 1185(a) supersedes § 1152(a) because § 1185(a) was amended more recently. Opp. 33-34. But the Government cites an amendment that changed only the introductory language of § 1185(a); it did not change the substantive authority that the President invoked here. *See* Pub. L. No. 95-426, § 707(a), 92 Stat. 992-93 (1978). Moreover,

[3] The Government further hypothesizes that enforcement of § 1152(a)(1)(A) according to its plain language would hamstring the country in time of war. But Congress has provided other mechanisms to prevent saboteurs and spies from entering the country. *See, e.g.*, 8 U.S.C. § 1182(a)(3)(A). In any event, unlawful "discrimination" as a legal concept typically does not encompass restrictions narrowly tailored to a compelling interest. *See LAVAS*, 45 F.3d at 473.

§ 1152(a) provides a specific prohibition on discrimination that takes precedence over § 1185(a)'s recognition of general rulemaking authority. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) ("general/specific canon" applies when "a general permission … is contradicted by a specific prohibition").

B. The Proclamation Violates The Constitution.

1. The Proclamation is subject to constitutional scrutiny.

The Government claims that the Establishment Clause inquiry ends before it begins because of *Kleindienst v. Mandel*, 408 U.S. 753 (1972). Opp. 35. But when plaintiffs have made a showing of bad faith, judicial review is required. *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015).[4] Here, the showing of bad faith is overwhelming: the President's campaign promise to ban Muslims from the United States, along with numerous other statements of hostility toward Muslims; the President's subsequent explanation that he would mask the ban on Muslims by targeting territories; the Executive Orders' targeting of territories predominantly home to Muslims; the rush to issue EO-1, without input from national-security officials; DHS's conclusion that a nationality ban would not improve national security; and issuance of EO-2 and the Proclamation, with almost all the same attributes and defects. First Amended Complaint (Dkt. 37) ¶¶ 28-64. The Proclamation, like the Executive Orders, "cannot be divorced from the cohesive narrative linking it to the animus that inspired it." *IRAP*, 857 F. 3d at 601.

The Government contends that this entire context must be ignored because a "worldwide review" based on a newly created "baseline" and "diplomatic engagement" pursuant to EO-2 "sets forth a bona fide basis" for the Proclamation. Opp. 2, 36. But the proffered reasons must

[4] *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), does not change the analysis. There, the Court concluded that the standard of review used in *Fiallo v. Bell* did not apply. *Id.* at 1693–94. The Court said nothing about Din's bad-faith standard, much less abandon it. *Id.* at 1693.

be assessed against the evidence of bad faith already in the record from which the Proclamation arises. That evidence is reinforced by the structure and text of the Proclamation itself.

a. The "baseline" created as a basis for the Proclamation is the same post-hoc rationale that was proffered, and rejected, by the courts on review of EO-2. When the President issued the Executive Orders, he relied on the fact that the targeted countries had been "previously identified" under the Visa Waiver Program ("VWP"), 8 U.S.C. § 1187, as "warrant[ing] additional scrutiny in connection with our immigration policies because the conditions in these countries present heightened threats." EO-2 § 1(d). Courts rejected that rationale and enjoined the Executive Orders, ruling that their primary purpose was anti-Muslim animus, not the purported national-security rationale based on the VWP. *See, e.g.*, *IRAP*, 857 F.3d at 592, 596; *Aziz v. Trump*, 234 F. Supp. 3d 724, 736–37 (E.D. Va. 2017). The new "baseline" adopted by the federal agencies for determining which countries are "inadequate" or are "at risk" of being so for purposes of the Proclamation relies on the very same VWP criteria.

b. The VWP was, and is, an inappropriate fit for a § 1182(f) determination. The VWP applies to a small group of non-immigrant visas—business travelers and tourists visiting the U.S. for less than 90 days—and only to nationals of roughly 38 countries that permit U.S. nationals to travel to their countries without a visa. Because a noncitizen can enter the U.S. under the VWP without an in-person interview or a detailed written submission, customs officials must quickly assess the individual based on her passport and information in national security and law enforcement databases. *See* 8 U.S.C. § 1187(a)(9)-(11). That is why the VWP requirements place great emphasis on a foreign country's passport design and willingness to share information.

These concerns are very different from the purpose underlying the President's authority to suspend entry for a period of time of a particular "class" of noncitizens that "would be detri-

mental to the interests of the United States." 8 U.S.C. § 1182(f). If a country's information-sharing processes are insufficient, the response Congress chose was to exclude the country from the VWP. Nationals of such countries may still apply for entry, but they must use the traditional visa process to do so. The VWP criteria thus clearly fail to justify a blanket indefinite ban on entry. The Proclamation converts those criteria from their intended purpose to an unconstitutional, indefinite baseline for banning entry of Muslims.[5]

c. The Proclamation's treatment of the agencies' baseline test results further demonstrates that the worldwide review operates to retroactively produce the same results as the President's EO-2 travel restrictions. Rather than implementing the results of the baseline test, the Proclamation made alterations to ensure closer replication of EO-2.

For example, although Iraq failed the baseline test, the acting Secretary of Homeland Security recommended that its nationals not be banned from entry by the Proclamation. Proclamation § 1(g). She based her decision on "diplomatic" considerations, not a security determination, *id.*, and did not explain why DHS was making diplomatic judgments, leaving only the obvious explanation that her decision was influenced by Iraq's exclusion from the earlier EO-2. The President also departed from the baseline-test results to make the Proclamation more consistent with EO-2 when, with the narrow exception of certain government officials, he failed to impose restrictions on Venezuela—a country with few Muslims and that was not included in EO-2—even though it failed the baseline assessment. *Id.* § 2(f)(i).[6] Yet he banned entry for all im-

[5] This court need not, as the government argues, attribute bad faith to the government officials involved in the agency review (Opp. 38) to conclude that the draconian consequence of indefinite exclusion ordered by the President is a continuation of the bad faith demonstrated by his promise to ban Muslims, and his repeated attempts to do so.

[6] The President chose not to impose the travel restrictions on Venezuela because he asserted (but did not identify) "alternative sources for obtaining information" about Venezuelans. *Id.* The (continued…)

migrants from Somalia—a predominately Muslim country—even though it passed the baseline test. The reason is clear: Somalia had been in EO-2, and the President refused to take it out.[7]

d. The "baseline test" irrationally omits any consideration of whether current vetting practices have been sufficient to detect which applicants pose national security risks. Although the President previously ordered DHS to produce a report on these issues, the Proclamation notably omits any such analysis. The statistics on past vetting failures suggest that considering this information would have skewed the results away from the President's promised Muslim ban. *See, e.g.*, J.R. 695-702. Nationals from the countries targeted in the ban are responsible for virtually no terrorist attacks in the United States. *Id.*

In sum, the evidence surrounding the baseline and the Proclamation does not provide a different or better rationale for the ban against nationals from the targeted Muslim-majority countries than did the VWP criteria rationale in the previous iterations of the President's travel ban. It does not eliminate the bad faith that has infected the entire effort to ban Muslims from the United States, and it does not shield the Proclamation from constitutional scrutiny.

2. The Proclamation violates the Establishment Clause.

The Government does not dispute that a policy that prefers one religious denomination over another violates the Establishment Clause. *Larson v. Valente*, 456 U.S. 228, 244 (1982). Indeed, it has previously acknowledged that an explicit ban on Muslims, as called for by then candidate Trump, would likely violate the Constitution.[8] It contends, however, that "[t]here is no

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President gave no explanation for why Venezuela received such favorable treatment while other countries did not.

[7] The Proclamation states that DHS's recommendations would be disregarded because of "several other considerations." Proclamation § 2(h)(i). But the "other considerations" were factors already in the baseline test, which Somalia passed. *Id.*

[8] *IRAP v. Trump*, CSPAN 30:29 (May 8, 2017), http://cs.pn/2j4kM4h.

basis for invalidating the Proclamation [because] [t]he Proclamation's text does not refer to or draw any distinction based on religion." Opp. 39. But serial efforts to ban Muslims by targeting Muslim-majority countries and "calling it territories" is as constitutionally defective as banning Muslims explicitly. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (Establishment Clause "extends beyond facial discrimination" to "'forbid[] subtle departures from neutrality' and 'covert suppression of particular religious beliefs.'"). A policy that so disproportionately—almost exclusively—disadvantages Muslims clearly violates *Larson*'s bar against denominational preference, regardless of the policymaker's intent.[9] By its categorical terms, and its indefinite duration, the Proclamation goes further than either of the EOs in effecting "a total and complete shutdown of Muslims entering the United States." First Am. Compl. ¶ 30. And that means that certain American Muslims may never live with their spouses in the United States (Declarations of Jane Does 2 and 3 (ECF No. 26, Ex. 3-4)), or have the company of their adult children during the later years of their lives (Declaration of Jane Doe 5), regardless of whether the government has any bona fide basis for barring their loved ones' entry.

There is also ample, uncontroverted evidence of improper religious purpose: animus toward one denomination that is unprecedented in modern political discourse. Those expressions of animus, along with the policy itself, inflict stigma and fear on members of the affected communities. *See, e.g.*, Kharrazi Decl. ¶ 12 (describing youth campers' "feelings of fear, self-hate, and lowered self-esteem arising specifically from the statements made about Muslims and Iranians during the election, and the imposition of travel bans on Iranians and nationals of other

[9] The Government makes only passing reference to non-Muslim countries North Korea (from which there is almost no travel to the United States), and Venezuela (which is largely excluded from the ban). It did not argue that their inclusion demonstrates religious neutrality.

predominantly Muslim countries."). "The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial." *Bd. of Educ. v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring).

The Government purports to have made a clean break from both candidate Trump's promise to ban Muslims and the prior Executive Orders that *did* ban Muslims, because the Proclamation, unlike its predecessors, is supposedly based on the worldwide review and engagement with foreign countries (completed in less than two months). Opp. 39. That is not how the Establishment Clause works. The Government's purpose is not viewed through the lens of "an absentminded objective observer," "[un]familiar with the history of the government's actions" and aware only of "the latest news about the last in a series of governmental actions." *See McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005).[10]

The objective observer of the Proclamation's history will know that President Trump has relentlessly pursued the Muslim ban he promised, and also that the "baseline test" is virtually identical to the VWP criteria that courts evaluating the Executive Orders deemed inadequate to show a genuine national-security purpose. Prior rulings that the EO-2 violated the Establishment Clause, even if no longer in effect, are historical facts that the objective observer would know. *See McCreary.*, 545 U.S. at 857, 871 (affirming that the Counties' purported new purpose "crumble[s]…upon an examination of the history of…litigation" regarding related government actions); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) (striking down the school district's policy as "the latest step in developing litigation brought as a challenge to institutional

[10] While the government may take curative actions to neutralize an impermissible religious purpose, these actions must "be sufficient not only to persuasively present a primary nonreligious effect, but also to disassociate the [government action] from its previous religious effect." *Felix v. City of Bloomfield*, 841 F.3d 848, 863 (10th Cir. 2016). The President has taken no actions to disassociate himself from his prior statements.

practices that unquestionably violated the Establishment Clause"); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir. 1996) (finding Texas' School Prayer Statute unconstitutional in light of its reactionary relationship to litigation affirming the suspension of school principal who allowed students to lead prayer over the school's intercom). Defendants, acting with knowledge that the Executive Orders were unconstitutional, issued a substantially similar Proclamation. Courts should not "turn a blind eye" to their own prior evaluations of EO-1 and EO-2, nor to the impact those decisions have on objective observers of the Proclamation. *Santa Fe*, 530 U.S. at 315.

The Government suggests that the President, after taking office, has effected a "genuine change[] in constitutionally significant conditions" through a handful of statements, unrelated to his immigration and travel bans, that are not hostile to Muslims. Opp. 43. None of the statements disavow the Muslim ban promise, and no reasonable observer would be "able to awake without the vivid memory of" the President's prior statements. *IRAP*, 857 F. 3d at 599. And certainly no reasonable observer could ignore that the President persistently attempted to ban Muslims, trying different formulations and rationales; that the President has advocated tougher bans that are not "politically correct";[11] and that he continues to laud an even rougher, explicitly anti-Muslim approach to fighting terror: a mythical account of General John Pershing executing Muslim insurgents in the Philippines with bullets dipped in pigs' blood.[12] Just as the counties in *McCreary* never "repudiated" the resolutions authorizing prior Ten Commandments displays, Opp. 43, neither has the President repudiated his intent to ban Muslims.

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[11] Donald J. Trump (@real Donald Trump), Twitter (June 5, 2017, 6:20 PM EDT); Donald J. Trump (@real Donald Trump), Twitter (Sept. 15, 2017, 6:54 AM EDT)

[12] Alex Horton, *Trump Said to Study General Pershing. Here's What the President Got Wrong*, Wash. Post (Aug. 18, 2017), https://goo.gl/tY5ZbA.

3. The Proclamation violates the Equal Protection Clause.

The Government argues that the Equal Protection claim fails for the same reasons as the Establishment Clause claim. Opp. 43 n.20. But the Government's argument fails because both direct and circumstantial evidence of discriminatory intent may be considered under an equal protection analysis.

The Proclamation violates the Equal Protection Clause if it has a discriminatory impact and there is "proof that a discriminatory purpose has been a motivating factor in the [challenged] decision." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). The discriminatory impact is clear given that the ban overwhelmingly bars travel by Muslims. To determine whether a purpose of discriminating against Muslims was a "motivating factor" for the Proclamation, the Court must conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id*; *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279, n.24 (1979) (describing the inquiry as "practical"). This evidence can be drawn from "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes," the "specific sequence of events leading up [to] the challenged decision," and procedural and substantive departures from established procedures. *Arlington Heights*, 429 U.S. at 266.

The historical background and the specific sequence in which the Proclamation came about show that it was motivated by anti-Muslim animus. *See* Am. Compl. ¶¶ 28-38, 41, 43-44, 50, 56, 61. The President's statements, which courts found to be persuasive evidence that EO-1 and EO-2 were motivated by religious animus, are equally probative of the discriminatory intent behind the Proclamation. *See, e.g.*, *Jean v. Nelson*, 711 F.2d 1455, 1490-92 (11th Cir. 1983) (finding evidence of prior discriminatory policies and internal discussions regarding those policies, to be probative of whether the challenged policy was motivated by discriminatory intent);

see also N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 224-225 (4th Cir. 2016) ("that a legislature impermissibly relied on race" in enacting a prior election law "certainly provides relevant evidence as to whether race motivated other election legislation passed by the same legislature"). The sequence leading up to the Proclamation—the third attempt to accomplish a goal that courts have twice enjoined—is also evidence of discriminatory intent. *See, e.g.*, *NAACP*, 831 F.3d at 227 (finding discriminatory purpose based, in part, on fact that several prior proposed election law changes were found to be discriminatory).[13]

The Proclamation's effect—to bar entry by nationals of certain Muslim-majority countries—is also "probative of why the action was taken in the first place since people usually intend the natural consequences of their action." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997). That the ban does not include *all* Muslim-majority countries does not preclude a finding of discriminatory intent. *See Feeney*, 442 U.S. at 277 ("Invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude."). Nor does it matter that the ban will affect non-Muslims too: "[a] willingness to inflict collateral damage by harming … individuals from a favored group in order to successfully harm members of a disfavored class does not cleanse the taint of discrimination." *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1159 (9th Cir. 2013).

Given the overwhelming "direct and circumstantial" evidence of discriminatory intent, the Proclamation violates the Equal Protection Clause.

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[13] That some of the President's statements were made before he took office is irrelevant. *See, e.g.*, *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (looking to referendum campaign statements in the context of an Equal Protection Clause inquiry); *Arce v. Douglas*, 793 F.3d 968, 979-80 (9th Cir. 2015) (looking to campaign statements of Superintendent of Public Education and Attorney General in assessing discriminatory intent).

III. Plaintiffs Have Satisfied The Other Requirements For Injunctive Relief.

1. The Government ignores entirely the irreparable harm resulting from the Establishment Clause violation. The law is clear—and the Government does not dispute—that "[v]iolations of First Amendment rights constitute per se irreparable injury." *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978). The Government contends that Plaintiffs will not suffer irreparable harm because they have shown only that the Proclamation might delay the entry of family members. Opp. 44. But this delay is sufficient to establish irreparable harm: The Proclamation bans entry to Plaintiffs' family members indefinitely. Plaintiffs do not know when, if ever, they will be reunited. *See IRAP*, 857 F.3d at 601-02; *see also Hawaii*, 859 F.3d at 782-83.

2. The Government also fails to show that the balance of equities and public interest weigh against an injunction. The Government invokes the public interest in the President exercising his national-security and foreign-policy authorities (Opp. 44), but the public has no interest in the President exercising his powers in violation of Constitution. *See Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (government not "harmed by issuance of a preliminary injunction which prevents [it] from enforcing restrictions likely to be found unconstitutional"); *see also id.* ("upholding constitutional rights surely serves the public interest.").

CONCLUSION

Plaintiffs' motion for a preliminary injunction should be granted.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 14, 2017, a copy of the foregoing document was served on counsel for Defendants, via CM/ECF.

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