No. 17-17168

IN THE
United States Court of Appeals for the Ninth Circuit

STATE OF HAWAII, *et al.*,
Plaintiffs-Appellees,
v.
DONALD J. TRUMP, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawaii, No. 1:17-cv-00050-DKW-KSC
District Judge Derrick K. Watson

OPPOSITION TO MOTION OF DEFENDANTS-APPELLANTS FOR AN EMERGENCY STAY PENDING EXPEDITED APPEAL AND ADMINISTRATIVE STAY

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INTRODUCTION

On September 24, 2017, the President unveiled his latest effort to ban travel from a set of Muslim-majority countries. As before, the new order flouts the statutory and constitutional restrictions on the President's immigration power: It indefinitely suspends immigration from the targeted countries without making adequate findings under 8 U.S.C §§ 1182(f) and 1185(a); it mandates precisely the nationality-based discrimination in the issuance of visas that is barred by 8 U.S.C. § 1152; and, because it is a continuation of the President's ongoing effort to prevent Muslim immigration, it violates the Constitution's guarantees of religious freedom and equal protection. Thus, as before, the order was swiftly enjoined by the District Court.

The Government now seeks a stay of that injunction, but it offers no reason why an order that shares the same statutory and constitutional defects as its precursors should not share those orders' fate before the courts. As this Court held when the President first attempted to implement his unlawful travel ban, the Government's purported national security harms are clearly outweighed by the irreparable harms inflicted on the State of Hawaii, the other Plaintiffs, and the public as a whole. Moreover, as in the past, the Government's claims of urgency are belied by its own behavior: The order deferred implementation of the bulk of its restrictions for almost a month, and even after it was enjoined the Government

waited a full week to request a stay. And, because the Government has not corrected the deficiencies that made the prior orders unlawful, it is no more likely to prevail on the merits.

In short, none of the stay requirements are met, and the Government's request should be denied.

BACKGROUND

A. Earlier Executive Orders

By now, this Court is well familiar with the background of this case. Seven days after taking office, the President issued an executive order entitled "Protecting the Nation From Foreign Terrorist Entry Into The United States," Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Feb. 1, 2017) ("EO-1"), which purported to temporarily ban entry into the United States by nationals of seven Muslim-majority countries and all refugees. The District Court for the Western District of Washington swiftly enjoined EO-1, and this Court declined to stay the injunction. *Washington* v. *Trump*, 847 F.3d 1151, 1156 (2017) (per curiam).

Rather than seek review of that decision, the President issued a new order, which bore the same title and imposed nearly the same bans as EO-1. *See* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) ("EO-2"). This new order barred entry by nationals of six overwhelmingly Muslim countries for 90 days, excluded all refugees for 120 days, and capped annual refugee admissions at

50,000. *Id.* §§ 2(c), 6(a)-(b). EO-2 also established a process to identify "additional countries" for "inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals." *Id.* § 2(e).

Before EO-2 could take effect, the District Court enjoined the order's travel and refugee bans. *Hawaii* v. *Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017). This Court largely affirmed. *Hawaii* v. *Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam). It held that the President had not satisfied the "essential precondition" for invoking the statutes on which EO-2 rested—8 U.S.C. §§ 1182(f) and 1185(a)—because EO-2's "findings" did not "support the conclusion that entry of" the affected classes of aliens "would be harmful to the national interest." *Id.* at 755, 770. The Court further held that EO-2 "violat[ed] the non-discrimination mandate" of 8 U.S.C. § 1152(a)(1)(A) by "suspending the issuance of immigrant visas and denying entry based on nationality." *Id.* at 776, 779. And it found that the refugee cap contravened 8 U.S.C. § 1157(a). *Id.* at 779.

The Supreme Court granted certiorari in this case and a parallel Fourth Circuit suit and partially stayed the injunction pending its disposition. *Trump* v. *Int'l Refugee Assistance Project* ("*IRAP*"), 137 S. Ct. 2080 (2017) (per curiam). The Government did not seek expedited review, and two weeks before the scheduled oral argument, EO-2's travel ban expired. The Court therefore removed the case from its oral argument calendar, and after the refugee ban expired on

October 24, 2017, it dismissed the case as moot. *Trump* v. *Hawaii*, No. 16-1540, 2017 WL 4782860, at *1 (U.S. Oct. 24, 2017). "Following [its] established practice in such cases," the Supreme Court vacated this Court's judgment but "express[ed] no view on the merits." *Id.*

B. The Third Executive Order

The same day that EO-2's travel ban expired, the President issued a proclamation entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats," Proc. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017) ("EO-3"). Despite the changed nomenclature, EO-3 is a direct descendant of EO-1 and EO-2. The very first line of the order identifies it as an outgrowth of EO-2. EO-3 pmbl. And the order continues, and makes indefinite, substantially the same travel ban that has been at the core of all three executive orders. *See id.* § 2.

In particular, EO-3 continues to ban all immigration from five of the six overwhelmingly Muslim countries covered by EO-2: Iran, Libya, Syria, Yemen, and Somalia. *Id.* § 2(b)-(c), (e), (g)-(h). It also swaps out the sixth Muslim-majority country, Sudan, for another Muslim-majority country, Chad. *Id.* § 2(a). In addition, the order prohibits all non-immigrant visas for nationals of Syria, bars all non-immigrant visas except student and exchange visas for nationals of Iran,

and prohibits business and tourist visas for nationals of Libya, Yemen, and Chad. *Id.* § 2(a)-(c), (e), (g)-(h).

EO-3 also addresses two non-Muslim-majority countries. But both additions are almost entirely symbolic. The order bars some forms of entry for a small set of Venezuelan government officials. *Id.* § 2(f). And it bans all entry from North Korea—a country that sent fewer than 100 nationals to the United States last year, and that was already subject to extensive entry bans. *See* Compl. ¶ 93 nn.57-59 (D. Ct. Dkt. 381).

EO-3 immediately went into effect for nationals already subject to EO-2 and not protected by the District Court's partially-stayed injunction. EO-3 § 7(a). It was set to go into full effect on October 18, 2017. *Id.* § 7(b).

C. The District Court's Opinion

On October 10, 2017, the State of Hawaii and Dr. Ismail Elshikh moved to file a Third Amended Complaint challenging certain provisions of EO-3 and adding three new Plaintiffs: two John Does with family members affected by EO-3 and the Muslim Association of Hawaii. D. Ct. Dkts. 367, 380-381. Plaintiffs also moved for a TRO against the provisions of EO-3 banning entry from every targeted country except Venezuela and North Korea.

On October 17, 2017, the District Court granted Plaintiffs' request for a TRO. TRO Op. 2-3 (D. Ct. Dkt. 387). It held, at the outset, that each Plaintiff had

standing to challenge EO-3. Just as this Court found with respect to EO-1 in *Washington* and with respect to EO-2 in *Hawaii*, the District Court concluded that EO-3 "harms * * * the State's proprietary interests" by "hinder[ing] the University from recruiting and retaining a world-class faculty and student body," including numerous existing and prospective students, faculty, and speakers from the targeted countries. *Id.* at 11-12. The District Court also found that EO-3 harms Dr. Elshikh, John Doe 1, and John Doe 2 by impairing each individual's ability to reunite with close relatives in the targeted countries. *Id.* at 14-17. And the court found that the order harms the Muslim Association of Hawaii by diminishing its membership and visitors. *Id.* at 17-20. The Court also "ha[d] little trouble" rejecting the Government's various challenges regarding statutory standing, ripeness, and reviewability. *Id.* at 20.

On the merits, the District Court concluded that it did not need to reach Plaintiffs' constitutional challenge because Plaintiffs were likely to succeed in showing that EO-3 violates the INA. *Id.* at 25. The court found that EO-3 likely exceeds the express limits on the President's suspension authority under Sections 1182(f) and 1185(a) because its "findings are inconsistent with and do not fit the restrictions that the order actually imposes." *Id*. Among other problems, the order gives no reason "why existing law is insufficient to address the President's described concerns"; contains "internal inconsistencies that markedly undermine

its stated 'national security' rationale"; and is both "overbroad *and* underinclusive." *Id.* at 27-33. The court also found that "EO-3 attempts to do exactly what Section 1152 prohibits" by "singling out immigrant visa applicants seeking entry to the United States on the basis of nationality." *Id.* at 33-35.

The District Court held that the remaining TRO factors were satisfied. It found that Plaintiffs had "identif[ied] a multitude of harms that are . . . irreparable," including "prolonged separation from family members" and "constraints to recruiting and retaining students and faculty members." *Id.* at 36. In contrast, Defendants "are not likely harmed by having to adhere to immigration procedures that have been in place for years." *Id.* at 37. "[C]arefully weighing the harms," the court concluded that "the equities tip in Plaintiffs' favor," and—consistent with *Washington* and *Hawaii*—issued "[n]ationwide relief." *Id.* at 37-38.[1]

On October 20, 2017, the parties jointly stipulated that the TRO in this case should be converted to a preliminary injunction. D. Ct. Dkt. 389.

ARGUMENT

A "stay is an 'intrusion into the ordinary processes of administration and judicial review,' and accordingly 'is not a matter of right, even if irreparable injury

[1] Later on the same day that the District Court issued its decision, the U.S. District Court for the District of Maryland concluded that the order violated Section 1152 and the Establishment Clause and issued an additional order largely enjoining EO-3's implementation. *IRAP* v. *Trump*, 2017 WL 4674314 (D. Md. Oct. 17, 2017), *appeal docketed*, No. 17-2240 (4th Cir. Oct. 23, 2017).

might otherwise result to the appellant.'" *Nken* v. *Holder*, 556 U.S. 418, 427 (2009). The Government bears the heavy burden of "showing that the circumstances justify an exercise of [the Court's] discretion." *Id.* at 433-434. In determining whether a stay should issue, the Court is "guided by four questions: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Washington*, 847 F.3d at 1164 (quoting *Lair* v. *Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012)).

Just as with EO-1 and EO-2, the Government cannot make the steep showing required for a stay. The District Court properly concluded that Plaintiffs were likely to succeed in showing that EO-3 contravenes the clear limits contained in 8 U.S.C. §§ 1182(f), 1185(a), and 1152(a), and that the equities balanced in Plaintiffs' favor. The scope of the injunction was likewise proper. The Government's request for a stay should be denied.

I. The Government Is Not Likely To Prevail On The Merits.

A. The Order Is Reviewable.

Judicial review of EO-3 is available through two well-trod paths. Courts have the equitable power to enjoin "violations of federal law by federal officials." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *see*

Chamber of Commerce of U.S. v. *Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (Silberman, J.). And the Administrative Procedure Act ("APA") authorizes courts to "set aside agency action" at the behest of an "aggrieved" person. 5 U.S.C. §§ 702, 706(2). Plaintiffs may invoke both sources of judicial authority, because they fall within the "zone of interests" of the relevant provisions of the INA. TRO Op. 20-21.

The Government asserts (at 10) that review is precluded by the doctrine of consular nonreviewability. But as this Court has held, that doctrine concerns only judicial review of an individual consular officer's decision to deny a visa; it does not apply to a challenge to "the President's *promulgation* of sweeping immigration policy." *Washington*, 847 F.3d at 1162; *see Hawaii*, 859 F.3d at 768.[2] That holding remains the law of this Circuit. It also follows directly from Supreme Court precedent. In *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), the Supreme Court evaluated whether "[t]he President * * * violate[d]" various

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[2] The District Court's holding is correct irrespective of this Court's June decision in *Hawaii*. But because the Supreme Court's vacatur "express[ed] no view on the merits," *Hawaii*, 2017 WL 4782860, at *1, and because the Government has "agree[d] that the Court may cite" a decision vacated as moot "as persuasive authority," *IRAP*, 2017 WL 4674314, at *6 n.1, Plaintiffs cite this Court's well-reasoned *Hawaii* opinion as persuasive support for the District Court's conclusions. *See generally DHX, Inc.* v. *Allianz AGF MAT, Ltd.*, 425 F.3d 1169, 1176 (9th Cir. 2005) (Beezer, J., concurring) (collecting cases and explaining that "a vacated opinion still carries informational and perhaps even persuasive or precedential value").

provisions of the INA by invoking his authority under 8 U.S.C. § 1182(f) to "suspend[] the entry of undocumented aliens from the high seas." 509 U.S. at 158, 160. Although the Government argued extensively that the plaintiffs' claims were unreviewable, U.S. Br. 13-18 (No. 92-344); Oral Arg. Tr., 1993 WL 754941, at *16-22 (Mar. 2, 1993), no Justice accepted that argument.

The Government also argues (at 13-14) that judicial review is not available under the APA for a variety of reasons. None of its arguments has merit. Although the President himself is not an "agency," "injunctive relief against executive officials like" Cabinet Secretaries is "within the courts' power," and Plaintiffs' injuries can be redressed that way. *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-803 (1992); *see Hawaii*, 859 F.3d at 788; *Chamber of Commerce*, 74 F.3d at 1327-28. Plaintiffs' claims are ripe because, if EO-3 were allowed to go into effect, it would immediately impede Plaintiffs from recruiting students, faculty, and speakers, reuniting with their families, and welcoming new members and visitors to the Association. TRO Op. 22; *see Abbott Labs.* v. *Gardner*, 387 U.S. 136, 152 (1967); *Hawaii*, 859 F.3d at 767-768. And the President's suspension power is not "committed to" his sole "discretion." Mot. 13 (quoting 5 U.S.C. § 701(a)(2)). Plaintiffs' core claim is that the INA imposes statutory *limits* on the President's power. The Court can and should review whether the President has exceeded those limits. *See Dalton* v. *Specter*, 511 U.S. 462, 474 (1994).

B. The Order Violates the INA.

1. EO-3 exceeds the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a).

EO-3 exceeds the limits on the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a). Those provisions require the President to make "find[ings]" that support the ordered exclusions. As the District Court correctly found, none of EO-3's rationales justifies the sweeping restrictions on entry the President has imposed.[3]

a. Section 1182(f) provides that the President may suspend any class of aliens whose entry he "find[s] * * * would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). By its plain text, this provision sets an "essential precondition" for invocation of the President's suspension power: Before excluding any class of aliens from the country, the President must issue a "find[ing]" that supports the conclusion that entry of the prohibited class "would be detrimental to the interests of the United States." *Hawaii*, 859 F.3d at 755, 770.

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[3] Because the District Court concluded that EO-3 likely violated the statute's "finding" requirement, it did not reach Plaintiffs' alternative argument that the order transgresses the substantive limits on the President's suspension authority—adhered to by every President since 1917—by excluding aliens who are not akin to subversives, war criminals, or the statutorily inadmissible in the absence of an exigency in which it is impracticable for Congress to act. That transgression further demonstrates Plaintiffs' likelihood of success on the merits.

This interpretation accords with both precedent and common sense. When a statute requires that an officer make "findings," courts invariably have authority to inquire whether there is some "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962). Otherwise, the President could justify an exclusion for an irrational reason or no reason at all—by "finding," for example, that Somali nationals must be excluded because their visas are printed in a color the President dislikes. Congress drafted Section 1182(f) and its predecessors to use the word "find," rather than "deem," precisely so that the President would need to "base his [decision] on some fact," and could not rely on mere "opinion" or "guesses." 87 Cong. Rec. 5051 (1941) (statements of Rep. Jonkman and Rep. Jenkins).

The Government observes (at 16) that prior orders have not included "detailed" findings. But the question is not the elaborateness of an order's findings, but whether they actually support the exclusions ordered. Every past order the Government cites excluded aliens because they were found to have engaged in self-evidently harmful conduct, such as supporting "subversive activities" against the United States or its allies,[4] committing severe violations of

[4] Proc. 5887, 53 Fed. Reg. 43,184 (Oct. 25, 1988); *see* Proc. 5829, 53 Fed. Reg. 22,289 (June 14, 1988).

international law,[5] or attempting to enter the country "illegally."[6] Those findings, while brief, plainly supported the exclusion of the culpable aliens.

Further, contrary to the Government's suggestion (at 15), the President cannot dispense with Section 1182(f)'s "finding" requirement simply by invoking his authority under 8 U.S.C. § 1185(a). Section 1182(f) specifically governs the President's power to suspend entry. Section 1185(a), in contrast, grants the President general authority to "prescribe" "reasonable rules, regulations, and orders" over entry and departure. 8 U.S.C. § 1185(a)(1). Under established principles of statutory interpretation, the more general authority cannot be used to evade the preconditions in the specific one. *See Hawaii*, 859 F.3d at 770 n.10. Nor has any prior President attempted such a circumvention; every previous order suspending a class of aliens has both invoked Section 1182(f) and offered some finding in support of the exclusion.[7]

b. EO-3 fails to satisfy the precondition for invoking Sections 1182(f) and 1185(a). The principal reason the order gives for banning every national of six

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[5] Proc. 8342, 74 Fed. Reg. 4093 (Jan. 22, 2009) (human trafficking); Proc. 6958, 61 Fed. Reg. 60,007 (Nov. 26, 1996) (sheltering international terrorists).
[6] Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (June 1, 1992); *see also* Proc. 8693, 76 Fed. Reg. 44,751 (July 27, 2011) (excluding aliens falling into all three groups).
[7] The Government points (at 17) to President Carter's 1979 order. But that order did not suspend entry at all; it delegated the President's general Section 1185(a)(1) powers with respect to Iranian visa-holders. Exec. Order No. 12,172, § 1-101, 44 Fed. Reg. 67,947 (Nov. 28, 1979).

countries is that those countries do not follow adequate "identity-management and information-sharing protocols and practices" to provide the United States "sufficient information to assess the risks" that their nationals pose. EO-3 § 1(h)(i). As the District Court explained, that finding is wholly inadequate for at least three reasons.

First, the law already addresses the problem the President identifies. TRO Op. 29. "[A]s the law stands, a visa applicant bears the burden of showing that the applicant is eligible to receive a visa," and "[t]he Government already can exclude individuals who do not meet that burden." *Id.*; *see* 8 U.S.C. § 1361. Contrary to the Government's suggestion (at 18), EO-3 fails to explain how this individualized adjudication process is flawed. Rather, it states that the targeted countries "have 'inadequate' * * * information-sharing practices." EO-3 § 1(g). But if a foreign government does not provide information necessary to determine whether a national of that country is a terrorist, immigration officers already can deny entry to that individual. There is no logical reason why an additional sweeping restriction is necessary.

Second, EO-3 contradicts its stated rationale. TRO Op. 30-31. The Government claims that it "lack[s] sufficient information to assess the risks" that nationals of the banned countries purportedly pose, EO-3 § 1(h)(i), but the order permits nationals from nearly every banned country to enter on a wide variety of

nonimmigrant visas. *See* EO-3 § 2(a)-(c), (g)-(h). EO-3 fails to explain why it would be detrimental to the national interest to admit aliens as business travelers or tourists but not (for example) as crewmembers, exchange visitors, or agricultural workers. *See generally* U.S. Dep't of State, *Directory of Visa Categories*, https://goo.gl/c1t3P3 (last visited Oct. 30, 2017).

Moreover, although EO-3 purports to be the product of a neutral review of each country's information-sharing capability and identity-management practices, it conspicuously fails to adhere to its own criteria. TRO Op. 29-30. Both Iraq and Venezuela failed to meet the Administration's baseline standards, yet the President declined to impose any entry ban on Iraq and imposed *de minimis* restrictions on Venezuela. *See* EO-3, §§ 1(g), 2(f). Conversely, Somalia satisfied all of the baseline standards, but the President imposed significant restrictions on the country nonetheless. *Id.* § 2(h).

Third, EO-3 is substantially overbroad. The United States does not need information from a foreign government in order to confirm that a child under the age of 5 or an alien fleeing persecution is not a terrorist. Nor is it plausible that the banned countries have meaningful information about aliens who left as children or whose nationality is based solely on the nationality of their parents. *See* TRO Op. 28. The Government's only response is to assert (at 19) that a foreign government's identity-management practices "apply" to all of their nationals. But

in the absence of some reason to believe a foreign government actually has probative information revealing that a toddler or a person who has never set foot in the country is a threat, that rationale is inadequate to justify the nationality-based bans the President imposed.[8] Much like EO-2, EO-3 makes no finding sufficient to show that "nationality alone renders" the banned individuals "a heightened security risk." *Id.* (quoting *Hawaii*, 859 F.3d at 772).

Perhaps recognizing these problems, the President offered an alternative justification for the travel ban: EO-3 states that the bans will serve as a bargaining chip to help "elicit" greater cooperation from the affected governments. EO-3 § 1(h)(i), (iii). But the President's finding that an entry ban would "encourage positive future behavior," Mot. 18, does not suffice under the plain text of the statute. The President must find that "*entry*" "would be detrimental to the interests of the United States"—in other words, that *entry* would cause some *harm* to U.S. interests. Otherwise, the "finding" requirement would be an empty shell. Every restriction on entry imposes diplomatic pressure on the target government, and the President could always claim that such pressure furnished a basis for whatever ban he wished to impose.

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[8] The order's waiver provision does not solve this problem: It continues to subject all individuals from the targeted countries to heightened restrictions, and it bars their entry unless they can show that denying admission would cause "undue hardship" and that "entry would be in the national interest." EO-3 § 3(c)(i).

2. EO-3 violates the INA's prohibition on nationality-based discrimination.

EO-3 also violates the INA's antidiscrimination provision. Section 1152(a)(1)(A) provides that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of * * * nationality." 8 U.S.C. § 1152(a)(1)(A). As Judge Sentelle has explained, "Congress could hardly have chosen more explicit language" in "unambiguously direct[ing] that no nationality-based discrimination shall occur." *Legal Assistance for Vietnamese Asylum Seekers ("LAVAS")* v. *Dep't of State*, 45 F.3d 469, 473 (D.C. Cir. 1995). Indeed, Congress enacted Section 1152 to abolish the pernicious "national origins system" that had dominated immigration earlier in the twentieth century. *See* H.R. Rep. No. 89-745, at 8 (1965).

EO-3 flouts the plain text of Section 1152(a). TRO Op. 35. It imposes indefinite bans on immigration from six countries "because of [the aliens'] nationality," effectively reestablishing the national-origins system that Congress enacted Section 1152(a) to eliminate.

The Government attempts to justify the President's flagrant violation of Section 1152(a)(1)(A) by asserting (at 21) that the provision bans nationality discrimination among those eligible for visas, but leaves the President free to discriminate in deciding visa eligibility under Sections 1182(f) and 1185(a)(1). But permitting that circumvention of the statute's restrictions would turn it into a

"nullity." *Dada* v. *Mukasey*, 554 U.S. 1, 16 (2008). As this Court explained in rejecting a similar defense of EO-2, this construction "would enable the President to restore [the] discrimination on the basis of nationality that Congress sought to eliminate." *Hawaii*, 859 F.3d at 777.

Moreover, the Government's interpretation is a complete departure from the text: Section 1152(a)(1)(A) carves out certain provisions from its reach before providing an absolute guarantee that "no person shall * * * be discriminated against" based on "nationality." Neither Section 1182(f) nor Section 1185(a) is among the carveouts, although both predate Section 1152.[9] And, as this Court previously explained, any conflict between "the President's broad authority to exclude aliens" and Section 1152's "specific" bar on nationality discrimination must be resolved in favor of Section 1152. *Hawaii*, 859 F.3d at 778.

Nevertheless, the Government contends (at 22) that the President must be permitted to impose his country bans because Presidents have imposed similar restrictions in the past. But the orders the Government points to are readily distinguishable, because they were issued in "exigent" circumstances. *Hawaii*, 859 F.3d at 772 n.13. President Carter's Iran order came in the midst of the Iranian hostage crisis, and even then it did not itself impose any restrictions on entry.

[9] The Government gestures (at 23) towards the 1978 revisions to Section 1185(a), but nothing in those amendments remotely suggests an intent to repeal or limit Section 1152.

Exec. Order No. 12,172; *see supra* n.7. Similarly, President Reagan's Cuba order was issued during a dynamic diplomatic dispute, after lesser sanctions had failed and it became obvious that the Cuban government was using the visa process to "traffick[] in human beings" by extorting funds from visa applicants. 86 U.S. Dep't of State Bull. No. 2116, *Cuba: New Migration and Embargo Measures* 86-87 (Nov. 1986). As the D.C. Circuit has held, Section 1152(a)'s prohibition on "discrimination" may not foreclose nationality-based restrictions that are narrowly tailored to address a genuine exigency. *LAVAS*, 45 F.3d at 473. But the President has pointed to no exigency that would justify the enjoined provisions of EO-3.[10]

C. The Order Violates the Establishment Clause.

The District Court did not reach Plaintiffs' claims that EO-3 violates the Constitution's guarantees of religious freedom and equal protection because that court found EO-3's clear statutory violations sufficient to sustain an injunction. But EO-3's constitutional defects further diminish the likelihood that the Government will prevail. As the President's own statements demonstrate, and as the only court to rule on the issue has concluded, EO-3 is the latest iteration of the

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[10] While the District Court held that Section 1152 only bars discrimination in the issuance of immigrant visas, the provision demonstrates a broader congressional policy against nationality-based discrimination in the immigration system. *Wong Wing Hang* v. *INS*, 360 F.2d 715, 719 (2d Cir. 1966) (Friendly, J.). Thus, Section 1152 also provides an alternate ground for upholding the injunction against EO-3's restrictions on nonimmigrant visas.

President's ongoing effort to enact a Muslim ban. *IRAP*, 2017 WL 4674314, at *27-37. Moreover, EO-3's irrationality, its connection with EO-1 and EO-2, and the President's selection of countries in defiance of the purportedly neutral criteria devised by his Administration all suggest that the President was pursuing the unconstitutional object of excluding Muslims. *Id.*; *see supra* pp. 14-16.

II. The Government Will Not Suffer Irreparable Harm In The Absence Of A Stay.

The Government has not demonstrated that it would suffer irreparable injury without a stay. The injunction merely "maintain[s] the status quo" that has prevailed in immigration "for years." TRO Op. 37; *see Washington*, 847 F.3d at 1168. The Government pleads for "deference" to its national security interests. Mot. 8. But "national-security concerns" are not a "talisman." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1862 (2017). The Government has not explained how existing vetting procedures are "flawed such that permitting entry of an entire class of nationals is injurious to the interests of the United States." TRO Op. 29 (quoting *Hawaii*, 859 F.3d at 773); *see supra* pp. 13-16. Nor has it identified any imminent threat to which the order responds. *See* Jt. Decl. of Former National Security Officials ¶¶ 5-12 (D. Ct. Dkt. 383-1). Indeed, the Government's own conduct belies the existence of an exigency: EO-3 delayed the restrictions' effective date for weeks, and after the TRO was issued, the Government waited a full week to seek a stay.

Lacking any genuine national-security imperative, the Government falls back on the purported harm inflicted by a judicial "overrid[e]" of "the President's judgment." Mot. 9. But, as this Court explained in *Washington*, any alleged "institutional injury by erosion of the separation of powers * * * is not 'irreparable'" and cannot justify a stay. 847 F.3d at 1168.

III. Plaintiffs And The Public Will Suffer Irreparable Harm If A Stay Is Entered.

Granting the Government's requested stay would irreparably harm Plaintiffs. If put into effect, EO-3 would result in "prolonged separation from family members, constraints to recruiting and retaining students and faculty members" at the State's University, and "diminished membership" for the Muslim Association of Hawaii. TRO Op. 36. These are textbook examples of irreparable injuries, *Washington,* 847 F.3d at 1169; *see Hawaii*, 859 F.3d at 782-783, and the Government does not contest the majority of them. Instead, it asserts only that delays in entry are not irreparable because they are too "speculative." Mot. 10. But as soon as EO-3 enters into effect, it will constrain Hawaii's "university employees and students" and prolong the "separation of families." *Washington*, 847 F.3d at 1169; *see Hawaii*, 859 F.3d at 782-783. Those harms are immediate and strongly counsel against a stay.

Moreover, a stay will immediately harm the public, which "has an interest in free flow of travel, in avoiding separation of families, and in freedom from discrimination." *Washington*, 847 F.3d at 1169.

IV. The Balance Of Equities Favors The Injunction.

The equities support the full scope of the District Court's injunction. Courts have repeatedly held that nationwide relief is proper to redress the President's violation of the immigration laws. *See Washington*, 847 F.3d at 1166-67; *Hawaii*, 859 F.3d at 787-788; *Texas* v. *United States*, 809 F.3d 134, 187-188 (5th Cir. 2015), *aff'd by equally divided Court*, 136 S. Ct. 2271 (2016). When an Executive Branch policy contravenes a statute, it is invalid in all applications and must be enjoined on its face. *See, e.g.*, *Sierra Club* v. *Bosworth*, 510 F.3d 1016, 1023-24 (9th Cir. 2007). That is all the more true in the immigration realm, given that piecemeal relief would "fragment[] immigration policy" and "run afoul of the constitutional and statutory requirement for uniform immigration law and policy." *Washington*, 847 F.3d at 1166-67.

The Government urges this Court (at 24) to limit the injunction against EO-3 to aliens who have a "bona fide relationship with a person or entity in the United States." That argument is waived. The Government proposed several restrictions on the scope of a TRO in the District Court, but the restriction it now proposes was not one of them. *See* TRO Opp. 39-40 (D. Ct. Dkt. 378). Further, when the

District Court issued a nationwide TRO, the Government stipulated to its conversion to a preliminary injunction without objecting *in any way* to its scope. Just as this Court held two months ago, "the Government did not raise [its] argument regarding the scope of the injunction before the district court, and has therefore waived it." *Hawaii* v. *Trump*, 871 F.3d 646, 658 n.8 (2017) (per curiam).

In any event, as the Government concedes, the Supreme Court's stay judgment in *IRAP* was "tailored * * * to the circumstances presented there," and this order is "very different." Mot. 24; *see IRAP*, 137 S. Ct. at 2087 (Court's equitable judgment in crafting an injunction is "dependent * * * on the equities of a given case"). Notably, the harms of EO-3 are increased because unlike in EO-2, the travel bans apply *indefinitely.* Further, the Muslim Association of Hawaii points to the injury inflicted by its inability to welcome new individuals from the targeted nations to enrich the mosque. Because those new individuals do not yet have a bona fide relationship with the United States, a stay "tailored" as the Government requests will not ameliorate that profound harm.

CONCLUSION

For the foregoing reasons, the Government's requested stays should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitations of Circuit Rule 27-1 and 32-3(2) because it contains 5,397 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 27(a)(2)(B) and 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 31, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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