17-17168

United States Court of Appeals for the Ninth Circuit

STATE OF HAWAII, ISMAIL ELSHIKH, JOHN DOES 1 & 2, and MUSLIM ASSOCIATION OF HAWAII, INC.,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; ELAINE DUKE, in her official capacity as Acting Secretary of Homeland Security; UNITED STATES DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawaii
No. 17-cv-50 (DKW/KSC)

BRIEF FOR THE STATES OF NEW YORK, ILLINOIS, CALIFORNIA, CONNECTICUT, DELAWARE, IOWA, MAINE, MARYLAND, MASSACHUSETTS, NEW MEXICO, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, and WASHINGTON, and THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF APPELLEES

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INTRODUCTION AND INTERESTS OF AMICI

The States of New York, Illinois, California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia submit this brief as amici curiae in support of affirmance. This appeal arises from a challenge by the State of Hawaii and other plaintiffs to Presidential Proclamation No. 9645: the third in a series of presidential orders executed this year that imposed discriminatory bans on the entry into the United States of nationals from six overwhelmingly Muslim countries.[1]

The United States District Court for the District of Hawaii (Watson, J.) issued a preliminary injunction restraining defendants from implementing those sections of the Proclamation.[2] *Hawaii v. Trump*, 2017 WL 4639560 (D. Haw. Oct. 17, 2017). The district court held that interim relief was warranted because plaintiffs would experience irreparable

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[1] *See* Proclamation No.9645, § 2(a)-(c),(e),(g)-(h) (Sept. 24, 2017), 82 Fed. Reg. 45,161 (Sept. 27, 2017).

[2] The injunction does not cover the provisions that bar entry of a limited number of government officials from Venezuela and all North Korean nationals, *see* Proclamation § 2(d),(f).

injury in the absence of an injunction, the balance of the equities favored an injunction, and plaintiffs had made a strong showing of the likelihood of success on the merits of their claims under the Immigration and Nationality Act. This Court previously affirmed an injunction entered against the similar travel ban contained in the second of two Executive Orders that preceded the Proclamation,[3] in an earlier stage in this case.[4]

This brief supplements plaintiffs' brief by providing the perspective and experience of fifteen additional sovereign States and the District of Columbia. Like its predecessors, the Proclamation's entry ban gravely and irreparably harms our universities, hospitals, businesses, communities, and residents. Keeping the preliminary injunction in place will continue to provide critical protection to the state interests the ban endangers.

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[3] Executive Order No.13,780, §§ 2(c), 6(a)-(b) (Mar. 6, 2017), 82 Fed. Reg. 13,209 (Mar. 9, 2017); *see also* Executive Order No.13,769, §§ 3(c), 5(a)-(c), (e) (Jan. 27, 2017), 82 Fed. Reg. 8,977 (Feb. 1, 2017).

[4] *See Hawaii v. Trump*, 859 F.3d 741 (9th Cir.) (per curiam), *cert. granted*, 137 S.Ct. 2080, *vacated and remanded*, 2017 WL 4782860 (Oct. 24, 2017) (with instructions to dismiss as moot).

Amici thus have a strong interest in plaintiffs' challenges to the Proclamation's entry ban. Indeed, like plaintiffs here, many of the amici States have brought suits challenging the two preceding Executive Orders on the grounds that certain aspects of those Orders violated the Establishment Clause of the First Amendment and various other constitutional and statutory provisions.[5] We have also previously filed briefs as amici curiae in this and related cases, including briefs supporting the entry of preliminary injunctions against the previous Orders and the Proclamation at issue here, and briefs opposing any stay of such injunctions.[6]

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[5] Many of the amici States challenged the March Order in *Washington v. Trump*, No.17-cv-141 (W.D.Wash. 2017). They challenged the January Order in *Washington v. Trump*, No.17-cv-141 (W.D.Wash. 2017), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir. 2017); Mass. & N.Y. Amicus Br. (15 States and D.C.), *Washington v. Trump*, No.17-35105 (9th Cir. 2017), ECF No.58-2; *Aziz v. Trump*, 2017 WL 580855 (E.D.Va. 2017).

[6] N.Y. Amicus Br. (16 States and D.C.), *IRAP v. Trump*, No. 17-2231(L) (4th Cir. Nov. 16, 2017), ECF No.90; N.Y. and Ill. Amicus Br. (16 States and D.C.), *Hawaii v. Trump*, No. 17-17168 (9th Cir. Oct. 31, 2017), ECF Nos.15, 23; N.Y. Amicus Br. (17 States and D.C.), *Trump v. IRAP* and *Trump v. Hawaii*, Nos.16-1436, 16-1540 (U.S. Sept. 18, 2017); N.Y. Amicus Br. (15 States and D.C.), *Trump v. Hawaii*, No.16-1540 (U.S. July 18, 2017); Va. Amicus Br. (16 States and D.C.), *Trump v. IRAP*, Nos.16-A1190, 16A-1191 (U.S. June 12, 2017); N.Y. Amicus Br. (16 States and

While amici States differ in many ways, all benefit from immigration, tourism, and international travel by students, academics, skilled professionals, and businesspeople. Like the previous bans, the disputed provisions of the Proclamation continue to significantly disrupt the ability of our States' public colleges and universities to recruit and retain students and faculty, impairing academic staffing and research needs, and causing the loss of tuition and tax revenues, among other costs. The Proclamation likewise continues to disrupt the provision of medical care at amici States' hospitals and further harms our science, technology, finance, and tourism industries by inhibiting—permanently—the free exchange of information, ideas, and talent between the designated countries and our States, causing long-term economic and reputational damage. In addition, the ban has made it more difficult for the States to effectuate our own constitutional and statutory policies of religious tolerance and nondiscrimination.

D.C.), *Trump v. IRAP*, Nos.16A-1190, 16A-1191 (U.S. June 12, 2017); Ill. Amicus Br. (16 States and D.C.), *Hawaii v. Trump*, No.17-15589 (9th Cir. Apr. 20, 2017), ECF No.125; Va. & Md. Amicus Br. (16 States and D.C.), *IRAP v. Trump*, No.17-1351 (4th Cir. Apr. 19, 2017), ECF No.153.

If this Court vacates or narrows the preliminary injunction, all amici States will face further immediate, concrete—and likely permanent—harms flowing directly from the disputed provisions of the Proclamation. Accordingly, amici States have a strong interest in ensuring that the protection provided by the nationwide injunction remains in place throughout the course of this litigation.

ARGUMENT

I. THE PROCLAMATION PERPETUATES, AND MAKES PERMANENT, THE HARM THAT ITS PREDECESSOR ORDERS INFLICTED ON THE AMICI STATES.

A. Harms to the Amici States' Proprietary Interests.

The disputed provisions of the Proclamation block the entry of all immigrants and most nonimmigrants from six Muslim-majority countries,[7] including those who seek to be students and faculty at our public universities, physicians and researchers at our medical institutions, employees of our businesses, and guests who contribute to our

[7] Five of these countries were covered under the previous travel bans: Iran, Libya, Somalia, Syria, and Yemen. The sixth country is Chad.

economies when they come here as tourists or for family visits.[8] The provisions are thus irreparably harming the work of our state institutions and treasuries.[9] *See Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017) (recognizing such harms as irreparable); *Hawaii v. Trump*, 859 F.3d 741, 783 (9th Cir.) (same), *cert. granted*, 137 S.Ct. 2080, *vacated and remanded*, 2017 WL 4782860 (Oct. 24, 2017).

Harms to State Colleges and Universities. State colleges and universities rely on faculty and students from across the world. By interfering with the entry of individuals from the designated countries, the disputed provisions of the Proclamation continue to seriously disrupt our public institutions' ability to recruit and retain students and

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[8] The Proclamation bars *all* immigration from the six affected countries; the issuance of all nonimmigrant visas to Syrians; all business and tourist visas for nationals of Chad, Libya, and Yemen; and all nonimmigrant visas for nationals of Iran, except certain student and exchange visas that will be subject to additional but unspecified scrutiny. *See* § 2(a)-(c), (e), (g)-(h).

[9] All of the amici States support the legal arguments put forth in this brief, although not every specified harm occurs in every State. For example, almost all amici States operate state hospitals, but Delaware does not.

faculty—causing lost tuition revenue, increased administrative burdens, and the expenditure of additional university resources.[10]

As with the two previous travel bans, announcement of the Proclamation's entry ban has created serious doubt as to whether faculty from the designated countries will be able to obtain the visas they need to timely assume positions with public universities in amici States. For example, two scholars who had accepted offers at the University of Washington in 2017 were unable to enter to begin their positions due to the initial travel ban.[11] Similarly, officials at the University of Massachusetts—which typically hires a dozen new employees from the affected countries annually—believe that the Proclamation's now indefinite entry ban will result in the University being "permanently unable to hire top-ranked potential faculty, lecturers or visiting scholars from the affected countries, because [the Proclamation] may preclude

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[10] *See* Third Am. Compl. ¶¶ 41, 43-44, 53, 55-56, 80, 93, 105, 107-108, 125, *Washington v. Trump*, No.17-cv-141 (W.D.Wash.), ECF No.198.

[11] *Id.* ¶ 40.

them from reaching the United States to fulfill their teaching obligations."[12]

The Proclamation's entry ban also continues to disrupt the ability of our public universities to recruit and retain foreign students from the designated countries, imperiling hundreds of millions of tuition dollars and other revenue generated from such students, as well as important academic research projects.[13]

Before this series of travel bans was implemented, amici States' colleges and universities had already made numerous offers of admission for the 2017-2018 academic year to students from the affected countries and—but for the bans' interference with their continuing admissions process—might have admitted many more.[14] Some schools are continuing to make such offers, including to students from nations designated in the Proclamation. But some of these students have withdrawn applications; others have had to abandon entirely their plans to enroll in our university

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[12] *Id.* ¶ 93.

[13] *E.g.*, *id.* ¶¶ 38, 43-46, 53, 57, 86, 94-95, 105, 107, 112.

[14] *E.g.*, *id.* ¶¶ 43-44.

programs due to the bans; and many have chosen not to apply at all, resulting in a significant decline in international student applications at many of amici States' universities.[15]

Indeed, in this climate of uncertainty and discrimination, forty percent of colleges surveyed across the nation reported a drop in applications from foreign students in the wake of the first two travel bans.[16] Graduate departments in science and engineering have reported that "international student applications for many programs declined by 20 to 30 percent for 2017 programs."[17] Additionally, 80 percent of college registrars and admissions officials surveyed have serious concerns about their future application yields from international students.[18] And 46 percent of graduate deans have reported "substantial" declines in

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[15] *E.g.*, *id.* ¶¶ 37, 46, 53, 122.

[16] *See* Kirk Carapezza, *Travel Ban's 'Chilling Effect' Could Cost Universities Hundreds of Millions*, Nat'l Pub. Radio (Apr. 7, 2017) (internet). (For authorities available on the internet, full URLs are listed in the table of authorities.)

[17] Sam Petulla, *Entry Ban Could Cause Doctor Shortages in Trump Territory, New Research Finds*, NBC News (Mar. 7, 2017) (internet).

[18] Carapezza, *supra*.

admission yields for international students.[19] Not surprisingly, countries that are perceived as more welcoming—such as Canada, the United Kingdom, Australia, and New Zealand—have already seen a jump in applications in this same time period.[20] This drain of highly qualified student talent will continue under the Proclamation.

The ability of state institutions of higher education to retain their existing foreign students and faculty has also been compromised by the broad, continuing entry ban contained in the Proclamation. Amici States' public universities and colleges currently have hundreds of students and faculty members from the targeted countries. For example, at Washington State University, there are 140 students and 9 faculty members from the countries designated in the Proclamation, and 105 such graduate students at the University of Washington.[21] The University of Massachusetts has 180 similarly situated students and 25

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[19] Hironao Okahana, *Data Sources: Admissions Yields of Prospective International Graduate Students* (Council of Graduate Schs., June 2017) (internet).

[20] Carapezza, *supra*.

[21] Third Am. Compl. ¶¶ 35-36.

employees.[22] There are 529 such students in the University of California system; 250 in the California State University system; 297 at the State University of New York; and 61 at Portland State University.[23]

Many of these students will need to apply for additional visas during the course of their academic studies because only single-entry visas are permitted from some of the affected countries, and because the required visas are valid only for relatively short periods.[24] And those students and faculty members whose visas are set to expire will face obstacles to renewal—if renewal of their visas is even possible under the disputed provisions of the Proclamation, which prohibit the issuance of most nonimmigrant visas for nationals of the affected countries. Thus, if enforcement of the disputed provisions of the Proclamation is permitted, certain students who are no longer eligible for student visas (e.g., Syrian students) may be required to discontinue their courses of study. And

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[22] *Id.* ¶¶ 91, 94.

[23] *Id.* ¶¶ 53, 58, 108, 124.

[24] U.S. Department of State, Bureau of Consular Affairs, *Reciprocity and Civil Documents by Country* (internet) (search by country and visa types F, M).

other students will face the prospect of not knowing whether they may be denied access to the U.S. institutions where they are studying, particularly if the Proclamation calls for them to be subject to heightened scrutiny and vetting procedures (e.g., Iranian and Somali students).[25]

Any such visa delays or denials could jeopardize not only these individuals' education or employment, but also any grant funding and scientific research projects that depend on their work.[26] And those whose visas remain valid for a longer duration may be unwilling to take the risk of participating in educational, professional, or personal obligations that require travel outside the United States, and will also face the hardship of being unable to receive visits from their parents, spouses, children, and other relatives.[27] Indeed, many faculty members and researchers at amici

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[25] Although the Proclamation gives consular officers discretion to waive the travel ban in individual cases, it does not describe the process for applying for a waiver, specify a time frame for receiving a waiver, or set concrete guidelines for issuance of a waiver beyond providing a list of circumstances in which waivers "may be appropriate." § 3(c). And there is no reason to believe that waivers are likely to be issued in the ordinary course because the ultimate decision on whether to issue it lies solely within a consular official's discretion. *See id.*

[26] Third Am. Compl. ¶¶ 36, 42, 55, 91, 94.

[27] *Id.* ¶¶ 37-38, 54, 78-79, 91, 94, 107, 109-110, 112, 123.

States' universities are contemplating leaving their current positions for opportunities in more welcoming countries in the wake of the Proclamation's now indefinite ban.[28]

The foreign-national scholars and faculty employed by or recruited by our state universities typically have specialized expertise that cannot easily be replaced. Universities that are delayed in or prevented from recruiting international faculty and related staff thus suffer significant financial and reputational harm, including delayed or lost federal funding for research efforts.[29] Our educational institutions have needed to expend considerable amounts of scarce university resources to make contingency plans for filling unexpected gaps in faculty rosters caused by the exclusion or possible departure of scholars from the designated countries. Despite this effort, there is reason to doubt that our universities will be able to meet all of their needs.[30]

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[28] *Id.* ¶¶ 38, 42, 111.

[29] *Id.* ¶¶ 38, 43-44, 55, 105-106, 112.

[30] *Id.* ¶ 55 (Proclamation "disrupts the ability of California's universities and colleges to meet staffing needs"); *id.* ¶ 93 (Proclamation will "severely interfere" with ability of University of Massachusetts "to hire top-ranked" faculty).

While public colleges and universities are always subject to federal immigration law and policy, these successive travel bans have injured them unexpectedly, by upending with no advance notice the established framework around which they have designed their faculty recruitment and student enrollment processes.[31] As explained above, this has left seats unfilled, tuition dollars irretrievably lost, and important academic programs and research projects in peril.

The disputed provisions of the Proclamation's third ban have also harmed and will continue to harm our educational institutions' core missions of excellence in education and scholarship. The loss of students, scholars, and faculty from the affected nations not only impairs important academic and medical research at our States' universities, but also inhibits the free exchange of information, ideas, and talent that is so essential to academic life and our state universities' missions.[32]

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[31] *See* Petulla, *supra* (University of Massachusetts and others have had to "shift[] their recruitment strategies to avoid a talent drought").

[32] Third Am. Compl. ¶¶ 38, 105-106.

Harms to State Hospitals and Medical Institutions. The disputed provisions of the Proclamation, like the travel bans of the earlier Executive Orders, have created staffing disruptions in state hospitals and medical institutions, which employ physicians, medical residents, research faculty, and other professionals from the designated countries.[33]

For example, foreign-national medical residents at public hospitals often provide crucial services, such as caring for some of the most underserved populations in our States.[34] They are assigned to our state university hospital residency programs through a computerized "match" that, after applications and interviews, ranks and assigns residency candidates to programs nationwide; programs and candidates are advised of match results in the spring of each calendar year and all new residents begin their positions on July 1.[35]

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[33] *E.g.*, *id.* ¶ 127 (Oregon Health and Sciences University employs 11 such individuals from seven of the countries designated in the Proclamation).

[34] *E.g.*, *id.* ¶ 115 (New York's public safety-net hospitals employ a "significant number" of foreign-national residents in 97 medically underserved communities).

[35] *Id.* ¶ 116.

Many state university residency programs regularly match residents from the affected countries. If a program's matched residents are precluded from obtaining a visa under the disputed provisions of the Proclamation, as many of them were under the predecessor travel bans, the program risks having an insufficient number of residents to meet staffing needs.[36] This continuing uncertainty is of particular concern in view of the indefinite duration of the Proclamation's entry ban. The practical effect of this dilemma is that our state university programs will be reluctant (or unable) to interview or rank highly-qualified residency candidates from the designated countries going forward, because there is no guarantee they will be able to begin or complete their residencies.[37] Indeed, residency programs are at this very moment in the process of interviewing candidates for next year's match.[38]

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[36] The 2017 match took place one day after the revised Executive Order was scheduled to take effect, and there was serious doubt whether "[a]s many as several hundred doctors" from the six countries designated in that Order would be granted waivers to be able to begin the residencies for which they had matched. Petulla, *supra*.

[37] Third Am. Compl. ¶¶ 60, 115, 127.

[38] *Id*. ¶ 115.

In addition, if current residents who are nationals of the designated countries cannot renew or extend their visas—as the Proclamation continues to threaten—state university residency programs will be unable to continue to employ them; these multiyear programs will then be left with unfilled positions, and further staffing gaps will result.[39] Such disruptions will translate into uncertainty in residency training programs, as well as threats to the provision and quality of health care services.[40] And because patients at our medical facilities must be cared for, our facilities must quickly adapt to any staffing complications resulting from the disputed provisions of the Proclamation—and spend precious time and resources preparing to do so.[41]

Diminished Tax Revenues and Broader Economic Harms. In addition to losing the tuition, room and board, and other fees paid by students at our public universities, amici States have suffered—and will continue to suffer—other direct and substantial economic losses as a

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[39] *Id.*

[40] See *infra* pp. 23-25.

[41] Third Am. Compl. ¶ 59 (shortage of "even one physician" can have "serious implications" for safety-net hospitals in underserved areas).

result of the disputed provisions of the Proclamation, just as we did under the Proclamation's predecessors. Every foreign student (whether attending a public or private college or university), every tourist, and every business visitor arriving in our States contributes to our economies through their purchases of our goods and services and the tax receipts that their presence generates. Despite the present preliminary injunction, and those that were issued against the Proclamation's predecessor Orders, this series of successive travel bans during the past ten months has blocked or dissuaded thousands of individuals—potential consumers all—from entering amici States, thereby eliminating the significant tax contributions those individuals would have made.[42] That lost revenue will never be recovered and the lasting economic damage cannot be undone, even if plaintiffs ultimately prevail.

The contribution of foreign students alone to our States' economies is immense. A survey by the Institute of International Education conducted in the months following the issuance of the initial travel ban found that "more than 15,000 students enrolled at U.S. universities

[42] *See id.* ¶¶ 31-32, 62, 75, 87-88, 120-121.

during 2015-16 were from the [six] countries named in" the revised Executive Order; more than half of those students attended institutions in amici States and Hawaii; and, nationwide, "these students contributed $ 496 million to the U.S. economy, including tuition, room and board and other spending."[43] For example, in both New York and Illinois, nearly 1,000 foreign nationals from the countries designated in the revised Order were studying on temporary visas in 2015-2016 in each State, and they collectively contributed approximately $30 million to each State's economy.[44] And such figures do not even begin to account for the indirect economic benefits to our States, such as the contributions of international students and scholars to innovation in academic and medical research.

Tourism dollars are also a critical component of amici States' economies. As a result of the successive travel bans, including the ban announced in the Proclamation, an estimated 4.3 million fewer tourists are expected to visit the United States this year, resulting in $7.4 billion

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[43] Institute of Int'l Educ., *Advising International Students in an Age of Anxiety* 3 (Mar. 31, 2017) (internet).

[44] *See id.* at app. 1.

in lost revenue; and in 2018, those numbers will increase to 6.3 million fewer tourists and $10.8 billion in lost revenue.[45] This reduction results from trips that were prohibited by the parts of the initial bans that were not enjoined, or because individual travelers were deterred by fear that the previous injunctions would be lifted. The now indefinite ban may also lead to the loss of hundreds of thousands of tourism-related jobs held by our States' residents.[46]

Absent relief from the courts, including interim relief, these broad chilling effects will likely continue.[47] This is hardly surprising in view of defendants' clear message to the world that foreign visitors—particularly those from certain regions, countries, or religions—are unwelcome.

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[45] *See* Abha Bhattarai, *Even Canadians are Skipping Trips to the U.S. After Trump Travel Ban*, Wash. Post (Apr. 14, 2017) (internet); *see also* Third Am. Compl. ¶¶ 30-32 (describing "chilling effect" on tourism in Washington); *id.* ¶¶ 52, 61 (Proclamation has decreased tourist travel to California and will cause significant losses in tourism revenues).

[46] Third Am. Compl. ¶¶ 63-64 (Los Angeles tourism board projecting a $220 million loss in tourism revenue in 2017, which jeopardizes hundreds of thousands of tourism-related jobs held by City's residents).

[47] Alana Wise, *Travel to the United States Rose in April, But Industry Remains Wary*, Reuters (June 6, 2017) (internet).

Indeed, the disputed provisions of the Proclamation have made this message clearer and more permanent.

The disputed provisions of the Proclamation also continue the profound harms that the initial and revised travel bans have inflicted on amici States' ability to remain internationally competitive destinations for businesses in the sectors of science, technology, finance, and health care, as well as for entrepreneurs. Even a temporary disruption in our ability to attract the best-qualified individuals and entities world-wide—including from the affected countries—puts the institutions and businesses in our States at a competitive disadvantage in the global marketplace, particularly where the excluded individuals possess specialized skills or training.[48] And now that the initially temporary entry bans have become an indefinite ban, defendants' message of intolerance and uncertainty more deeply threatens amici States' ability to attract and retain the foreign professionals, entrepreneurs, and companies that are vital to our economies.

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[48] *See* Third Am. Compl. ¶¶ 18-23, 33, 51-52, 69-70, 74, 86-87, 113, 118, 120-123.

Thus, as the experience of amici States shows, our States and our residents have been subjected to widespread, particularized, and well-documented harm from the moment the first travel ban was announced through today—and likely for the foreseeable future.

B. Harms to the Amici States' Sovereign and Quasi-Sovereign Interests

Decreased Effectiveness of Anti-Discrimination Laws. The amici States have exercised their sovereign prerogatives to adopt constitutional provisions and enact laws that protect their residents from discrimination. For example, our residents and businesses—and, indeed, many of the amici States ourselves—are prohibited by such state enactments from taking national origin and religion into account when determining to whom they can extend employment and other opportunities.[49] The disputed provisions of the Proclamation interfere

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[49] *See, e.g.*, Cal. Const. art.I, §§ 4,7-8,31; Cal. Civ. Code § 51(b); Cal. Gov't Code §§ 11135-11137,12900 et seq.; Conn. Gen. Stat. § 46a-60; 19 Del. Code § 710 et seq.; Ill. Const. art. I, §§ 3,17; 740 Ill. Comp. Stat. 23/5(a)(1); 775 Ill. Comp. Stat. 5/1-102(A); 775 Ill. Comp. Stat. 5/10-104(A)(1); 5 Me. Rev. Stat. §§ 784, 4551-4634; Md. Code, State Gov't § 20-606; Mass. Gen. L. ch.93, § 102; Mass. Gen. L. ch.151B, §§ 1,4; N.M. Const. art.II, § 11; N.M. Stat. § 28-1-7; Or. Rev. Stat. § 659A.006(1); R.I.

with the effectiveness of these laws by encouraging discrimination against Muslims in general, and nationals of six of the designated countries in particular.

Harms to Residents Seeking Medical Care. Like its predecessors, the Proclamation's entry ban will harm residents seeking medical care in our States, particularly those in underserved communities. The countries designated in the Proclamation are important sources of physicians who provide health care to our residents, particularly in underserved areas of our States.[50] The current ban will thus impede amici States' efforts to recruit and retain providers of essential primary care, dental health, and mental health services.[51] In New York, safety-net hospitals—which include all public acute care hospitals, the entire New York City Health and Hospitals system, and most of the hospitals in Brooklyn, Queens, and the Bronx—rely heavily on foreign-national

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Gen. Laws § 28-5-7(1)(i); 9 Vt. Stat. §§ 4500-4507; 21 Vt. Stat. § 495; Wash. Rev. Code § 49.60.030(1).

[50] *See* Third Am. Compl. ¶ 26 (nearly 200 such physicians and medical residents in Washington); *id.* ¶ 58 (191 such physicians in California); *id.* ¶ 114 (500 such physicians in New York).

[51] *Id.* ¶¶ 27-28, 58, 128-129.

physicians.[52] Indeed, many foreign-national physicians work in the primary care field at a time when primary care physicians are in short supply in many areas across the country.[53]

At least 7,000 physicians practicing in the United States attended medical school in one of the six countries designated in the previous Executive Orders (five of which remain designated in the current Proclamation), and these physicians provide 14 million appointments a year, 2.3 million of which are in areas with "a shortage of medical residents and doctors."[54] When residents or physicians from the designated countries are unable to commence or continue their employment at public hospitals, those staffing disruptions will result in serious risks to the quality of our States' health care services and put the public health of our communities at risk.[55] Even before defendants made

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[52] *Id.* ¶¶ 114, 116.

[53] *Id.* ¶¶ 27, 58-59, 116, 128-129.

[54] Immigrant Doctors Project, https://immigrantdoctors.org; *see also* Anna Maria Barry-Jester, *Trump's New Travel Ban Could Affect Doctors, Especially in the Rust Belt and Appalachia*, FiveThirtyEight (Mar. 6, 2017) (internet).

[55] *See* Third Am. Compl. ¶¶ 27, 58-59, 116, 128.

permanent the latest version of the entry ban through issuance of the Proclamation at issue here, researchers had concluded that the federal government's travel restrictions were likely to hurt the health of millions of Americans who rely on physicians trained in the designated countries.[56]

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE PRELIMINARY INJUNCTION.

This Court affirmed a similar preliminary injunction issued in an earlier stage of this case challenging one of the Proclamation's predecessor travel bans. In *Hawaii v. Trump*, the Court held that preliminary relief was justified to restrain likely violations of the INA that threatened substantial irreparable harm, and that the nationwide scope of that injunction was justified by the nationwide scope of the threatened harm. 859 F.3d at 769-88; *see also International Refugee Assistance Project* (*IRAP*) *v. Trump*, 857 F.3d 554, 588-606 (affirming

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[56] *See* Maryam Saleh, *Hospitals in Trump Country Suffer As Muslim Doctors Denied Visas to U.S.*, The Intercept (Aug. 17, 2017) (internet) (foreign physicians "take care of the sickest of the sick and the poorest of the poor," many have pledged to work in areas designated as "medically underserved," and without them "the U.S. healthcare system would simply collapse, with the pain felt most acutely in rural areas").

nationwide preliminary injunction in related challenge to predecessor ban based on likelihood of success of plaintiffs' Establishment Clause challenge), *cert. granted*, 137 S.Ct 2080, *vacated and remanded*, 2017 WL 4518553 (Oct. 10, 2017). Although this Court's prior decision was vacated as moot, its reasoning remains applicable and persuasive, and the district court did not abuse its discretion in concluding, for similar reasons as before, that preliminary relief is justified to enjoin application of the disputed provisions of the Proclamation. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (factors to be considered include whether plaintiff will likely suffer irreparable harm absent preliminary relief, whether "the balance of equities tips in his favor," and whether an "injunction is in the public interest"); *accord Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1289 (9th Cir. 2013).

A. The Harms, Equities, and Public Interest Weigh Decidedly in Favor of Preliminary Relief.

As the Supreme Court recognized during an earlier stage of this case, "[c]rafting a preliminary injunction" is "often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. IRAP,* 137 S.Ct. 2080, 2087 (2017). Balancing the

equities requires the Court to explore the relative harms to the parties, as well as to "pay particular regard for the public consequences." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *see also Trump v. IRAP*, 137 S.Ct. at 2087 (considering balance of equities and public interest factors together).

The harms that the Proclamation has inflicted and threatens to inflict on amici States and their residents (*supra*, Point I) are representative of the injuries experienced by plaintiffs here.[57] The district court correctly found that plaintiffs would be irreparably injured if the Proclamation's disputed provisions were permitted to go into effect, given the threat of "prolonged separation from family members" and the "constraints" that the Proclamation places on Hawaii's ability to recruit

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[57] These harms also underscore plaintiffs' standing to sue. Notwithstanding defendants' conclusory and unsupported assertion to the contrary (made in a single sentence, *see* Defs. Br. 26), the Proclamation has injured cognizable interests conferred on the amici States and others by the INA. This Court has already recognized that Hawaii's interests in employment-based petitions for its university faculty fall squarely within the INA's zone of interests. *See Hawaii v. Trump*, 859 F.3d at 766. Indeed, as employers, our state colleges and universities are in many cases the entities directly petitioning for approval of a potential employee's entry into the United States, bringing them directly within the ambit of the INA—a fact which defendants continue to ignore (Defs. Br. 26).

and retain certain international students and faculty members. (Order 36.) This Court has recognized that these particular injuries "are not compensable with monetary damages" and therefore constitute irreparable harm. *Hawaii v. Trump*, 859 F.3d at 782-83 (also identifying additional harm to Hawaii of "decreased tuition revenue").

This Court also held that the "public interest favor[ed] affirming" the prior injunction, in view of the widespread but particularized harms that defendants' travel bans inflicted on plaintiffs and many others—including amici States and our residents. *Id.* at 784-85. Those harms, which the Proclamation renews, included injuries to "state colleges, disrupti[on in] staffing and research in state medical institutions, and reduc[tion of] tax revenues." *Id.* at 785. Thus, the Court's prior conclusion remains valid here.

The Proclamation's other serious threatened harms include its indefinite obstruction of family visits for the individual plaintiffs and other similarly situated persons, including our States' residents.[58] *See id.*

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[58] *See* Third Am. Compl. ¶¶ 24-25, 104-105 (examples of Washington and New York residents).

(recognizing that prior injunction served the public interest in uniting families). Such deprivations constitute a constitutionally cognizable hardship to the affected United States–based persons.[59] Moreover, the exclusions at issue hinder amici States' ability to prohibit discrimination under their own constitutions and statutes,[60] and to protect their residents to the extent allowed under other federal laws. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607-08 (1982) (recognizing State's interests in ensuring that its residents are "not excluded from benefits that are to flow from participation in the federal system" and in "securing observance of the terms under which it participates in" that system). These are some of the very same interests that the preliminary injunctions issued in the earlier travel ban litigation were designed to protect, and that the Supreme Court carefully sought to protect when leaving certain portions of those prior injunctions in place. *See Trump v. IRAP*, 137 S.Ct. at 2088.

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[59] *See, e.g, Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977) (tradition of sharing household with extended family "deserving of constitutional recognition").

[60] See *supra* p. 22.

On the other side of the equation, defendants have not demonstrated that lifting the injunction is necessary to prevent any irreparable harm to their interests. Defendants' generalized claim of harm to their interest in maintaining national security (Defs. Br. 50) is abstract and conclusory—unlike the concrete and particularized harms to amici States and their residents outlined above. *See Hawaii v. Trump*, 859 F.3d at 774 ("National security is not a 'talismanic incantation' that once invoked can support any and all exercise of executive power") (quotation marks omitted). For example, defendants have identified no specific urgency warranting immediate implementation of the disputed provisions of the Proclamation, nor do they claim any disastrous result from the injunction thus far (or any of the prior related injunctions for that matter).

Indeed, defendants' assertions of harm to national security interests are substantially undermined by several factors. First, as the district court recognized, the terms of the Proclamation itself contain internal inconsistencies that "markedly undermine its national security rationale." (Order 29-32.) For instance, not every country that failed to meet the Proclamation's stated criteria is included in the entry ban—and

even with respect to the some of the designated countries, not every category of travelers is presumptively barred from entry (*id.*). Second, the Proclamation itself delayed implementation of its entry ban for approximately one month, undermining defendants' suggestion that a short stay of the Proclamation would cause irreparable harm. *See* § 7(a) (signed on September 24, but setting effective date as either October 18 or October 24 for different groups of foreign nationals). Third, as the district court correctly observed (Order 28-29), defendants' assertions fail to account for current immigration law's well-established, individualized vetting process, which already permits the exclusion of foreign nationals who present a national security concern or about whom the United States lacks adequate information.[61] Thus, continuing to enjoin the disputed provisions of the Proclamation simply "restores immigration procedures and programs to the position they were in prior to its issuance." *Hawaii v. Trump*, 859 F.3d at 783; *see also Washington v. Trump*, 847 F.3d at 1168 (observing in connection with review of interim relief enjoining

[61] *See, e.g.,* 8 U.S.C. § 1182(a)(3) (inadmissibility of aliens for terrorist activities and other security grounds); *id.* § 1182(a)(7) (inadmissibility of aliens who fail to meet documentation requirements).

provisions of the first travel ban that such an order "merely returned the nation . . . to the position it has occupied for many previous years").

In sum, while national security is a compelling government interest, it "will [not] always tip the balance of the equities in favor of the government." *IRAP v. Trump*, 857 F.3d at 603; *see also Hawaii v. Trump*, 859 F.3d at 783 (this Court could not "conclude that national security interests outweigh[ed] the harms to [p]laintiffs"). Rather, in a case like this, the balance of the equities here tips decidedly in favor of preserving the preliminary injunction because defendants have identified no appreciable harm that the injunction will cause to their interests, while reversing the district court's order would allow further irreparable harm to be imposed on amici States and our residents. The status quo should thus be preserved while this litigation continues. *See Hawaii v. Trump*, 859 F.3d at 783 (holding district court did not abuse its discretion "in finding that the balance of hardships tipped in [p]laintiffs' favor" and that public interest was served by maintaining the status quo).[62]

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[62] The preliminary injunction was also appropriate because plaintiffs have made a strong showing of the likelihood of success on the merits of their claims. *See* Pls. Br. 13-58; *Winter*, 555 U.S. at 20.

B. The Nationwide Scope of the Injunction Is Proper in View of the Proclamation's Violations and Actual and Threatened Harms.

The preliminary injunction entered by the district court was appropriately crafted to restrain the systemic, nationwide harm perpetuated by the disputed provisions of the Proclamation, including the harms to amici States. Although defendants' claim (Defs. Br. 52-53) that any injunction here must be to limited to redressing only plaintiffs' individual injuries, the numerous actual and threatened harms to amici States exemplify the public interests affected and underscore the appropriateness of the injunction's nationwide scope.

"[C]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than . . . when only private interests are involved." *Virginian Ry. Co. v. Railway Employees*, 300 U.S. 515, 552 (1937); *see also United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) (district courts enjoy broad discretion "to consider the necessities of the public interest when fashioning injunctive relief" (quotation marks omitted)).

Consistent with these principles, this Court found no error in the district court's issuance of a nationwide injunction enjoining the previous

travel ban. *See Hawaii v. Trump*, 859 F.3d at 787-88. The Court correctly recognized that the myriad harms flowing from such a ban—including to "the proprietary interests of the States"—would not be addressed by injunctive relief limited just to plaintiffs because that "would not cure the statutory violations identified, which in all applications would violate provisions of the INA." *Id.* at 788. Thus, "a nationwide injunction was necessary to provide complete relief." *Madsen v. Women's Health Ctr. Inc.*, 512 U.S. 753, 778 (1994); *see also Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987) (injunction extending protection to nonparty individuals not "over-broad" where such breadth is "necessary to give prevailing parties the relief to which they are entitled"). The district court properly made the same assessment here. (Order 38.)

Affirmance of the preliminary injunction here is also necessary to provide continued relief to amici States from the cumulative nationwide effect of defendants' policy, including the substantial disruption and uncertainty that was unleashed by this entire series of discriminatory travel bans and that now has no end in sight. The disputed provisions of the Proclamation have not only exacerbated the harms that amici States, our institutions, and our residents have experienced, but the current

indefinite ban may make these irreparable injuries permanent if the preliminary injunction is vacated or narrowed in any respect.

Finally, contrary to defendants' argument (Defs. Br. 53), the district court did not abuse its discretion by fashioning injunctive relief that was broader than the terms of the Supreme Court's partial stay of the injunction in the earlier litigation with respect to individuals lacking "a bona fide relationship with a person or entity in the United States." *Trump v. IRAP*, 137 S.Ct. at 2088. Neither the Supreme Court's stay opinion, nor this Court's recent grant of a similar partial stay of the present injunction (*see* ECF No. 39) mandates an identical limitation after this Court's consideration of the merits of the appeal. In awarding the limited interim relief, the Supreme Court did not consider the merits of plaintiffs' claims. Here, in contrast, the district court concluded that broader relief was appropriate after thoroughly evaluating plaintiffs' likelihood of success on the merits of their claims. Moreover, the equities at stake here weigh even more strongly in favor of plaintiffs now than at the time the Supreme Court conducted its balancing analysis in the previous litigation. Not only have defendants continued to fail in providing any concrete evidence of any true national security risk

(despite more time to do so), but the Proclamation's entry ban is now indefinite and will likely result in permanent—not just temporary—harms to plaintiffs as well as amici States and their residents. Thus, the district court correctly concluded that the balance of equities warrants a more comprehensive injunction under the circumstances. *See* Pls. Br. 57-63, *IRAP v. Trump*, No. 17-2231(L) (4th Cir.), ECF No. 89 (describing harms that a partial injunction of the Proclamation's entry ban inflicts on plaintiffs).

In sum, the district court did not abuse its "considerable discretion in fashioning" the injunctive relief at issue here. *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991); *see also American Civil Liberties Union of Ky. v. McCreary County, Ky.*, 545 U.S. 844, 867 (2005) (scope of preliminary injunction is matter within district court's sound discretion).

CONCLUSION

This Court should affirm the preliminary injunction.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29 and 32(a) of the Federal Rules of Appellate Procedure, Barbara D. Underwood, counsel for amici curiae States of New York et al., hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,883 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7).

/s/ Barbara D. Underwood