No. 17-35105

IN THE

United States Court of Appeals for the Ninth Circuit

DONALD J. TRUMP, et al.,

Defendants-Appellants,

v.

STATE OF WASHINGTON, et al.,

Plaintiffs-Appellees

On Appeal from the United States District Court
for the Western District of Washington, No. 2-17-cv-00141
District Judge James L. Robart

STATE OF HAWAII'S EMERGENCY MOTION TO INTERVENE UNDER FEDERAL RULE 24 AND CIRCUIT RULE 27-3

DOUGLAS S. CHIN
Attorney General of the State of Hawai'i
CLYDE J. WADSWORTH
Solicitor General of the State of Hawai'i
DEIRDRE MARIE-IHA
KIMBERLY T. GUIDRY
DONNA H. KALAMA
ROBERT T. NAKATSUJI
Deputy Attorneys General

DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI'I
425 Queen Street
Honolulu, HI 96813
Telephone: (808) 586-1500
Fax: (808) 586-1239

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

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

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

Attorneys for Proposed Intervenor, State of Hawai'i

CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies that the following is the information required by Circuit Rule 27-3:

(1) Telephone numbers and addresses of the attorneys for the parties.

Counsel for Proposed Intervenor the State of Hawai'i

Neal Katyal (neal.katyal@hoganlovells.com)
Colleen Roh Sinzdak
Mitchell Reich
Thomas P. Schmidt
Sara Solow
Hogan Lovells US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: (202) 637-5600
Fax: (202) 637-5910

Douglas S. Chin
Clyde J. Wadsworth
Deirdre Marie-Iha (deirdre.marie-iha@hawaii.gov)
Kimberly T. Guidry
Donna H. Kalama
Robert T. Nakatsuji
Department of the Attorney General, State of Hawai'i
425 Queen Street
Honolulu, HI 96813
Telephone: (808) 586-1500
Fax: (808) 586-1239

Counsel for Appellants Donald Trump, et al.

Noel J. Francisco
Chad A. Readler (Chad.A.Readler@usdoj.gov)
August E. Flentje
Douglas N. Letter (Douglas.Letter@usdoj.gov)
Sharon Swingle (Sharon.Swingle@usdoj.gov)
H. Thomas Byron (H.Thomas.Byron@usdoj.gov)

Lowell V. Sturgill Jr. (Lowell.Sturgill@usdoj.gov)
Attorneys, Appellate Staff
Civil Division, Room 7241
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
(202) 514-3427

Counsel for Appellees.

For State of Washington:
Colleen N. Melody (Coleenm1@atg.WA.Gov)
Noah Guzzo Purcell (Noahp@atg.Wa.Gov)
Anne Elizabeth Egeler (Annee1@atg.Wa.Gov)
Patricio A. Marquez (Patriciom@atg.Wa.Gov)
Marsha J. Chien (Marshac@atg.Wa.Gov)
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744

For State of Minnesota:
Jacob Campion (Jacob.Campion@ag.State.Mn.Us)
445 Minnesota Street, Suite 1100
St. Paul, MN 55101
(651) 757-1459.

(2) Facts showing the existence and nature of the emergency.

As set forth in the Motion, the Government has moved for an emergency stay of the District Court's temporary restraining order, barring Appellants from enforcing provisions of an Executive Order that would otherwise inflict irreparable harm on the State of Hawai‘i. Hawai‘i filed a Complaint and Motion for Temporary Restraining Order in the District Court for the District of Hawai‘i, challenging the Executive Order, on February 4, 2017—just hours before the

District Court's TRO was issued in this case. Hawaii's intervention in this appeal is necessary to protect its interests, because this Court's decision could create binding circuit precedent that affects Hawaii's case.

(3) When and how counsel notified.

The undersigned counsel notified counsel for appellants and appellees by email, phone calls, and phone and text messages on February 4, 2017 and February 5, 2017, of the State of Hawaii's intent to file this motion. Service will be effected by electronic service through the CM/ECF system.

MOTION FOR INTERVENTION UNDER RULE 24

The State of Hawai‘i respectfully moves to intervene in this appeal through the present emergency motion. Hawai‘i moves for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure; or, alternatively, for permissive intervention under Rule 24(b). If intervention is denied, Hawai‘i respectfully moves for leave to file the Brief as *amicus curiae*. This Motion and Brief comport with the provisions of Fed. R. App. P. Rule 27 and 9th Cir. R. 27-1. On February 4, 2017, undersigned counsel for the State of Hawai‘i contacted legal counsel for both parties. Counsel for the United States opposes Hawaii's intervention. Counsel for the State of Washington and the State of Minnesota have not responded to Hawaii's request for intervention.

STATEMENT

On January 27, 2017, President Donald Trump signed the Executive Order that is the subject of this litigation and appeal. On January 30, 2017, the State of Washington filed a Complaint for Declaratory and Injunctive Relief and an Emergency Motion for a Temporary Restraining Order in the District Court for the Western District of Washington, seeking to enjoin Defendants from implementing Sections 3(c), 5(a)-(c) and 5(e) of the Executive Order. Those provisions implement a nationwide immigration ban for nationals from seven majority-Muslim countries, halt refugee admissions, and create a selective carve-out for

some Christian and non-Muslim refugees. (Case No. 17-141 (W.D. Wash.), Dkt. #1, #3). In the TRO motion, the State of Washington argued that the Executive Order violated the Fifth Amendment's equal protection and due process guarantees, the Establishment Clause, and the Immigration and Nationality Act's (INA) prohibition against discrimination on the basis of national origin. On February 1, the State of Minnesota joined this litigation as a plaintiff.

Also on February 1, 2017, the State of Washington filed a Supplemental Brief on Standing (Dkt. #17) and an Amended Complaint (Dkt. #18). On February 2, 2017, Defendants filed a Response. (Dkt. #50). The next day the District Court held a hearing on the TRO Motion. (Dkt. #53). At the end of the hearing, the court granted Plaintiffs' Emergency Motion for a Temporary Restraining Order, thereby enjoining Defendants from enforcing Section 3(c), 5(a), 5(b), 5(c), and 5(e) of the Order. (Dkt. #52).

A few hours before this hearing concluded, and before the temporary restraining order was issued, the State of Hawai‘i filed a Complaint for Declaratory and Injunctive Relief and a Motion for a Temporary Restraining Order in the District Court for the District of Hawai‘i. (Case No. 17-00050 (D. Haw.), Dkt. #1, #2-1). In its TRO motion, Hawai‘i argued that the Executive Order violated both the Establishment Clause and the Fifth Amendment of the Constitution. Additionally, Hawai‘i argued that the Executive Order violated three provisions of

the INA—its prohibition on nationality-based classifications, its prohibition on religion-based classifications, and its limited grant of presidential discretion to suspend the entry of classes of immigrants and non-immigrants under Section 212(f). *See* Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order, at 26-32 (Case No. 17-00050 (D. Haw.), Dkt. #2-1) [attached as **Exhibit B**]. Hawai'i also argued that the implementation of the Executive Order violated the Administrative Procedure Act on both substantive and procedural grounds. *See id.* at 32-34. Hawai'i requested that Defendants be enjoined from implementing Sections 3(c), 5(a)-(c) and 5(e).

Hawai'i contended that it would suffer irreparable harm in the absence of immediate relief. Among other things, it averred, "the Order is inflicting irreparable harm on the State's sovereign and dignitary interests by commanding instruments of Hawaii's government to support discriminatory conduct that is offensive to its own laws and policies," *id.* at 35; the "Order is inflicting permanent damage on Hawaii's economy and tax revenues," particularly through its effect on tourism, *id.* at 36-37; and the Order is "subject[ing] a portion of its population to discrimination and marginalization, while denying all residents of the State the benefits of a pluralistic and inclusive society," *id.* at 37.

On the evening of February 4, 2017, the Government filed its Notice of Appeal to the Ninth Circuit in the District Court. (Case No. 17-141 (W.D. Wash.),

Dkt. #53). Later that night, the Government filed its "appeal" in this Court. Hawai'i filed the instant motion on February 5, 2017.

ARGUMENT

"Intervention on appeal is governed by Rule 24 of the Federal Rules of Civil Procedure." *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997). Hawai'i is entitled to intervene as of right under Rule 24(a)(2). In the alternative, the State easily satisfies the requirements for permissive intervention under Rule 24(b). That is particularly so because the Motion here is filed on behalf of the State, and to protect its sovereign interests. In the closely analogous Article III standing context, the Supreme Court has recognized that States receive "special solicitude," due to "the long development of cases permitting States 'to litigate as *parens patriae* to protect quasi-sovereign interests,'" including when "'substantial impairment of the health and prosperity of [their residents] are at stake." *Massachusetts v. EPA*, 549 U.S. 497, 521 n.17 (2007) (citation omitted). Those very interests are gravely at stake in this litigation. Other special factors distinguish Hawai'i in ways that make intervention particularly appropriate, including the fact that Hawai'i has already filed for a temporary restraining order to protect its sovereign and quasi-sovereign interests, and the fact that Hawaii's action is pending in a district court within this Circuit such that any decision by this Court could have a binding effect on that

action. These factors, when layered on top of the Rule 24 analysis below, demonstrate why intervention is warranted for the State of Hawai‘i in this case.

I. HAWAI‘I IS ENTITLED TO INTERVENE AS OF RIGHT PURSUANT TO RULE 24(a).

Rule 24(a)(2) grants a party the right to intervene if (1) its motion is "timely," (2) it "ha[s] a significantly protectable interest relating to the property or transaction that is the subject of the action"; (3) it is "situated such that the disposition of the action may impair or impede the party's ability to protect that interest"; and (4) it is "not * * * adequately represented by existing parties." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (citing Fed. R. Civ. P. 24(a)(2)).

Hawai‘i plainly satisfies each requirement. (1) It filed this motion within hours of the Government's appeal. (2) The appeal concerns the validity of an order that is protecting Hawai‘i and its citizens from irreparable harm, and that is identical to one Hawai‘i is seeking in the District of Hawai‘i. (3) The Court's resolution of this matter will decide whether the State and its citizens are once again subjected to travel bans and discrimination, and may decide whether the State can secure a similar order in its own case. And (4) because Hawai‘i has suffered distinct harms, makes distinct arguments, and is a distinct sovereign from the plaintiffs, it must intervene to ensure its interests are adequately protected.

A. Hawaii's Motion Is Timely.

Hawai'i moved to intervene in this appeal with extraordinary speed. The District Court issued its order on Friday, February 3. The Government filed its motion to appeal that order—directly threatening Hawaii's interests—the evening of February 4. Hawai'i moved to intervene the following day.

It is inconceivable that the State could have acted with greater urgency, and no party can claim that it has been "prejudice[d]" by any delay. *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004). Hawai'i, moreover, intervened "at th[e] particular stage of the lawsuit" in which its interests were implicated—when the Government challenged an order that directly implicates the State's interests. *Id.*; *see infra* 6-13. By any standard its motion is timely. *Cf. Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007) (deeming motion timely when made two years after case was filed); *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016) (deeming motion timely when made twenty years after case was filed).

B. Hawai'i Has A Significant Protectable Interest In The Outcome Of This Appeal.

The Ninth Circuit has explained that an applicant for intervention has adequate interests in a suit where "the resolution of the plaintiffs' claims *actually will affect* the applicant." *S. California Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (emphasis added) (quoting *Donnelly v. Glickman*, 159 F.3d 405,

410 (9th Cir. 1998). This test does not establish "a clear-cut or bright-line rule," and "[n]o specific legal or equitable interest need be established." *Id.* (citation omitted)). Instead, courts must make "a 'practical, threshold inquiry,' " designed to "involve[e] as many apparently concerned persons" in a suit "as is compatible with efficiency and due process." *Id.* (citations omitted).

Hawai'i has two vital, "practical" interests in the outcome of this appeal. First, this appeal concerns the validity of an order that is protecting Hawai'i and its citizens from grievous harm. For seven days, the Executive Order barred nationals of seven majority-Muslim nations from entering the country. As detailed at length in Hawaii's motion in support of a temporary restraining order, this restriction inflicted multiple irreparable harms on the State. *See* Ex. B at 35-38. It halted tourism from the banned countries, and chilled tourism from many more, threatening one of the pillars of the State's economy. *Id.* at 36-37. It prevented a number of Hawaii's residents from traveling abroad. *Id.* at 38. It required Hawai'i to participate in discrimination against members of the Muslim faith in violation of Hawaii's laws and constitution. *Id.* at 36-37. And it threatened to tarnish Hawaii's hard-won reputation as a place of openness and inclusion, and force the State to abandon its commitment to pluralism and respect. *Id.* at 35, 37-38.

The District Court's order has temporarily put a stop to that. But the Government seeks to bring all of those harms back: to reinstate the Executive

Order, and thus to damage the State's citizenry, hinder its economy, and trample on its laws and values. The State's interest in preventing that from occurring could not be stronger. *See, e.g.*, *Alisal Water Corp.*, 370 F.3d at 919 (a "non-speculative, economic interest" is "sufficient to support a right of intervention"); *Nuesse v. Camp*, 385 F.2d 694, 669-701(D.C. Cir. 1967) (state banking commissioner's "interest" in the construction of a federal banking statute—which could frustrate the purpose of a state banking statute—was sufficient for intervention).

Second, Hawai'i has an interest in preventing the Ninth Circuit from establishing precedent that could impair its own pending motion for a temporary restraining order. Hours before the District Court entered its order, Hawai'i filed suit challenging the Executive Order in the District of Hawai'i. It argued that the Executive Order violated the Establishment Clause, the equal protection and due process components of the Due Process Clause, the Immigration and Nationality Act (INA), and the Administrative Procedure Act. *See* Ex. B at 12-34. It said that immediate relief was necessary to prevent irreparable harm to the State, and that the harm far outweighed any inconvenience the Government might face from putting the Order on hold. *Id.* at 35-39. And it asked for precisely the same interim relief later awarded by the court below: a temporary restraining order preventing the Defendants from enforcing sections 3(c), 5(a)-(c), and 5(e) of the Executive Order. *Id.* at 39.

The Government now argues that the Western District of Washington's temporary restraining order was improper. In doing so, it makes arguments that might well apply to the order and injunction Hawai'i seeks. It says that Washington "lacks Article III standing to bring this action." Mot. at 9. It says that the President's Executive Order does not violate the Constitution or the INA; that the balance of the equities tips in its favor; and that the State's harms are not sufficiently serious to merit emergency relief. *Id.* at 12-15, 18-19, 22-23. Should the Court accept some or all of the Government's arguments, it would establish precedent binding in every District Court in the Circuit—including, of course, the District of Hawai'i—that might make it difficult or impossible for Hawai'i to prevail in its own pending motion for temporary injunctive relief.

Hawai'i has a cognizable interest in preventing that result. This Court has repeatedly recognized that a party has a protectable interest in the outcome of a suit that might, "as a practical matter, bear significantly on the resolution of [its] claims" in a "related action." *United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986), *vacated on other grounds sub nom. Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987); *see, e.g., In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 536 F.3d 980, 986-87 (9th Cir. 2008) (holding intervention proper where "an issue [the intervenor] raised in one proceeding * * * lands in another proceeding for disposition"); *U.S. ex rel. McGough v. Covington*

Techs. Co., 967 F.2d 1391, 1396 (9th Cir. 1992) (finding no "serious[] dispute" that a party may intervene in a suit that might "preclude [it] from proceeding with claims" in a separate proceeding); *United States v. State of Or.*, 839 F.2d 635, 638 (9th Cir. 1988) (granting intervention where "an appellate ruling will have a persuasive *stare decisis* effect in any parallel or subsequent litigation"). Indeed, this Court has previously permitted the State of Hawai'i itself to intervene in a suit on the ground that it "may have a precedential impact" on its claims in a related action. *Cf. Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007). Because this suit may heavily influence the merits of Hawaii's separate motion for a TRO, the State should have a "voice" when "th[e] decision is made." *Smith* v. *Pangilinan*, 651 F.2d 1320, 1325 (9th Cir. 1981).

C. The Disposition Of This Action May Impair Hawaii's Ability To Protect Its Interests.

The third requirement of Rule 24(a)(2) follows from the second. It is satisfied when the suit "may as a practical matter impair or impede [an applicant's] ability to safeguard [its] protectable interest." *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 862 (9th Cir. 2016). For the reasons just discussed, that is true here. If the Court stays the district court's temporary restraining order, it will immediately re-subject Hawai'i residents to the irreparable harms inflicted by the President's order. At that point, Hawai'i might have little recourse. Because this Court's decision may well set precedent that could impede the ability of a judge in

the District of Hawai‘i to award the relief Hawai‘i requests, the State needs to press its claims in this Court and in this appeal.

D. Absent Intervention, Hawaii's Interests Will Not Be Adequately Represented.

The final requirement of the test for intervention is "minimal," and is satisfied so long as "the applicant can demonstrate that representation of its interests 'may be' inadequate." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011); *see Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). Three factors are relevant in conducting this inquiry: "(1) whether the interest of a present party is such that it will *undoubtedly* make *all* of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Citizens for Balanced Use*, 647 F.3d at 898 (emphases added).

Here, these factors all point in the same direction. Washington and Minnesota have not made all of the arguments that Hawai‘i pressed in its TRO motion, and that Hawai‘i intends to make on appeal. Among other things, Washington's TRO motion argues only that Section 5(b) of the Executive Order violates the Establishment Clause, and does not argue—as Hawai‘i does—that Section 3 and Section 5(e) also violate that Clause. Further, Washington presses only one of two statutory arguments made by Hawai‘i—that is, the argument about

nationality-based classifications under the INA. Hawai'i has also argued that the Executive Order exceeds the limited grant of authority to the President under Section 212(f). *Compare* Mot. for Temporary Restraining Order, *Washington* v. *Trump*, No. 17-141 (W.D. Wash. Jan 30, 2017), Dkt. #3, *with* Ex. B at 28-34. Additionally, the Government's Motion places great weight on the argument that the Executive Order is valid—and federal courts should not question the President's judgment—because of the President's "plenary powers" over immigration and foreign affairs. Mot. at 12-17. Washington's TRO did not discuss the plenary powers doctrine; Hawaii's TRO motion devotes considerable discussion to that point. *See* Ex. B. at 17-18, 23-25. Hawaii's proposed brief in response to the Government's motion for a stay advances these points. *See* Br. at 6-7, 7-12 [attached at **Exhibit A**].

Moreover, because of Hawaii's unique status, Washington and Minnesota are not "capable" of presenting the same theories of standing and irreparable injury as Hawai'i. Hawai'i suffers from the Order in distinct and particularly severe ways. By virtue of the State's especially heavy reliance on tourism, the Executive Order's travel restrictions could immediately inflict damage on its economy. In addition, because Hawai'i is an island state, residents are entirely reliant on air travel to leave and return home, and, for the vast majority, to travel between islands. The travel ban, which discourages any use of airports by affected

individuals, thus effectively locks many of Hawaii's residents not only in the State but on individual small islands as well. Finally, Hawaii's most basic identity and values are implicated by the Executive Order in a way unique to the State as a result of its demography and history. Hawai'i is our country's most ethnically diverse state, it is home to more than 250,000 foreign-born residents, and it has the fifth-highest percentage of foreign born workers of any state. Complaint, ¶¶8-10, (Case No. 17-00050 (D. Haw.), Dkt. #1) [attached here as **Exhibit C**]. For many in the State, including state officials, the Executive Order conjures up memories of the Chinese Exclusion Acts and the imposition of martial law and Japanese internment after the bombing of Pearl Harbor. Comp. ¶ 81.

For these reasons, Hawai'i may offer "necessary elements" to the current proceeding that the other parties might not present. If the standing of Washington and Minnesota are called into question, Hawai'i may be critical to the Court's retaining Article III jurisdiction over the case. Hawai'i may also offer meritorious arguments that would otherwise be omitted. For example, Hawai'i intends to argue that the United States' application for a stay should not be granted because temporary restraining orders—such as the District Court's Order below—are not appealable. Further, Hawai'i intends to argue that the United States should have sought mandamus relief; because it did not, this Court lacks jurisdiction.

In sum, Hawai‘i is entitled to intervene as of right to preserve its interest in maintaining a nationwide order that protects its residents from rank discrimination.

II. IN THE ALTERNATIVE, HAWAI‘I SHOULD BE GRANTED PERMISSIVE INTERVENTION PURSUANT TO RULE 24(b)

Alternatively, Hawai‘i should be permitted to intervene in this appeal pursuant to Rule 24(b). Permissive intervention typically requires "(1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011). If these criteria are satisfied, a court may deny a motion if intervention "will unduly delay the main action or will unfairly prejudice the existing parties." *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998).

Hawai‘i easily satisfies each of these requirements. First, because this is "a federal-question case" and Hawai‘i "does not seek to bring any counterclaims or cross-claims," "the independent jurisdictional grounds requirement does not apply." *Freedom from Religion Found.*, 644 F.3d at 844 (explaining that in this circumstance, the court's jurisdiction "is grounded in the federal question(s) raised by the plaintiff," and so "the identity of the parties is irrelevant"). Second, Hawaii's motion is timely. It was filed within two days of the entry of the TRO, and within a day of the Government's appeal. Third, Hawai‘i seeks precisely the same relief as Washington and Minnesota: preservation of the District Court's

TRO. Hawai‘i is therefore not raising any claims significantly "different from the issues in the underlying action." *S. California Edison Co.* v. *Lynch*, 307 F.3d 794, 804 (9th Cir. 2002).

There is also no prospect that Hawaii's intervention will cause undue delay or prejudice. Hawai‘i asks for no delay, and intends to file briefs simultaneous with the plaintiffs. Indeed, its well-developed legal arguments may speed the Court's consideration of this critically important matter.

Hawai‘i should be permitted to participate in this matter, which is vital to the outcome of its pending action and to the lives of its residents.

CONCLUSION

Hawaii's motion to intervene as of right pursuant to Rule 24(a)(2) should be granted. In the alternative, Hawaii's motion for permissive intervention pursuant to Rule 24(b)(1)(B) should be granted. If Hawaii's motion to intervene is denied, Hawai‘i should be granted leave to file the Brief as *amicus curiae*.

DATED: Honolulu, Hawai‘i, February 5, 2017.

Respectfully submitted,

/s/ Neal K. Katyal

DOUGLAS S. CHIN
Attorney General of the State of Hawai‘i
CLYDE J. WADSWORTH
Solicitor General of the State of Hawai‘i
DEIRDRE MARIE-IHA
KIMBERLY T. GUIDRY

NEAL K. KATYAL
COLLEEN ROH SINZDAK
MITCHELL P. REICH
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004

DONNA H. KALAMA
ROBERT T. NAKATSUJI
Deputy Attorneys General

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

Telephone: (202) 637-5600
Fax: (202) 637-5910
Email: neal.katyal@hoganlovells.com

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

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

Attorneys for Proposed Intervenor, State of Hawai‘i

CERTIFICATE OF COMPLIANCE

I certify that the forgoing Motion complies with the type-volume limitation of Fed. R. App. 27 because it contains 3,517 words. This Motion complies with the typeface and type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ Neal Kumar Katyal
Neal Kumar Katyal

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2017, I filed the foregoing Motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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.

/s/ Neal Kumar Katyal
Neal Kumar Katyal

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STATE OF HAWAII'S OPPOSITION TO DEFENDANTS' MOTION FOR EMERGENCY STAY

DOUGLAS S. CHIN
Attorney General of the State of Hawai'i
CLYDE J. WADSWORTH
Solicitor General of the State of Hawai'i
DEIRDRE MARIE-IHA
KIMBERLY T. GUIDRY
DONNA H. KALAMA
ROBERT T. NAKATSUJI
Deputy Attorneys General

DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI'I
425 Queen Street
Honolulu, HI 96813
Telephone: (808) 586-1500
Fax: (808) 586-1239

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

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

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

Attorneys for Proposed Intervenor, State of Hawai‘i

INTRODUCTION

On January 27, 2017, President Donald Trump signed an Executive Order that bans visitors and immigrants from seven Muslim-majority countries; slams the door shut on refugees; and creates a preference for Christians when refugees are admitted at all. Recognizing that the Order is unconstitutional and unlawful several times over, the District Court stayed its enforcement. The Federal Government now challenges that stay. But its brief says little about the Constitution or the laws the President swore an oath to uphold. Instead, it paints a picture of federal courts powerless in the face of presidential prerogative, arguing that the President has "unreviewable authority" to bar aliens. The Government even ventures, strikingly, that "[j]udicial second-guessing of the President's national security determination *in itself* imposes substantial harm." Mot. 2, 21 (emphasis added).

Not so. The President does not "have the power to switch the Constitution on or off at will"; it is not for "the President * * * [to] say 'what the law is.'" *Boumediene* v. *Bush*, 553 U.S. 723, 765 (2008) (quoting *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)). That is the judiciary's responsibility, and this case demonstrates why. Without a judicial check, Hawai'i and the country face an Order that tramples our core constitutional values and flouts Congress's commands. In establishing a policy designed to "ban Muslims," the Order violates

the Establishment Clause and the guarantee of Equal Protection. In summarily preventing resident aliens from returning from abroad, it violates the Due Process Clause. And in openly discriminating on the basis of nationality, it contravenes a landmark statute of Congress. The stay should be rejected.

FACTUAL BACKGROUND

Then-candidate Donald Trump made it crystal-clear throughout his campaign that, if elected, he planned to bar Muslims from the United States. Shortly after the Paris attacks in December 2015, Mr. Trump called for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." Compl. ¶ 30 [attached as **Exhibit C].** In resonant terms for Hawaii's residents, he compared the idea to President Roosevelt's internment of Japanese Americans during World War II, saying, "[Roosevelt] did the same thing." *Id.* ¶ 31. And when asked what the customs process would look like for a Muslim non-citizen attempting to enter the United States, Mr. Trump said: "[T]hey would say, are you Muslim?" An interviewer responded: "And if they said 'yes,' they would not be allowed into the country." Mr. Trump said: "That's correct." *Id.*

Later, as the presumptive Republican nominee, Mr. Trump began using neutral language to describe the Muslim ban; he described his proposal as stopping immigration from countries "where there is a proven history of terrorism." *Id.*

¶ 34. But when asked in July 2016 whether he was retracting his call to ban Muslim immigrants, he said: "I actually don't think it's a pull back. In fact, you could say it's an expansion." *Id.* ¶ 36. And he explained: "People were so upset when I used the word Muslim. 'Oh, you can't use the word Muslim * * *. And I'm okay with that, because I'm talking territory instead of Muslim." *Id.*

Indeed, it is now clear that Mr. Trump—apparently recognizing that he could not implement a naked ban legally—was working behind the scenes to create a subterfuge. In a recent interview, one of the President's surrogates explained: "So when [Donald Trump] first announced it, *he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally*.'" *Id.* ¶ 54. After his election, on December 21, 2016, the President-Elect was asked whether he had decided "to rethink or re-evaluate [his] plans to create a Muslim registry or ban Muslim immigration to the United States." He replied: "You know my plans. All along, I've been proven to be right." *Id.* ¶ 38.

Within one week of his swearing-in, President Trump acted upon his ominous campaign promises. On January 27, 2017, he signed an Executive Order, entitled "Protecting the Nation From Terrorist Entry into the United States." *Id.* ¶¶ 2, 41. When signing the Order, President Trump read its title, looked up, and said: "We all know what that means." *Id.* ¶ 41.

As set forth at length in Washington's brief, the Order has two dramatic effects. First, it categorically bans immigration from seven Muslim-majority countries for a set period. Order § 3(c). Second, it halts admission of any refugees, subject to a targeted carve-out for members of "minority religion[s]" in each country. *Id.* § 5(a)-(b), (e).

President Trump's Order was greeted by widespread protests and condemnation, as well as reports of chaotic conditions at the nation's airports. Within days, more than 100 people had been detained at U.S. airports pursuant to the Order's directives, and more than 60,000 visas were revoked.

ARGUMENT

I. THIS MOTION IS PROCEDURALLY IMPROPER.

It is black-letter law that review of a TRO "cannot be by appeal as of right, but is limited to the consideration of a petition for mandamus." *Wilson* v. *U.S. Dist. Court for Northern Dist. of California*, 161 F.3d 1185, 1187 (9th Cir. 1998). The appeal of the TRO must therefore be dismissed.

The Government attempts to evade this obstacle by claiming that the TRO is in fact a preliminary injunction. Mot. 8. Not so. The District Court has ordered the parties to set a briefing schedule for "the States' motion for a preliminary injunction" by 5:00 pm Monday so that it can "promptly" decide if such an injunction is appropriate. D.Ct. Order at 6. Plainly, the District Court has not

already issued a preliminary injunction. And in light of the impending hearing, there is no reason to think that the TRO will "exceed[] * * * ordinary duration," or that the court below has already heard adequate presentation of the arguments. Mot. 8. The Government's premature attempt to seek appellate review is improper.

II. THE GOVERNMENT IS NOT ENTITLED TO A STAY.

Even if the instant appeal were appropriate, it wholly lacks merit. The Order violates the Immigration and Nationality Act (INA), the Establishment Clause, and the Due Process Clause. And while the Government suffers no hardship under the TRO—which merely preserves the status quo that has prevailed for literally decades—Hawai'i and much of the Nation will suffer irreparable harm to their laws, economies, and most fundamental values if the TRO is lifted.

A. The Government Cannot Succeed On The Merits.

1. The Government Does Not Have Unreviewable Power to Issue The Order.

The Government offers no satisfying explanation as to how a policy that began life as a "Muslim ban" is nonetheless consistent with the INA, the Establishment Clause and the Fifth Amendment. Instead it relies primarily on the so-called "plenary power" doctrine. But that doctrine "is subject to important constitutional limitations." *Zadvydas* v. *Davis*, 533 U.S. 678, 695 (2001). At most, it means that an Executive decision that "burdens * * * constitutional rights"

is valid "when it is made 'on the basis of a facially legitimate and *bona fide* reason.'" *Kerry* v. *Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring in the judgment) (quoting *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972) (emphasis added)). Justice Kennedy's controlling concurrence in *Din* made clear that courts may "look behind" the stated rationale for an exclusion if there is "an affirmative showing of bad faith." *Id.*; *see Cardenas* v. *United States*, 826 F.3d 1164, 1171-72 (9th Cir. 2016) (holding that Justice Kennedy's *Din* concurrence is controlling). If President Trump and his surrogates' repeated statements that the purpose of the Order was to effect a "Muslim ban" do not satisfy that standard, nothing will.

Moreover, because the ban conflicts with the INA, the President's "power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring in the judgment).

2. The Order Is Inconsistent with the Immigration and Nationality Act.

In general, "the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Bond* v. *United States*, 134 S. Ct. 2077, 2087 (2014). The plain terms of the immigration laws suffice to resolve this appeal. The Order "discriminate[s]" against prospective immigrants based on "nationality," in violation of 8 U.S.C. § 1152(a)(1)(A), and it grossly

misapplies the President's authority to "suspend the entry" of aliens, 8 U.S.C. § 1182(f).

a. The order's nationality-based classifications violate the INA.

To start, the Order violates the INA's flat prohibition on nationality-based discrimination. Section 202(a)(1)(A) of the INA provides that "[e]xcept as specifically provided" in certain subsections, "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). As Judge Sentelle has written, "Congress could hardly have chosen more explicit language": It "unambiguously directed that no nationality-based discrimination shall occur." *Legal Assistance for Vietnamese Asylum Seekers* v. *Dep't of State*, 45 F.3d 469, 473 (D.C. Cir. 1995) ("*LAVAS*"), *vacated on other grounds*, 519 U.S. 1 (1996).

The Order flouts this clear command. Tracking the words of the statute almost verbatim, it purports to prohibit the "*Issuance of Visas* * * * *to Nationals* of Countries of Particular Concern," § 3(a) (emphasis added), by "suspend[ing] the entry into the United States" of aliens "from" seven designated countries, § 3(c). It further provides that "*nationals of countries for which visas* and other benefits are otherwise *blocked*" by this suspension can only obtain entry to the United States "on a case-by-case basis, and when in the national interest." *Id.* § 3(e) (emphases

added). In words too plain to mistake, this Order directs that aliens should "receive preference or priority [and] be discriminated against in the issuance of an immigrant visa because of * * * nationality." 8 U.S.C. § 1152(a)(1)(A).

Remarkably, the Government suggests the Order does not mandate nationality-based discrimination "in the issuance of visas" because section 3(c) only says that it "suspend[s] the *entry*" of nationals of seven countries. Mot. 14 (emphasis added). Nonsense. The Order expressly says that it suspends the "Issuance of Visas * * * to Nationals of [those] Countries," § 3(a), and that the "suspension pursuant to subsection (c) * * * block[s]" immigration officials from "issu[ing] visas" to them, § 3(e). Moreover, the only purpose of a visa is to permit "entry." It would gut section 202(a)(1)(A) if the President could circumvent its prohibition simply by denying visas any *effect* on the basis of nationality.

The Government also claims (at 14-15) that the Order falls within an exception to section 202(a)(1)(A) concerning "the authority of the Secretary of State to determine the *procedures* for the *processing* of immigrant visa applications." 8 U.S.C. § 1152(a)(1)(B) (emphases added). But the Order plainly does not just change "the procedures for the processing of" visa applications. It "block[s]" altogether the issuance of "visas or other immigration benefits" to hundreds of millions of individuals. § 3(g). The fact that one of the stated (and

highly dubious) rationales for that ban is to speed a review of visa rules does not transform the ban itself into a matter of mere procedure.

Finally, ignoring the text of the statute entirely, the Government claims (at 13) that courts and Presidents have previously authorized discriminatory bans on entry. No. Courts have sometimes held that already-admitted aliens may be subjected to nationality-based reporting rules, *Narenji* v. *Civiletti*, 617 F.2d 745, 746 (D.C. Cir. 1979), and registration requirements, *Rajah* v. *Mukasey*, 544 F.3d 427, 433-435 (2d Cir. 2008). In *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), the Supreme Court approved an order that made no distinction based on nationality at all. *See id.* at 160 (order prohibited any unlawful entry by sea). No court has held—nor could it—that the Government may engage in nationality-based discrimination in visa-issuance decisions, in clear violation of section 202(a)(1)(A)'s text. *See Jean* v. *Nelson*, 727 F.2d 957, 978 n.30 (11th Cir. 1984) (en banc), *aff'd*, 472U.S. 846 (1985) (expressly distinguishing between "administrative" rules that draw nationality-based distinctions and the system for "the issuance of immigrant visas"). Indeed, many courts have made clear that the Government may not. *See, e.g.*, *LAVAS*, 45 F.3d at 473; *Olsen*, 990 F. Supp. at 37; *Bertrand v. Sava*, 684 F.2d 204, 213 n.12 (2d Cir. 1982).

Until now, Presidents accepted this limit. Since Congress enacted section 8 U.S.C. § 1182(f) in 1952, Presidents have relied on that provision over 40 times to

suspend entry by limited groups of aliens. *See* Cong. Research Serv., Executive Authority to Exclude Aliens: In Brief 6-10 (Jan. 23, 2017), https://fas.org/sgp/crs/homesec/R44743.pdf. The only instance the Government can find in which a President supposedly engaged in nationality-based discrimination is a 1986 order that briefly limited Cuban immigration. *See* Mot. 4, 13. That order, however, had a standalone and last-in-time source of authority: It enforced an immigration treaty that Cuba had violated. 1986 WL 796773; *see* U.S.-Cuba Immigration Agreement, TIAS 11057 (Dec. 14, 1984) (agreeing to permit immigration from Cuba contingent on certain terms). The order did not claim—as this President does—limitless power to shut the Nation's ports of entry to any group of nationals the President deems unwanted.[1]

b. The Order's categorical bans exceed the President's authority.

Further, even apart from its blatant discrimination, the Order exceeds the President's authority by imposing categorical and arbitrary bans on entry that the immigration laws do not permit. As a basis for its sweeping bans, the Order again relies on 8 U.S.C. § 1182(f). But in every prior instance in which Presidents have invoked section 1182(f), they used it to suspend entry of a *discrete* set of

[1] The Government claims that reading section 202(a)(1)(A) to limit the President's power to suspend entry in time of war would "raise a serious constitutional question." Mot. 15. That issue is not presented in this case; the Nation is not at war with any of the seven countries whose nationals the Order bans.

individuals based on an *individualized* determination that *each* prohibited member of the class had engaged in conduct "detrimental to the [United States'] interests." 8 U.S.C. § 1182(f); *see* CRS Report at 6-10. Before now, no President attempted to invoke this statute to impose a *categorical* bar on admission based on a *generalized* (and unsupported) claim that *some* members of a class *might* engage in misconduct. And no President has taken the further step of establishing an *ad hoc* scheme of exceptions that allows immigration officers to admit whomever they choose on either a "case-by-case basis," Order § 3(g), or categorically, *see* Statement by Secretary John Kelly on the Entry of Lawful Permanent Residents Into the United States (Jan. 29, 2017).

If these novel assertions of authority were accepted, the immigration laws could be nullified by executive fiat. It is always possible to claim that some broad group might include dangerous individuals. The President's logic would permit him to abandon Congress's immigration system at will, and replace it with his own rules of entry governed by administrative whim.

That is not the law Congress enacted. "Congress * * * does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions"—it does not, as Justice Scalia wrote, "hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Enabling the President to unilaterally suspend the immigration laws would surely be an

elephant; and the vague terms of Section 1182(f)—never once in six decades interpreted in the manner the President now proposes—are a quintessential mousehole. *See FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-160 (2000). Indeed, it is doubtful that Congress *could* delegate such unbounded authority to the President. *See Whitman*, 531 U.S. at 472 (Congress cannot delegate powers without an "intelligible principle" to govern their exercise).

3. The Order Violates the Establishment Clause.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). To determine whether a particular policy runs afoul of that command, the Ninth Circuit typically applies the three-part test from *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). *See, e.g.*, *Access Fund* v. *U.S. Dep't of Agric.*, 499 F.3d 1036, 1042-43 (9th Cir. 2007). "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion * * *; finally the statute must not foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-613 (internal quotation marks omitted). The Order cannot satisfy a single one of these requirements.

While the Government has asserted that the Order serves the secular purpose of protecting against terrorism, "an 'avowed' secular purpose is not sufficient to

avoid conflict with the First Amendment" where the order's actual aim is establishing a religious preference. *Stone* v. *Graham*, 449 U.S. 39, 41 (1980) (per curiam). Here, the President and his aides have made it abundantly clear that their aim is to exclude individuals of the Muslim faith. Compl. ¶¶ 27-43, 53-54. And sections 5(b) and 5(e) explicitly direct the government to prioritize religious refugee claims if the "religion of the individual is a minority religion in the individual's country"—a provision that President Trump told the media was expressly designed to favor Christians. *Id.* ¶¶ 51, 53.

In the Establishment Clause context, these statements matter. Because *Lemon*'s first step is concerned with "whether [the] government's actual purpose is to endorse or disapprove of religion," courts routinely look to the public declarations of an act's originator to discern its true aim. *Wallace* v. *Jaffree*, 472 U.S. 38, 56-57 (1985) (finding a constitutional violation where a bill's sponsor "inserted into the legislative record * * * a statement indicating that the legislation was an 'effort to return voluntary prayer' to the public schools"); *Edwards* v. *Aguillard*, 482 U.S. 578, 586-587 (1987) (examining the remarks of a bill's sponsor to determine whether a stated secular purpose was "sincere and not a sham"). That is particularly so when the head of our government publicly expresses "a purpose to favor religion"; in doing so, he "sends the message to nonadherents that they are outsiders, not full members of the political community."

McCreary Cty., Ky. v. *Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860-861 (2005) (internal quotation marks and ellipses omitted). An otherwise constitutional policy therefore may be invalidated "if the government justifies the decision with a stated desire" to promote a particular religion. *Id.*

Further, there is no question that the President's public statements have caused citizens to reasonably *believe* that the policy is aimed at the Muslim faith: *Supra* at pp. 2-4. That is enough to demonstrate an Establishment Clause violation under the second prong of *Lemon*, which "asks whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Access Fund*, 499 F.3d at 1045 (internal quotation marks omitted); *see McCreary*, 545 U.S. at 868 n.14. And the Order is also unconstitutional under *Lemon*'s third prong because its exception for members of religious minorities alone "foster[s] an excessive government entanglement with religion." 403 U.S. at 612-613 (internal quotation marks omitted).

There is also no question that the Establishment Clause fully applies in the immigration context. Indeed, in one of the Supreme Court's most recent Establishment Clause cases, six members of the Court agreed that requiring "an immigrant seeking naturalization * * * to bow her head and recite a Christian prayer" would unquestionably violate the Establishment Clause. *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1834 (2014) (Alito, J., joined by Scalia, J.,

concurring); *id.* at 1842 (Kagan, J., joined by Ginsburg, J., Breyer, J., and Sotomayor, J., dissenting).

The Government has no response to any of this. It says (at 19) that section 5(b) is "neutral" because on its face it applies to any refugee who belongs to a "minority" faith in his country, wishing away the President's statement that this provision's "purpose" was to aid Christians. *Wallace*, 472 U.S. at 56. Nor does it explain how Section 3(c)'s ban on any travel from seven Muslim-majority nations—a restriction intended and widely understood as an effort to disfavor Muslims—is consistent with the Establishment Clause. Although reasonable minds may disagree as to what quantum of financial support that Clause permits for private education, *Agostini* v. *Felton*, 521 U.S. 203 (1997), or whether the Establishment Clause is violated by a purportedly secular monument of the Ten Commandments, *McCreary*, 545 U.S. at 844, there can be no dispute that the Clause is violated where the Executive announces and makes good on a desire to exclude or privilege the entrance of individuals into the country depending on their faith.

4. The Order Violates Equal Protection.

The Order also violates the equal protection component of the Due Process Clause. Classifications based on religion and national origin are subject to strict scrutiny, and so must be "narrowly tailored to achieving a compelling * * *

interest." *Miller* v. *Johnson*, 515 U.S. 900, 904 (1995); *see Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 107 n.30 (1976); *Employment Div.* v. *Smith*, 494 U.S. 872, 886 n.3 (1990) The Order expressly and intentionally differentiates among people based on national origin, §§ 3(c), 5(c), and religion, §§ 3(c), 5(b), (e). And it is nowhere near "tailored" enough to justify that differentiation: Despite its assertion that it is meant to prevent terrorism, the Order ensnares countless resident aliens lacking even the remotest connection to terrorism of any sort, yet would not have prohibited entry by *any* of the perpetrators of the worst recent terrorist attacks on American soil. Compl. ¶ 46. This mismatch—so severe that it would flunk even rational-basis review—indicates that the real purpose of the Order was an unlawful intent to "harm a politically unpopular group." *United States* v. *Windsor*, 133 S. Ct. 2675, 2693 (2013) (citation omitted).

The Government (at 17) defends the Order on the basis of the plenary power doctrine. But its blinkered refusal to "look behind" the face of the policy to the "bad faith" that underlies it dooms that argument. *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). The Government also claims (at 19) that there can be no animus here because the countries that the Order targets in section 3(c) were "identified in restricting the waiver program in 2015 and 2016." But that program's restrictions are far less burdensome, and more closely related to their purpose—critical considerations in the narrow tailoring analysis. Moreover,

the fact that the countries were once selected for neutral purposes cannot erase the fact that *here*, as the President's and his surrogates' statements make clear, they were selected to camouflage religious discrimination.

5. The Order Violates Due Process.

Sections 3(c) and 3(e)-(f) of the Order also violate the Fifth Amendment's procedural due process requirements. Denial of reentry "is, without question, a weighty" interest, and a person in that circumstance must be given "an opportunity to present her case effectively." *Landon* v. *Plasencia*, 459 U.S. 21, 34, 36 (1982). But the Order offers no procedural protections whatsoever: It allows for no counsel, no hearings, no inquiry, and no review. That will not do.

The Government responds (at 18) that some of those individuals affected by the Order lack Fifth Amendment rights because they have never been admitted to the United States. That is far from clear; six justices recently indicated that Due Process may demand certain protections for aliens seeking entry. *See Din*, 135 S. Ct. at 2142 (Breyer, J., dissenting); *id.* at 2139 (Kennedy, J., concurring in the judgment). And in any event, the Government offers no defense as to those aliens who *have* been admitted, and are merely seeking to return from abroad. The Court has made crystal clear that "[t]he returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him." *Rosenberg* v. *Fleuti*, 374 U.S. 449, 460 (1963).

6. The State Has Standing to Bring These Challenges to the Order.

The Government attempts to dodge the merits by asserting that States lack standing to challenge the order. Not so.

As an initial matter, the Government studiously ignores *Massachusetts v. EPA*, 549 U.S. 497 (2007), which held that States are due "*special solicitude* in [the] standing analysis" when they challenge executive measures that affect their "sovereign prerogatives," *id.* at 520 (emphasis added). The need for solicitude is particularly acute in cases like this one because unlawful Executive action deprives Hawai'i of the key structural mechanism the Constitution provides for protecting their sovereign interests—representation in Congress. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985). And this Order will inflict at least four unique injuries on Hawai'i, making it readily apparent that Hawai'i would have standing, even without this special solicitude.

First, the Executive Order will irreparably harm Hawaii's sovereign interest in preventing the unconstitutional "establishment" of a national religion in the State. The Government suggests that States lack standing to bring Establishment Clause challenges because they "cannot suffer 'spiritual or psychological harm' or hold 'religious beliefs.'" Mot. 11 n.4. Wrong. The Establishment Clause—whose text instructs that "*Congress* shall make no law respecting an establishment of religion," U.S. Const. amdt. 1(emphasis added)—was added to the Constitution not

only to protect individuals' rights but "as a federalism provision intended to prevent Congress from interfering with *state*" policies on religion. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 49 (Thomas, J., concurring).

Second, the Order gives rise to cognizable Article III injuries because it prevents Hawai'i from fully enforcing its anti-discrimination laws and policies. Hawaii's Constitution protects religious freedom and the equal rights of all persons. Hawai'i Const. art. 1, §§ 2, 4. Its statutes and policies bar discrimination and further diversity. Haw. Rev. Stat. §§ 378-2(1); 489-3; 515-3; Compl. ¶ 72. The Executive Order commands Hawai'i to abandon these sovereign prerogatives by requiring its universities, its agencies, and its instrumentalities to discriminate on the basis of nationality and religion. As the Government notes (at 22), in a related context the Court has held that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers).

Third, the Executive Order will inflict irreparable harm on Hawaii's economy and tax revenues. Tourism is the "state's lead[ing] economic driver"; in 2015 alone, Hawai'i had 8.7 million visitor arrivals, accounting for $15 billion in spending. Compl. ¶ 15. The Order prevents any nationals of the designated countries from visiting the State, and chills tourism from many other countries,

resulting in considerable lost revenues. Ex. B, Decls. E-F (declarations filed by State officials). These consequences will reduce the State's economic output and its tax revenues, and inflict incalculable harm on Hawaii's hard-won reputation as a place of welcome. *See Oracle USA, Inc.* v. *Rimini St., Inc.*, 2016 WL 5213917, at *2 (9th Cir. Sept. 21, 2016).

The Government, citing a 1927 case, erroneously suggests (at 10) that such irreparable injuries to a State's economy, tax revenues, and reputation cannot support standing. False. More recent precedent establishes exactly the opposite. *See Texas v. United States*, 809 F.3d 134, 155-156 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (Texas' "financial loss[es]" that it would bear, due to having to grant DAPA recipients drivers licenses, constituted a concrete and immediate injury for standing purposes); *see also United States v. Windsor*, 133 S. Ct. 2675 (2013) (standing to appeal an order to pay a tax refund); *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992) (standing to sue for "direct injury in the form of a loss of specific tax revenues").

Finally, the Order subjects a portion of Hawaii's population to discrimination and marginalization while denying all residents of the State the benefits of a pluralistic and inclusive society. Hawai‘i has a quasi-sovereign interest in "securing [its] residents from the harmful effects of discrimination." *Alfred L. Snapp & Son*, 458 U.S. 592, 609 (1982). Hawai‘i is home to over 6,000

legal permanent residents, including numerous individuals from the designated countries. Compl. ¶ 10. It currently has 12,000 foreign students, including 27 graduate students from the designated countries at the University of Hawai‘i alone. Ex. B., Decl. D (declaration of University official). The University of Hawai‘i also has at least 10 faculty members who are legal permanent residents from the designated countries, and at least 30 faculty members with valid visas from those countries. *Id.* Section 3(c) of the Order subjects these Hawaii residents to second-class treatment—denying them their fundamental right to travel overseas, preventing them from tending to important family matters, and impairing their ability to complete necessary aspects of their work or study. More broadly, the Order subjects all of Hawai‘i—which prides itself on its ethnic diversity and inclusion—to a discriminatory policy that differentiates among State residents based on their national origin.

B. The Balance of the Equities Bars a Stay.

The Government has identified no exigency that demands immediate implementation of this Order. They have *no* evidence that the Order's wildly over- and under-inclusive bans will actually prevent terrorism or make the Nation more secure. Moreover, their claims of national security dangers are dramatically undercut by the fact that the TRO simply restored the status quo for decades that was in place little more than one week ago.

By contrast, the four harms that establish Hawaii's standing also demonstrate that the State will be irreparably harmed if the TRO is stayed. And the Nation as a whole will be injured for many of these same reasons. Religion is being improperly established, rights are being unconstitutionally denied, and the values and freedoms at the core of our nation are being defied. There is therefore no question that the public interest counsels against a stay. Indeed, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres* v. *Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

Finally, the Government suggests that it was inappropriate for the District Court to issue a "nationwide" injunction. But a "district court has broad discretion in fashioning equitable relief." *Koniag, Inc. v. Koncor Forest Res.*, 39 F.3d 991, 1001 (9th Cir. 1994). And this Court has noted that a "nationwide injunction" setting aside unlawful agency action "is compelled by the text of the Administrative Procedure Act." *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007), *rev'd in part on other grounds*, 555 U.S. 488 (2009). A nationwide injunction is particularly appropriate in the immigration context because of the Constitution's requirement of "a *uniform* Rule of Naturalization." *Texas*, 787 F.3d at 769 (emphasis added).

CONCLUSION

The Motion for an Emergency Stay should be denied.

Respectfully submitted,

/s/ Neal Kumar Katyal

DOUGLAS S. CHIN
Attorney General of the State of Hawai‘i
CLYDE J. WADSWORTH
Solicitor General of the State of Hawai‘i
DEIRDRE MARIE-IHA
KIMBERLY T. GUIDRY
DONNA H. KALAMA
ROBERT T. NAKATSUJI
Deputy Attorneys General

DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI‘I
425 Queen Street
Honolulu, HI 96813
Telephone: (808) 586-1500
Fax: (808) 586-1239

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

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

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

Attorneys for Proposed Intervenor, State of Hawai‘i

CERTIFICATE OF COMPLIANCE

I certify pursuant to Circuit Rule 35-4 that the attached Opposition to Defendants' Motion for an Emergency Stay is proportionately spaced, has a typeface of 14 points or more, and contains 5,189 words of text.

/s/ Neal Kumar Katyal
Neal Kumar Katyal

CERTIFICATE OF SERVICE

I certify that the foregoing Opposition to Defendants' Motion for an Emergency Stay was filed with the Clerk using the appellate CM/ECF system on February 5, 2017. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Neal Kumar Katyal
Neal Kumar Katyal

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

STATE OF HAWAI'I, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No. _____ MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

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INTRODUCTION

On January 27, 2017, President Donald Trump signed an Executive Order that banned immigrants from seven Muslim-majority countries and created a preference for Christian refugees. That Order has triggered an uproar across the United States and the world. And rightfully so: As many have observed, the Order is a distressing departure from an American tradition that has long celebrated immigrants and opened its arms to the homeless, the tempest-tossed.

Hawai‘i joins the many voices that have condemned the Order. But this pleading is not about politics or rhetoric—it is about the law. The simple fact is that the Order is unlawful. By banning Muslims and creating a preference for Christian refugees, the Order violates the Establishment Clause of the United States Constitution. By those same acts, it violates the equal protection guarantee of the Fifth Amendment. By failing utterly to provide procedures or protections of any kind for people detained or turned away at our airports, it violates the Due Process Clause. And by enshrining rank discrimination on the basis of nationality and religion, it flies in the face of statutes enacted by Congress.

Hawai‘i and its residents are being grievously harmed by these violations of the law. The Order is keeping Hawai‘i families apart; it is blocking Hawai‘i residents from traveling; it is using the State’s airport facilities to further discriminatory policies the State abhors; it is harming Hawaii’s critical tourism

industry; it is establishing a religion in Hawai‘i against the will of its residents; and it is blocking Hawaii's businesses and universities from hiring as they see fit. Perhaps most importantly, it is degrading the pluralistic values Hawai‘i has worked hard to protect and subjecting an identifiable portion of its population to discrimination and second-class treatment.

Hawai‘i respectfully asks this Court to enter a temporary restraining order blocking enforcement of key portions of the Order. The test for such a remedy is met: Hawai‘i is likely to succeed in showing on the merits that the Order is unlawful several times over. The State is being irreparably harmed by the Order's enforcement. And those harms far outweigh the non-existent interest the Executive Branch has identified in enforcing its discriminatory regime. The motion should be granted.

FACTUAL BACKGROUND

A. Candidate Trump Calls For A Muslim Ban.

Then-candidate Donald Trump made it crystal clear throughout his presidential campaign that if elected, he planned to bar Muslims from the United States. Shortly after the Paris attacks in December 2015, Mr. Trump issued a press release calling for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." Compl. ¶ 30 & Ex. 5. When questioned about the idea shortly thereafter, he compared it to

President Roosevelt's race-based internment of the Japanese during World War II, saying, "[Roosevelt] did the same thing." Compl. ¶ 31. And when asked what the customs process would look like for a Muslim non-citizen attempting to enter the United States, Mr. Trump said: "[T]hey would say, are you Muslim?" An interviewer responded: "And if they said 'yes,' they would not be allowed into the country." Mr. Trump said: "That's correct." *Id.*

Later, as the presumptive Republican nominee, Mr. Trump began using facially neutral language to describe the Muslim ban; he described his proposal as stopping immigration from countries "where there's a proven history of terrorism." Compl. ¶ 34. But he continued to link that idea to the need to stop "importing radical Islamic terrorism to the West through a failed immigration system." *Id.* And he continued to admit, when pressed, that his plan to ban Muslims remained intact. Asked in July 2016 whether he was retracting his call for "a total and complete shut-down of Muslim" immigration, he said: "I don't think it's a rollback. In fact, you could say it's an expansion." Compl. ¶ 36 & Ex. 6. And he explained: "People were so upset when I used the word Muslim. 'Oh, you can't use the word Muslim * * *. And I'm okay with that, because I'm talking territory instead of Muslim." *Id.*

Indeed, it is now clear that Mr. Trump—apparently recognizing that he could not come right out and implement his Muslim ban without violating the

law—was working behind the scenes to create a suitable subterfuge. In a recent television interview, one of the President's surrogates explained what happened: "So when [Donald Trump] first announced it, *he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally*.'" Compl. ¶ 54 & Ex. 8. After his election, the President-Elect signaled that he would not retreat from his Muslim ban. On December 21, 2016, he was asked whether he had decided "to rethink or re-evaluate [his] plans to create a Muslim registry or ban Muslim immigration to the United States." He replied: "You know my plans. All along, I've been proven to be right." Compl. ¶ 38.

Donald Trump's comments also targeted more specific groups. Throughout the presidential campaign, he vowed to curb refugee admissions, particularly from Syria. In June 2016, he issued a press release stating: "We have to stop the tremendous flow of Syrian refugees into the United States." Compl. ¶ 35. At one point, he promised to deport the 10,000 Syrian refugees the Administration had accepted for 2016. Compl. ¶ 29. Meanwhile, he asserted (wrongly) that Christian refugees from Syria were being blocked. He said in July 2015: "If you're * * * a Christian, you cannot come into this country." Compl. ¶ 28.

B. President Trump Implements His Discriminatory Bans.

Within one week of being sworn in as President, Donald Trump acted upon his ominous campaign promises. On January 27, 2017, he signed an Executive

Order ("Order"), entitled "Protecting the Nation From Terrorist Entry into the United States." Compl. ¶¶ 2, 41 & Ex. 1. When signing the Order, President Trump read its title, looked up, and said: "We all know what that means." Compl. ¶ 43.

The Order has two dramatic effects: It categorically bans immigration from seven Muslim-majority countries for a set period; and it halts admission of any refugees, subject to a targeted carve-out for members of "minority religion[s]" in each country.

First, Section 3(c) of the Order "suspend[s the] entry into the United States, as immigrants and nonimmigrants," of nearly all aliens from seven Muslim-majority countries—Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen—"for 90 days from the date of this order." Exceptions are made for narrow categories of diplomats. Putting aside those diplomats, Section 3(c) means that for 90 days *all* non-U.S. citizens from those seven countries are barred. And it means that even people who have been living legally in the United States—foreign students enrolled in U.S. universities, refugees already granted asylum here, and people employed in the United States on temporary work visas, among others—will be halted at the border if they travel outside the United States. Section 3(g) gives the Secretaries of Homeland Security and State discretion to "on a case-by-case basis * * * issue visas or other immigration benefits to nationals of countries for which

visas and benefits are otherwise blocked." *Id.* However, it provides no procedure for an alien to request such an exception or for the Secretaries to process one.

By its plain terms, this order bars lawful permanent residents (LPRs) from the seven prohibited nations from reentering the country. Two days after the order was issued, Secretary of Homeland Security Kelly issued a press release purporting to categorically exempt LPRs from the travel ban. Compl. ¶ 62. Four days later, the White House changed its mind and issued a memorandum stating that, despite the order's language, LPRs were not covered in the first place. Compl. ¶ 64.

While the Order's immigration ban currently applies only to people from the seven designated countries, the Order indicates that more will be added to the list. It directs the Secretary of State to "request [that] all foreign governments" provide the United States with information necessary "to adjudicate any visa, admission, or other [immigration] benefit * * * in order to determine that the individual * * * is not a security or public-safety threat." *Id.* § 3(a), (d). Foreign countries must "start providing such information [to the United States] regarding their nationals within 60 days of notification." *Id.* § 3(d). If foreign countries do not comply, the Secretaries of Homeland Security and State are directed to "submit to the President a list of [those] countries recommended for inclusion" in the immigration ban. *Id.* § 3(e).

The Order also bars refugees—and it does so in a way that discriminates based on religion. Sections 5(a) and (b) impose a 120-day moratorium on the U.S. Refugee Admissions Program, and Section 5(c) suspends entry of Syrian refugees indefinitely. When refugee admissions resume, the Order directs the Secretary of State to prioritize refugees claiming religious-based persecution, "provided that the religion of the individual is a minority religion in the individual's country of nationality." *Id.* § 5(b). It also provides that even during the initial 120-day period, the Secretaries of State and Homeland Security can admit refugees on a case-by-case basis, but only when doing so is "in the national interest." *Id.* § 5(e). Three circumstances automatically fulfill that criterion; one is "when the person is a religious minority in his country of nationality facing religious persecution." *Id.*

Because all seven countries named in the Order have majority-Muslim populations, these provisions create a preference for Christians. They mean that Christians (and other non-Muslim religions) may enter the United States as refugees and may obtain priority treatment, while Muslims may not. In an interview on January 27, President Trump told the Christian Broadcasting Network that his intent was to "help" Christian refugees. Compl. ¶ 53& Ex. 7.

C. The Order's Impact

President Trump's Order was greeted by widespread protests and condemnation, as well as reports of chaotic conditions at the nation's airports. Within five days, more than 100 people had been detained at U.S. airports pursuant to the Order's directives. Compl. ¶ 55. That included dozens of lawful permanent residents, an Iraqi national with Special Immigrant Visa status who had worked as an interpreter for the U.S. army in Iraq, and a doctor at the Cleveland Clinic with a work visa who was trying to return home from vacation. Compl. ¶ 57. Hundreds of others were blocked from boarding flights to the United States or have been notified that they can no longer come here—including foreign students with valid visas and Syrian refugees with visas and U.S. placements already lined up. Compl. ¶ 58. According to a Justice Department lawyer, more than 100,000 visas have been revoked since the Order was signed. *Id*.

Meanwhile, thousands of diplomats, former diplomats, and legislators from both parties spoke out against the ban, calling it inhumane and discriminatory. Hundreds of State Department officials signed a memo stating that the Order "runs counter to core American values" including "nondiscrimination," and that "[d]espite the Executive Order's focus on them, a vanishingly small number of terror attacks on U.S. soil have been committed by foreign nationals" here on visas. Compl. ¶ 60 & Ex. 10. Senators John McCain (R-AZ) and Lindsey Graham

(R-SC) stated: "This executive order sends a signal, intended or not, that America does not want Muslims coming into our country." Comp. ¶ 61.

The Order quickly impacted Hawai'i too, as delineated in detail in the attached Complaint. Hawai'i is home to numerous nationals from the seven designated countries—including foreign students, refugees, and temporary workers—whose lives have now been upended by the Order. *See* Compl. ¶¶ 10-11, 14, 68. Because of the Order, they cannot leave the country for family, educational, religious, or business reasons if they wish to return. Indeed, one State employee's travel plans abroad have been severely disrupted by the Order. Decl. of John Doe 2 (Ex. B), ¶¶ 8-11. Conversely, nationals of the seven designated countries cannot relocate to or even visit Hawai'i for any reason. Compl. ¶ 69. Several Hawai'i residents are being thwarted from reuniting with their families as a result of the Order—including a U.S. citizen, and his wife and five children (all also U.S. citizens), who are being prevented from seeing or reuniting and living with their Syrian mother-in-law/mother/grandmother, Decl. of Elshikh (Ex. H), ¶¶4-7; and at least two others who are currently being separated from members of their immediate family but are too fearful of future government retaliation to provide details in a public filing, Decl. of John Doe 1 (Ex. A), ¶¶ 6, 10, 13; Decl. of John Doe 3 (Ex. C), ¶¶ 3-4.

Hawai‘i *qua* Hawai‘i also is being actively harmed by the Order. For example, Defendants are enforcing the Order on Hawai‘i soil, including at Honolulu and Kona International Airports. Compl. ¶ 67. As a result of the Order, the facilities provided by Hawai‘i's State Department of Transportation for international passengers coming into Hawaii will be used by the federal government to carry out the unlawful acts required by the Order. Compl. ¶ 71; Decl. of R. Higashi (Ex. G), ¶¶ 5-7. Likewise, State universities and agencies cannot accept qualified applicants for positions if they are nationals of one of the seven designated countries; other employers within the State cannot recruit and/or hire workers from those countries; and Hawai‘i can no longer welcome their tourists—a direct harm to Hawai‘i's critical tourism business. *See* Compl. ¶¶ 15, 72-78; Decl. of R. Dickson (Ex. D), ¶¶ 13-14; Decl. of G. Szigeti (Ex. F), ¶ 9; Decl. of L. Salaveria (Ex. E), ¶¶ 9-12.

Last but not least, the Order is harming Hawaii's identity and most basic values. For many in Hawai‘i, including State officials, the Order conjures the memory of the Chinese Exclusion Acts and the post-Pearl Harbor imposition of martial law and Japanese internment. As Governor Ige said two days after President Trump signed the Order: "Hawai‘i has a proud history as a place immigrants of diverse backgrounds can achieve their dreams through hard work. Many of our people also know all too well the consequences of giving in to fear of

newcomers. The remains of the internment camp at Honouliuli are a sad testament to that fear. We must remain true to our values and be vigilant where we see the worst part of history about to be repeated." Compl. ¶ 81.

STANDARD OF REVIEW

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

ARGUMENT

Hawai'i meets this standard. First, it has a substantial likelihood of success on the merits because the Order is unlawful several times over: Among other things, it imposes a "Muslim ban" in violation of the Establishment Clause; discriminates against particular classes of people in violation of the Fifth

Amendment; contravenes the Immigration and Nationality Act's prohibitions on nationality- and religion-based discrimination; and, through its implementation, violates the Administrative Procedure Act (APA). Second, Hawai'i will suffer irreparable harm if relief is not granted: The Order imposes religious harms on the state, imposes immeasurable costs on Hawaii's economy and tax revenues, and discriminates against a portion of the State's population. Third, the balance of equities tips in Hawai'i's favor. The United States will suffer no hardship if the Order is enjoined because the Government can achieve its national security objectives through other means, while remedying constitutional and statutory violations is in the public interest.

A. Hawai'i Is Likely To Succeed on the Merits of Its Claims.

1. The Order Violates the Establishment Clause.

Because Sections 3(c) and Sections 5(a)-(c) and 5(e) of the Order plainly conflict with the Establishment Clause, plaintiffs are likely to succeed on their constitutional claims.

The United States was settled by an ecumenically diverse set of immigrants seeking religious freedom. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 182-183 (2012). The Framers enshrined that freedom in the First Amendment's Religion Clauses. One of those Clauses, the Establishment Clause, "addressed the fear that 'one sect might obtain a pre-

eminence * * * and establish a religion to which they would compel others to conform.'" *Id.*at 184 (quoting 1 Annals of Cong. 730-731 (1789) (remarks of J. Madison)). Thus "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982).

To determine whether a particular policy runs afoul of that command, the Ninth Circuit typically applies the three-part test from *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). *See, e.g.*, *Access Fund* v. *U.S. Dep't of Agric.*, 499 F.3d 1036, 1042-43 (9th Cir. 2007). "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion * * *; finally the statute must not foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-613 (internal quotation marks and citation omitted). A failure to satisfy any one of these requirements establishes a constitutional violation. The Order flunks all three.

First, while the Government has asserted in the Order itself that it serves the secular purpose of protecting against terrorism, "an 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment" where the order's actual aim is establishing a religious preference. *Stone* v. *Graham*, 449 U.S. 39, 41 (1980) (per curiam). For example, in *Stone* the Supreme Court invalidated a law requiring that the Ten Commandments be placed on classroom walls. The law

mandated that each display include a statement that "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." *Id.* But that was not enough because the "pre-eminent purpose" of requiring the display was "plainly religious in nature." *Id.*

The same is true here. The President and his aides have made it abundantly clear that they intend to exclude individuals of the Muslim faith, and that this Order—which bans travel only with respect to certain Muslim-majority countries—is part of that plan. *See* Compl. ¶¶ 27-43, 53-54. Sections 5(b) and 5(e) also explicitly direct the government to prioritize religious refugee claims if the "religion of the individual is a minority religion in the individual's country"—a system of religious preference that President Trump told the media was expressly designed to favor Christians. Compl. ¶¶ 51, 53 & Ex. 7.

In the Establishment Clause context, these statements matter. Because *Lemon*'s first step is concerned with "whether [the] government's actual purpose is to endorse or disapprove of religion," courts routinely look to the public declarations of an act's originator to discern its true aim. *Wallace* v. *Jaffree*, 472 U.S. 38, 56-57 (1985) (finding an Establishment Clause violation because "[t]he sponsor of the bill * * * inserted into the legislative record—apparently without dissent—a statement indicating that the legislation was an 'effort to return

voluntary prayer' to the public schools"); *Edwards* v. *Aguillard*, 482 U.S. 578, 586-587 (1987) (examining the remarks of a bill's sponsor during a legislative hearing to determine whether a stated secular purpose was "sincere and not a sham"). Accordingly, when a challenged policy is generated by the Executive, rather than Congress, the court may examine the statements of the President and his aides. *Cf. Utley* v. *Varian Assocs., Inc.*, 811 F.2d 1279, 1285 (9th Cir. 1987) (in the affirmative action context, if a program was created by the Executive, the "analysis focus[es] on executive rather than congressional intent").

Indeed, public statements of purpose calculated to be heard by a wide audience carry particular weight. When the head of our government publicly expresses "a purpose to favor religion," it "sends the message to nonadherents that they are outsiders, not full members of the political community." *McCreary Cty., Ky.* v. *Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860-861 (2005) (internal quotation marks and ellipses omitted). Thus, the Supreme Court has explained that a policy that might otherwise pass constitutional muster may be invalidated "if the government justifies the decision with a stated desire" to promote a particular religion. *Id.*

If there were any doubt as to the actual purpose of the policy, there is no question that the President's public statements have caused citizens to reasonably *believe* that the policy is aimed at the Muslim faith: Witness, for example, the mass

protests at airports and in cities across the country and the explicit statement of two Republican Senators. *See supra* at pp. 7-8. That in and of itself is enough to demonstrate an Establishment Clause violation under the second prong of *Lemon*. This second "prong * * * asks whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Access Fund*, 499 F.3d at 1045 (internal quotation marks omitted); *see also McCreary*, 545 U.S. at 868 n.14 (examining how a challenged action will be perceived by an "objective observer[ ]"). One need hardly do more than articulate this inquiry to understand why the Order fails. And the same is true for *Lemon*'s third prong, which considers whether a policy "foster[s] an excessive government entanglement with religion." 403 U.S. at 612-613 (internal quotation marks omitted). The exception for members of religious minorities alone hopelessly entangles the government in religious matters.

To be sure, courts are inconsistent in how or whether they invoke *Lemon*, and the Supreme Court has applied several different frameworks in analyzing potential Establishment Clause violations. But no framework permits the government to enact a policy that amounts to a governmental preference for or against a particular faith. *See, e.g.*, *Town of Greece, N.Y.* v. *Galloway*, 134 S. Ct. 1811, 1824 (2014) (declining to apply *Lemon* but upholding a policy in part because—unlike the Order—it did not "reflect an aversion or bias on the part of

town leaders against minority faiths"); *Larson*, 456 U.S. at 246 (applying strict scrutiny and invalidating a policy because it unnecessarily "grant[ed] a denominational preference").

Some of the Order's defenders attempt to avoid this conclusion by pointing to older Supreme Court cases discussing Congress's plenary power over immigration. *See, e.g.*, *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972). That argument fails for two independent reasons. First, as discussed in greater length below, even if it is good law, the doctrine would not apply to a policy like this one. *See infra* at pp. 22-25. Second, the plenary power cases are not relevant to the Establishment Clause anyway: The Court has never applied the doctrine with respect to policies that draw religious distinctions in the immigration context. Nor could it. Allowing an immigration exception would swallow the Establishment Clause whole. After all, a primary means of establishing a national religion is to exclude members of another faith from immigrating or to privilege the entry of members of the faith one wishes to establish. Indeed, in one of the Supreme Court's most recent Establishment Clause cases, six members of the Court agreed that requiring "an immigrant seeking naturalization * * * to bow her head and recite a Christian prayer" would unquestionably violate the Establishment Clause. *Town of Greece*, 134 S. Ct. at 1834 (Alito, J., joined by Scalia, J., concurring); *id.*

at 1842 (Kagan, J., joined by Ginsburg, J., Breyer, J., and Sotomayor, J., dissenting).

The Order's defenders have also suggested that if this Order is held to violate the Establishment Clause, then all future immigration policies that disproportionately aid or exclude members of a particular faith will be foreclosed. That is simply not so. An immigration policy with a secular purpose and design that just happens to disproportionately exclude members of a particular faith likely would survive *Lemon*. But that is not this Order. Instead, the President that issued it openly announced a desire to ban Muslims, *told his advisors he wanted their help to do just that while disguising his purpose*, and then followed through by signing a Muslim ban and tossing in a transparent fig leaf. Holding that *that* practice violates the Establishment Clause will foreclose nothing more than cynical attempts to skirt core constitutional commands.

2. The Order Violates Equal Protection and the Fifth Amendment's Due Process Clause.

There is little doubt that, under normal equal-protection and due-process principles, the Order is unconstitutional: It discriminates based on protected classifications, and it cannot survive strict scrutiny. The only question, then, is whether the "plenary power" doctrine excuses the constitutional violations. It does not.

a. The Order violates equal protection and the right to travel.

To begin, the Order violates the Constitution's guarantee of equal protection.[1]

"From its inception, our Nation welcomed and drew strength from the immigration of aliens." *In re Griffiths*, 413 U.S. 717, 719 (1973). The "contributions" of immigrants "to the social and economic life of the country" are "self-evident." *Id*. Thus any government classification based on alienage or national origin is "objectionable." *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 107 n.30 (1976). Similarly, courts must "strictly scrutinize governmental classifications based on religion." *Employment Div.* v. *Smith*, 494 U.S. 872, 886 n.3 (1990). Classifications based on religion and national origin are therefore both subject to strict scrutiny, and must be "narrowly tailored to achieving a compelling * * * interest." *Miller* v. *Johnson*, 515 U.S. 900, 904 (1995)

Sections 3(c) and 3(e)-(f) of the Order plainly flunk that test. They are premised on differentiating among people based on national origin: People from certain countries can enter the United States, and people from other countries cannot. In addition, those provisions as well as Sections 5(a) and (c) treat people

[1] The Fourteenth Amendment's Equal Protection Clause applies only against the states, but "[i]n numerous decisions," the Supreme Court has held that the same equal protection analysis applies to the federal government through the Due Process Clause of the Fifth Amendment. *See, e.g.*, *Davis* v. *Passman*, 442 U.S. 228, 234 (1979).

differently because of their religion: They are intentionally structured in a way that blocks Muslims while allowing Christians.

The Order is nowhere near "tailored" enough to justify that differentiation. It asserts that it is meant to prevent terrorism. But if so, it is wildly over- and under-inclusive. It is over-inclusive because it ensnares countless students, tourists, businesspeople, refugees, and other travelers lacking even the remotest connection to terrorism of any sort. And it is under-inclusive because it would not have covered *any* of the perpetrators of the worst recent terrorist attacks on American soil: September 11, the Boston Marathon bombing, San Bernardino, or Orlando. Not a single fatal terrorist attack has been perpetrated in the United States by a national of one of the seven identified countries since at least 1975. Compl. ¶ 46.

Indeed, the fit between the Order's coverage and its stated purpose is so poor that it would fail even rational-basis review. The mismatch indicates that the real purpose of the Order was simply to harm a politically unpopular group: Muslims. That is unlawful. The "Constitution's guarantee of equality 'must at the very least mean that a bare * * * desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *United States* v. *Windsor*, 133 S. Ct. 2675, 2693 (2013) (citation omitted).

Separately, the Order infringes the right to international travel. "Freedom of movement is basic in our scheme of values." *Kent* v. *Dulles*, 357 U.S. 116, 126 (1958). The right to travel abroad is therefore "part of the 'liberty'" protected by the Due Process Clause. *Id*. at 125. And because the Order curtails this right, it must be "narrowly drawn to prevent the supposed evil." *Id*. at 904. As explained above, it does not come close.

b. The Order violates procedural due process.

Sections 3(c) and 3(e)-(f) of the Order also violate procedural due process requirements. "[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent," *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001), and resident foreigners have liberty interests in being able to re-enter the United States and in being free from detention at the border, *see Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). The Government may only take away those liberty interests by "due process of law." U.S. Const. amend. V. The process that is "due" turns on three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute

procedural requirement would entail." *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

The procedures in place here fall far short. Denial of reentry "is, without question, a weighty" interest, and a person in that circumstance must be given "an opportunity to present her case effectively." *Landon*, 459 U.S. at 34, 36. But the Order offers no procedural protections whatsoever: It allows for no counsel, no hearings, no inquiry, no review—no process of any sort. That will not do. At the very least, those barred from the country or detained pursuant to the Order should be given some individualized consideration of their circumstances. "[T]he returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him," a principle in keeping with "the general proposition that a resident alien who leaves this country is to be regarded as retaining certain basic rights." *Rosenberg* v. *Fleuti*, 374 U.S. 449, 460 (1963).

Similarly, detention of a resident at the border is an invasion of liberty that requires the government to provide concomitant protections. "Even where detention is permissible * * * due process requires 'adequate procedural protections' to ensure that the government's asserted justification for physical confinement 'outweighs the individual's constitutionally protected interest in avoiding physical restraint.'" *Casas-Castrillon* v. *Dep't of Homeland Sec.*, 535

F.3d 942, 950 (9th Cir. 2008) (quoting *Zadvydas*, 533 U.S. at 690). Those protections are nonexistent here.

Moreover, while the Order authorizes executive officials to make certain case-by-case exceptions, *see, e.g.*, Order § 3(g), it creates no mechanism for processing those exceptions and no procedure to ensure they are applied consistently and fairly. That unfettered executive discretion is the antithesis of due process. *See Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972). It is cold comfort for a resident seeking reentry to know that some provision for exceptions is made, if that power is exercised arbitrarily and unreviewably. The Due Process Clause requires more.

c. The plenary-power doctrine does not change the outcome.

The Order's defenders again seek refuge in the plenary-power doctrine. But that doctrine does not help them for two reasons.

First, while it is true that the plenary-power doctrine gives Congress latitude to "make rules for the admission of aliens," *Kleindienst*, 408 U.S. at 766 (citation omitted), the Order here has profound discriminatory effects on aliens *already within* the United States. And the Supreme Court has made clear that political branches' power in that area is not plenary. To the contrary, it "is subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695. Specifically, aliens who are present within the United States are entitled to the full panoply of

equal-protection and due-process protections, "whether their presence here is lawful, unlawful, temporary, or permanent." *Id*. at 693. The Order here runs afoul of both those protections. It prevents people present in the United States from traveling and from seeing their loved ones, and it imposes that burden on the basis of religion and national origin. That is not constitutional, and the incantation of "plenary power" does not make it so. *See Hampton*, 426 U.S. at 101 ("We do not agree * * * that the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens.").

Second, the plenary-power doctrine emphasizes the broad authority of "*Congress*." *See Kleindienst*, 408 U.S. at 766 (emphasis added). Congress is, after all, constitutionally empowered to regulate immigration. U.S. Const. art. I, § 8. Even if the doctrine authorizes Congress to flatly ban a particular racial or religious group from entering the United States—a highly doubtful proposition—it certainly does not authorize the *President* to plow ahead and enact such a ban where Congress has not provided for it. Indeed, the delegation of authority to the President here is expressly subject to the INA's antidiscrimination provision. *See* Part 3, *infra*. And the President surely could not take a general grant of discretion to make immigration rules and use it to decree that only whites or Christians are allowed to immigrate into the United States. *Cf. Kwai Fun Wong* v. *United States*,

373 F.3d 952, 974 (9th Cir. 2004) ("We cannot countenance that the Constitution would permit immigration officials to engage in such behavior as rounding up all immigration parolees of a particular race solely because of a consideration such as skin color.").

The Supreme Court has made this clear. In *Kleindienst*, for example, the Court explained that when Congress "delegate[s]" the exercise of "plenary power" to the Executive, and "the Executive exercises this power negatively *on the basis of a facially legitimate and bona fide reason*, the courts will neither look behind the exercise of that discretion, nor test it." 408 U.S. at 770 (emphasis added). The inverse must also be true: When the Executive *lacks* "a facially legitimate and bona fide reason" for excluding foreigners, the plenary-power doctrine is no shield for unconstitutional discrimination.

That is the case here. As explained above, the profound mismatch between the Order's purported purpose and its scope reveals its true illegitimate purpose: to burden a politically unpopular group. Moreover, the Order's express terms and the statements of President Trump and his advisors cast grave doubt on whether the Order's stated purpose was in fact its "bona fide" impetus.

For this reason, too, the plenary-power doctrine does not insulate the Order from constitutional scrutiny, and the Order must fall.

3. The Order is Inconsistent with the Immigration and Nationality Act.

The Order also violates the plain terms of the immigration laws three times over. It "discriminate[s]" against prospective immigrants based on "nationality," in violation of 8 U.S.C. § 1152(a)(1)(A); it "discriminat[es]" against refugees based on "religion," in violation of the United Nations Convention Relating to the Status of Refugees art. 3, July 28, 1951, 19 U.S.T. 6259; and it grossly misapplies the President's authority to "suspend the entry" of aliens, 8 U.S.C. § 1182(f).

a. The order's nationality-based classifications violate the INA.

First, the Order violates the Immigration and Nationality Act's (INA) flat prohibition on nationality-based discrimination.

Section 202(a)(1)(A) of the INA provides:

> Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

8 U.S.C. § 1152(a)(1)(A). "Congress could hardly have chosen more explicit language." *Legal Assistance for Vietnamese Asylum Seekers* v. *Dep't of State, Bureau of Consular Affairs*, 45 F.3d 469, 473 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996). It "unambiguously directed that no nationality-based discrimination shall occur," *id.*, and so "eliminat[ed] * * * the national origins system as the basis for the selection of immigrations to the United States." H.R.

Rep. No. 89-745, at 8 (1965); *see Olsen* v. *Albright*, 990 F. Supp. 31, 37 (D.D.C. 1997).

The Order flouts this clear command. Section 3(c) provides that aliens "from" seven identified "countries" cannot enter the United States. Sections 3(e)-(f) authorizes the President to bar entry by "foreign nationals * * * from [additional] countries" he will subsequently identify. And Section 5 prohibits "the entry of Syrian nationals as refugees," *id.* § 5(c), and permits the Secretary of State to resume refugee admissions "only for nationals of [designated] countries," *id.* § 5(a). Each of these provisions facially discriminates on the basis of "nationality, place of birth, or place of residence," 8 U.S.C. § 1152(a)(1)(A)—exactly what Congress said the Executive cannot do. The Order thus unilaterally resurrects the "national origins system" that Congress ended in 1965.

The President cannot ignore Section 202(a)(1)(A) in this manner. Congress specified exactly when federal officials could take nationality into account: "as specifically provided in paragraph (2) [of Section 202(a)] and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of" title 8. 8 U.S.C. § 1152(a)(1)(A). None of those narrow exceptions is even arguably relevant here; and by enumerating those few exemptions, Congress made clear it did not intend to authorize others. *See, e.g.*, *United Dominion Indus.* v. *United States*, 532 U.S. 822, 836 (2001) (describing *expressio unius* canon). The fact that the immigration laws

give the President some discretion makes no difference. As courts have recognized for decades—and as Section 202(a)(1)(A) makes clear—"discretion" in enforcing the immigration laws "may not be exercised to discriminate invidiously against a particular race or group." *Wong Wing Hang* v. *INS*, 360 F.2d 715, 719 (2d Cir. 1966) (Friendly, J.); *see, e.g.*, *Patel* v. *INS*, 811 F.2d 377, 382 (7th Cir. 1987) (same).

b. The Order's religion-based classifications violate the INA.

Sections 5(b) and 5(e) of the Order also violate the INA by discriminating against refugees on the basis of religion. In 1968, the United States ratified the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 ("UN Protocol"), a multilateral treaty that requires signatory states to treat refugees "without discrimination as to race, religion or country of origin." United Nations Convention Relating to the Status of Refugees art. 3, July 28, 1951, 19 U.S.T. 6259; *see* UN Protocol art. I.1 (incorporating this requirement by reference). Congress subsequently overhauled the INA "to bring United States refugee law into conformity with the Protocol." *Khan* v. *Holder*, 584 F.3d 773, 783 (9th Cir. 2009). Accordingly, the Ninth Circuit (echoing the Supreme Court) has held that courts must "interpret the INA in such a way as to avoid any conflict with the Protocol, if possible." *Id.*; *see INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 426-427 (1999); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 437 (1987). Nothing in the

INA suggests that Congress intended to authorize immigration officials—or the President—to violate the Protocol's straightforward prohibition on religious discrimination. Indeed, the INA expressly prohibits *States* from discriminating against refugees with "regard to race, religion, nationality, sex, or political opinion." 8 U.S.C. § 1522(a)(5). It is inconceivable that Congress intended *federal* officials to engage in such discrimination, in clear violation of the Nation's treaty obligations. As describe above, *see supra* at pp. 19-20, the Order does precisely that, and so cannot stand.

c. The INA does not authorize the President to impose sweeping class-based restrictions on immigration.

Sections 3(c), 3(e)-(f), 5(a), and 5(c) are also unlawful because the President lacks any affirmative authority to impose the Order's sweeping, undifferentiated, and arbitrary bans on entry.

As a basis for its immigration and refugee bans, the Order relies on Section 212(f) of the INA, which states that the President may "suspend the entry of * * * any class of aliens as immigrants or nonimmigrants" if he "finds that the[ir] entry * * * would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f); *see* Order §§ 3(c), 5(c). But Section 212(f) provides no support for the Order.

That is so for two reasons. First—as discussed above—the INA prohibits nationality discrimination, and section 212(f) does not override that limit. *See*

8 U.S.C. § 1152(a)(1)(a). Section 202(a)(1)(A), with its focus on particular categories of protection, is more specific than Section 212(f)'s generalized grant of discretion. It also is later-enacted—1965 versus 1952. And it enumerates specific exceptions to its prohibition that do not include section 212(f). It therefore overrides any authority the President would otherwise have had under Section 212(f). *See United States* v. *Juvenile Male*, 670 F.3d 999 (9th Cir. 2012) (recognizing principle of statutory construction that "[w]here two statutes conflict, the later-enacted, more specific provision generally governs."); *United Dominion*, 532 U.S. at 836.

In any event, the Order's reliance on Section 212(f) stretches that provision far beyond its limits. Presidents have invoked Section 212(f) dozens of times since it was enacted in 1952; in every instance, they used it to suspend entry of a *discrete* set of individuals based on an *individualized* determination that *each* prohibited member of the class had engaged in conduct "detrimental to the [United States'] interests." *See, e.g.*, Pres. Proc. No. 8342 (Jan. 22, 2009) (suspending entry of human traffickers); Pres. Proc. No. 5887 (Oct. 26, 1988) (suspending entry of Sandinistas); *see generally* Cong. Research Serv., Executive Authority to Exclude Aliens: In Brief 6-10 (Jan. 23, 2017), https://fas.org/sgp/crs/homesec/R44743.pdf. Before now, no President attempted to invoke Section 212(f) to impose a *categorical* bar on admission based on a *generalized* (and unsupported) claim that

some members of a class *might* engage in misconduct. And no President has taken the further step of establishing an *ad hoc* scheme of exceptions that allows immigration officers to admit whomever they choose on either a "case-by-case basis," Order § 3(g), or categorically, *see* Statement by Secretary John Kelly on the Entry of Lawful Permanent Residents Into the United States (Jan. 29, 2017) (determining, within two days of the Order's issuance, that lawful permanent residents are entitled to a blanket exception).

If these novel assertions of authority were accepted, the immigration laws could be nullified by executive fiat. It is always possible to claim that some broad group might include dangerous individuals; many countries, for example, have worse records of terrorism than the seven the President singled out. *See* U.S. Dep't of State, National Consortium for the Study of Terrorism and Responses to Terrorism: Annex of Statistical Information (2016) (showing that 7 of the 10 countries with the most terrorism were not included in the Order). The President's logic would therefore permit him—and any future President—to abandon Congress's immigration system at will, and replace it with his own rules of entry governed by administrative whim.

That is not the law Congress enacted. "Congress * * * does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions"—it does not, as Justice Scalia wrote, "hide elephants in mouseholes."

Whitman v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Enabling the President to unilaterally suspend the immigration laws would surely be an elephant; and the vague terms of Section 212(f)—never once in six decades interpreted in the manner the President now proposes—are a quintessential mousehole. *See FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-160 (2000) (declining to find that Congress "intended to delegate a decision of [substantial] economic and political significance" whether authority ran "[c]ontrary to [the Executive Branch's] representations" for 80 years). Indeed, it is doubtful that Congress *could* delegate such unbounded authority to the President. *See Clinton* v. *City of New York*, 524 U.S. 417, 443 (1998) (Congress cannot authorize President "to cancel portions of a duly enacted statute"); *Whitman*, 531 U.S. at 472 (Congress cannot delegate powers without an "intelligible principle" to govern their exercise). Section 212(f) cannot be construed to authorize the Order's sweeping and discriminatory immigration bans.

4. The Order's Implementation Violates the APA.

Finally, the Order's implementation violates the APA, both on procedural and substantive fronts.

APA Procedural Requirements. The APA requires that agencies provide public notice and an opportunity for comment on any rule that is "legislative" or "substantive." *Lincoln* v. *Vigil*, 508 U.S. 182, 196 (1993); *see* 5 U.S.C. § 553(b)-

(c). "Substantive rules" are those that "change existing rights and obligations," *Time Warner Cable Inc.* v. *FCC*, 729 F.3d 137, 168 (2d Cir. 2013), and "limi[t] administrative discretion or establish a binding norm" for agency officials to follow, *Sacora* v. *Thomas*, 628 F.3d 1059, 1069 (9th Cir. 2010) (italics omitted).

In this case, Sections 3 and 5 of the Order are substantive because they unquestionably affect existing "rights and obligations": Immigrants and non-immigrants living in the United States can no longer leave and re-enter the country, and nationals of designated countries who have visas can no longer use them. But more to the point, the rules that *agencies* have to create to carry out the Order also are (and will be) substantive rules. After all, the Order speaks in broad generalities and leaves it to the agencies to implement binding norms around everything from which refugees get exemptions, to who counts as "immigrants and nonimmigrants" under Section 3(c), to whether Section 5(e)'s in-the-national-interest exemptions extend beyond the enumerated examples.

Those newly-minted norms will affect existing "rights and obligations" in extraordinary ways. To take just one example, the implementing officials have changed their view as to whether lawful permanent residents fall within the Order's national-interest prong *twice*—and have effectuated each change with no more than a *press release*. Compl. ¶¶ 62-64. That is plainly improper. The same

goes for the many similarly substantive rules that have been and will be promulgated under the Order's auspices.

APA Substantive Requirements. Defendants have also committed substantive violations of the APA. The APA prohibits federal agencies from taking any action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2). The Order, and agency norms promulgated under the Order, are plainly "not in accordance with law." *See supra*, A.1-3. And Defendants' issuance and implementation of the Order has been flagrantly arbitrary and capricious. The Order has been issued and implemented abruptly and with no reasonable explanation of how its various provisions further its stated objective. *See City of Sausalito* v. *O'Neill*, 386 F.3d 1186, 1206 (9th Cir. 2004) (agencies must at least articulate "a rational connection between the factors found and the choices made" (internal quotation marks omitted)). Just within the first 72 hours, Defendants are reported to have changed their minds three times about one of the Order's essential aspects—whether it applies to green card holders. Compl. ¶ 59. A few days later, they changed their minds yet *again*. Comp. ¶ 64. If this is not arbitrary and capricious executive action, it is hard to imagine what would be.

B. Hawai‘i Will Suffer Irreparable Harm If Relief Is Not Granted.

Hawai‘i will be irreparably harmed if Defendants are not temporarily enjoined from enforcing Sections 3(c), 3(e)-(f), 5(a)-(c), and 5(e) of the Order. Implementation of these provisions has already caused significant religious, dignitary, and economic harms in and to Hawai‘i. If Defendants are not enjoined, the damage will be immeasurable. For these reasons, the State *a fortiori* satisfies the requirements of Article III standing as well.

First, the Order is creating an unconstitutional "establishment" of religion in Hawai‘i and across the country. This harm alone is sufficient to warrant injunctive relief; in Establishment Clause cases, irreparable harm is presumed. *See, e.g.*, *Chaplaincy of Full Gospel Churches* v. *England*, 454 F.3d 290, 303 (D.C. Cir. 2006) (if a movant demonstrates a likelihood of success on an Establishment Clause claim, "this is sufficient, without more, to satisfy the irreparable harm prong"); *see also Farris*, 677 F.3d at 868 (9th Cir. 2012) (adopting the same rule for First Amendment claims generally).

Second, the Order is inflicting irreparable harm on the State's sovereign and dignitary interests by commanding instruments of Hawaii's government to support discriminatory conduct that is offensive to its own laws and policies. Hawaii's Constitution protects religious freedom and the equal rights of all persons. Hawai‘i Const. art. 1, §§2, 4. Its statutes bar discrimination on the basis of ancestry. Haw.

Rev. Stat. §§ 378-2(1); 489-3; 515-3. And Hawai‘i has a number of policies that aim to further diversity. Compl. ¶ 72. Hawai‘i has a sovereign interest in seeing that its laws and policies are given effect, and in following them *itself*. *See Bond* v. *United States*, 564 U.S. 211, 221 (2011); *Missouri* v. *Holland*, 252 U.S. 416, 431 (1920).

The Order commands Hawai‘i to abandon its sovereign prerogatives, and become complicit in discrimination barred by its own Constitution and statutes: The State's universities cannot enroll qualified persons from the designated countries; state governmental entities cannot hire such persons; and the State's Department of Transportation must provide areas inside the State's international airports to Customs and Border Patrol to detain and deport immigrants barred by the Order. In stopping Hawaii's governmental entities from abiding by the State's own laws and policies, the Order inflicts dignitary harms that have no remedy. *See, e.g.*, *Shelby Cty.* v. *Holder*, 133 S. Ct. 2612, 2623 (2013) (states should "retain broad autonomy in structuring their governments and pursuing legislative objectives"); *Arizona Dream Act Coal.* v. *Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (irreparable harm is threatened when "there is no adequate legal remedy").

Third, the Order is inflicting permanent damage on Hawaii's economy and tax revenues. Tourism is the "state's lead economic driver"; in 2015 alone, Hawai‘i had 8.7 million visitor arrivals, accounting for $15 billion in spending.

Compl. ¶ 15. The Order prevents any nationals of the designated countries from visiting the State, which will result in considerable lost revenues. Decl. of G. Szigeti (Ex. F), ¶¶ 9-11 (showing thousands of visitors in 2015 from the Middle East and Africa). The Order deters Muslim immigrants and non-immigrants across America from engaging in interstate travel that involves an airport, effectively precluding travel to Hawai‘i. And it will likely chill international tourism to Hawai‘i more broadly, as nationals of other countries fear that they too will become subject to an immigration ban. Decl. of L. Salaveria (Ex. E), ¶¶ 11-14. These consequences will drastically reduce the State's economic output and its tax revenues, and they will inflict incalculable harm on Hawaii's reputation as a place of welcome—a brand that it is has spent significant time and energy developing internationally. *See Oracle USA, Inc.* v. *Rimini St., Inc.*, 2016 WL 5213917, at *2 (9th Cir. Sept. 21, 2016) (injunctive relief warranted when "injuries [are] difficult to quantify and compensate").

Finally, the Order inflicts irreparable damage to Hawai‘i because it subjects a portion of its population to discrimination and marginalization, while denying all residents of the State the benefits of a pluralistic and inclusive society. Hawai‘i is home to over 6,000 legal permanent residents, including numerous individuals from the designated countries. Compl. ¶ 10. It currently has 12,000 foreign students, including 27 graduate students from the designated countries at the

University of Hawai‘i alone. Decl. of R. Dickson (Ex. D), ¶ 9. The University of Hawai‘i also has at least 10 faculty members who are legal permanent residents from the designated countries, and at least 30 faculty members with valid visas from the countries. *Id.* ¶¶ 10-11. Section 3(c) of the Order subjects these Hawaii residents to second-class treatment—denying them their fundamental right to travel overseas, preventing them from tending to important family matters, and impairing their ability to complete necessary aspects of their work or study. *Id.* ¶ 12; Decl. of John Doe 3 (Ex. C), ¶¶ 3-4 . More broadly, the Order subjects all of Hawai‘i—which prides itself on its ethnic diversity and inclusion—to a discriminatory policy that differentiates among State residents based on their national origin. *See, e.g.*, Decl. of R. Dickson (Ex. D), ¶ 13. Hawai‘i has a quasi-sovereign interest in "securing [its] residents from the harmful effects of discrimination." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 609 (1982). The Order is irreparably undermining that interest.

C. The Balance of the Equities and Public Interest Favor Relief.

The balance of the equities and public interest factors tip decidedly in favor of Hawai‘i. The harms the Order inflicts are immediate and severe, and "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres* v. *Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

Defendants, in contrast, have identified no exigency that demands immediate implementation of this Order. They have *no* evidence that the Order's wildly over- and under-inclusive bans will actually prevent terrorism or make the Nation more secure. Defendants can fully achieve the Order's stated goal of strengthening the country's vetting procedures without also depriving millions of people of their rights under the Constitution and federal law.

CONCLUSION

The Motion for a Temporary Restraining Order should be granted, and Defendants should be restrained from continuing to enforce Sections 3(c), 5(a)-(c), and 5(e) of the Executive Order, in Hawai'i and nationwide.

DATED: Honolulu, Hawai'i, February 3, 2017.

Respectfully submitted,

/s/ Douglas S. Chin

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

THOMAS P. SCHMIDT*
HOGAN LOVELLS US LLP
875 Third Avenue

DOUGLAS S. CHIN (Bar No. 6465)
Attorney General of the State of Hawai'i
CLYDE J. WADSWORTH (Bar No. 8495)
Solicitor General of the State of Hawai'i
DEIRDRE MARIE-IHA (Bar No. 7923)
KIMBERLY T. GUIDRY (Bar No. 7813)
DONNA H. KALAMA (Bar No. 6051)
ROBERT T. NAKATSUJI (Bar No. 6743)
Deputy Attorneys General

DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI'I

New York, NY 10022
Telephone: (212) 918-3000
Fax: (212) 918-3100

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

425 Queen Street
Honolulu, HI 96813
Telephone: (808) 586-1500
Fax: (808) 586-1239
Email: deirdre.marie-iha@hawaii.gov

**Pro Hac Vice Applications Forthcoming*

Attorneys for Plaintiff, State of Hawai'i

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

STATE OF HAWAI‘I, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No.

DECLARATION OF JOHN DOE 1

[Sealed copies provided to the Court for in camera review, pursuant to the concurrently filed *Ex Parte* Motion for In Camera Review of Exhibits A, B, and C to Declaration of Douglas S. Chin in Support of Plaintiff’s Motion for Temporary Restraining Order]

EXHIBIT A

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

STATE OF HAWAI'I, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No.

DECLARATION OF JOHN DOE 2

[Sealed copies provided to the Court for in camera review, pursuant to the concurrently filed *Ex Parte* Motion for In Camera Review of Exhibits A, B, and C to Declaration of Douglas S. Chin in Support of Plaintiff's Motion for Temporary Restraining Order]

EXHIBIT B

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

STATE OF HAWAI'I, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No.

DECLARATION OF JOHN DOE 3

[Sealed copies provided to the Court for in camera review, pursuant to the concurrently filed *Ex Parte* Motion for In Camera Review of Exhibits A, B, and C to Declaration of Douglas S. Chin in Support of Plaintiff's Motion for Temporary Restraining Order]

EXHIBIT C

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

STATE OF HAWAI‘I, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No.

DECLARATION OF RISA E. DICKSON

EXHIBIT D

I, Risa E. Dickson, do declare and would competently testify as follows.

1. I am Vice President for Academic Planning and Policy, at the University of Hawai'i system. I began this role in February 2015. Previously, I worked at California State University, San Bernardino from 1991-2014. Among the positions I held there included Associate Provost for Academic Personnel. As Associate Provost, my office processed and monitored visas for international faculty.

2. As Vice President I have overall responsibility for leadership, planning, and intercampus coordination of academic affairs, student affairs, policy and planning, institutional research and analysis, international and strategic initiatives, and the Hawai'i P-20 Partnerships for Education. Given my current role with international and strategic initiatives, and my previous experience with recruitment of international faculty, I am well aware of the importance of the role of international faculty in the vibrancy of a healthy university.

3. The University of Hawai'i system was founded in 1907 and includes three universities, seven community colleges, and community-based learning centers across six of the Hawaiian Islands.

4. The University is a leading engine for economic growth and diversification in Hawai'i. The University stimulates the local economy with jobs, research, and skilled workers.

5. The University is a unique and important institution in our island State, and in our nation. Because of Hawai'i's unique geographic location, the University is able to offer unique research and employment opportunities in the fields of astronomy and oceanography.

6. Hawai'i's location in the Pacific Ocean, balanced between east and west, creates opportunities for international leadership and collaboration.

7. The University is an international institution. This is reflected in our diverse faculty, which includes approximately four hundred and seventy-seven international faculty members legally present in the United States. Throughout the University system, we have study abroad or exchange programs in thirty-three different countries. Throughout the University system, we have 489 separate international agreements with 353 institutions in forty different countries, providing opportunities for learning and collaboration for our faculty and scholars.

8. The University has been apprised of the Executive Order entitled, "Protecting the Nation from Foreign Terrorist Entry Into the United States," which was issued by President Donald Trump on January 27, 2017. I have been informed that the Executive Order temporarily bars entry into the United States of any person who is a citizen of any one of seven countries: Syria, Iraq, Iran, Somalia, Sudan, Libya and Yemen. I have also been informed that this bar to travel to the United States applies regardless of whether the person in question poses any individualized threat of violence or any connection to terrorist activities in any way.

9. This Executive Order directly impacts the University of Hawai'i community. The University presently has approximately 27 graduate students from the seven countries affected by the Executive Order. These students attend our institution under valid visas issued by the United States government. These students study and work alongside the University's many thousands of other students, who hail from all over Hawai'i, the United States, and the world.

10. The University has permanent resident faculty from the same seven affected countries, namely Iran, Iraq and Sudan. I am aware of at least ten faculty members who fall within

this category and are subject to the Executive Order. There may be more faculty members who fall within this category, because we do not actively track legal permanent residency.

11. In addition, the University also has visiting faculty and scholars who are directly affected by the Executive Order. The University has at least thirty faculty members with valid visas who are from the seven countries affected by this Executive Order As with all institutions of higher education, the scholarship and community of the University of Hawai'i relies upon the collaborative exchange of ideas and research partnerships. The University relies upon faculty, teaching, research, conferences, and program activities that regularly require travel outside the United States.

12. The Executive Order will affect the ability for the faculty and students discussed above to have the freedom to fully engage in their fields of study, by effectively prohibiting travel outside the United States for those affected individuals who are present here today. It is anticipated that the Executive Order will negatively impact their development as scholars and professors; deprive them of the chance to visit family and friends in their countries of origin, or to attend significant personal events such as weddings and funerals; and prevent their family and friends from being able to reunite with their families, visit Hawai'i or move here permanently. I am aware of faculty who have planned trips to reunite with family members and are concerned about their ability to return to their work and home.

13. The Executive Order will also hinder the diversity of thought and experience that forms the backbone of any institution of higher education. A diverse student body is part of the educational experience for all students. This is immeasurably enriched by our international students and schools, including those from the seven countries targeted in the Executive Order.

14. The University of Hawaii stands with the higher education community nationwide in our concern over the impact the Executive Order has on the free flow of information and ideas. Our experience with higher education indicates that the Executive Order will have not just the direct impacts described here, but will also deter students, scholars and faculty from other affected countries and communities from attending our institutions.

15. The University of Hawai'i and the State of Hawai'i have been immeasurably strengthened through the diversity of the students and faculty we attract. The fundamental values of our nation and our State have long supported the welcoming of others to our Islands and embracing them into our communities.

I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: Honolulu, Hawai'i, February 1, 2017.

Risa E. Dickson

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

STATE OF HAWAI'I, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No.

DECLARATION OF LUIS P. SALAVERIA

EXHIBIT E

DECLARATION OF LUIS P. SALAVERIA

I, LUIS P. SALAVERIA, do declare and would competently testify as follows.

1. I am the Director of the State of Hawaii Department of Business, Economic Development and Tourism (DBEDT). I have held this position since December 2014. Prior to this position, I served as the State's Deputy Director of Finance from 2011 to 2014.

2. As Director, I lead DBEDT's efforts to achieve a Hawaii economy that embraces innovation and is globally competitive and dynamic, providing opportunities for all Hawaii's citizens.

3. Through our attached agencies, we also foster planned community development, create affordable workforce housing units in high-quality living environments, and promote innovation sector job growth.

4. In my professional experience working for and promoting Hawaii, the ability for government and business leaders to travel to each other's respective countries is critical to maintaining Hawaii's tourism economy and to expand our local economy's potential beyond tourism.

5. The networking and trust-building that occurs as a result of travel is not something that can be replicated through phone calls, emails, or video-conferences. Meaningful relationships between government agencies,

private businesses, and community organizations is best accomplished through direct interaction and face-to-face engagements.

6. I have recently traveled to Japan, Korea, and the Philippines to explore opportunities for collaborative engagements in renewable energy and to discuss Hawaii's renewable energy laws.

7. As a result of my trip to the Philippines, a delegation from that country came to Hawaii to participate in our annual Clean Energy Summit. They also participated in one of our business start-up accelerator programs and invested funds into the program. This outcome would not have been possible if not for the willingness of these individuals to travel to Hawaii.

8. The State of Hawaii maintains a number of sister-state relationships with countries throughout world. Countries such as China, Indonesia, Japan, Philippines, and Taiwan are partners to Hawaii in this global economy, and these relationships are integral to maintaining Hawaii's position as a global destination and place of business. The ability to interact with these countries without concern of impeded travel by individuals from those countries is crucial to these relationships.

9. Through news coverage and through conversations with others in state government, I am aware of Executive Order entitled, "Protecting the Nation from Foreign Terrorist Entry Into the United States," which was issued by

President Donald Trump on January 27, 2017. It is my understanding that the Executive Order temporarily bars entry into the United States of any person who is a citizen of any one of six countries: Iraq, Iran, Somalia, Sudan, Libya and Yemen. It is my understanding that the Executive Order indefinitely bars entry into the United States of any person who is a citizen of Syria. It is my understanding that this bar to travel to the United States applies regardless of whether the person in question poses a specific threat of violence or any connection to terrorist activities in any way.

10. I am also aware that a great deal of confusion and inconsistent implementation occurred as the Executive Order was placed into effect nationwide. I am generally aware of the news coverage regarding the Executive Order and how its impact is being felt around the world and here in Hawaii.

11. Based on my professional experience it is my opinion that this Executive Order has the potential to inhibit and impair Hawaii's relationships with foreign countries. Hawaii has millions of visitors annually from all over the world. I expect, given the instability it has caused to international travel generally, that this Executive Order may depress tourism, business travel, and financial investments in Hawaii. It is also my opinion that the confusion and difficulties brought about by the Executive Order may result in visitors

who would choose to visit Hawaii to instead look at other destinations where travel will not be impeded.

12. In my experience as DBEDT director, Hawaii has always been viewed as a place of acceptance, hospitality, and cultural diversity. Any potential action that could jeopardize that reputation has the ability to do irreparable harm to our State's brand. For many of our visitors, Hawaii is a vacation destination, and people generally take vacations to places where they feel welcome, invited, and safe.

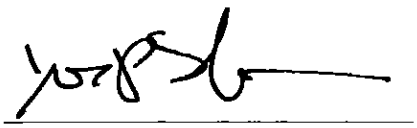
13. In addition to being a tourist destination, Hawaii has been positioning itself for many years as a hub of international business, located midway between Asia and the continental United States. In my time in state government I have witnessed and been part of efforts to attract business and financial investments to Hawaii by emphasizing our inclusiveness and diversity. I believe that the Executive Order causes harm to this reputation and may negatively impact Hawaii's ability to attract future investments from countries that are not currently named in the Executive Order.

14. In my professional travel experience working to expand Hawaii's businesses, I have learned how important it is that Hawaii maintain its reputation as a place of inclusivity and welcome. I believe the Executive Order threatens this reputation.

15. There is no recent parallel to this situation and the Executive Order was recently issued. At this point, it is difficult to determine with precision how its effects will play out for Hawaii's air travelers. Hawaii is uniquely positioned geographically, in the middle of the Pacific Ocean. For the vast majority of our visitors, flying is the only way to travel here. Given the confusion, controversy, and shifting instructions from the federal government regarding the Executive Order, travelers may consider the current situation as a reason for not undertaking travel to Hawaii.

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

Executed on the 2nd of February, 2017, in Honolulu, Hawaii.



Luis P. Salaveria

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

STATE OF HAWAI‘I, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No.

DECLARATION OF GEORGE SZIGETI

EXHIBIT F

DECLARATION OF GEORGE SZIGETI

I, GEORGE SZIGETI, do declare and would competently testify as follows.

1. I am the President and Chief Executive Officer of the Hawaii Tourism Authority (HTA). I have served in this role since May 2015. From 2012 to 2015, I was the President and CEO of the Hawaii Lodging and Tourism Association, a private organization of Hawaii tourism industry leaders, which represents over 700 lodging properties and businesses across the State.

2. The HTA was established in 1998 as the lead state agency for Hawaii's tourism industry. The HTA is the state agency charged with the research, development, and fostering of tourism in Hawai'i. HTA's mission is to strategically manage Hawai'i tourism in a sustainable manner consistent with economic goals, cultural values, preservation of natural resources, community desires, and visitor industry needs.

3. The Tourism Special Fund was also established in 1998. It is a set percentage of the transient accommodations tax collections that is assessed on hotels, vacation rentals, and other accommodations. It is used by the HTA to market, develop, and support Hawaii's tourism economy.

4. Among its responsibilities, HTA is charged with:

   a. setting tourism policy and direction from a statewide perspective;

   b. developing and implementing the State's tourism marketing plan and efforts;

   c. supporting programs and initiatives that enhance and showcase Hawaii's diverse peoples, places, and cultures of the islands, in order to deliver an incomparable visitor experience, including supporting Native Hawaiian culture and community, signature events and festivals, and preservation and proper use of Hawaii's striking natural resources;

   d. managing programs and activities to sustain a healthy tourism industry for the State;

   e. coordinating tourism-related research, planning, promotional and outreach activities with the public and private sectors; and

   f. encouraging distribution of visitors across all of the Hawaiian Islands to balance capacity.

5. HTA maintains data regarding visitor arrivals and total visitor spending for various regions around the world.

6. The data maintained by our agency shows the following for the last five years:

	2012	2013	2014	2015	2016
Total Visitor Expenditures (in Million $)	$14,364.8	$14,520.5	$14,973.3	$15,110.9	$15,745.7
Total arrivals (by air and cruise ships)	8,028,743	8,174,461	8,320,785	8,679,564	8,941,394
Arrivals by Air	7,867,143	8,003,474	8,196,342	8,563,018	8,832,598
Arrivals by cruise ship	161,600	170,987	124,443	116,546	108,796

The total visitor expenditures reported in this chart from 2012-2015 includes supplemental business expenditures. For 2016, the data is preliminary and the supplemental business expenditures have been estimated.

7. To translate, Hawaii's tourism industry brought well over $14 billion into the State during 2012 to 2014. In 2015 and 2016, it brought in over $15 billion. Tourism is the leading economic driver in the State.

8. As this data shows, airline travel is far and away the preferred method to travel to Hawai'i. In 2016, for example, a total of 8,941,394 people arrived in the islands. Only 108,796 of this total (1.2%) arrived by cruise ship.

9. Our data also shows that there is a steady flow of visitors from the Middle East and Africa. The data maintained by our agency shows the following for the last five years:

Visitor Arrivals	2012	2013	2014	2015	2016
Middle East	3,565	3,182	5,784	6,804	5,451
Africa	1,345	1,111	1,877	2,090	1,725

This data reflects visitor arrivals, in surveys taken for air arrivals. The 2016 data is preliminary.

10. As our data is maintained, the region Middle East includes Iran, Iraq, Syria, and Yemen.

11. As our data is maintained, the region Africa includes Libya, Somalia, and Sudan.

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

Executed on 2 of February, 2017, in Honolulu, Hawaii.

George Szigeti

George Szigeti

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

STATE OF HAWAI‘I, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No.

DECLARATION OF ROSS HIGASHI

EXHIBIT G

DECLARATION OF ROSS HIGASHI

I, ROSS M. HIGASHI ("Declarant"), declare based upon my personal knowledge and belief, the following:

1. Declarant is employed as the Deputy Director for the Airports Division, Department of Transportation, State of Hawaii, and has served in this capacity since December, 2014.

2. Declarant's duties as the Deputy Director include the responsibility for the management of the statewide airport system that is owned and operated by the State of Hawaii ("State"). There are fifteen state airports including the Honolulu International Airport ("HNL") and Kona International Airport ("KOA").

3. HNL and KOA qualify as "international airports" which are airports that have customs and immigration facilities to process passengers traveling from other countries to the United States.

4. To acquire international airport status for HNL and KOA, the State was required to obtain the approval of the federal Department of Homeland Security, U.S. Customs and Border Protection ("CBP"). Part of the approval process included providing a facility for use by the CBP to process passengers arriving on international flights.

5. The CBP mandates the requirements of the facility which is sometimes referred to as the "International Arrival Building." If the CBP requirements are not met, the airport may not be used as a port of entry into the United States for international flights (i.e., the airport could not be used to accommodate international flights).

6. HNL and KOA each have an International Arrival Building that meets the strict CBP requirements.

7. The State provides CBP, at no cost to CBP, with an area inside the International Arrival Building to screen international passengers and luggage.

I, Ross Higashi, do declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawaii, FEBRUARY 2, 2017.

ROSS HIGASHI

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

STATE OF HAWAI'I, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No.

DECLARATION OF ISMAIL ELSHIKH, PhD

EXHIBIT H

DECLARATION OF ISMAIL ELSHIKH, PhD

I, Ismail Elshikh, PhD declare the following:

1. I am an American citizen of Egyptian descent, and a resident of Hawai'i. I have been a resident of Hawai'i for over a decade. My wife, Dana, who is of Syrian descent, and my five children are also American citizens and residents of Hawai'i. I am proud to be an American citizen, and consider the United States to be my home country. Because of my allegiance to America, and my deep belief in the American ideals of democracy and equality, I am deeply saddened by the passage of the Executive Order barring nationals from seven Muslim countries from entering the United States.

2. I am the Imam of the Muslim Association of Hawai'i. As Imam, I am a leader within the local Hawai'i Islamic community. I believe strongly in religious equality, and that individuals of different faiths should be allowed to exercise their religious beliefs, free from government suppression, and in a way that does not harm others. The members of my Mosque consider Hawai'i to be home. They are integrated into local society and culture. They have friends and family within and outside of the local Islamic community.

3. My five children are 11, 9, 7, 5 and almost 2 years of age. They have all been United States citizens, and Hawai'i residents, since birth. All of my children were born at Kaiser Hospital in Honolulu, Hawai'i. My older children attend

school in Honolulu, and they have many friends from all walks of life. They are aware of the travel ban, and are deeply saddened by the message it conveys – that a broad travel-ban is "needed" to prevent people from certain Muslim countries from entering the United States. They are deeply affected by the knowledge that the United States – their own country – would discriminate against individuals who are of the same ethnicity as them, including members of their own family, and who hold the same religious beliefs. They do not fully understand why this is happening, but they feel hurt, confused, and sad.

4. The travel ban also has a direct personal effect on my children because it creates additional obstacles to their grandmother's plan to visit them in Hawai‘i. My wife's mother is a Syrian national, living in Syria. She has been making concrete plans to visit my family for many years. It is not easy for Syrian nationals, like my wife's mother, to obtain visitor travel documentation from the American government permitting entry into the United States. My wife filed a I130 Petition for Alien Relative, on behalf of her mother, with the United States government in September 2015. The Petition was approved in February 2016, and my wife's mother was eagerly anticipating the completion of the rest of her visa application process.

5. My mother-in-law has been looking forward to visiting my family for years. She last visited Hawai‘i in 2005, when she stayed for one month. She has

not yet met two of my five children. Only my oldest child remembers meeting her grandmother.

6. President Trump's issuance of the Executive Order banning Syrian nationals from entering the United States has directly impacted my family by complicating my mother-in-law's ability to visit Hawai'i to see, spend time with, and get to know her grandchildren. This is devastating to my wife and children. I believe that it is also devastating to my mother-in-law.

7. As an Imam, I work with many members of the Hawai'i Islamic community. Many members of my Mosque are upset about the travel ban, and some are very fearful. All feel that the travel ban targets Muslim citizens because of their religious views and national origin. The travel ban has a very real and direct impact upon their lives. Although many members of my Mosque consider Hawai'i to be home, many have family and friends still living in the countries affected by the travel ban. While the travel ban remains in effect, these individuals live in forced separation from those family members and friends.

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

Dated: Honolulu, Hawai'i, February 2, 2017.

ISMAIL ELSHIKH, PhD

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

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

**Pro Hac Vice Application Forthcoming*

Attorneys for Plaintiff, State of Hawai‘i
(See Next Page For Additional Counsel)

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

STATE OF HAWAI‘I, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of the U.S. Department of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Acting Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No. COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF; SUMMONS

ADDITIONAL COUNSEL

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

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

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

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

**Pro Hac Vice Applications Forthcoming*

Attorneys for Plaintiff, State of Hawai'i

INTRODUCTION

1. The State of Hawai‘i (the “State”) brings this action to protect its residents, its employers, its educational institutions, and its sovereignty against illegal actions of President Donald J. Trump and the federal government.

2. President Trump’s January 27, 2017 Executive Order, “Protecting the Nation From Terrorist Entry into the United States” (the “Executive Order”), blocks the entry into the United States, including Hawai‘i, of any person from seven Muslim-majority countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.[1] The Executive Order has led to the detention of lawful permanent residents and noncitizens with valid visas seeking to enter or reenter the country. It has led to hundreds of persons overseas with valid visas—students, family members of U.S. citizens, and persons whose green card status was approved—being turned away from boarding plane flights to the United States. The Executive Order also introduces religious criteria for the admission of refugees into the United States, including Hawai‘i: After suspending *all* refugee admissions for 120 days, President Trump’s Executive Order prioritizes refugees who claim religious-based persecution where “the religion of the individual is a minority religion in the individual’s country of nationality.” In Muslim-majority countries, this means a preference for Christians.

3. President Trump’s Executive Order is tearing apart Hawai‘i families, damaging Hawaii’s economy, and wounding Hawai‘i institutions. It is subjecting a portion of Hawaii’s population to discrimination and second-class treatment, and denying them their fundamental right to travel overseas. Moreover, the Executive Order is eroding Hawaii’s sovereign interests in maintaining the separation

[1] *See* Executive Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017). A copy of the Executive Order is attached as Exhibit 1.

between church and state and in welcoming persons from all nations around the world into the fabric of its society.

4. The State accordingly seeks an Order invalidating the portions of President Trump's Executive Order challenged here.

JURISDICTION AND VENUE

5. This Court has Federal Question Jurisdiction under 28 U.S.C. § 1331 because this action arises under the U.S. Constitution, the Administrative Procedure Act ("APA"), the Immigration and Nationality Act ("INA"), and other Federal statutes.

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

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

PARTIES

8. Plaintiff is the State of Hawai'i. Hawai'i is the nation's most ethnically diverse State, and is home to more than 250,000 foreign-born residents. More than 100,000 of Hawaii's foreign-born residents are non-citizens.[2]

9. Estimates from the Fiscal Policy Institute show that as of 2010, Hawai'i had the fifth-highest percentage of foreign-born workers of any state (20% of the labor force). And 22.5% of Hawai'i business owners were foreign-born.[3]

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[2] United States Census Bureau, *2015 American Community Survey 1-Year Estimates*, *available at* https://goo.gl/IGwJyf. A collection of the relevant data for Hawai'i is attached as Exhibit 2.

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

10. Thousands of people living in Hawai‘i obtain lawful permanent resident status each year, including over 6,500 in 2015.[4] That includes numerous individuals from the seven designated countries. According to DHS statistics, over 100 Hawai‘i residents from Iran, Iraq, and Syria have obtained lawful permanent resident status since 2004 (DHS has withheld data pertaining to additional residents from the seven designated countries).[5]

11. Hawai‘i is also home to 12,000 foreign students.[6] That includes numerous individuals from the seven designated countries. At the University of Hawai‘i, there are at least 27 graduate students from the seven countries studying pursuant to valid visas issued by the U.S. government.

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

13. In 2009, foreign residents (i.e., non-citizens who had not obtained lawful permanent resident status) made up 42.9% of doctorate students, and 27.7%

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[4] U.S. Department of Homeland Security, *Lawful Permanent Residents Supplemental Table 1: Persons Obtaining Legal Permanent Resident Status by State or Territory of Residence and Country of Birth Fiscal Year 2015*, *available at* https://goo.gl/ELYIkn. Copies of these tables for fiscal years 2005 through 2015 are attached as Exhibit 3.

[5] *See* Exhibit 3.

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

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

of master's students, in science, technology, engineering, and mathematics ("STEM") programs in Hawai'i.[8]

14. Hawaii's educational institutions have diverse faculties. At the University of Hawai'i, there are approximately 477 international faculty members legally present in the United States. There are at least 10 faculty members at the University who are legal permanent residents from one of the seven designated countries, and 30 visiting faculty members with valid visas who are from one of the seven designated countries.

15. Tourism is Hawaii's "lead economic driver."[9] In 2015 alone, Hawai'i welcomed 8.7 million visitors accounting for $15 billion in spending.[10]

16. Hawai'i is home to several airports, including Honolulu International Airport and Kona International Airport.

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

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

19. The Constitution of the State of Hawai'i provides that "[n]o law shall be enacted respecting an establishment of religion, or prohibiting the free exercise

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[8] U.S. Chamber of Commerce et al., *Help Wanted: The Role of Foreign Workers in the Innovation Economy*, at 21 (2013), *available at* https://goo.gl/c3BYBu.
[9] Hawai'i Tourism Authority, *2016 Annual Report to the Hawai'i State Legislature*, at 20, *available at* https://goo.gl/T8uiWW.
[10] Hawai'i Tourism Authority, *2015 Annual Visitor Research Report*, at 2, *available at* https://goo.gl/u3RQmX. A copy of the table of contents and executive summary of this report is attached as Exhibit 4.

thereof." Haw. Const. Art. I § 4. And the State has declared that the practice of discrimination "because of race, color, religion, age, sex, including gender identity or expression, sexual orientation, marital status, national origin, ancestry, or disability" is against public policy. Haw. Rev. Stat. Ann. § 381-1; *accord id.* §§ 489-3 & 515-3.

20. The State has an interest in protecting the health, safety, and welfare of its residents—including residents awaiting adjustment of their immigration status or naturalization—and in safeguarding its ability to enforce State law. The State also has an interest in "assuring that the benefits of the federal system," including the rights and privileges protected by the United States Constitution and Federal statutes, "are not denied to its general population." *Alfred L. Snapp & Sons v. Puerto Rico*, 458 U.S. 592, 608 (1982). The State's interests extend to all of the State's residents, including individuals who suffer indirect injuries and members of the general public.

21. Defendant Donald J. Trump is the President of the United States. He issued the January 27, 2017 Executive Order that is the subject of this Complaint.

22. Defendant U.S. Department of Homeland Security ("DHS") is a federal cabinet agency responsible for implementing and enforcing the Immigration and Nationality Act ("INA") and the Executive Order that is the subject of this Complaint. DHS is a Department of the Executive Branch of the United States Government, and is an agency within the meaning of 5. U.S.C. § 552(f). U.S. Customs and Border Protection ("CBP") is an Operational and Support Component agency within DHS, and is responsible for detaining and removing non-citizens from Iran, Iraq, Syria, Somalia, Sudan, Libya, and Yemen who arrive at air, land, and sea ports across the United States, including Honolulu International Airport and Kona International Airport.

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

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

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

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

ALLEGATIONS

A. President Trump's Campaign Promises

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

28. On July 11, 2015, Mr. Trump claimed (falsely) that Christian refugees from Syria are blocked from entering the United States. In a speech in Las Vegas, Mr. Trump said, "If you're from Syria and you're a Christian, you cannot come

into this country, and they're the ones that are being decimated. If you are Islamic . . . it's hard to believe, you can come in so easily."[11]

29. On September 30, 2015, while speaking in New Hampshire about the 10,000 Syrian refugees the Obama Administration had accepted for 2016, Mr. Trump said "if I win, they're going back!" He said "they could be ISIS," and referred to Syrian refugees as a "200,000-man army."[12]

30. On December 7, 2015, shortly after the terror attacks in Paris, Mr. Trump issued a press release entitled: "Donald J. Trump Statement on Preventing Muslim Immigration."[13] The press release stated: "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States . . . ." The release asserted that "there is great hatred towards Americans by large segments of the Muslim population." The press release remains accessible on www.donaldjtrump.com as of this filing.

31. The next day, when questioned about the proposed "shutdown," Mr. Trump compared his proposal to President Franklin Roosevelt's internment of Japanese Americans during World War II, saying, "[Roosevelt] did the same thing."[14] When asked what the customs process would look like for a Muslim non-citizen attempting to enter the United States, Mr. Trump said, "[T]hey would say,

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

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

[13] Press Release, Donald J. Trump for President, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), *available at* https://goo.gl/D3OdJJ. A copy of this press release is attached as Exhibit 5.

[14] Jenna Johnson, *Donald Trump says he is not bothered by comparisons to Hitler*, The Washington Post (Dec. 8, 2016), https://goo.gl/6G0oH7.

are you Muslim?" The interviewer responded: "And if they said 'yes,' they would not be allowed into the country." Mr. Trump said: "That's correct."[15]

32. During a Republican primary debate in January 2016, Mr. Trump was asked about how his "comments about banning Muslims from entering the country created a firestorm," and whether he wanted to "rethink this position." He said, "No."[16]

33. A few months later, in March 2016, Mr. Trump said, during an interview, "I think Islam hates us." Mr. Trump was asked, "Is there a war between the West and radical Islam, or between the West and Islam itself?" He replied: "It's very hard to separate. Because you don't know who's who."[17]

34. Later, as the presumptive Republican nominee, Trump began using facially neutral language, at times, to describe the Muslim ban. Following the mass shootings at an Orlando nightclub in June 2016, Mr. Trump gave a speech promising to "suspend immigration from areas of the world where there's a proven history of terrorism against the United States, Europe or our allies until we fully understand how to end these threats." But he continued to link that idea to the need to stop "importing radical Islamic terrorism to the West through a failed immigration system." He said that "to protect the quality of life for all Americans—women and children, gay and straight, Jews and Christians and all people then we need to tell the truth about radical Islam." And he criticized Hillary Clinton for, as he described it, "her refusal to say the words 'radical

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[15] Nick Gass, *Trump not bothered by comparisons to Hitler*, Politico (Dec. 8, 2015 7:51 AM ET), https://goo.gl/IkBzPO.

[16] The American Presidency Project, *Presidential Candidates Debates: Republican Candidates Debate in North Charleston, South Carolina* (January 14, 2016), https://goo.gl/se0aCX.

[17] *Anderson Cooper 360 Degrees: Exclusive Interview With Donald Trump* (CNN television broadcast Mar. 9, 2016 8:00 PM ET), *transcript available at* https://goo.gl/y7s2kQ.

Islam,'" stating: "Here is what she said, exact quote, 'Muslims are peaceful and tolerant people, and have nothing whatsoever to do with terrorism.' That is Hillary Clinton." Mr. Trump further stated that the Obama administration had "put political correctness above common sense," but said that he "refuse[d] to be politically correct."

35. Mr. Trump's June 2016 speech also covered refugees. He said that "[e]ach year the United States permanently admits 100,000 immigrants from the Middle East and many more from Muslim countries outside of the Middle East. Our government has been admitting ever-growing numbers, year after year, without any effective plan for our own security."[18] He issued a press release stating: "We have to stop the tremendous flow of Syrian refugees into the United States."[19]

36. Later, on July 24, 2016, Mr. Trump was asked: "The Muslim ban. I think you've pulled back from it, but you tell me." Mr. Trump responded: "I don't think it's a rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim."[20]

37. During an October 9, 2016 Presidential Debate, Mr. Trump was asked: "Your running mate said this week that the Muslim ban is no longer your position. Is that correct? And if it is, was it a mistake to have a religious test?" Mr. Trump

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

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

[20] *Meet the Press* (NBC television broadcast July 24, 2016), *transcript available at* https://goo.gl/jHc6aU. A copy of this transcript is attached as Exhibit 6.

replied: "The Muslim ban is something that in some form has morphed into a[n] extreme vetting from certain areas of the world." When asked to clarify whether "the Muslim ban still stands," Mr. Trump said, "It's called extreme vetting."[21]

38. Then, on December 21, 2016, following terror attacks in Berlin, Mr. Trump was asked whether he had decided "to rethink or re-evaluate [his] plans to create a Muslim registry or ban Muslim immigration to the United States." Mr. Trump replied: "You know my plans. All along, I've been proven to be right."[22]

B. President Trump's Executive Order

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

40. In an interview on January 25, 2017, Mr. Trump discussed his plans to implement "extreme vetting" of people seeking entry into the United States. He remarked: "[N]o, it's not the Muslim ban. But it's countries that have tremendous terror. . . . [I]t's countries that people are going to come in and cause us tremendous problems."[23]

41. Two days later, on January 27, 2017, President Trump signed the Executive Order that is the subject of this Complaint, which is entitled "Protecting the Nation From Terrorist Entry into the United States."

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

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[21] The American Presidency Project, *Presidential Debates: Presidential Debate at Washington University in St. Louis, Missouri* (Oct. 9, 2016), https://goo.gl/iIzf0A.
[22] *President-Elect Trump Remarks in Palm Beach, Florida*, C-SPAN (Dec. 21, 2016), https://goo.gl/JlMCst.
[23] *Transcript: ABC News Anchor David Muir Interviews President Trump*, ABC News (Jan. 25, 2017, 10:25 PM ET), https://goo.gl/NUzSpq.

43. When signing the Executive Order, President Trump read the title, looked up, and said: "We all know what that means."[24] President Trump said he was "establishing a new vetting measure to keep radical Islamic terrorists out of the United States of America," and that: "We don't want them here."[25]

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

45. The majority of the population in each of these seven countries is Muslim.

46. Not a single fatal terrorist attack has been perpetrated in the United States by a national of one of these seven countries since at least 1975.[26] Other countries whose nationals have perpetrated fatal terrorist attacks in the United States are not part of the immigration ban.[27]

47. Section 3(c) means that Lawful Permanent Residents, foreign students enrolled in U.S. universities (including in Hawai'i), individuals employed in the United States on temporary work visas, and others must be halted at the border if

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[24] *Trump Signs Executive Orders at Pentagon*, ABC News (Jan. 27, 2017), https://goo.gl/7Jzird.

[25] Sarah Pulliam Bailey, *Trump signs order limiting refugee entry, says he will prioritize Christian refugees*, The Washington Post (Jan. 27, 2017), https://goo.gl/WF2hmS.

[26] Alex Nowrasteh, *Little National Security Benefit to Trump's Executive Order on Immigration*, Cato Institute Blog (Jan. 25, 2017 3:31 PM ET), https://goo.gl/BCv6rQ.

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

they arrive in the United States (in Hawai‘i or elsewhere) from one of the seven designated countries, including if he or she leaves the country and tries to return. Section 3(g) allows the Secretaries of State and Homeland Security to make exceptions when they determine that doing so is "in the national interest."

48. The Executive Order also provides for an expansion of the immigration ban to nationals from additional countries. Section 3(d) directs the Secretary of State to (within about 30 days) "request [that] all foreign governments" provide the United States with information to determine whether a person is a security threat. And, should any countries fail to comply, Section 3(e) directs the Secretaries of Homeland Security and State to "submit to the President a list of countries recommended for inclusion" in the ban from among any countries who do not provide the information requested.

49. Section 3(f) gives the Secretary of State and the Secretary of Homeland Security further authority to "submit to the President the names of any additional countries recommended for similar treatment" in the future.

50. Section 5 of the Executive Order is entitled "Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017." Section 5(a) directs the Secretary of State to "suspend the U.S. Refugee Admissions Program (USRAP) for 120 days." Section 5(e) permits the Secretaries of State and Homeland Security to admit individuals as refugees on a case-by-case basis, but only if they determine that admission of the refugee is in the "national interest," including "when the person is a religious minority in his country of nationality facing religious persecution."

51. Section 5(b) directs the Secretaries of State and Homeland Security, "[u]pon resumption of USRAP admissions," to "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality."

In Section 5(c), President Trump "proclaim[s] that the entry of nationals of Syria as refugees is detrimental to the interests of the United States and thus suspends any such entry" indefinitely.

52. The restrictions in Sections 3 and 5 of the Executive Order apply whether or not a non-citizen poses any individualized threat of violence, or has any connection to terrorist activities in any way.

53. In a January 27, 2017 interview with Christian Broadcasting Network, President Trump said that persecuted Christians would be given priority under the Executive Order. He said (once again, falsely): "Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them."[28]

54. The day after signing the Executive Order, President Trump advisor Rudolph Giuliani explained on television how the Executive Order came to be. He said: "When [Mr. Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"[29]

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[28] *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority as Refugees*, Christian Broadcasting Network (Jan. 27, 2017), https://goo.gl/2GLB5q. A printout of this webpage is attached as Exhibit 7. Additional pages including advertisements, reader comments, and other extraneous material are omitted.

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

C. Effects of the Executive Order

55. Upon issuance of the Executive Order, Defendants began detaining people at U.S. airports who, but for the Executive Order, were legally entitled to enter the United States. Some were also removed from the United States. Estimates indicate that over 100 people were detained upon arrival at U.S. airports.[30]

56. Defendants have not afforded people an opportunity to apply for asylum, withholding of removal, or other relief before removing them, and have even prevented detained individuals from speaking with their attorneys.

57. Among others, Defendants have detained and/or removed:

a. Lawful permanent residents, including dozens at Dulles International Airport in Virginia,[31] and others at Los Angeles International Airport who were pressured to sign Form I-407 to *relinquish* their green cards;[32]

b. People with special immigrant visas, including an Iraqi national at John F. Kennedy International Airport who worked as an interpreter for the U.S. Army in Iraq;[33]

c. A doctor at the Cleveland Clinic with a valid work visa who was trying to return home from vacation;[34]

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[30] Michael D. Shear et al., *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide*, N.Y. Times (Jan. 28, 2017), https://goo.gl/OrUJEr.
[31] *See, e.g.*, Petition ¶ 2, *Aziz v. Trump*, No. 1:17-cv-116 (E.D. Va. Jan. 28, 2017).
[32] Leslie Berestein Rojas et al., *LAX immigration agents asks detainees to sign away their legal residency status, attorneys say*, Southern California Public Radio News (Jan. 30, 2017), https://goo.gl/v6JoUC; Brenda Gazzar & Cynthia Washicko, *Thousands protest Trump's immigration order at LAX*, Los Angeles Daily News (Jan. 29, 2017), https://goo.gl/1vA37M.
[33] *See, e.g.*, Petition 2, *Darweesh v. Trump*, No. 1:17-cv-00480 (E.D.N.Y. Jan. 28, 2017).

d. People with valid visas to visit family in the United States, including a Syrian woman sent to Saudi Arabia after being convinced by officials at O'Hare International Airport to sign paperwork cancelling her visa.[35]

58. People overseas were blocked from boarding flights to the United States or told they could no longer come here. At a hearing in the U.S. District Court for the Eastern District of Virginia on February 3, 2017, an attorney for the Federal Government revealed that over 100,000 visas have been revoked since the Executive Order was signed a week earlier on January 27.[36] Those affected included:

a. People with valid student, work, or visitor visas;

b. People who could seek asylum in the United States;

c. Syrian refugees with visas and U.S. placements lined up, including a family assisted by a church in Sheboygan, Wisconsin;[37]

d. Parents seeking to reunite with children they were forced to leave behind, or have never met;[38] and

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[34] Jane Morice, *Two Cleveland Clinic doctors vacationing in Iran detained in New York, then released*, Cleveland.com (Jan. 29, 2017), https://goo.gl/f0EGV3.
[35] John Rogers, *Longtime US residents, aspiring citizens caught up in ban*, StarTribune (Jan. 30, 2017 1:45 AM ET), https://goo.gl/eEPAuE.
[36] Rachael Revesz, *Donald Trump immigration ban: More than 100,000 visas revoked after travel restrictions imposed on seven Muslim-majority countries*, The Independent (Feb. 3, 2017 1:24 PM ET), https://goo.gl/5KnCUh.
[37] *Families, students, scientists: Faces of the immigration ban*, USA Today Network (Jan. 31, 2017 5:35 AM ET), https://goo.gl/VKuhds.
[38] *Refugees Anticipate Family Reunions, Instead Endure Doubt*, ABC News (Jan. 31, 2017 4:56 PM ET), https://goo.gl/3JT6iC.

e. People caught in limbo because they cannot enter the United States, return to their native country, or stay much longer where they are on temporary visas.[39]

59. Confusion, backlash, and habeas corpus litigation arose in the wake of the Executive Order, including with regard to whether the Executive Order applied to lawful permanent residents. Within the first 72 hours that the Executive Order was in effect, Defendants reportedly changed their minds three times about whether it did.[40]

60. Hundreds of State Department officials signed a memorandum circulated through the State Department's "Dissent Channel" stating that the Executive Order "runs counter to core American values" including "nondiscrimination," and that "[d]espite the Executive Order's focus on them, a vanishingly small number of terror attacks on U.S. soil have been committed by foreign nationals" here on visas.[41]

61. Likewise, Senators John McCain (R-AZ) and Lindsey Graham (R-SC) stated: "This executive order sends a signal, intended or not, that America does not want Muslims coming into our country."[42]

62. DHS Secretary Kelly issued a press release on Sunday, January 29, 2017, stating that: "In applying the provisions of the president's executive order, I

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[39] Jamie Doward, *US-bound migrants blocked from flying to JFK airport*, The Guardian (Jan. 28, 2017), https://goo.gl/pWu0NZ.

[40] Evan Perez et al., *Inside the confusion of the Trump executive order and travel ban*, CNN Politics (Jan. 30, 2017 11:29 AM ET), https://goo.gl/Z3kYEC. A printed copy of this article is attached as Exhibit 9.

[41] Jeffrey Gettleman, *State Department Dissent Cable on Trump's Ban Draws 1,000 Signatures*, N.Y. Times (Jan. 31, 2017), https://goo.gl/svRdIw. A copy of the Dissent Channel memorandum is attached as Exhibit 10.

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

hereby deem the entry of lawful permanent residents to be in the national interest. Accordingly, absent the receipt of significant derogatory information indicating a serious threat to public safety and welfare, lawful permanent resident status will be a dispositive factor in our case-by-case determinations."[43]

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

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

65. Because of the Executive Order, non-citizens from the seven designated countries who are legally present in the United States cannot leave the country for family, educational, religious, or business reasons if they wish to return.

66. Among others, people planning to travel overseas on *ummas*, a Muslim pilgrimage, are unsure whether they can make the trip.[44]

67. Defendants are enforcing the Executive Order on Hawai'i soil, including at Honolulu and Kona International Airports.

68. Hawai'i is home to numerous non-citizens from the seven designated countries—legal permanent residents, foreign students, and temporary workers—whose lives have now been upended by the Executive Order. Some non-citizens have been forced to cancel or postpone travel plans. Others may be forced to

[43] Press Release, U.S. Department of Homeland Security, *Statement By Secretary John Kelly On The Entry Of Lawful Permanent Residents Into The United States* (Jan. 29, 2017), *available at* https://goo.gl/6krafi. A copy of this press release is attached as Exhibit 11.

[44] *US-bound migrants blocked from flying to JFK airport*, *supra*.

abandon their studies at Hawaii's universities in order to be reunited with immediate family members abroad.

69. Conversely, nationals of the seven designated countries cannot relocate to or even visit Hawai'i for family, educational, religious, or business reasons. As a result, the Executive Order is blocking Hawai'i residents—including U.S. citizens—from reunifying with their families.

70. Both citizens and non-citizens living in Hawai'i are harmed by the Executive Order.

71. As a result of the Order, the airport facilities provided by Hawaii's State Department of Transportation for international passengers coming into Hawai'i will be used by the federal government to carry out the unlawful acts required by the Executive Order.

72. As a result of the Executive Order, State universities and State agencies cannot accept qualified applicants for open positions—as students, researchers, post-docs, faculty members, or employees—if they are residents of one of the seven designated countries. This contravenes policies at the State's universities and agencies to promote diversity and recruit talent from abroad.[45]

73. Beyond universities and government entities, other employers within the State cannot recruit and/or hire workers from the seven designated countries.

74. The University of Hawai'i and other State learning institutions depend on the collaborative exchange of ideas, including among people of different

[45] *See, e.g.*, State of Hawai'i, Department of Human Resources Development, Policy No. 601.001: Discrimination / Harassment-Free Workplace Policy (revised Nov. 16, 2016), *available at* https://goo.gl/7q6yzJ; University of Hawai'i, Mānoa, Policy M1.100: Non-Discrimination and Affirmative Action Policy, *available at* https://goo.gl/6YqVl8 (last visited Feb. 2, 2017 8:27 PM ET); *see also, e.g.*, *Campus Life: Diversity*, University of Hawai'i, Mānoa, https://goo.gl/3nF5C9 (last visited Feb. 2, 2017 8:27 PM ET).

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

75. The Executive Order is depressing international travel to and tourism in Hawai‘i. Hawai‘i can no longer welcome tourists from the seven designated countries. This directly harms Hawai‘i businesses and, in turn, the State’s revenue. In 2015 alone, Hawai‘i welcomed over 6,800 visitors from the Middle East and over 2,000 visitors from Africa.

76. Even with respect to countries not currently targeted by the Executive Order, there is a likely “chilling effect” on tourism to the United States and to Hawai‘i. Non-citizen Muslims in the United States who would otherwise consider taking vacations will be less likely to travel using airports, and thus less likely to visit Hawai‘i. The Executive Order also contemplates an expansion of the immigration ban and in fact authorizes the Secretaries of State and Homeland Security to recommend additional countries for inclusion in the near future. This likely instills fear and a disinclination to travel to the United States among foreigners in other countries that President Trump has been hostile towards—i.e., residents of other Muslims countries, China, and Mexico.

77. The Executive Order gives rise to a global perception that the United States is an exclusionary country, and it dampens the appetite for international travel here generally.

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

79. The Executive Order also throttles the efforts of the State and its residents to resettle and assist refugees. Refugees from numerous countries, including Iraq, have resettled in Hawai‘i in recent years.[46] While the State's refugee program is small, it is an important part of the State's culture, and aiding refugees is central to the mission of private Hawai‘i organizations like Catholic Charities Hawai‘i and the Pacific Gateway Center.[47] In late 2015, as other states objected to the admission of Syrian refugees, Governor Ige issued a statement that "slamming the door in their face would be a betrayal of our values." Governor Ige explained: "Hawai‘i and our nation have a long history of welcoming refugees impacted by war and oppression. Hawai‘i is the Aloha State, known for its tradition of welcoming all people with tolerance and mutual respect."[48] But as long as the Executive Order prohibits refugee admissions, the State and its residents are prevented from helping refugees resettle in Hawai‘i.

80. In the event refugee admissions resume, the Executive Order promotes the admission of Christian refugees and impedes the admission of Muslim refugees. The Executive Order thus establishes a preference by the Federal Government for Christianity and against Islam, despite the Establishment Clauses of the Constitutions of the State of Hawai‘i and the United States.

81. President Trump's Executive Order is antithetical to Hawai‘i's state identity and spirit. For many in Hawai‘i, including State officials, the Executive Order conjures up the memory of the Chinese Exclusion Acts and the imposition of

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[46] U.S. Department of Health & Human Servs., Office of Refugee Resettlement, *Overseas Refugee Arrival Data: Fiscal Years 2012-2015, available at* https://goo.gl/JcgkDM.

[47] *See About: Our History*, Catholic Charities Hawai‘i, https://goo.gl/deVBla (last visited Feb. 2, 2017 8:28 PM ET); *About: Mission*, Pacific Gateway Center, https://goo.gl/J8bN5k (last visited Feb. 2, 2017 8:29 PM ET).

[48] Press Release, Governor of the State of Hawai‘i, *Governor David Ige's Statement On Syrian Refugees* (Nov. 16, 2015), *available at* https://goo.gl/gJcMIv.

martial law and Japanese internment after the bombing of Pearl Harbor. As Governor Ige expressed two days after President Trump issued the Executive Order, "Hawai'i has a proud history as a place immigrants of diverse backgrounds can achieve their dreams through hard work. Many of our people also know all too well the consequences of giving in to fear of newcomers. The remains of the internment camp at Honouliuli are a sad testament to that fear. We must remain true to our values and be vigilant where we see the worst part of history about to be repeated."[49]

82. If the State had the power to unilaterally address the problems raised by the Executive Order, it would. But because power over immigration is largely lodged in the Federal Government, litigation against the Federal Government is the only way for the State to vindicate its interests and those of its citizens.

CAUSES OF ACTION

COUNT I

(First Amendment – Establishment Clause)

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

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

85. Sections 3 and 5 of the Executive Order, as well as Defendants' statements regarding the Executive Order and their actions to implement it, are intended to disfavor Islam and favor Christianity.

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

86. Sections 3 and 5 of the Executive Order, as well as Defendants' statements regarding the Executive Order and their actions to implement it, have the effect of disfavoring Islam and favoring Christianity.

87. Through their actions described in this Complaint, Defendants have violated the Establishment Clause. Defendants' violation inflicts ongoing harm upon Hawai'i residents and the sovereign interests of the State of Hawai'i.

COUNT II

(Fifth Amendment – Equal Protection)

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

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

90. The Executive Order was motivated by animus and a desire to discriminate on the basis of religion and/or national origin.

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

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

93. Sections 3 and 5 of the Executive Order, as well as Defendants' statements regarding the Executive Order and their actions to implement it, discriminate against individuals based on their religion and/or national origin without lawful justification.

94. Through their actions described in this Complaint, Defendants have violated the Equal Protection guarantees of the Fifth Amendment. Defendants' violation inflicts ongoing harm upon Hawai'i residents and the sovereign interests of the State of Hawai'i.

COUNT III

(Fifth Amendment – Substantive Due Process)

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

96. The right to international travel is protected by the Due Process Clause of the Fifth Amendment.

97. The Executive Order directly curtails that right, without any legal justification.

98. Through their actions described in this Complaint, Defendants have violated the Substantive Due Process guarantees of the Fifth Amendment. Defendants' violation inflicts ongoing harm upon Hawai'i residents and the sovereign interests of the State of Hawai'i.

COUNT IV

(Fifth Amendment – Procedural Due Process)

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

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

101. Non-citizens, including lawful permanent residents and non-immigrants holding valid visas, have a liberty interest in leaving and reentering the country, and in being free from unlawful detention.

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

103. In addition, where Congress has granted statutory rights and authorized procedures applicable to arriving and present non-citizens, rights under the Due Process Clause attach to those statutory rights.

104. Sections 3 and 5 of the Executive Order, and Defendants' actions implementing the Executive Order, deprive non-citizens arriving in the United States, including in Hawai'i, of their statutory rights to apply for asylum and withholding of removal in the United States.

105. Through their actions described in this Complaint, Defendants have violated the Procedural Due Process guarantees of the Fifth Amendment. Defendants' violation inflicts ongoing harm upon Hawai'i residents and the sovereign interests of the State of Hawai'i.

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

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

107. The APA requires courts to hold unlawful and set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right, power, privilege, or immunity"; or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A)-(C).

108. In enacting and implementing Sections 3 and 5 of the Executive Order, Defendants have acted contrary to the Establishment Clause and Fifth Amendment of the United States Constitution.

109. In enacting and implementing Sections 3 and 5 of the Executive Order, Defendants have acted contrary to the INA and the United Nations Protocol Relating to the Status of Refugees. Defendants have exceeded their statutory authority, engaged in nationality- and religion-based discrimination, and failed to vindicate statutory rights guaranteed by the INA.

110. Further, in enacting and implementing Sections 3 and 5 of the Executive Order, Defendants have acted arbitrarily and capriciously. Among other arbitrary actions and omissions, Defendants have offered no explanation for the countries that are and are not included within the scope of the Executive Order. The Executive Order purports to protect the country from terrorism, but sweeps in millions of people who have absolutely no connection to terrorism. And while Defendants have reversed course in their application of the Executive Order to lawful permanent residents, Defendants again acted without explanation, and have yet to explain how all other people with valid visas to enter the country pose a security threat.

111. Through their actions described in this Complaint, Defendants have violated the substantive requirements of the APA. Defendants' violation inflicts ongoing harm upon Hawai‘i residents and the sovereign interests of the State of Hawai‘i.

COUNT VII

(Procedural Violation of the Administrative Procedure Act)

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

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

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

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

116. In implementing Sections 3 and 5 of the Executive Order, federal agencies have changed the substantive criteria by which individuals from the seven designated countries may enter the United States. This, among other actions by Defendants, impacts substantive rights.

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

118. Through their actions described in this Complaint, Defendants have violated the procedural requirements of the APA. Defendants' violation inflicts ongoing harm upon Hawai'i residents and the sovereign interests of the State of Hawai'i.

PRAYER FOR RELIEF

119. WHEREFORE, the State of Hawai'i prays that the Court:

a. Declare that Sections 3(c), 5(a)-(c), and 5(e) of President Trump's Executive Order are unauthorized by, and contrary to, the Constitution and laws of the United States;

b. Enjoin Defendants from implementing or enforcing Sections 3(c), 5(a)-(c), and 5(e) across the nation;

c. Pursuant to Federal Rule of Civil Procedure 65(b)(2), set an expedited hearing within fourteen (14) days to determine

whether the Temporary Restraining Order should be extended; and

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

DATED: Honolulu, Hawai‘i, February 3, 2017.

Respectfully submitted,

/s/ Douglas S. Chin

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

**Pro Hac Vice Applications Forthcoming*

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

Attorneys for Plaintiff, State of Hawai‘i