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## **CLASS II**

### **Immigration Policy and Enforcement in the Trump Administration**

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## **PRACTICE ADVISORY<sup>1</sup>**

**February 20, 2017**

### **EXPEDITED REMOVAL: WHAT HAS CHANGED SINCE EXECUTIVE ORDER NO. 13767, BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS (ISSUED ON JANUARY 25, 2017)**

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## **Expedited Removal Prior to Executive Order 13767**

### **1. What is expedited removal, and who does it apply to now?**

Expedited removal is a procedure that allows a Department of Homeland Security (DHS) official to summarily remove a noncitizen without a hearing before an immigration judge or review by the Board of Immigration Appeals (BIA). *See* 8 U.S.C. § 1225(b)(1). Under the Immigration and Nationality Act (INA), any individual who arrives at a port of entry in the United States and who is inadmissible under either 8 U.S.C. § 1182(a)(6)(C) (misrepresentations and false claims to U.S. citizenship) or § 1182(a)(7) (lack of valid entry documents), is subject to expedited removal. 8 U.S.C. § 1225(b)(1)(A)(i).<sup>2</sup> Additionally, the Secretary of DHS has the authority to apply expedited removal to any individual apprehended at a place other than a port of entry, who is inadmissible under either of those grounds, has not been admitted or paroled, and cannot show that he or she has been continuously present in the United States for two or more years. 8 U.S.C. §§ 1225(b)(1)(A)(i), (iii).

To date, DHS has limited its application of expedited removal to noncitizens inadmissible for one of the above-stated grounds who either arrive at a port of entry or are apprehended within 14 days of their arrival and within 100 miles of an international land border. *See* Designating Aliens For Expedited Removal, 69 Fed. Reg. 48877, 48880 (2004).

### **2. How does expedited removal differ from removal proceedings before an immigration judge?**

Expedited removal is substantially different from removal proceedings in immigration court conducted under 8 U.S.C. § 1229a. In removal proceedings, an immigration judge hears the case. 8 U.S.C. § 1229a(a)(1). Noncitizens may have an attorney represent them (at their own expense), may apply for relief from removal, and are entitled to substantial due process protections. *See, e.g., Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009) (“[I]mmigration proceedings must conform to the Fifth Amendment’s due process requirement.”). Finally, even if an immigration

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<sup>2</sup> DHS may not charge an individual with any other ground of inadmissibility in expedited removal proceedings; if an officer chooses to include an additional charge, the individual must be placed in removal proceedings before an immigration judge under 8 U.S.C. § 1229a. *See* 8 C.F.R. § 235.3(b)(3).

judge orders an individual removed, that person may appeal the decision, first to the Board of Immigration Appeals (BIA) and then to a federal court of appeals. 8 U.S.C. §§ 1229a(c)(5), 1252.

Expedited removal, as applied by DHS, does not have any of those procedural protections. The DHS officer who is authorized to issue an order of expedited removal operates as prosecutor and judge and often arrests an individual and orders him or her deported on the same day. With limited exceptions, discussed below, the government takes the position that noncitizens subject to expedited removal have no right to an appeal. At least one court has held that certain immigrants in expedited removal proceedings have no right to counsel. *United States v. Peralta-Sanchez*, Nos. 14-50393, 14-50394, \_ F.3d\_, 2017 U.S. App. LEXIS 2165 (9th Cir. Feb. 7, 2017).

### **3. What happens if a person subject to expedited removal has a fear of return?**

Congress included safeguards in the expedited removal statute to ensure that individuals fleeing persecution are not returned to their countries of origin. If, during the expedited removal process before a DHS officer, an individual indicates either an intention to apply for asylum or any fear of return to his or her home country, the officer must refer the individual for an interview with an asylum officer. 8 U.S.C. §§ 1225(b)(1)(A)(ii), (B); 8 C.F.R. § 235.3(b)(4). Significantly, DHS officers are required to read individuals subject to expedited removal a script that informs them of their right to speak to an asylum officer if they express a fear of return. *See* 8 C.F.R. § 235.3(b)(2)(i) (requiring reading of Form I-867A); DHS Form I-867A (including an advisal that individuals who express “fear or . . . concern about being removed from the United States or about being sent home . . . will have the opportunity to speak privately and confidentially to another officer about [their] fear or concern”).

Upon referral, the asylum officer will conduct a “credible fear interview,” which is designed “to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture.” 8 C.F.R. § 208.30(d). An individual will be determined to have a credible fear of persecution if there is a “significant possibility,” taking into account the credibility of his or her statements and any other facts known to the asylum officer, that the individual can establish eligibility for asylum under 8 U.S.C. § 1158 or for withholding of removal under 8 U.S.C. § 1231(b)(3). 8 C.F.R. § 208.30(e)(2).

If the asylum officer determines that the individual satisfies the credible fear standard, the applicant is taken out of the expedited removal process, is served with a Notice to Appear, and is placed in removal proceedings before an immigration judge under 8 U.S.C. § 1229a where he or she can pursue an asylum application and any other form of relief for which he or she is eligible. 8 C.F.R. § 208.30(f); *see also* 8 U.S.C. § 1225(b)(1)(B)(ii).

If the asylum officer makes a negative credible fear determination, the officer must provide a written record of the determination. Upon request, the individual must be provided with prompt review of the determination by an immigration judge. 8 U.S.C. §§ 1225(b)(1)(B)(iii)(II)-(III); *see also* 8 C.F.R. §§ 208.30(g)(1), 1003.42, 1208.30. If the immigration judge determines that the individual has a credible fear of persecution, the expedited removal order will be vacated and DHS will institute removal proceedings under 8 U.S.C. § 1229a. 8 C.F.R. § 1003.42(f).

If the immigration judge determines that the individual does *not* have a credible fear, the case will be remanded to DHS to execute the expedited removal order. *Id.* Upon request by the individual, an asylum officer may reconsider a negative credible fear determination after notifying the immigration judge. *See* 8 C.F.R. § 1208.30(g)(2)(iv)(A). Alternatively, an asylum officer may grant the individual a second interview where the individual “has made a reasonable claim that compelling new information concerning the case exists and should be considered.” Michael A. Benson, Executive Assoc. Commissioner for Field Operations, Immigration & Naturalization Service, Memorandum, *Expedited Removal: Additional Policy Guidance* (Dec. 30, 1997) (AILA Doc. No. 98021090).

#### **4. In what situations, and how, can someone *directly* challenge an expedited removal order in federal court?**

Under the government’s construction of the applicable statutory provisions, federal court review of expedited removal orders is extremely limited.

The INA bars courts of appeals from reviewing expedited removal orders on petitions for review. *See* 8 U.S.C. §§ 1252(a)(2)(A), (e); *see also* *Shunaula v. Holder*, 732 F.3d 143 (2d Cir. 2013); *Khan v. Holder*, 608 F.3d 325 (7th Cir. 2010); *Brumme v. INS*, 275 F.3d 443 (5th Cir. 2001).

The INA provides for habeas review of expedited removal orders, but purportedly limits the scope of review to the following determinations: (1) whether the petitioner is a noncitizen (i.e., whether the person has a citizenship claim); (2) whether the petitioner was ordered removed under § 1225(b)(1) (the expedited removal provision); and (3) whether the petitioner can prove by a preponderance of the evidence (i.e., 50.1%) that he or she (a) is an LPR; (b) has been admitted as a refugee; or (b) has been granted asylum, and that such status has not been terminated. 8 U.S.C. §§ 1252(e)(2)(A)-(C). Title 8 U.S.C. § 1252(e)(5) further defines the scope of this inquiry; it provides that review is limited to the existence of the order and whether it relates to the petitioner and further precludes review of actual inadmissibility or eligibility for relief from removal.

The government takes the position that the federal courts lack jurisdiction to review most challenges to expedited removal orders. However, these restrictions arguably would not preclude habeas review of, for example, expedited removal orders against individuals who claim that they have been present in the United States for more than 14 days or were located more than 100 miles from the border, and, therefore, are not properly “ordered removed under § 1225(b)(1)” as DHS currently applies it. Additionally, there are ongoing challenges to the government’s interpretation, asserting that if the statute is construed to restrict review of challenges to expedited removal, it would violate the Constitution. *See, e.g., Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422 (3d Cir. 2016) (discussed further below).

If a petitioner prevails, the habeas court can order the government to provide the individual with a removal hearing before an immigration judge under 8 U.S.C. § 1229a. *See* 8 U.S.C. § 1252(e)(4).

Litigation concerning the scope of habeas review under this provision is minimal. In *Smith v. U.S. Customs and Border Protection*, 741 F.3d 1016 (9th Cir. 2014), a Canadian citizen sought

habeas review under 8 U.S.C. § 1252(e)(2)(B) from outside the United States. He argued that Customs and Border Protection (CBP) lacked authority to issue him an expedited removal order. He asserted that Canadian nonimmigrants could not be subject to expedited removal proceedings, because the relevant documentation requirements are waived for Canadian nonimmigrants. On appeal, the Ninth Circuit “assum[ed], without deciding, that there is no [physical] custody requirement under § 1252(e)(2)(B),” but affirmed the order. 741 F.3d at 1020. The Court reasoned that the documentation requirements are only waived for Canadians who have established that they are “nonimmigrants” and that “Smith failed to defeat the presumption that he should have been classified as an intending immigrant.” *Id.* at 1021. Therefore, the Court held that Smith was “‘ordered removed’ under § 1225,” and rejected his claim on the merits.<sup>3</sup> *Id.* at 1022. *See also id.* at 1022 n.6 (“Because we are reviewing Smith’s petition under § 1252(e)(2), we need not reach the question whether and under what circumstances a petitioner who establishes none of the permissible bases under § 1252(e)(2) might still have claims under the Suspension Clause . . .”).

In *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422 (3d Cir. 2016), twenty-eight families sought review of their expedited removal orders based on negative credible fear determinations. They asserted that the expedited removal statute had to be construed to provide for such review, and that otherwise, the Suspension Clause would be violated. The Third Circuit rejected the availability of habeas corpus review under § 1252(e)(2)(B). 835 F.3d at 429-34. The court also found that because they were seeking initial admission to the United States, the petitioners were unable to invoke habeas review under the Suspension Clause, even though they had entered the country before CBP apprehended them. *Id.* at 444-49. On December 22, 2016, the petitioners filed a petition for writ of certiorari to the Supreme Court (Case No. 16-812). The government’s response is due March 13, 2017.

In a third case, a district court held that a petitioner with a bona fide claim that his lawful permanent resident status had not been lawfully terminated at the time he was subject to expedited removal was entitled to a stay of removal and an immigration court hearing. *See Kabenga v. Holder*, 76 F. Supp. 3d 480 (S.D.N.Y. 2015) (jurisdictional decision); No. 14-cv-9084, 2015 U.S. Dist. LEXIS 20361 (S.D.N.Y. Feb. 19, 2015) (merits decision). That case is on appeal, and proceedings currently are held in abeyance. *Kabenga v. Lynch*, No. 15-1367 (2d Cir.).

Finally, although the INA provides for systemic challenges to the validity of determinations under § 1225(b) and implementation of the expedited removal system, such review is subject to the statute’s accompanying venue, deadline, and scope of review provisions. *See* 8 U.S.C. § 1252(e)(3). Venue is only permissible in the U.S. District Court for the District of Columbia. 8 U.S.C. § 1252(e)(3)(A). The district court is limited to reviewing: (1) the constitutionality of § 1225(b) or any implementing regulation; or (2) whether any regulation or written policy is inconsistent with certain sections of the INA or is otherwise unlawful. 8 U.S.C. § 1252(e)(3)(A).

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<sup>3</sup> Smith also raised a second argument, that even assuming expedited removal could be applied to him, he was not inadmissible; the Ninth Circuit held that it lacked jurisdiction over the second argument because 8 U.S.C. § 1252(e)(5) expressly prohibited review of whether one was “actually inadmissible.” *Id.* at 1021–22, & n.4.

Any such action must be filed “no later than 60 days after the challenged [regulation or written policy] is first implemented.” 8 U.S.C. § 1252(e)(3)(B). Past systemic challenges under this provision have not been successful. *See AILA v. Reno*, 199 F.3d 1352 (D.C. Cir. 2000). Due to the complexities of such challenges and the stakes involved, attorneys are encouraged to contact the organizational authors of this advisory before contemplating any such action. Please send an email to [kristin@nipnlg.org](mailto:kristin@nipnlg.org).

**5. In what situations, and how, can someone *indirectly* challenge an expedited removal order in federal court?**

Expedited removal orders can serve as an underlying factual predicate in both civil prosecutions for reinstatement of removal under 8 U.S.C. § 1231(a)(5) and criminal prosecutions for illegal reentry after removal under 8 U.S.C. § 1326.

In the civil reinstatement context, thus far, courts of appeals have concluded that they lack jurisdiction to review collateral challenges to expedited removal orders. *See, e.g., de Rincon v. DHS*, 539 F.3d 1133, 1138-39 (9th Cir. 2008); *Lorenzo v. Mukasey*, 508 F.3d 1278, 1281 (10th Cir. 2007).

In the criminal context, at least one circuit has held that the government cannot use an expedited removal order as the predicate offense to a § 1326 charge where the defendant demonstrated a violation of his due process rights in the expedited removal process that prejudiced him. *United States v. Raya-Vaca*, 771 F.3d 1195, 1205-06, 1210-11 (9th Cir. 2014) (holding that immigration officer’s failure to advise the defendant of the charge of removability and to permit him to review the sworn statement prepared by the officer violated his due process rights to notice and an opportunity to respond); *but see Peralta-Sanchez*, 2017 U.S. App. LEXIS 2165 (upholding § 1326 conviction and finding that defendant had no Fifth Amendment right to a lawyer in expedited removal proceedings and that he was not prejudiced by DHS’s failure to inform him of the possibility of withdrawing his application for admission). A rehearing petition is planned in *Peralta-Sanchez*.

**6. Is there a way to ask the issuing agency to reconsider or reopen an expedited removal order?**

Yes, expedited removal orders are covered by 8 C.F.R. § 103.5, which governs motions to reopen or reconsider DHS decisions.<sup>4</sup> Some courts of appeals have addressed the availability of 8

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<sup>4</sup> The regulation provides:

- “A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.” 8 C.F.R. § 103.5(a)(2).
- “A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy.” 8 C.F.R. § 103.5(a)(2).
- There is a 30-day deadline to file a motion to reopen or reconsider; the deadline for reopening “may be excused in the discretion of the Service where it is demonstrated that

C.F.R. § 103.5 to reopen or reconsider DHS-issued orders.<sup>5</sup> Any motion to reopen (based on new evidence) or reconsider (based on an incorrect application of law or policy) should be filed with the DHS office that issued the expedited removal order.

It is advisable to include a cover letter, Form I-290B, Form G-28, and a well-written motion supported by documentation. Whether a filing fee is required is unclear; however, counsel may wish to include either a request for a fee waiver and/or indicate that the fee will be paid upon request. The motion should explain both why DHS should vacate the expedited removal order on legal or equitable grounds and why the person subject to the order is eligible for and/or deserving of the requested relief. For example, if the motion seeks cancellation of the expedited removal order to allow the person to withdraw his or her application for admission (*see* 8 U.S.C. § 1225(a)(4)), the motion should evaluate each factor a CBP officer would consider in deciding such a request. *See Raya-Vaca*, 771 F.3d at 1206-07 (discussing factors). If the motion seeks cancellation of the expedited removal order and issuance of a Notice to Appear, the motion should demonstrate what relief is available to the person in removal proceedings before an immigration judge.

Significantly, some CBP offices may initially take the position that they lack authority to reconsider or reopen an expedited removal order. For this reason, attorneys strongly are advised to attach examples of CBP decisions vacating expedited removal orders in response to such motions. Two examples are available at [http://nipnl.org/ourLit/motions\\_dhs\\_removal.html](http://nipnl.org/ourLit/motions_dhs_removal.html) and others are available upon request. Please contact [trina@nipnl.org](mailto:trina@nipnl.org).

Lastly, DHS has discretion to elect between issuing an expedited removal order, allowing withdrawal of an application for admission pursuant to 8 U.S.C. § 1225(a)(4), or issuing a Notice to Appear and placing the individual in removal proceedings before an immigration judge. Counsel always can request that DHS exercise its prosecutorial discretion to either allow withdrawal of an application for admission or issue a Notice to Appear.

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the delay was reasonable and was beyond the control of the applicant or petitioner.” 8 C.F.R. § 103.5(a)(1)(i).

Notably, the regulation’s language expressly excludes certain matters that fall outside its general grant of authority, but expedited removal orders are not among these exclusions. *See* 8 C.F.R. § 103.5(a)(1)(i).

<sup>5</sup> *Perez-Garcia v. Lynch*, 829 F.3d 937 (8th Cir. 2016) (exercising jurisdiction to review denial of motion to reopen reinstatement order); *Escoto-Castillo v. Holder*, 658 F.3d 864, 866 (8th Cir. 2011) (accepting government’s argument that motion under 8 C.F.R. § 103.5 is an administrative remedy that must be exhausted in order to challenge an administrative removal order under 8 U.S.C. § 1228(b)); *Evers v. Mukasey*, 288 F. App’x 441, 441 (9th Cir. 2008) (unpublished) (same); *but see Aguilar-Aguilar v. Napolitano*, 700 F.3d 1238, 1242 n.3 (10th Cir. 2012) (suggesting 8 C.F.R. § 103.5 is limited to benefit request denials); *Tapia-Lemos v. Holder*, 696 F.3d 687 (7th Cir. 2012) (holding court of appeals lacked jurisdiction to review denial of a motion to reopen a reinstatement order that “duplicated” claims put forth in other filings).



## **Expanded Expedited Removal**

### **7. What does Section 11(c) of Executive Order 13767 say?**

The Executive Order instructs the Secretary of Homeland Security to apply expedited removal to the fullest extent of the law. *See* Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (2017). Section 11(c) of the Executive Order states in full:

Pursuant to section 235(b)(1)(A)(iii)(I) of the INA, the Secretary shall take appropriate action to apply, in his sole and unreviewable discretion, the provisions of section 235(b)(1)(A)(i) and (ii) of the INA to the aliens designated under section 235(b)(1)(A)(iii)(II).

*Id.* at 8796.

### **8. Has the Executive Order changed who is eligible for expedited removal? How?**

The Executive Order instructs the Secretary of DHS to take action to implement the expansion. As of the date of this advisory, DHS has not yet implemented any expansion of expedited removal. In a February 20, 2017 memorandum, DHS Secretary John Kelly stated that he would publish a notice in the Federal Register designating who would be subject to expedited removal. John Kelly, Implement the President's Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017).<sup>6</sup> This memorandum did not specify when the Federal Register notice would be published or the extent to which it would expand expedited removal; rather, Kelly stated that the notice might, “to the extent [he] determine[s] is appropriate, depart from the limitations set forth in the designation currently in force.” *Id.*

Following issuance of the Executive Order, DHS has continued to issue expedited removal orders against individuals allegedly apprehended at ports of entry, or within two weeks of entry into the United States and within 100 air miles of an international land border.

Counsel who are aware or become aware of *any* individual subject to expedited removal who 1) entered without inspection (EWI) more than 14 days before he or she was arrested, and/or 2) was arrested more than [100 miles from the border](#) are urged to contact [kristin@nipnl.org](mailto:kristin@nipnl.org) immediately.

### **9. Who is at risk of being subjected to expanded expedited removal?**

The full scope of any expansion of expedited removal will not be clear until notice of the expansion is published in the Federal Register. Should the Secretary expand expedited removal to the full extent provided by statute, immigration officers would be authorized to use it against any noncitizen apprehended anywhere in the United States who is inadmissible under either 8 U.S.C. § 1182(a)(6)(C) or § 1182(a)(7) and who entered without inspection less than two years

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<sup>6</sup> Available at [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf) .

prior to the date of the expedited removal proceedings. Because of the likelihood of an overzealous and flawed application of expedited removal, it is possible that even noncitizens who have been present for more than two years will risk being subject to expedited removal.

#### **10. Is expanded expedited removal likely to violate noncitizens' due process rights?**

Even in its existing form, the expedited removal process raises serious due process concerns. As Judge Pregerson recently explained, in expedited removal cases:

[T]he deportation process can begin and end with a CBP officer untrained in the law. . . . There is no hearing, no neutral decision-maker, no evidentiary findings, and no opportunity for administrative or judicial review. This lack of procedural safeguards in expedited removal proceedings creates a substantial risk that noncitizens subjected to expedited removal will suffer an erroneous removal.

*Peralta-Sanchez*, 2017 U.S. App. LEXIS 2165, at \*42 (Pregerson, J., dissenting) (footnotes omitted); *but see* Questions 4-6 *supra* (outlining limited options that do exist to challenge expedited removal orders). In reality, CBP officers fail to provide some people even the minimal procedural protections included in the expedited removal process. *See, e.g., Raya-Vaca*, 771 F.3d at 1204-06 (holding that CBP officer violated due process rights in expedited removal proceedings by failing to provide notice of charges against noncitizen or opportunity to respond).

The risks are especially great for people trapped in the expedited removal process who fear persecution in their countries of origin. Although CBP officers are required to refer people with a fear of return to asylum officers—and to inform people subject to expedited removal of the protections to which they are entitled if they fear return, *see* Question 3, *supra*—practitioners and organizations report that officers regularly fail to do so. *See, e.g., ACLU, American Exile: Rapid Deportations that Bypass the Courtroom*, 32-40 (Dec. 2014) (describing asylum seekers who were required to sign forms in languages they do not understand, were interviewed without interpreters, were not asked about their fear of return, and/or were not allowed to speak to asylum officers); American Immigration Council, *Mexican and Central American Asylum and Credible Fear Claims: Background and Context*, 9-10 (May 2014) (noting that “advocates complained that clients were harassed, threatened with separation from their families or long detentions, or told that their fears did not amount to asylum claims”). The expedited removal system also ensnares people with a legal right to remain in the United States—such as U.S. citizens and lawful permanent residents—who are unable to explain their immigration status or citizenship claims before they are rushed or coerced through the deportation process, including people with serious mental disabilities. *See, e.g., American Exile* at 44-58.

If DHS expands the scope of individuals subject to expedited removal, these ongoing problems similarly will increase. Under expedited removal as outlined in Section 11(c) of the Executive Order, DHS would apply the process to a greater number of individuals, potentially including both U.S. citizens and noncitizens with substantial ties to the United States.<sup>7</sup> Even assuming that

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<sup>7</sup> For example, Sharon McKnight, a U.S. citizen who has cognitive disabilities, was unlawfully deported to Jamaica through expedited removal in 2000 after immigration officers believed her passport was fraudulent. In 2008, Mark Lyttle, a U.S. citizen who has bipolar

DHS officers give individuals they apprehend an opportunity to prove how long they have been in the United States, it will be difficult for people to provide proof of up to two years’—rather than two weeks’—presence.

**11. After someone is arrested by DHS, how can she show that she must receive an immigration court hearing, rather than be subject to expedited removal?**

It is too early to know how DHS will implement an expansion of expedited removal. As noted above, DHS has discretion to elect between issuing an expedited removal order, allowing withdrawal of an application for admission pursuant to 8 U.S.C. § 1225(a)(4), or issuing a Notice to Appear and placing the individual in removal proceedings before an immigration judge. Requesting that DHS exercise its prosecutorial discretion to either allow withdrawal of an application for admission or issue a Notice to Appear is advisable.

Furthermore, the INA provides that an individual may be subject to expedited removal only if she or he “has not affirmatively shown, to the satisfaction of an immigration officer, that [she or he] has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility.” 8 U.S.C. § 1225(b)(1)(A)(iii)(II); *see also* 8 C.F.R. § 235.3(b)(1)(ii). Therefore, DHS officers are obligated to put an individual into immigration court proceedings, rather than expedited removal, if that person provides proof that she or he has been present in the United States for two years (or a lesser amount of time depending upon the scope of any expansion of expedited removal).<sup>8</sup> However, there are pros and cons to carrying documents demonstrating length of residency. *See* Question 12, *infra*.

**12. Once expedited removal is expanded, should people who have lived in the United States for sufficient time such that they should not be subject to expedited removal carry proof of presence?**

Unfortunately, there is no correct answer to this question. Consequently, whether to carry documents proving length of presence will be an individual choice that each person will need to make. Below are some pros and cons of carrying documents.

The advantage of carrying documents proving presence is straightforward: it may convince a DHS officer to place someone potentially subject to expedited removal into removal proceedings before an immigration judge instead. Individuals who can make this showing seemingly have a strong incentive to carry such documents. Of course, given the ongoing problems with the existing expedited removal process, *see* Question 10, *supra*, there is no guarantee that DHS officers will treat all those individuals who carry proof as having “shown, to the satisfaction of an immigration officer” that they have been present in the United States for sufficient time such that they should not be subject to expedited removal. In addition, to the extent that people

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disorder and developmental disabilities, similarly was deported to Mexico unlawfully. *American Exile* at 49.

<sup>8</sup> As discussed *supra* at Question 4, an individual who was present in the United States for sufficient time such that he or she should not be subject to 8 U.S.C. § 1225(b)(1) arguably could seek habeas review if DHS nonetheless issues an expedited removal order.

regularly carry and provide documentation to DHS, this may create an implicit heightened standard that *all* people should provide such documentation.

Moreover, there are potential disadvantages to carrying documents, including:

- To the extent that the documents may contain proof of the individual's alienage or lack of lawful immigration status, DHS could then use that proof against the individual, or others mentioned in the documents, in removal proceedings (or, potentially, criminal proceedings).
- Even if the documents do not contain such proof on their face, immigration officials may treat individuals who choose to carry such documents as implicitly conceding their undocumented status, regardless of whether it is lawful to do so.
- Depending on their content, documents turned over to DHS that contain proof that an individual worked without authorization potentially could be used in criminal prosecutions against the employer or even the individual if, for example, the documents contained proof that he or she used a false social security number.
- To the extent that individuals carry the original versions of documents proving their length of presence, they risk losing those documents, including to DHS officers who may fail to return them.

**13. If a person chooses to carry documents establishing proof of presence in the United States, what types of documents should they carry?**

In other contexts, to prove length of residency and/or presence in the United States, DHS and the immigration courts previously have relied upon photocopies of documents from individuals' schools, places of work, churches, and banks, among others. However, at this time, DHS has not indicated what types of documents the agency would consider sufficient to establish length of presence or whether providing photocopies of documents that establish presence would be acceptable.

**14. In what situations, and how, can someone challenge an expanded expedited removal order?**

The same avenues that currently exist for a federal court or administrative review of an expedited removal order in an individual case will continue to exist following any expansion of expedited removal, including for individuals subjected to expedited removal despite being present in the United States for sufficient time that they should not fall within the scope of any expansion. These are discussed above in Questions 4-6.

As noted in Question 4, *supra*, the INA also provides for review over a systemic challenge to the validity of determinations under § 1225(b) and the implementation of the expedited removal system. 8 U.S.C. § 1252(e)(3). In particular, there are statutory restrictions on where such a challenge can be brought, when it can be brought, and what the court can review. *Id.*

The ACLU Immigrants' Rights Project, the National Immigration Project of the National Lawyers Guild, and the American Immigration Council are now investigating the expansion of

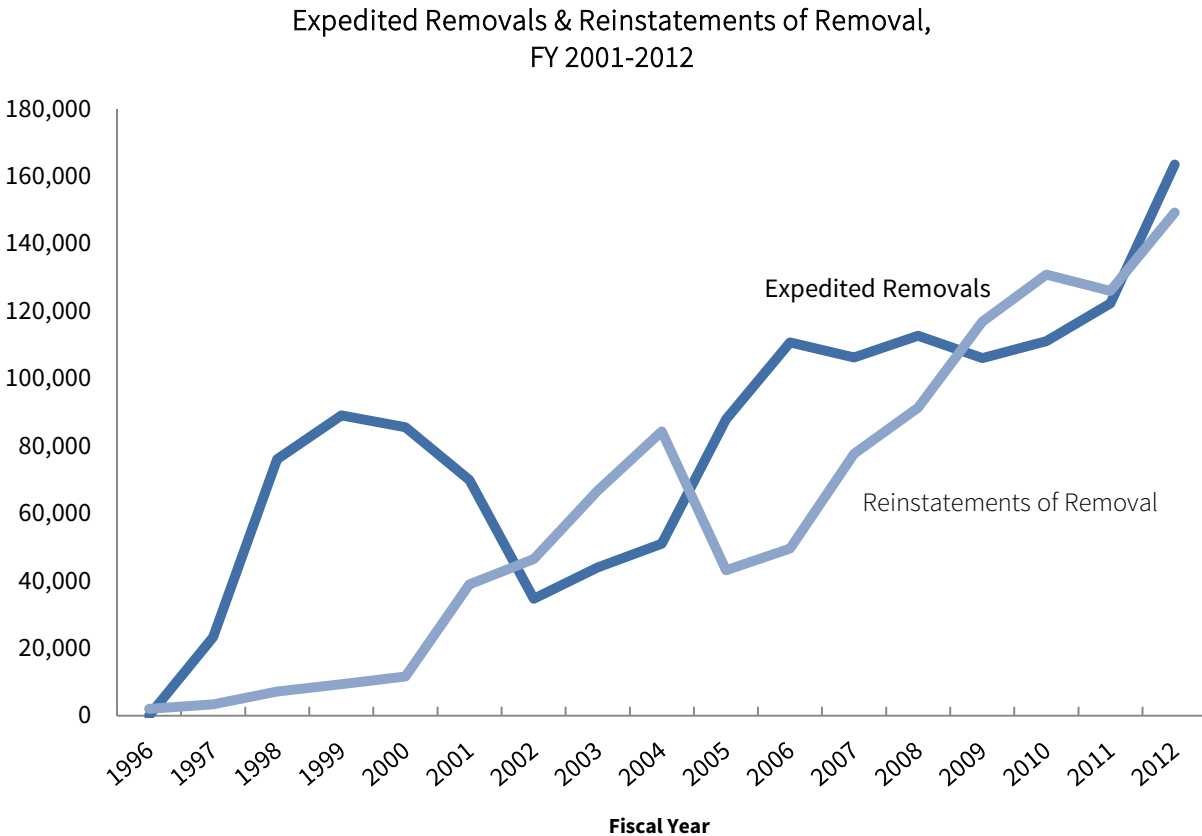
expedited removal. If you learn of an individual being subjected to expedited removal who either 1) entered without inspection more than 14 days before he or she was arrested, and/or 2) was arrested more than [100 miles from the border](#), please contact [kristin@nipnlg.org](mailto:kristin@nipnlg.org) immediately.



## Removal Without Recourse: The Growth Of Summary Deportations From The United States

The deportation process has been transformed drastically over the last two decades. Today, two-thirds of individuals deported are subject to what are known as “summary removal procedures,” which deprive them of both the right to appear before a judge and the right to apply for status in the United States. In 1996, as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress established streamlined deportation procedures that allow the government to deport (or “remove”) certain noncitizens from the United States without a hearing before an immigration judge. Two of these procedures, “expedited removal” and “reinstatement of removal,” allow immigration officers to serve as both prosecutor and judge—often investigating, charging, and making a decision all within the course of one day. These rapid deportation decisions often fail to take into account many critical factors, including whether the individual is eligible to apply for lawful status in the United States, whether he or she has long-standing ties here, or whether he or she has U.S.-citizen family members.

In recent years, summary procedures have eclipsed traditional immigration court proceedings, accounting for the dramatic increase in removals overall. As the chart below demonstrates, since 1996, the number of deportations executed under summary removal procedures—including expedited removal, reinstatement of removal, and stipulated removal (all described below)—has dramatically increased.



**Source: U.S. Department of Homeland Security, Immigration Enforcement Actions: 2010 and 2012;  
U.S. Immigration and Naturalization Service, 2000 Statistical Yearbook, chp. 6.**

In Fiscal Year (FY) 2013, more than 70 percent of all people Immigration and Customs Enforcement (ICE) deported were subject to summary removal procedures.<sup>1</sup>

### **Expedited Removal (INA § 235(b))**

In FY 2013, ICE deported about 101,000 people through the expedited removal process.<sup>2</sup> Expedited removal is a summary process for formally deporting certain noncitizens who do not have proper entry documents and who are seeking entry to the United States at a port of entry (POE), such as a border crossing or an airport, or who are found within 100 miles of the border. Specifically, it applies only if the immigration officer determines that an individual:

- committed fraud or misrepresented a material fact for purposes of seeking entry to the United States;
- falsely claimed U.S. citizenship; or
- is not in possession of a valid visa or other required documentation.

When expedited removal was first enacted, immigration officers applied it only to people who were seeking entry to the United States and not to those who were already in the United States. However, in 2004, the Department of Homeland Security (DHS) drastically expanded the scope of expedited removal by deciding that noncitizens encountered within 100 air miles of the southwest border who have not been present in the United States for the 14 days immediately prior to the date of encounter can be subject to expedited removal.<sup>3</sup> In 2006, DHS announced that it would implement this policy along all of the U.S. borders.<sup>4</sup>

A person subject to expedited removal is immediately ordered removed without any further hearing, review, or opportunity to apply to stay in the United States unless the person expresses a fear of persecution, in which case he or she is afforded a “credible fear interview” to determine whether he or she may apply for asylum.<sup>5</sup> The process is so truncated that frequently a person with an expedited removal order has no idea why he or she was deported. Individuals subject to expedited removal generally are not informed of their right to counsel. Likewise, they are not provided a sufficient opportunity to contact counsel to help them challenge the charges against them or present evidence that is not with them at the time of apprehension.

As a result, expedited removal can lead to erroneous deportations of individuals who are not deportable or who would be eligible to apply for lawful status in the United States or to seek prosecutorial discretion if processed through normal immigration court procedures. In addition, individuals who may have resided in the United States for decades, and left only for a brief period of time, may be deported pursuant to expedited removal despite having significant ties to the United States.<sup>6</sup> Those subject to expedited removal are automatically barred from returning to the United States for five years. In cases where an expedited removal order is based on a false claim of U.S. citizenship, an individual is permanently barred from re-entering the country.

### **Reinstatement of Removal (INA § 241(a)(5))**

In FY 2013, 159,634 individuals were deported based on a reinstatement of removal order,<sup>7</sup> a 270 percent increase from 2005.<sup>8</sup> Reinstatement of removal applies to noncitizens who return illegally to the United States after having previously been deported. Essentially, DHS “reinstates” the original removal order without considering the individual’s current situation, reasons for returning to the United States, or the presence of flaws in the original removal proceedings. They even may apply it to someone whose initial deportation order was entered in absentia.<sup>9</sup> A person whose order is reinstated is barred from applying to remain in the United States or from seeking to correct any errors that may have occurred in the original deportation. The primary exception to this rule is that an individual who expresses a fear of return during the reinstatement process must be referred to an asylum officer for screening for eligibility for withholding of removal or protection under the Convention Against Torture.<sup>10</sup>

Unlike expedited removal, immigration officers may use the reinstatement process anywhere throughout the United States—not just at a POE or within 100 miles of the border. Most persons subject to reinstatement are arrested and kept in custody throughout the process without an opportunity to seek a bond. The process is



designed to allow DHS to remove individuals immediately; the entire process (including the removal) may occur within 24 hours. Typically, the DHS officer conducts a short interrogation to determine whether the individual has a prior removal order, actually is the person identified in the prior order, and has unlawfully reentered. At the conclusion of the interrogation, the person is afforded an opportunity to make a statement and, thereafter, the officer typically issues the final order. The process usually happens too quickly for an individual to consult with a lawyer to assist in challenging the reinstatement.

### **Stipulated Removal (INA § 240(d))**

Stipulated removal orders are different from expedited removal orders and reinstated removal orders in that the person is formally charged and placed in immigration court proceedings before an immigration judge. However, like these other summary removal procedures, the person usually does not appear in an immigration court; rather, the noncitizen agrees (or “stipulates”) to deportation and gives up his or her right to a hearing. The immigration judge may enter the order of removal without seeing the person and asking him or her whether the stipulation was entered into knowingly and voluntarily. The use of stipulated removal expanded from zero in 2000 to over 30,000 in 2008.<sup>11</sup>

Of the more than 160,000 noncitizens who agreed to stipulated removal orders between 2004 and 2010, the vast majority were in immigration detention—often far from family and home—and unrepresented by counsel.<sup>12</sup> The correlation between detention and stipulated removals is particularly troubling given that individuals in detention have little access to lawyers or even basic information about their legal options and because the conditions of confinement are inherently coercive.<sup>13</sup> Until they go before an immigration judge, they may not know whether they have claims to immigration relief,<sup>14</sup> and they may not appreciate the timeframes for making decisions in their cases. ICE agents who ask detainees to sign stipulated removal orders often leave the individuals confused about their options and feeling pressured to agree to give up their right to hearings.<sup>15</sup> As a result, many stipulated removals cannot be said to be voluntary, knowing, and intelligent, and the procedure raises serious due process concerns.

### **Conclusion**

The deportation process has been transformed drastically over the last two decades. In the past, immigration court hearings were the standard procedure. These judicial proceedings ensure a basic level of due process, help safeguard against unlawful removals, and permit noncitizens to pursue legal status in the United States, if they are eligible. Today, two-thirds of individuals deported are subject to summary removal procedures which deprive them of both the right to appear before a judge and the right to apply for status in the United States. The deportation decisions are made quickly by immigration officers, and generally there is no opportunity to consult with counsel and there is no judicial oversight. Even immigrants who are put into the immigration court process may not make it to court if they stipulate to deportation before their first hearing. The stipulation may occur quickly and without the assistance of an attorney.

Too little attention has been paid to this dramatic shift away from fundamental principles of fairness and due process. One of the hallmarks of the U.S. justice system is the right to have a day in court before an impartial decision-maker, yet the vast majority of immigrants who are removed never see the inside of a courtroom. Understanding this transformation from immigration court process to streamlined procedures is an important step in unraveling the breadth and scope of U.S. deportation policies today.

## Endnotes

1. U.S. Immigration and Customs Enforcement, [FY 2013 ICE Immigration Removals](#), December 2013, p. 4.
2. Ibid.
3. 69 Fed. Reg. 48877 (Aug. 11, 2004).
4. DHS Press Release, [DHS Streamlines Removal Process Along Entire U.S. Border](#), January 31, 2006).
5. For an overview of the credible fear process and the challenges asylum seekers face in obtaining protection, see Sara Campos and Joan Friedland, [Mexican and Central American Asylum and Credible Fear Claims: Background and Context](#) (Washington, DC: American Immigration Council, May 2014).
6. ICE emphasizes that length of presence in the United States and ties to the community, including family relationships, are important factors in considering whether to exercise prosecutorial discretion. See Memorandum from John Morton, Director, ICE, on “[Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens](#),” June 17, 2011.
7. U.S. Immigration and Customs Enforcement, [FY 2013 ICE Immigration Removals](#), December 2013, p. 4.
8. In 2005, DHS deported 43,137 people with reinstatement orders. U.S. Department of Homeland Security, [Immigration Enforcement Actions: 2010](#), June 2011, p. 4.
9. See *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 488, 496 (9th Cir. 2007) (en banc).
10. While individuals subject to reinstatement of removal may not be eligible for asylum, treaty obligations require that the U.S. protect immigrants who express a reasonable fear of persecution or torture. Individuals subject to reinstatement who express fear of return are referred for a reasonable fear screening to determine whether they may apply for withholding of removal and protection under the Convention Against Torture. 8 CFR 208.31; INA § 241(b)(3).
11. Jayashri Srikantiah and Karen Tumlin, [Backgrounder: Stipulated Removal](#) (Stanford Immigrants’ Rights Clinic and National Immigration Law Center, 2008).
12. Jennifer Lee Koh, et al., [Deportation without Due Process](#) (National Immigration Law Center, 2011); Jayashri Srikantiah and Karen Tumlin, [Backgrounder: Stipulated Removal](#) (Stanford Immigrants’ Rights Clinic and National Immigration Law Center, 2008).
13. Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders Of Removal And The Crisis In Immigration Adjudication*, 91 N.C. L. REV. 475, 489 (2013).
14. Ibid.



## Immigration Detainers: An Overview

Federal immigration enforcement often overlaps with interactions between local law enforcement and communities. When federal immigration agents want to assume custody of an individual apprehended by local law enforcement, a formal request called a detainer plays a key role in the exchange. Detainers are a heavily relied upon immigration enforcement tool yet are often misunderstood. This fact sheet explains detainers, how they are used by federal and local enforcement, and the impact they have on immigrants.

### What Is an Immigration Detainer?

An immigration detainer is a tool used by U.S. Immigration and Customs Enforcement (ICE) and other Department of Homeland Security (DHS) officials when the agency identifies potentially deportable individuals who are held in jails or prisons nationwide.<sup>1</sup> Typically, detainers are issued by an authorized immigration official or local police officer designated to act as an immigration official under [section 287\(g\)](#) of the Immigration and Nationality Act (INA).<sup>2</sup>

Detainers instruct federal, state, or local law enforcement agencies (LEA) to hold individuals for up to 48 **business** hours beyond the time they otherwise would have been released (*i.e.*, when charges have been disposed of through a finding of guilt or innocence; when charges have been dropped; when bail has been secured; or when convicted individuals have served out their sentence).<sup>3</sup>

- Detainers are only **requests** made by ICE; compliance is voluntary. An LEA has discretion to decide which detainers to honor and under what circumstances.<sup>4</sup>
- In order to issue a detainer, ICE is supposed to have probable cause that the individual is deportable. For example, a detainer could be issued if the person has a final order of deportation or is in removal proceedings, or if ICE has other evidence or confirmation that the person is deportable.<sup>5</sup>
- The presence of a detainer is not indicative of an individual's immigration status. Further, detainers do not initiate deportation proceedings and do not signify whether or not a person will be deported.
- Detainers are different than a Notice to Appear (NTA), which is an official document that commences a removal proceeding in immigration court. The [immigration detainer](#) merely states that DHS has taken action to determine whether "there is reason to believe the individual [...] is subject to removal from the United States."<sup>6</sup>

## How Does ICE Identify Noncitizens that May Be Subject to Detainers?

Through the mandatory [Secure Communities](#) program, ICE automatically receives the fingerprints of those taken into LEA custody.<sup>7</sup> ICE then uses that information to determine the immigration status of individuals and identify those they have cause to arrest.

- In jails where ICE agents are present,<sup>8</sup> they may use the booking information to make decisions about whom to interview and whether to issue a detainer.
- In cases where ICE is not physically present, local officials may contact ICE with information about persons they believe to be foreign-born, based on booking information or other criteria.
- If the jail has a [287\(g\) agreement](#) with ICE,<sup>9</sup> deputized local law enforcement officers work with ICE to interview arrestees and issue detainers.

## Why Do Some Jurisdictions Limit Their Compliance with Detainers?

Hundreds of [local jurisdictions](#) have passed policies limiting their cooperation with ICE and their responses to detainers.<sup>10</sup> These policies resulted from a variety of concerns, including impediments to trust-building between LEAs and their communities as a result of honoring detainers<sup>11</sup> and ICE's practice of issuing detainers to individuals without serious criminal convictions or who were not threats to public safety or national security.<sup>12</sup>

Following lawsuits filed by individuals held in local jails under detainers, several federal courts found that compliance with detainers is not mandatory<sup>13</sup> and that key aspects of detainers are unconstitutional.<sup>14</sup> As a result, many local jurisdictions became concerned about their liability if they were to honor detainers.<sup>15</sup>

## Is Everyone with an Immigration Detainer a “Criminal” or Undocumented?

**Not everyone with a detainer is a “criminal.”**

Detainers may be issued when a person is merely booked into jail following an arrest for suspected criminal activity, regardless of whether the person is eventually convicted of a crime. The charges may be dropped, or the person may not be found guilty.

- Immigrants can be subject to a detainer regardless of the severity of the crime for which they are arrested or convicted. Even a person simply arrested for a misdemeanor or traffic violation can be subject to a detainer.
- The police may arrest victims of, or witnesses to, certain crimes when the perpetrator is not clearly

identified, such as domestic violence cases in which a victim fights back in self-defense.<sup>16</sup> This happens with some frequency when one or both parties are not fluent in English and the officer does not understand their accounts. Once taken into custody, these witnesses and victims may then find themselves subjected to immigration detainers and at risk of deportation.

### **Not everyone with a detainer is an undocumented immigrant.**

Lawful permanent residents (LPRs, or green card holders) may also be subject to immigration detainers if ICE determines they may be deportable under immigration law.<sup>17</sup>

- Yet ICE has issued detainers erroneously. Even [U.S. citizens](#) have experienced this when, for example, there was an error in ICE's database, the person's claims to citizenship were disregarded or difficult to prove, or the individual's name was similar to someone else in their database.<sup>18</sup>

### **What Happens if ICE Does Not Take Custody after 48 Hours?**

If ICE issues a detainer request to a LEA and ICE does not take custody of the individual within the 48 hour window of time (excluding weekends and holidays) requested, the detainer automatically lapses and the LEA is required to release the individual. However, some law enforcement officers who do not understand the law, or otherwise disregard it, keep the individual in custody for longer than the permitted 48 business hours, even when ICE does not assume custody.

- Some detained individuals have filed habeas petitions to challenge their continued detention. A habeas petition calls upon a state or federal court to intervene when the government has unlawfully deprived an individual of liberty.<sup>19</sup>
- In addition, some individuals held longer than 48 hours have successfully obtained civil damages from the detaining authority. A deported immigrant received a \$145,000 settlement with the City of New York after being held longer than 48 hours on two separate occasions.<sup>20</sup>
- While remedies to unlawful detention exist, many people held on detainers are not aware of their options. They may not have access to a lawyer or to the courts. In some cases, they may not be aware that they are being held on a detainer, or for longer than the time period permitted by law.

### **Do Detainers Impact a Person's Release on Bail?**

A detainer often affects a person's release on bail pending criminal charges. Generally, people who are jailed are released on bail while awaiting trial. In other cases, they may be released on their own recognizance without having to pay any money to the court. However, when ICE issues a detainer, the court sometimes considers the detainer an adverse factor when determining a bail amount or whether to set bail at all.<sup>21</sup>

## Do Detainers Impact the Length of Detention?

Immigrants placed under detainer may have substantially longer jail stays than people without detainers.

- In addition to detainers extending a person's jail stay up to 48 business hours, they reduce the likelihood that a person will receive bail while awaiting trial. This means that immigrants held on detainers often stay in jail for the duration of the pre-trial period, while similarly situated U.S. citizens would be released on bond.
- A [study](#) of Travis County, Texas, for example, found that immigrants under detainer have consistently stayed in jail three times longer than other inmates.<sup>22</sup>

Longer detention periods mean that more local tax dollars are spent detaining immigrants.

- The federal government reimburses local jails for some of the costs of holding certain noncitizens through local contracts with DHS and the Department of Justice's [State Criminal Alien Assistance Program](#) (SCAAP), but these payments are insufficient to cover all costs.<sup>23</sup>
- Furthermore, the federal government has proposed with some regularity eliminating SCAAP funding.<sup>24</sup>

## Do Detainers Impact a Person's Access to Treatment Programs?

Researchers have documented how individuals subject to a detainer are less likely to have access to drug or alcohol treatment programs, or other rehabilitation services.

- According to a [report](#) by the New York City Bar, many judges, prosecutors, and defense attorneys assume that a detainer disqualifies the individual from participating in these types of programs.<sup>25</sup>
- "Alternative-to-incarceration" (ATI) programs often provide defendants an opportunity to enter treatment instead of prison. Successful completion of such programs may result in a reduction or dismissal of the initial criminal charges, or may lead to non-incarceratory sentences such as probation.<sup>26</sup>
- ATI programs have also successfully reduced recidivism and lowered the costs to the criminal justice system. Participation in ATI programs may help establish evidence of rehabilitation, which could be a positive factor for noncitizens seeking immigration relief and may provide defense for lawful permanent residents with certain deportation charges.<sup>27</sup>

## Endnotes

1. 8 CFR 287.7(a) and 8 CFR 287.7(d).
2. “Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act,” *U.S. Immigration and Customs Enforcement*, accessed March 20, 2017, <https://www.ice.gov/factsheets/287g>.
3. 8 C.F.R. § 287.7(a).
4. *Galarza v. Szalczyk*, No. 10-cv-06815, 2012 WL 1080020 (E.D. Pa. Mar. 30, 2012), rev’d in part on other grounds, 745 F.3d 634 (3d Cir. 2013).
5. Memorandum from Matthew J. Piers et al., Hughes Socol Piers Resnick & Dym, Ltd., to Tom Cochran, U.S. Conference of Mayors, and Darrel W. Stephens, Major Cities Chiefs Association, Re: Legal Issues Regarding Local Policies Limiting Local Enforcement of Immigration Laws and Potential Federal Responses, January 13, 2017, <http://www.usmayors.org/wp-content/uploads/2017/02/HSPRD-Memo-on-Local-Enforcement-of-Immigration-Laws-and-Federal-Responses-00732386x9D9DD.pdf>.
6. Dept. of Homeland Security, “Immigration Detainer – Notice of Action” Form I-247, December 2012, <https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf>. An immigration detainer must also be distinguished from an interstate detainer, which governs the transfer of incarcerated prisoners from one jurisdiction to another. An interstate detainer is part of criminal law, not immigration law.
7. The Secure Communities program is another partnership between DHS and localities. Upon booking, the fingerprints of everyone detained in a participating jail are sent to the FBI, which then automatically sends them to DHS to check against immigration databases. DHS takes enforcement action against immigrants they identify as removable. “Secure Communities,” *U.S. Immigration and Customs Enforcement*, accessed March 20, 2017, <https://www.ice.gov/secure-communities>.
8. ICE has three major local collaboration programs: the Criminal Alien Program (CAP) through which local law-enforcement agencies collaborate with ICE to identify deportable noncitizens in county jails; Secure Communities, which is a technologically intensive version of CAP; and the 287(g) program, which cross-designates local police officers to act as immigration agents. See Guillermo Cantor, Mark Noferi, and Daniel E. Martinez, *Enforcement Overdrive: A Comprehensive Assessment of ICE’s Criminal Alien Program* (Washington, DC: American Immigration Council, 2015), <https://www.americanimmigrationcouncil.org/research/enforcement-overdrive-comprehensive-assessment-ice%E2%80%99s-criminal-alien-program>; American Immigration Council, “Secure Communities: A Fact Sheet,” November 29, 2011, <https://www.americanimmigrationcouncil.org/research/secure-communities-fact-sheet>; American Immigration Council, “The 287(g) Program: An Overview,” March 15, 2017, <https://www.americanimmigrationcouncil.org/research/287g-program-immigration>.
9. The 287(g) program is a partnership between DHS and local law enforcement agencies in which local law enforcement officers are deputized to enforce federal immigration laws. In the detention or “jail model,” deputized officers are located in jails/correctional facilities to perform immigration enforcement functions after individuals are detained by police. “Updated Facts on ICE’s 287(g) Program,” *U.S. Immigration and Customs Enforcement*, accessed March 20, 2017, <https://www.ice.gov/factsheets/287g-reform>.
10. National Immigrant Legal Resource Center, “National Map of Local Entanglement with ICE,” December 19, 2016, <https://www.ilrc.org/local-enforcement-map>.
11. American Immigration Council, “Understanding TRUST Acts, Community Policing, and ‘Sanctuary Cities,’” October 10, 2015, <https://www.americanimmigrationcouncil.org/research/sanctuary-cities-trust-acts-and-community-policing-explained>.
12. Transactional Records Access Clearinghouse, “Reforms of ICE Detainer Program Largely Ignored by Field Officers,” August 9, 2016, <http://trac.syr.edu/immigration/reports/432/>.
13. *Galarza v. Szalczyk*, No. 10-cv-06815, 2012 WL 1080020 (E.D. Pa. Mar. 30, 2012), rev’d in part on other grounds, 745 F.3d 634 (3d Cir. 2013).
14. *Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D. R.I.), aff’d on appeal, 2015 WL4385945 (1st Cir. 2015). See also Immigrant Legal Resource Center, “Immigration Detainers Legal Update,” October 2016, [https://www.ilrc.org/sites/default/files/resources/detainers\\_legal\\_update\\_october\\_2016.pdf](https://www.ilrc.org/sites/default/files/resources/detainers_legal_update_october_2016.pdf); Christopher Lasch, *The Faulty Legal Arguments Behind Immigration Detainers* (Washington, DC: American Immigration Council, 2013), <https://www.americanimmigrationcouncil.org/research/faulty-legal-arguments-behind-immigration-detainers>.
15. *Miranda-Olivares v. Clackamas Cnty.*, No. 12-02317, 2014 WL 1414305, at \*11 (D. Ore. Apr. 11, 2014).
16. See American Civil Liberties Union of Maryland, *Restoring Trust: How Immigration Detainers In Maryland Undermine Public Safety Through Unnecessary Enforcement* (Baltimore, MD, 2013), 18, <https://immigrantjustice.org/sites/immigrantjustice.org/files/ACLU%20Maryland--Detainer%20Report.pdf>.
17. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208 (1996), 110 Stat. 3009-546 § 348.
18. See Andy East, “U.S. Citizen Jailed in Immigration Status Mistake,” *The Texas Tribune*, February 27, 2017, <https://www.texastribune.org/2016/02/27/us-citizen-held-immigration-question/>.
19. The case law remains unsettled regarding whether a court has jurisdiction to grant a habeas petition in such cases.

20. *Harvey v. City of New York*, No. 07-0343 (E.D.N.Y. June 12, 2009).
21. See *State v. Fajardo-Santos*, A-82-08 (N.J. July 8, 2009).
22. Andrea Guttin, *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas* (Washington, DC: American Immigration Council, 2010), [https://www.americanimmigrationcouncil.org/sites/default/files/research/Criminal\\_Alien\\_Program\\_021710.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/Criminal_Alien_Program_021710.pdf); see also Katherine Beckett and Heather Evans, *Immigration Detainer Requests in King County, Washington: Costs and Consequences* (Seattle, WA: University of Washington Law, Societies & Justice, 2013), <https://lsj.washington.edu/publications/beckett-evans-2013-immigration-detainer-requests-king-county-wa>.
23. A county or state must meet several requirements to be eligible for SCAAP funding. The institution must have incarcerated a person in the country without authorization who has been convicted of a felony or two or more misdemeanors for "at least 4 consecutive days during the reporting period." The costs for incarcerating other individuals are not reimbursed. SCAAP reimburses both the pre-trial and post-conviction incarceration costs for eligible cases. Further, SCAAP does not necessarily cover the full salary costs of incarcerating undocumented immigrants. "State Criminal Alien Assistance Program (SCAAP)," *U.S. Dept. of Justice Bureau of Justice Assistance*, updated October 6, 2016, [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=86](https://www.bja.gov/ProgramDetails.aspx?Program_ID=86).
24. "The State Criminal Alien Assistance Program (SCAAP)," *National Conference of State Legislatures*, April 13, 2013, <http://www.ncsl.org/research/immigration/state-criminal-alien-assistance-program.aspx>.
25. Committee on Criminal Justice Operations, New York City Bar, "Immigration Detainers Need Not Bar Access to Jail Diversion Programs," June 2009, [http://www.nycbar.org/pdf/report/NYCBA\\_Immigration%20Detainers\\_Report\\_Final.pdf](http://www.nycbar.org/pdf/report/NYCBA_Immigration%20Detainers_Report_Final.pdf).
26. *Ibid.*
27. *Ibid.*



1089. If we apply faithfully the presumption against preemption, silence on the part of Congress should be the end of the analysis. But the Court went on to “infer from Congress’s clear intent to provide damage awards only to the debtor . . . that Congress did not intend [non-debtors] to be able to circumvent this rule by pursuing those very claims in state court.” *Id.* at 1091. Absent evidence that Congress actually meant for § 303(i) to be an exclusive remedy, we do not make the same inference.<sup>6</sup>

\* \* \* \* \*

In this context, we hold that Bankruptcy Code § 303(i) does not preempt state law claims by non-debtors for damages based on the filing of an involuntary bankruptcy petition. Accordingly, we reverse the decision of the District Court and remand for further proceedings.



Rosa Elida CASTRO; A.A.G.C.; Laura Lisseth Flores-Pichinte; E.S.U.F.; Karen Margarita Zelaya Alberto; S.E.A.Z.; Kelly Gutierrez Rubio; G.J.S.G.; Gladis Carrasco Gomez; B.J.R.C.; Wendy Amparo Osorio Martinez; D.S.R.O.; Carmen Leiva-Menji-

var; E.A.M.L.; A.M.M.L.; Dina Isabel Huezo De Chicas; L.J.C.H.; Cindy Gisela Lopez Funez; W.S.M.L.; Lesly Grizelda Cruz Matamoros; C.N.V.C.; Jeydi Erazo Anduray; D.A.L.E.; Dinora Lemus; A.R.M.L.; Jennys Mendez Debonilla; A.B.B.M.; Marta Alicia Rodriguez Romero; W.A.M.R.; C.A.M.R.; Roxana Aguirre-Lemus; C.A.A.; Celia Patricia Soriano Bran; J.A.A.S.; Maria Delmi Martinez Nolasco; J.E.L.M.; Guadalupe Flores Flores; W.J.B.F.; Carmen Aleyda Lobo Mejia; A.D.M.L.L.; Julissa Clementina Hernandez Jiminez; A.H.V.H.; \*Maria Erlinda Mejia Melgar; \*E.N.C.M.; \*D.G.C.M.; Jethzabel Martiza Aguilar Manica; V.G.R.A.; Heymi Lissamancia Arevalo-Monterroza; R.N.F.A.; Elsa Milagros Rodriguez Garcia; J.M.V.G.; Elizabeth Benitez De Marquez; A.M.B.; Ingrid Maricela Elias Soriano; A.E.C.E.; Maribel Maria Escobar Ramirez; C.Y.L.E.; Y.I.L.E.; R.J.L.E.; Ana Maricel Rodriguez-Granados; J.A.B.R.; V.E.B.R.; Zulma Lorena Portillo De Diaz; K.L.D.P., Appellants

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; United States Customs and Border Protection; United States Citizenship and Immigration Services; United States Immigration and Customs Enforcement Secretary of DHS; Attorney General of the United States; Commis-

6. The Defendants argue in the alternative that we can affirm on the basis of the statute of limitations, an issue the District Court did not reach. “It is an accepted tenet of appellate jurisdiction that we ‘may affirm a judgment on any ground apparent from the record, even if the district court did not reach it.’” *Oss Nokalva, Inc. v. European Space Agency*, 617 F.3d 756, 761 (3d Cir. 2010) (quoting *Kabakjian v. United States*, 267 F.3d 208, 213 (3d Cir. 2001)). We decline to affirm on that

alternate ground in this case because it is unclear from the record when the Rosenberg Affiliates were injured and when their tortious interference claim accrued. We do not know from the complaint, for example, when the NMI Real Estate Partnerships defaulted on their mortgages or when the Rosenberg Trust suffered its losses. Accordingly, we will leave the statute-of-limitations issue to the District Court on remand.

sioner of CBP; Director of USCIS; Philadelphia Field Director, CBP; Philadelphia Assistant Field Office Director, ICE; Director, Berks County Residential Center

\* Dismissed Pursuant to Court's  
Order entered May 13, 2016.

No. 16–1339

United States Court of Appeals,  
Third Circuit.

Argued May 19, 2016

(Opinion Filed: August 29, 2016)

**Background:** Aliens filed habeas petitions against Department of Homeland Security (DHS) to prevent or postpone their expedited removal from United States. The United States District Court for the Eastern District of Pennsylvania, Paul S. Diamond, J., 2016 WL 614862, dismissed petitions, and aliens appealed.

**Holdings:** The Court of Appeals, Smith, Circuit Judge, held that:

- (1) district court lacked habeas jurisdiction over aliens' claims, and
- (2) aliens could not invoke Suspension Clause.

Affirmed.

Hardiman, Circuit Judge, concurred dubitante and filed opinion.

#### 1. Federal Courts ⇌3581(1)

Court of Appeals reviews de novo district court's determination that it lacked subject matter jurisdiction.

#### 2. Federal Courts ⇌2081

Party asserting jurisdiction bears burden of proving that jurisdiction exists.

#### 3. Federal Courts ⇌3574

Court of Appeals reviews pure legal questions of statutory interpretation de novo.

#### 4. Statutes ⇌1405

Statute must be enforced according to its plain meaning, even if doing so may lead to harsh results.

#### 5. Habeas Corpus ⇌521

Federal district court lacked habeas jurisdiction over aliens' claims regarding purported inadequacy of credible fear proceedings pursuant to expedited removal statute. Immigration and Nationality Act § 242, 8 U.S.C.A. § 1252(e)(5).

#### 6. Constitutional Law ⇌1030

Party challenging statute's constitutionality bears burden of proof.

#### 7. Habeas Corpus ⇌912

Statute modifying scope of habeas review is constitutional under Suspension Clause so long as modified scope of review is neither inadequate nor ineffective to test legality of person's detention. U.S. Const. Art. 1, § 9, cl. 2.

#### 8. Habeas Corpus ⇌521, 911

Aliens who were apprehended within hours of surreptitiously entering United States were, in essence, seeking initial admission to United States, and as such had no constitutional rights regarding their applications for initial admission, and thus they could not invoke Suspension Clause to seek habeas review of Department of Homeland Security's (DHS) application of expedited removal statute. U.S. Const. Art. 1, § 9, cl. 2; Immigration and Nationality Act § 242, 8 U.S.C.A. § 1252(e)(5).

#### 9. Aliens, Immigration, and Citizenship ⇌162

Alien seeking initial admission to United States requests privilege and has no constitutional rights regarding his application.

On Appeal from the United States District Court for the Eastern District of Pennsylvania, District Court Nos. 5-15-cv-06153, 5-15-cv-06403, 5-15-cv-06404, 5-15-cv-06406, 5-15-cv-06410, 5-15-cv-06411, 5-15-cv-06428, 5-15-cv-06429, 5-15-cv-06430, 5-15-cv-06431, 5-15-cv-06451, 5-15-cv-06472, 5-15-cv-06474, 5-15-cv-06475, 5-15-cv-06546, 5-15-cv-06547, 5-15-cv-06551, 5-15-cv-06553, 5-15-cv-06591, 5-15-cv-06592, 5-15-cv-06594, 5-15-cv-06595, 5-15-cv-06676, 5-15-cv-06677, 5-15-cv-06755, 5-15-cv-06788, 5-15-cv-06798, 5-15-cv-06863, 5-16-cv-00069, District Judge: The Honorable Paul S. Diamond

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Charles Roth, National Immigrant Justice Center, 208 South LaSalle Street, Suite 1300, Chicago, IL 60604, Counsel for Amicus Curiae National Immigrant Justice Center (NIJC)

Before: SMITH, HARDIMAN, and SHWARTZ, Circuit Judges

#### OPINION

SMITH, Circuit Judge.

Petitioners are twenty-eight families—twenty-eight women and their minor children—who filed habeas petitions in the United States District Court for the Eastern District of Pennsylvania to prevent, or at least postpone, their expedited removal from this country. They were ordered expeditiously removed by the Department of

Homeland Security (DHS) pursuant to its authority under § 235(b)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1225(b)(1). Before DHS could effect their removal, however, each petitioning family indicated a fear of persecution if returned to their native country. Nevertheless, following interviews with an asylum officer and subsequent *de novo* review by an immigration judge (IJ), Petitioners' fear of persecution was found to be not credible, such that their expedited removal orders became administratively final. Each family then filed a habeas petition challenging various issues relating to their removal orders.

In this appeal we must determine, first, whether the District Court has jurisdiction to adjudicate the merits of Petitioners' habeas petitions under § 242 of the INA, 8 U.S.C. § 1252.<sup>1</sup> Because we hold that the District Court does not have jurisdiction under the statute, we must also determine whether the statute violates the Suspension Clause of the United States Constitution. This is a very difficult question that neither this Court nor the Supreme Court has addressed. We hold that, at least as applied to Petitioners and other similarly situated aliens, § 1252 does not violate the Suspension Clause. Consequently, we will affirm the District Court's order dismiss-

ing Petitioners' habeas petitions for lack of subject matter jurisdiction.

## I. STATUTORY FRAMEWORK

The statutory and regulatory provisions of the expedited removal regime are at the heart of this case. We will, therefore, provide an overview of the provisions which form the framework governing expedited removal before further introducing Petitioners and their specific claims. First, we will discuss 8 U.S.C. § 1225(b)(1) and its implementing regulations, which lay out the administrative side of the expedited removal regime. We will then turn to 8 U.S.C. § 1252, which specifies the scope of judicial review of all removal orders, including expedited removal orders.

### A. Section 1225(b)(1)

Under 8 U.S.C. § 1225(b)(1) and its companion regulations, two classes of aliens are subject to expedited removal if an immigration officer determines they are inadmissible due to misrepresentation or lack of immigration papers: (1) aliens "arriving in the United States," and (2) aliens "encountered within 14 days of entry without inspection and within 100 air miles of any U.S. international land border."<sup>2</sup> See 8 U.S.C. § 1225(b)(1)(A)(i) & (iii); Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877-01 (Aug. 11, 2004).<sup>3</sup> If an alien

1. From this point in this opinion, we will refer to provisions of the INA by their location in the United States Code.
2. Any aliens otherwise falling within these two categories but who are inadmissible for reasons other than misrepresentation or missing immigration papers are referred for regular—i.e., non-expedited—removal proceedings conducted under 8 U.S.C. § 1229a. See 8 U.S.C. § 1225(b)(2)(A).
3. The statute actually gives the Attorney General the unfettered authority to expand this second category of aliens to "any or all aliens" that cannot prove that they have been

physically present in the United States for at least the two years immediately preceding the date their inadmissibility is determined, regardless of their proximity to the border. See 8 U.S.C. § 1225(b)(1)(A)(iii). Although DHS (on behalf of the Attorney General) has opted to apply the expedited removal regime only to the limited subset of aliens described above, it has expressly reserved its authority to exercise at a later time "the full nationwide enforcement authority of [§ 1225(b)(1)(A)(iii)(II)]." See Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877-01 (Aug. 11, 2004).

falls into one of these two classes, and she indicates to the immigration officer that she fears persecution or torture if returned to her country, the officer "shall refer the alien for an interview by an asylum officer" to determine if she "has a credible fear of persecution [or torture]." 8 U.S.C. § 1225(b)(1)(A)(ii) & (B)(ii); 8 C.F.R. § 208.30(d). The statute defines the term "credible fear of persecution" as "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title." 8 U.S.C. § 1225(b)(1)(B)(v); *see also* 8 C.F.R. § 208.30(e)(3) ("An alien will be found to have a credible fear of torture if the alien shows that there is a significant possibility that he or she is eligible for withholding of removal or deferral of removal under the Convention Against Torture.").

Should the interviewing asylum officer determine that the alien lacks a credible fear of persecution (i.e., if the officer makes a "negative credible fear determination"), the officer orders the removal of the alien "without further hearing or review," except by an IJ as discussed below. 8 U.S.C. § 1225(b)(1)(B)(iii)(I). The officer is then required to "prepare a written record" that must include "a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution." *Id.* § 1225(b)(1)(B)(iii)(II). Next, the asylum officer's supervisor reviews and approves the negative credible fear deter-

mination, after which the order of removal becomes "final." 8 C.F.R. § 235.3(b)(7); *id.* § 208.30(e)(7). Nevertheless, if the alien so requests, she is entitled to have an IJ conduct a *de novo* review of the officer's negative credible fear determination, and "to be heard and questioned by the [IJ]" as part of this review. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 1003.42(d). Assuming the IJ concurs in the asylum officer's negative credible fear determination, "[t]he [IJ]'s decision is final and may not be appealed," and the alien is referred back to the asylum officer to effect her removal. 8 C.F.R. § 1208.30(g)(2)(iv)(A).<sup>4</sup>

## B. Section 1252

Section 1252 of Title 8 defines the scope of judicial review for all orders of removal. This statute narrowly circumscribes judicial review for expedited removal orders issued pursuant to § 1225(b)(1). It provides that "no court shall have jurisdiction to review . . . the application of [§ 1225(b)(1)] to individual aliens, including the [credible fear] determination made under [§ 1225(b)(1)(B)]." 8 U.S.C. § 1252(a)(2)(A)(iii). Moreover, except as provided in § 1252(e), the statute strips courts of jurisdiction to review: (1) "any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an [expedited removal] order"; (2) "a decision by the Attorney General to invoke" the expedited removal regime; and (3) the "procedures and policies adopted by the Attorney General to implement the provisions of [§ 1225(b)(1)]." *Id.* § 1252(a)(2)(A)(i), (ii) & (iv). Thus, the stat-

4. On the other hand, if the interviewing asylum officer, or the IJ upon *de novo* review, concludes that the alien possesses a credible fear of persecution or torture, the alien is referred for non-expedited removal proceed-

ings under 8 U.S.C. § 1229a, "during which time the alien may file an application for asylum and withholding of removal." 8 C.F.R. § 1208.30(g)(2)(iv)(B).

ute makes abundantly clear that whatever jurisdiction courts have to review issues relating to expedited removal orders arises under § 1252(e).

Section 1252(e), for its part, preserves judicial review for only a small subset of issues relating to individual expedited removal orders:

Judicial review of any determination made under [§ 1225(b)(1)] is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,  
(B) whether the petitioner was ordered removed under [§ 1225(b)(1)],  
and

(C) whether the petitioner can prove . . . that the petitioner is [a lawful permanent resident], has been admitted as a refugee . . . or has been granted asylum . . . .

*Id.* § 1252(e)(2). In reviewing a determination under subpart (B) above—i.e., in deciding “whether the petitioner was ordered removed under [§ 1225(b)(1)]”—“the court’s inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually admissible or entitled to any relief from removal.” *Id.* § 1252(e)(5).

Section 1252(e) also provides jurisdiction to the district court for the District of Columbia to review “[c]hallenges [to the] validity of the [expedited removal] system.” *Id.* § 1252(e)(3)(A). Such systemic challenges include challenges to the constitutionality of any provision of the expedited

removal statute or its implementing regulations, as well as challenges claiming that a given regulation is inconsistent with law. *See id.* § 1252(e)(3)(A)(i) & (ii). Nevertheless, systemic challenges must be brought within sixty days after implementation of the challenged statute or regulation. *Id.* § 1252(e)(3)(B); *see also Am. Immigration Lawyers Ass’n v. Reno*, 18 F.Supp.2d 38, 47 (D.D.C. 1998), *aff’d*, 199 F.3d 1352 (D.C. Cir. 2000) (holding that “the 60-day requirement is jurisdictional rather than a traditional limitations period”).<sup>5</sup>

## II. FACTUAL AND PROCEDURAL BACKGROUND

Petitioners are natives and citizens of El Salvador, Honduras, and Guatemala who, over a period of several months in late 2015, entered the United States seeking refuge. While their reasons for fleeing their home countries vary somewhat, each petitioner claims to have been, or to fear becoming, the victim of violence at the hands of gangs or former domestic partners. United States Customs and Border Protection (CBP) agents encountered and apprehended each petitioner within close proximity to the border and shortly after their illegal crossing. In fact, the vast majority were apprehended within an hour or less of entering the country, and at distances of less than one mile from the border; in all events, no petitioner appears to have been present in the country for more than about six hours, and none was apprehended more than four miles from the border.<sup>6</sup> And because none of the petition-

5. In its brief, as it did during oral argument, the government repeatedly argues that many of Petitioners’ claims are of a systemic nature and should have been brought in the district court for the District of Columbia under § 1252(e)(3). In making this argument, however, the government conveniently elides the fact that the sixty-day deadline would clearly

prevent Petitioners from litigating their systemic claims in that forum, because that deadline passed years ago.

6. For reasons explained in detail below, we consider the facts regarding Petitioners’ entry and practically-immediate arrest by immigration enforcement officials to be crucial in

ers presented immigration papers upon their arrest, and none claimed to have been previously admitted to the country, they clearly fall within the class of aliens to whom the expedited removal statute applies. *See* Part I.A above.

After the CBP agents apprehended them and began the expedited removal process, Petitioners each expressed a fear of persecution or torture if returned to their native country. Accordingly, each was referred to an asylum officer for a credible fear interview. As part of the credible fear interview process, the asylum officers filled out and gave to Petitioners a number of forms, including a form memorializing the officers' questions and Petitioners' answers during the interview. Following the interviews—all of which resulted in negative credible fear determinations—Petitioners requested and were granted *de novo* review by an IJ. Because the IJs concurred in the asylum officers' conclusions, Petitioners were referred back to DHS for removal without recourse to any further administrative review. Each petitioning family then submitted a separate habeas petition to the District Court,<sup>7</sup> each claiming that the asylum officer and IJ conducting their credible fear interview and review violated their Fifth Amend-

ment procedural due process rights, as well as their rights under the INA, the Foreign Affairs Reform and Restructuring Act of 1998, the United Nations Convention Against Torture, the Administrative Procedure Act, and the applicable implementing regulations.<sup>8</sup> All the petitions were reassigned to Judge Paul S. Diamond for the limited purpose of determining whether subject matter jurisdiction exists to adjudicate Petitioners' claims.

Petitioners argued before the District Court that § 1252 is ambiguous as to whether the Court could review their challenges to the substantive and procedural soundness of DHS's negative credible fear determinations. As such, they argued that the Court should construe the statute to allow review of their claims in order to avoid "the serious constitutional concerns that would arise" otherwise. JA 19. The District Court roundly rejected this argument, concluding instead that § 1252 unambiguously forecloses judicial review of all of Petitioners' claims, and that to adopt Petitioners' proposed construction would require the Court "to do violence to the English language to create an 'ambiguity' that does not otherwise exist." JA 20.

resolving Petitioners' Suspension Clause argument. Accordingly, we grant the government's motion for judicial notice as well as its motion to file under seal the documents subject to its motion for judicial notice.

7. Petitioners filed their habeas petitions in the Eastern District of Pennsylvania because they are being detained pending their removal at the Berks County Residential Center in Leesport, Pennsylvania. While we are uncertain whether venue was proper in the Eastern District of Pennsylvania—§ 1252 does not appear to indicate where habeas petitions under § 1252(e)(2) should be filed—none of the parties has argued that venue was improper. In that venue is non-jurisdictional, we need not resolve the issue. *See Bonhometre v. Gonzales*, 414 F.3d 442, 446 n.5 (3d Cir. 2005).

8. Though Petitioners assert on appeal that they each raised "a variety" of claims in their habeas petitions, Pet'rs' Br. 33, they specifically point us to only two as being uniform across all Petitioners: first, they claim that the asylum officers conducting the credible fear interviews failed to "prepare a written record" of their negative credible fear determinations that included the officers' "analysis of why . . . the alien has not established a credible fear of persecution," 8 U.S.C. § 1225(b)(1)(B)(iii)(II); and second, they claim that the officers and the IJs applied a higher standard for evaluating the credibility of their fear of persecution than is called for in the statute.

Turning then to the Suspension Clause issue, the District Court separately analyzed what it termed as Petitioners' "substantive" challenges—those going to the ultimate correctness of the negative credible fear determinations—versus their challenges relating to the procedures DHS followed in making those determinations. Based on the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008), the Court derived four "factors in determining the scope of an alien's Suspension Clause rights": "(1) historical precedent; (2) separation-of-powers principles; (3) the gravity of the petitioner's challenged liberty deprivation; and (4) a balancing of the petitioner's interest in more rigorous administrative and habeas procedures against the Government's interest in expedited proceedings." JA 25 (citations omitted). Applying these factors, the Court determined that the Suspension Clause did not require that judicial review be available to address any of Petitioners' claims, and therefore that § 1252(e) does not violate the Suspension Clause. Thus, the Court dismissed with prejudice the consolidated petitions for lack of subject matter jurisdiction. Petitioners then filed a timely notice of appeal with this Court.<sup>9</sup>

### III. ANALYSIS

[1,2] Petitioners challenge on appeal the District Court's holding that it lacked subject matter jurisdiction under § 1252(e) to review Petitioners' claims, as well as the Court's conclusion that § 1252(e) does not

violate the Suspension Clause. We review *de novo* the District Court's determination that it lacked subject matter jurisdiction.<sup>10</sup> *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 163 (3d Cir. 2010). Petitioners, as the side asserting jurisdiction, "bea[r] the burden of proving that jurisdiction exists." *Nuveen Mun. Trust ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.*, 692 F.3d 283, 293 (3d Cir. 2012).

#### A. Statutory Jurisdiction under § 1252(e)

The government contends that § 1252 unambiguously forecloses judicial review of Petitioners' claims, and that nearly every court to address this or similar issues has held that the statute precludes challenges related to the expedited removal regime. Petitioners, on the other hand, argue that the statute can plausibly be construed to provide jurisdiction over their claims, and that, per the doctrine of constitutional avoidance, the statute should therefore be so construed. They also point to precedent purportedly supporting their position.

[3,4] We review pure legal questions of statutory interpretation *de novo*. *Ki Se Lee v. Ashcroft*, 368 F.3d 218, 221 (3d Cir. 2004). "The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Id.* at 222 (internal quotation marks and citations omitted). If

9. A motions panel of this Court granted Petitioners' motion for stay of removal pending the outcome of this appeal, as well as Petitioners' motion to expedite the appeal. The panel also granted the motions of various persons and entities for leave to file amicus briefs in support of Petitioners. The Court thanks *amici* for their valuable contributions in this appeal.

10. Although the District Court concluded that it lacked subject matter jurisdiction and dismissed the petitions accordingly, we nonetheless have jurisdiction under 28 U.S.C. § 1291 "to determine [our] own jurisdiction." *White-Squire v. U.S. Postal Serv.*, 592 F.3d 453, 456 (3d Cir. 2010) (quoting *United States v. Ruiz*, 536 U.S. 622, 628, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002)).



the statute is unambiguous, we must go no further. *Roth v. Norfalco LLC*, 651 F.3d 367, 379 (3d Cir. 2011). The statute must be enforced according to its plain meaning, even if doing so may lead to harsh results. See *Lamie v. U.S. Tr.*, 540 U.S. 526, 534, 538, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) (“[W]hen the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms. . . . Our unwillingness to soften the import of Congress’ chosen words even if we believe the words lead to a harsh outcome is longstanding.” (internal quotation marks and citations omitted)). Thus, we begin with the statute’s plain meaning.

As discussed in our overview of the expedited removal regime, see Part I.B above, § 1252 makes abundantly clear that if jurisdiction exists to review any claim related to an expedited removal order, it exists only under subsection (e) of the statute. See 8 U.S.C. § 1252(a)(2)(A). And under subsection (e), unless the petitioner wishes to challenge the “validity of the system” as a whole rather than as applied to her, the district courts’ jurisdiction is limited to three narrow issues. See *id.* § 1252(e)(2) & (3). Petitioners in this case concede that two of those three issues do not apply to them; that is, they concede they are aliens, *id.* § 1252(e)(2)(A), and that they have not previously been lawfully admitted to the country, *id.* § 1252(e)(2)(C). Nevertheless, they argue that their claims fall within the third category of issues that courts are authorized to entertain: “whether [they have been] ordered removed under [§ 1225(b)(1).]” *Id.* § 1252(e)(2)(B).

At first glance, it is hard to see how this latter grant of jurisdiction can be of any help to Petitioners, since they do not dispute that an expedited removal order is

outstanding as to each. Indeed, their argument seems even more untenable in light of § 1252(e)(5), the first sentence of which clarifies that when a court must “determin[e] whether an alien has been ordered removed under [§ 1225(b)(1)], the court’s inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner.” *Id.* § 1252(e)(5). How could the government’s alleged procedural deficiencies in ordering the Petitioners’ expedited removal undermine the fact that expedited removal orders “in fact w[ere] issued” and that these orders “relat[e] to the petitioner[s]”? *Id.*

Nevertheless, Petitioners argue that the second sentence of § 1252(e)(5) creates a strong inference that courts have jurisdiction to review claims like theirs. This sentence states, “There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.” *Id.* Petitioners argue that because this sentence explicitly prohibits review of only two narrow questions, we should read it to implicitly authorize review of other questions related to the expedited removal order, such as whether the removal order resulted from a procedurally erroneous credible fear proceeding. Furthermore, Petitioners argue that the government’s proposed construction of § 1252(e)(2)(B) and (e)(5) would render the second sentence of § 1252(e)(5) superfluous since the first sentence—which would essentially limit courts’ review “only [to] whether the agency literally issued the alien a piece of paper marked ‘expedited removal,’” Pet’rs’ Br. 15—would already prevent review of the questions foreclosed by the second sentence. Based on these arguments, Petitioners claim that the statute is at least ambiguous as to whether their claims are reviewable and that we should construe the statute in their favor in order to avoid the “serious constitutional problems” that may ensue if we read it to

foreclose habeas review. *Sandoval v. Reno*, 166 F.3d 225, 237 (3d Cir. 1999).

[5] Petitioners are attempting to create ambiguity where none exists.<sup>11</sup> Their reading of the second sentence in § 1252(e)(5) may be creative, but it completely ignores other provisions in the statute—including the sentence immediately preceding it—that clearly evince Congress’ intent to narrowly circumscribe judicial review of issues relating to expedited removal orders. *See, e.g.*, 8 U.S.C. § 1252(a)(2)(A)(iii) (“[N]o court shall have jurisdiction to review . . . the application of [§ 1225(b)(1)] to individual aliens, including the [credible fear] determination made under [§ 1225(b)(1)(B)].”).

As for their argument that the government’s construction renders superfluous the second sentence of § 1252(e)(5), we think the better reading is that the second sentence simply clarifies the narrowness of the inquiry under the first sentence, i.e., that “review should only be for whether an immigration officer issued that piece of paper and whether the Petitioner is the same person referred to in that order.” *M.S.P.C. v. U.S. Customs & Border Prot.*, 60 F.Supp.3d 1156, 1163–64 (D.N.M. 2014), *vacated as moot*, No. 14–769, 2015 WL 7454248 (D.N.M. Sept. 23, 2015); *see also id.* (“Rather than being superfluous . . . the second sentence seems to clarify that Congress really did mean what it said in

the first sentence.”); *Diaz Rodriguez v. U.S. Customs & Border Prot.*, No. 6:14–CV–2716, 2014 WL 4675182, at \*2 (W.D. La. Sept. 18, 2014), *vacated as moot sub nom. Diaz–Rodriguez v. Holder*, No. 14–31103, 2014 WL 10965184 (5th Cir. Dec. 16, 2014) (“The second sentence of Section 1252(e)(5) . . . is most fairly interpreted as a clarification and attempt by Congress to foreclose narrow interpretations of the first sentence of Section 1252(e)(5).”).<sup>12</sup>

By reading the INA to foreclose Petitioners’ claims, we join the majority of courts that have addressed the scope of judicial review under § 1252 in the expedited removal context. *See, e.g., Shunaula v. Holder*, 732 F.3d 143, 145–47 (2d Cir. 2013) (observing that § 1252 “provides for limited judicial review of expedited removal orders in habeas corpus proceedings” but otherwise deprives the courts of jurisdiction to hear claims related to the implementation or operation of a removal order, and holding that an alien’s claims disputing that he sought to enter the country through fraud or misrepresentation and asserting that he was not advised that he was in an expedited removal proceeding or given the opportunity to consult with a lawyer “[f]ell within this jurisdictional bar”); *Brumme v. I.N.S.*, 275 F.3d 443, 448 (5th Cir. 2001) (characterizing argument that courts have jurisdiction under

11. And because we conclude that the statute is unambiguous, we are unable to employ the canon of constitutional avoidance to reach Petitioners’ desired result. *See Miller v. French*, 530 U.S. 327, 341, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000) (“[T]he canon of constitutional doubt permits us to avoid [constitutional] questions only where the saving construction is not plainly contrary to the intent of Congress. We cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.” (internal quotation marks and citations omitted)).

12. Furthermore, even if our reading of the statute means that the second sentence is superfluous, the canon against surplusage does not always control and generally should not be followed where doing so would render ambiguous a statute whose meaning is otherwise plain. *See Lamie*, 540 U.S. at 536, 124 S.Ct. 1023 (explaining that “our preference for avoiding surplusage constructions is not absolute,” and that “applying the rule against surplusage is, absent other indications, inappropriate” where applying the rule would make ambiguous an otherwise unambiguous statute).

§ 1252(e)(2)(B) to determine whether the expedited removal statute “was applicable in the first place” as an attempt to make “an end run around” the “clear” language of § 1252(e)(5)); *Li v. Eddy*, 259 F.3d 1132, 1134–35 (9th Cir. 2001), *opinion vacated as moot*, 324 F.3d 1109 (9th Cir. 2003) (“With respect to review of expedited removal orders, . . . the statute could not be much clearer in its intent to restrict habeas review. Accordingly, only two issues were properly before the district court: whether the order removing the petitioner was in fact issued, and whether the order named [the petitioner].” (citation omitted)); *Khan v. Holder*, 608 F.3d 325, 329–30 (7th Cir. 2010) (accord); *Diaz Rodriguez*, 2014 WL 4675182, at \*2 (rejecting proposed construction similar to Petitioners’ argument in this case; “The expedited removal statutes are express and unambiguous. The clarity of the language forecloses acrobatic attempts at interpretation.”).

Petitioners claim that the Ninth Circuit and two district courts in other circuits have construed § 1252 to allow judicial review of claims that the aliens in question had been ordered expeditiously removed in violation of the expedited removal statute. In *Smith v. U.S. Customs and Border Protection*, 741 F.3d 1016 (9th Cir. 2014), Smith, a Canadian national, was ordered removed under § 1225(b)(1) when, upon presenting himself for inspection at the United States–Canada border, the CBP agent concluded that he was an intending immigrant without proper work-authorization documents. Smith filed a habeas petition under § 1252(e)(2)(B), claiming that Canadians are exempt from the documentation requirements for admission, which meant that the CBP agent exceeded his authority in ordering Smith removed. Therefore (Smith’s argument went), he was not “ordered removed under [§ 1225(b)(1)].” *Id.* at 1021. The Ninth Circuit “[a]ccept[ed] [Smith’s] theory at face

value” only to then reject Smith’s argument on the merits. *Id.* Although the Supreme Court has disapproved of the practice, see *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93–94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), the court appears merely to have assumed *hypothetical* jurisdiction in order to dispose of the appeal on easier merits grounds. We therefore assign no weight to either *Smith*’s outcome or its reasoning.

In *American–Arab Anti–Discrimination Committee v. Ashcroft*, 272 F.Supp.2d 650 (E.D. Mich. 2003), several Lebanese aliens were ordered removed under § 1225(b)(1), years after entering the United States using fraudulent documentation. They filed habeas petitions challenging their expedited removal orders, and the district court concluded that it had jurisdiction “under the circumstances here . . . to determine whether the expedited removal statute was *lawfully applied* to petitioners in the first place.” *Id.* at 663. To support this conclusion, the court latched onto the language in § 1252(e)(5) limiting the scope of habeas review under § 1252(e)(2)(B) to “whether [the expedited removal order] relates to the petitioner,” reasoning that an order “relates to” a person only if it was lawfully applied to the person. *Id.* We find the court’s construction of the statute to be not just unsupported, but also flatly contradicted by the plain language of the statute itself. See 8 U.S.C. § 1252(a)(2)(A)(iii) (“[N]o court shall have jurisdiction to review . . . the *application* of [§ 1225(b)(1)] to individual aliens.” (emphasis added)). Accordingly, we decline to follow it.

The last case Petitioners point us to is *Dugdale v. U.S. Customs and Border Protection*, 88 F.Supp.3d 1 (D.D.C. 2015). Dugdale was an alien who had lived for extended periods in the United States but who was ordered removed pursuant to

§ 1225(b)(1) after trying to return to the country following a visit to Canada. He filed a habeas petition to challenge his removal order under § 1252(e)(2). In his petition he claimed, *inter alia*, that because his removal order was not signed by the supervisor of the issuing immigration officer, he was not actually “ordered removed” under § 1225(b)(1). *See id.* at 6. Addressing this argument, the court recognized that the “[c]ase law on this question is scarce.” *Id.* Nevertheless, the court ultimately concluded “that a determination of whether a removal order ‘in fact was issued’ fairly encompasses a claim that the order was not lawfully issued due to some procedural defect.” *Id.* (quoting 8 U.S.C. § 1252(e)(5)). Because the claim that the supervisor failed to sign the removal order “[f]ell within that category of claims,” *id.* the court exercised its jurisdiction, and ordered further briefing to determine if the CBP had complied with its own regulations in issuing his removal order.

Even if we were to agree with *Dugdale* that § 1252(e)(2)(B) encompasses claims alleging “some procedural defect” in the expedited removal order, we would nonetheless find Petitioners’ claims easily distinguishable. The procedural defect that *Dugdale* alleged was at least *arguably* related to the question whether a removal order “in fact was issued.” Petitioners’ claims here, on the other hand, have nothing to do with the issuance of the actual removal orders; instead, they go to the adequacy of the credible fear proceedings. Furthermore, to treat Petitioners’ claims regarding the procedural shortcomings of the credible fear determination process as though they were “claim[s] that the order

was not lawfully issued due to some procedural defect” would likely eviscerate the clear jurisdiction-limiting provisions of § 1252, for it would allow an alien to challenge in court practically any perceived shortcoming in the procedures prescribed by Congress or employed by the Executive—a result clearly at odds with Congress’ intent.

In a final effort to dissuade us from adopting the government’s proposed reading of the statute, Petitioners suggest a variety of presumably undesirable outcomes that could stem from it. For instance, they argue that under the government’s reading, a court would lack jurisdiction to review claims that, in ordering the expedited removal of an alien, “the government refused to provide a credible fear interview, manifestly applied the wrong legal standard, outright denied the applicant an interpreter, or even refused to permit the applicant to testify.” Pet’rs’ Br. 18; *see also* Brief for National Immigrant Justice Center as *Amicus Curiae* 5–21 (suggesting several other factual scenarios in which courts would lack jurisdiction to correct serious government violations of expedited removal statute). To this, we can only respond as the Seventh Circuit did in *Khan* when acknowledging some of the possible implications of the jurisdiction-stripping provisions of § 1252: “To say that this [expedited removal] procedure is fraught with risk of arbitrary, mistaken, or discriminatory behavior . . . is not, however, to say that courts are free to disregard jurisdictional limitations. They are not . . .” 608 F.3d at 329.<sup>13</sup>

13. Of course, even though our construction of § 1252 means that courts in the future will almost certainly lack statutory jurisdiction to review claims that the government has committed even more egregious violations of the expedited removal statute than those alleged

by Petitioners, this does not necessarily mean that all aliens wishing to raise such claims will be without a remedy. For instance, consider the case of an alien who has been living continuously for several years in the United States before being ordered removed under

For these reasons we agree with the District Court's conclusion that it lacked jurisdiction under § 1252 to review Petitioners' claims, and turn now to the constitutionality of the statute under the Suspension Clause.

## B. Suspension Clause Challenge

[6] The Suspension Clause of the United States Constitution states: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. The government does not contend that we are in a time of formal suspension. Thus, the question is whether § 1252 operates as an unconstitutional suspension of the writ by stripping courts of habeas jurisdiction over all but a few narrow questions. As the party challenging the constitutionality of a presumptively constitutional statute, Petitioners bear the burden of proof. *Marshall v. Lauriault*, 372 F.3d 175, 185 (3d Cir. 2004).

Petitioners argue that the answer to the ultimate question presented on appeal—whether § 1252 violates the Suspension Clause—can be found without too much effort in the Supreme Court's Suspension Clause jurisprudence, especially in *I.N.S. v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), and *Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008), as well as in a series of cases from what has been termed the "finality era." The government, on the other hand, largely views these cases as inapposite, and instead focuses our attention on what has been called the "plenary power

doctrine" and on the Supreme Court cases that elucidate it. The challenge we face is to discern the manner in which these seemingly disparate, and perhaps even competing, constitutional fields interact. Ultimately, and for the reasons we will explain below, we conclude that Congress may, consonant with the Constitution, deny habeas review in federal court of claims relating to an alien's application for admission to the country, at least as to aliens who have been denied initial entry or who, like Petitioners, were apprehended very near the border and, essentially, immediately after surreptitious entry into the country.

We will begin our discussion with a detailed overview of the Supreme Court's relevant Suspension Clause precedents, followed by a summary of the Court's plenary power cases. We will then explain how we think these two areas coalesce in the context of Petitioners' challenges to their expedited removal orders.

### 1. Suspension Clause Jurisprudence

[7] The Supreme Court has held that a statute modifying the scope of habeas review is constitutional under the Suspension Clause so long as the modified scope of review—that is, the habeas substitute—"is neither inadequate nor ineffective to test the legality of a person's detention." *Swain v. Pressley*, 430 U.S. 372, 381, 97 S.Ct. 1224, 51 L.Ed.2d 411 (1977) (citing *United States v. Hayman*, 342 U.S. 205, 223, 72 S.Ct. 263, 96 L.Ed. 232 (1952)). The Court has weighed the adequacy and effectiveness of habeas substitutes on only a few

§ 1225(b)(1). Even though the statute would prevent him from seeking judicial review of a claim, say, that he was never granted a credible fear interview, under our analysis of the Suspension Clause below, the statute could very well be unconstitutional as applied to him (though we by no means undertake to so

hold in this opinion). Suffice it to say, at least some of the arguably troubling implications of our reading of § 1252 may be tempered by the Constitution's requirement that habeas review be available in some circumstances and for some people.

occasions, and only once, in *Boumediene*, has it found a substitute wanting. See *Boumediene*, 553 U.S. at 795, 128 S.Ct. 2229 (holding that “the [Detainee Treatment Act] review procedures are an inadequate substitute for habeas corpus,” and therefore striking down under the Suspension Clause § 7 of the Military Commissions Act, which stripped federal courts of habeas jurisdiction over Guantanamo Bay detainees). Thus, *Boumediene* represents our only “sum certain” when it comes to evaluating the adequacy of a given habeas substitute such as § 1252, and even then the decision “leaves open as many questions as it settles about the operation of the [Suspension] Clause.” Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 Colum. L. Rev. 537, 578 (2010).

Before we delve into *Boumediene*, however, we must examine the Supreme Court’s decision in *St. Cyr*, another case on which Petitioners heavily rely. Although the Court in *St. Cyr* ultimately dodged the Suspension Clause question by construing the jurisdiction-stripping statute at issue to leave intact courts’ habeas jurisdiction under 28 U.S.C. § 2241, the opinion offers insight into “what the Suspension Clause might possibly protect.” Neuman, *supra*, at 539 & n.8.

St. Cyr was a lawful permanent resident alien who, in early 1996, pleaded guilty to a crime that qualified him for deportation. *St. Cyr*, 533 U.S. at 293, 121 S.Ct. 2271. Under the immigration laws prevailing at the time of his conviction, he was eligible for a waiver of deportation at the Attorney General’s discretion. *Id.* Nevertheless, by the time he was ordered removed in 1997, Congress had enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 110 Stat. 1214, and the Illegal

Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), 110 Stat. 3009–546. Among the myriad other revisions to our immigration laws that these enactments effected, AEDPA and IIRIRA stripped the Attorney General of his discretionary power to waive deportation, and replaced it with the authority to “cancel removal” for a narrow class of aliens that did not include aliens who, like St. Cyr, had been previously “convicted of any aggravated felony.” 8 U.S.C. § 1229b(a)(3). When St. Cyr applied to the Attorney General for waiver of deportation, the Attorney General concluded that AEDPA and IIRIRA stripped him of his waiver authority even as to aliens who pleaded guilty to the deportable offense prior to the statutes’ enactment. 533 U.S. at 297, 121 S.Ct. 2271. St. Cyr filed a habeas petition in federal district court under § 2241, claiming that the provisions of AEDPA and IIRIRA eliminating the Attorney General’s waiver authority did not apply to aliens who pleaded guilty to a deportable offense before their enactment. *Id.* at 293, 121 S.Ct. 2271.

The government contended that AEDPA and IIRIRA stripped the courts of habeas jurisdiction to review the Attorney General’s determination that he no longer had the power to waive St. Cyr’s deportation. *Id.* at 297–98, 121 S.Ct. 2271. The Court ultimately disagreed with the government, construing the judicial review statutes to permit habeas review under § 2241. To support this construction, the Court relied heavily on the doctrine of constitutional avoidance, under which courts are “obligated to construe the statute to avoid [serious constitutional] problems” if such a saving construction is “fairly possible.”<sup>14</sup> *Id.* at 299–300, 121 S.Ct. 2271 (internal quotation marks and citations omitted). In the

14. The Court also relied on “the longstanding rule requiring a clear statement of congress-

sional intent to repeal habeas jurisdiction.” 533 U.S. at 298, 121 S.Ct. 2271.

Court's review, the government's proposed construction of the jurisdiction-stripping provisions would have presented "a serious Suspension Clause issue." *Id.* at 305, 121 S.Ct. 2271.

To explain why the Suspension Clause could possibly have been violated by a statute stripping the courts of habeas jurisdiction under § 2241, the Court began with the foundational principle that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *Id.* at 301, 121 S.Ct. 2271 (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996)). Looking to the Founding era, the Court found evidence that "the writ of habeas corpus was available to nonenemy aliens as well as to citizens" as a means to challenge the "legality of Executive detention." *Id.* at 301–02, 121 S.Ct. 2271. In such cases, habeas review was available to challenge "detentions based on errors of law, including the erroneous application or interpretation of statutes." *Id.* at 302, 121 S.Ct. 2271.

Even while discussing the Founding-era evidence, however, the Court in *St. Cyr* was "careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ." *Boumediene*, 553 U.S. at 746, 128 S.Ct. 2229. Indeed, the Court discussed at some length the "historical

practice in immigration law," *St. Cyr*, 533 U.S. at 305, 121 S.Ct. 2271, with special focus on cases from what may be termed the "finality era." *See id.* at 306–07, 121 S.Ct. 2271. In order to understand the role that these finality-era cases appear to play in *St. Cyr*'s Suspension Clause analysis, and because Petitioners place significant weight on them in their argument that § 1252 violates the Suspension Clause, we will describe them in some depth.

The finality-era cases came about during an approximately sixty-year period when federal immigration law rendered final (hence, the "finality" era) the Executive's decisions to admit, exclude, or deport aliens. This period began with the passage of the Immigration Act of 1891, ch. 551, 26 Stat. 1084,<sup>15</sup> and concluded when Congress enacted the Immigration and Nationality Act of 1952, Pub. L. No. 82–414, 66 Stat. 163, which permitted judicial review of deportation orders through declaratory judgment actions in federal district courts. *See Shaughnessy v. Dreireiro*, 349 U.S. 48, 51–52, 75 S.Ct. 591, 99 L.Ed. 868 (1955).<sup>16</sup> During this period, and despite the statutes' finality provisions appearing to strip courts of all jurisdiction to review the Executive's immigration-related determinations, the Supreme Court consistently recognized the ability of immigrants to challenge the legality of their

15. Section 8 of the Act contained the finality provision: "All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury." Immigration Act of 1891, § 8, 26 Stat. 1084, 1085.

16. Between the 1891 and 1952 Acts, Congress revised the immigration laws on several occasions, each time maintaining a similar finality provision. *See, e.g.*, Immigration Act of 1907, § 25, 34 Stat. 898, 907 ("[I]n every case

where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Commerce and Labor."); Immigration Act of 1917, § 19, 39 Stat. 874, 890 ("In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final.").

exclusion or deportation through habeas corpus. Based on this, Petitioners contend that the finality-era cases “establishe[d] a constitutional floor for judicial review,” Pet’rs’ Br. 26, and that the Suspension Clause was the source of this floor. In making this argument, Petitioners rely especially on *Heikkila v. Barber*, 345 U.S. 229, 73 S.Ct. 603, 97 L.Ed. 972 (1953), in which the Court derived from its finality-era precedents the principle that the statutes’ finality provisions “had the effect of precluding judicial intervention in deportation cases *except insofar as it was required by the Constitution.*” *Id.* at 234–35, 73 S.Ct. 603 (emphasis added); *see also id.* at 234, 73 S.Ct. 603 (“During these years, the cases continued to recognize that Congress had intended to make these administrative decisions nonreviewable *to the fullest extent possible under the Constitution.*” (emphasis added; citing *Fong Yue Ting v. United States*, 149 U.S. 698, 713, 13 S.Ct. 1016, 37 L.Ed. 905 (1893) (“The power to exclude or to expel aliens . . . is vested in the political departments of the government, and is to be regulated by treaty or by act of congress, and to be executed by the executive authority according to the regulations so established, except so far the judicial department . . . is required by the paramount law of the

*constitution*, to intervene.” (emphasis added))).

Indeed, the *Heikkila* decision brings us back to *St. Cyr* and helps us understand the significance that the Court apparently assigned to the finality-era cases in its Suspension Clause discussion. First, the Court in *St. Cyr* noted that the government’s proposed construction of the AED-PA and IIRIRA jurisdiction-stripping provisions “would entirely preclude review of a pure question of law by any court.” 533 U.S. at 300, 121 S.Ct. 2271. Such a result was problematic because, under “[the Suspension] Clause, some ‘judicial intervention in deportation cases’ is unquestionably ‘required by the Constitution.’” *Id.* (quoting *Heikkila*, 345 U.S. at 235, 73 S.Ct. 603). In short, the Court found in the finality-era cases evidence that, as a matter of historical practice, aliens facing removal could challenge “the Executive’s legal determinations,”<sup>17</sup> including “Executive interpretations of the immigration laws.” *Id.* at 306–07, 121 S.Ct. 2271.

We turn now to *Boumediene*. In *Boumediene* the Court addressed two main, sequential questions. First, the Court considered whether detainees at the United States Naval Station at Guantanamo Bay,

17. As support for this proposition, the Court also cited *Gegiow v. Uhl*, 239 U.S. 3, 36 S.Ct. 2, 60 L.Ed. 114 (1915). *See St. Cyr*, 533 U.S. at 306 & n.28, 121 S.Ct. 2271. *Gegiow* involved Russian immigrants whom immigration officers had ordered deported after concluding that the aliens were “likely to become public charges.” 239 U.S. at 8, 36 S.Ct. 2 (internal quotation marks omitted). The immigrants sought and obtained habeas review of the Executive’s determination. According to the Supreme Court, the only reason the Executive provided to support its conclusion that the aliens were deportable was that they were not likely to find work in the city of their ultimate destination (Portland, Oregon) due to the poor conditions of the city’s labor market. *Id.* at 8–9, 36 S.Ct. 2. In order to avoid the

force of earlier Supreme Court precedent holding that “[t]he conclusiveness of the decisions of immigration officers under [the prevailing immigration statute’s finality provision] is conclusiveness upon matters of fact,” *id.* at 9, 36 S.Ct. 2 (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 12 S.Ct. 336, 35 L.Ed. 1146 (1892)), the Court presented the question on review as one of law, rather than one of fact: “whether an alien can be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked.” *Id.* at 9–10, 36 S.Ct. 2. And because the Court ultimately concluded that such a consideration was not an appropriate grounds for ordering the aliens deported, it reversed the order. *Id.* at 10, 36 S.Ct. 2.



Cuba, “are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status . . . as enemy combatants, or their physical location . . . at Guantanamo Bay.” 553 U.S. at 739, 128 S.Ct. 2229. Then, after determining that the detainees were entitled to the protections of the Suspension Clause, the Court addressed the question “whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus.” *Id.* at 771, 128 S.Ct. 2229.

In answering the first question regarding the detainees’ entitlement *vel non* to the protections of the Suspension Clause, the Court primarily looked to its “extraterritoriality” jurisprudence, i.e., its cases addressing where and under what circumstances the Constitution applies outside the United States. From these precedents the Court developed a multi-factor test to determine whether the Guantanamo detainees were covered by the Suspension Clause:

[A]t least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.

18. While the Court obviously analyzed how these factors apply to the Guantanamo detainees in much greater depth than our brief summary might suggest, we refrain from expounding its analysis further. That is because, as we explain in greater detail below, we think this multi-factor test provides little guidance in addressing Petitioners’ entitlement to the protections of the Suspension Clause in this case.

*Id.* at 766, 128 S.Ct. 2229. Based on these factors, the Court concluded that the Suspension Clause “has full effect at Guantanamo Bay.”<sup>18</sup> *Id.* at 771, 128 S.Ct. 2229.

The Court next considered the adequacy of the habeas substitute provided to the detainees by Congress. The Detainee Treatment Act (DTA) granted jurisdiction to the Court of Appeals for the D.C. Circuit “only to assess whether the CSRT [Combat Status Review Tribunal<sup>19</sup>] complied with the ‘standards and procedures specified by the Secretary of Defense’ and whether those standards and procedures are lawful.” *Id.* at 777, 128 S.Ct. 2229 (quoting DTA § 1005(e)(2)(C), 119 Stat. 2742). Under the DTA, the D.C. Circuit lacked jurisdiction “to inquire into the legality of the detention generally.” *Id.*

In assessing the adequacy of the DTA as a habeas substitute, the Court acknowledged the lack of case law addressing “standards defining suspension of the writ or [the] circumstances under which suspension has occurred.” *Id.* at 773, 128 S.Ct. 2229. It also made clear that it was not “offer[ing] a comprehensive summary of the requisites for an adequate substitute for habeas corpus.” *Id.* at 779, 128 S.Ct. 2229. Having pronounced these caveats, the Court then began its discussion of what features the habeas substitute needed to include to avoid violating the Suspension Clause. To begin, the Court recognized what it considered to be two “easily identified attributes of any constitutionally adequate habeas corpus proceeding,” *id.*:

19. CSRTs are the military tribunals established by the Department of Defense to determine if the Guantanamo detainees are “enemy combatants” who are therefore subject to indefinite detention without trial pending the duration of the war in Afghanistan. *See* 553 U.S. at 733–34, 128 S.Ct. 2229.

first, the Court “consider[ed] it uncontroversial [ ] that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law,” *id.* (quoting *St. Cyr*, 533 U.S. at 302, 121 S.Ct. 2271); and second, “the habeas court must have the power to order the conditional release of an individual unlawfully detained,” *id.*

In addition to these two seemingly irreducible attributes of a constitutionally adequate habeas substitute, the Court identified a few others that, “depending on the circumstances, [ ] *may* be required.” *Id.* (emphasis added). These additional features include: the ability of the prisoner to “controvert facts in the jailer’s return,” *see id.* at 780, 128 S.Ct. 2229; “some authority to assess the sufficiency of the Government’s evidence against the detainee,” *id.* at 786, 128 S.Ct. 2229; and the ability “to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner,” *id.* at 780, 128 S.Ct. 2229; *see also id.* at 786, 128 S.Ct. 2229. To determine whether the circumstances in a given case are such that the habeas substitute must also encompass these additional features, the Court discussed a number of considerations, all of which related to the “rigor of any earlier proceedings.” *Id.* at 781, 128 S.Ct. 2229. In short, the Court established a sort of sliding scale whose focus was “the sum total of procedural protections afforded to the detainee at all stages, direct and collateral.” *Id.* at 783, 128 S.Ct. 2229.

Applying these principles, the Court ultimately concluded that the DTA did not provide the detainees an adequate habeas substitute. The Court believed the DTA could be construed to provide *most* of the attributes necessary to make it a “constitutionally adequate substitute” for habeas—

including the detainees’ ability to challenge the CSRT’s legal and factual determinations, as well as authority for the court to order the release of the detainees if it concluded that detention was not justified. *Id.* at 787–89, 128 S.Ct. 2229. Nevertheless, the DTA did not afford detainees “an opportunity . . . to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings.” *Id.* at 789, 128 S.Ct. 2229. This latter deficiency doomed the DTA as a habeas substitute. Because of this, the Court held that the Military Commissions Act, which stripped federal courts of their § 2241 habeas jurisdiction with respect to the CSRT enemy combatant determinations, “effects an unconstitutional suspension of the writ.” *Id.* at 792, 128 S.Ct. 2229.

## 2. Plenary Power Jurisprudence

Against the backdrop of the Court’s most relevant Suspension Clause precedents, we direct our attention to the plenary power doctrine. Because the course of this doctrine’s development in the Supreme Court sheds useful light on the current state of the law, a brief historical overview is first in order.

The Supreme Court has “long recognized [that] the power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” *Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977) (internal quotation marks and citation omitted). “[T]he Court’s general reaffirmations of this principle have been legion.” *Kleindienst v. Mandel*, 408 U.S. 753, 765–766 & n.6, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972) (collecting cases). The doctrine first emerged in the late nineteenth century in the context of the Chinese Exclusion Act, one of the first federal statutes to regulate immigration.

The case that first recognized the political branches' plenary authority to exclude aliens, *Chae Chan Ping v. United States*, 130 U.S. 581, 9 S.Ct. 623, 32 L.Ed. 1068 (1889), involved a Chinese lawful permanent resident who, prior to departing the United States for a trip abroad, had obtained a certificate entitling him to reenter the country upon his return. *Id.* at 581–82, 9 S.Ct. 623. While he was away, however, Congress passed an amendment to the Chinese Exclusion Act that rendered such certificates null and void. *Id.* at 582, 9 S.Ct. 623. Thus, after immigration authorities refused him entrance upon his return, the alien brought a habeas petition to challenge the lawfulness of his exclusion, arguing that the amendment nullifying his reentry certificate was invalid. *Id.* The Court upheld the validity of the amendment, reasoning that “[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution,” and therefore that “the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.” *Id.* at 609, 9 S.Ct. 623; *see also id.* (concluding that questions regarding the political soundness of the amendment “are not questions for judicial determination”).

In subsequent decisions from the same period, the Court upheld and even extended its reasoning in *Chae Chan Ping*. For

instance, in *Nishimura Ekiu v. United States*, 142 U.S. 651, 12 S.Ct. 336, 35 L.Ed. 1146 (1892), another exclusion (as opposed to deportation) case, a Japanese immigrant was denied entry to the United States because immigration authorities determined that she was “likely to become a public charge.” *Id.* at 662, 12 S.Ct. 336 (internal quotation marks and citation omitted). The Court concluded that the statute authorizing exclusion on such grounds was valid under the sovereign authority of Congress and the Executive to control immigration. *Id.* at 659, 12 S.Ct. 336 (stating that the power over admission and exclusion “belongs to the political department[s] of the government”). In a statement that perfectly encapsulates the meaning of the plenary power doctrine, the Court declared:

It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law.

*Id.* at 660, 12 S.Ct. 336.<sup>20</sup>

The following year, in *Fong Yue Ting v. United States*, 149 U.S. 698, 13 S.Ct. 1016,

20. While the Court recognized *Nishimura Ekiu*'s “entitle[ment] to a writ of *habeas corpus* to ascertain whether the restraint [of her liberty] is lawful,” *id.* at 660, 12 S.Ct. 336, the scope of the Court's habeas review was limited to inquiring whether the immigration officer ordering the exclusion “was duly appointed” under the statute and whether the officer's decision to exclude her “was within the authority conferred upon him by [the Im-

migration Act of 1891].” *Id.* at 664, 12 S.Ct. 336. Thus, *Nishimura Ekiu* cannot help Petitioners because, as we noted above, they have conceded that they fall within the class of aliens for whom Congress has authorized expedited removal, and that the immigration officials ordering their removal are duly appointed to do so. *See* 8 U.S.C. § 1225(b)(1)(A)(iii). That said, it would be a different matter were the Executive to at-

37 L.Ed. 905 (1893), the Court extended the plenary power doctrine to deportation cases as well. *Fong Yue Ting* involved several Chinese immigrants who were ordered deported pursuant to the Chinese Exclusion Act because they lacked certificates of residence and could not show by the testimony of “at least one credible white witness” that they were lawful residents. *Id.* at 702–04, 13 S.Ct. 1016. The aliens sought to challenge their deportation orders, claiming, *inter alia*, that the Exclusion Act violated the equal protection clause of the Fourteenth Amendment. *See id.* at 724–25, 13 S.Ct. 1016 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)). As it had done in *Chae Chan Ping* and *Nishimura Ekiu*, the Court declined to intervene or review the validity of the immigration legislation:

The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by congress in the exercise of the powers confided to it by the constitution over this subject.

*Id.* at 731, 13 S.Ct. 1016; *see also id.* at 707, 13 S.Ct. 1016 (“The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.”).

Thus, the Court’s earliest plenary power decisions established a rule leaving essen-

tially no room for judicial intervention in immigration matters, a rule that applied equally in exclusion as well as deportation cases.

Yet not long after these initial decisions, the Court began to walk back the plenary power doctrine in significant ways. In *Yamataya v. Fisher*, 189 U.S. 86, 23 S.Ct. 611, 47 L.Ed. 721 (1903), a Japanese immigrant was initially allowed to enter the country after presenting herself for inspection at a port of entry. *Id.* at 87, 23 S.Ct. 611. Nevertheless, just a few days later, an immigration officer sought her deportation because he had concluded, after some investigation, that she “was a pauper and a person likely to become a public charge.” *Id.* About a week later, the Secretary of the Treasury ordered her deported without notice or hearing. *Id.* Yamataya then filed a habeas petition in federal district court to challenge her deportation, claiming that the failure to provide her notice and a hearing violated due process. *Id.* The Court acknowledged its plenary power precedents, including *Nishimura Ekiu* and *Fong Yue Ting*, *see id.* at 97–99, 23 S.Ct. 611, but clarified that these precedents did not recognize the authority of immigration officials to “disregard the fundamental principles that inhere in ‘due process of law’ as understood at the time of the adoption of the Constitution.” *Id.* at 100, 23 S.Ct. 611. According to these “fundamental principles,” the Court held, no immigration official has the power

arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving

tempt to expeditiously remove an alien that Congress has *not* authorized for expeditious removal—for example, an alien who claims to have been continuously present in the United

States for over two years prior to her detention. Such a situation might very well implicate the Suspension Clause in a way that Petitioners’ expedited removal does not.

him all opportunity to be heard upon the questions involving his right to be and remain in the United States.

*Id.* at 101, 23 S.Ct. 611.<sup>21</sup>

Thus, *Yamataya* proved to be a “turning point” in the Court’s plenary power jurisprudence. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1390 n.85 (1953). Indeed, as Professor Hart explains, it was at this point that the Court “began to see that the premise [of the plenary power doctrine] needed to be qualified—that a power to lay down general rules, even if it were plenary, did not necessarily include a power to be arbitrary or to authorize administrative officials to be arbitrary.” *Id.* at 1390; see also Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. Pa. L. Rev. 933, 947–48 & n.62 (1995) (discussing *Yamataya*’s significance to the development of the plenary power doctrine). *Yamataya*, then, essentially gave way to the finality-era cases upon which Petitioners and *amici* place such considerable weight. Hart, *supra*, at 1391 & n.86 (noting the “[t]housands” of habeas cases challenging exclusion and deportation orders “whose presence in the courts cannot be explained on any other basis” than on the reasoning of *Yamataya*).

Nevertheless, *Yamataya* did not mark the only “turning point” in the development of the plenary power doctrine. Nearly fifty years after *Yamataya*, the Court issued two opinions—*United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 70

S.Ct. 309, 94 L.Ed. 317 (1950) and *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953)—that essentially undid the effects of *Yamataya*, at least for aliens “on the threshold of initial entry,” as well as for those “assimilated to that status for constitutional purposes.” *Mezei*, 345 U.S. at 212, 214, 73 S.Ct. 625 (internal quotation marks and alterations omitted); see also Hart, *supra*, at 1391–92 (explaining the significance of *Knauff* and *Mezei* for the Court’s plenary power jurisprudence, noting specifically that by these decisions the Court “either ignores or renders obsolete every habeas corpus case in the books involving an exclusion proceeding”).

In *Knauff*, the German wife of a United States citizen sought admission to the country pursuant to the War Brides Act. 338 U.S. at 539, 70 S.Ct. 309 (citing Act of Dec. 28, 1945, ch. 591, 59 Stat. 659 (1946)). She was detained immediately upon her arrival at Ellis Island, and the Attorney General eventually ordered her excluded, without a hearing, because “her admission would be prejudicial to the interests of the United States.” *Id.* at 539–40, 70 S.Ct. 309. The Court upheld the Attorney General’s decision largely on the basis of pre-*Yamataya* plenary power principles and precedents:

[T]he decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such authority is final and conclusive. Whatever the rule may be concerning depor-

21. Although the Court recognized the due process rights of recent entrants to the country—even entrants who are subsequently determined “to be illegally here”—it explicitly declined to address whether very recent *clandestine* entrants like Petitioners enjoy such

rights. See *Yamataya*, 189 U.S. at 100, 23 S.Ct. 611. For obvious reasons, and as we explain below, we consider this carve-out in the Court’s holding to be of particular importance in resolving this appeal.

tation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.... Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.

*Id.* at 543–44, 70 S.Ct. 309 (citing, *inter alia*, *Nishimura Ekiu*, 142 U.S. at 659–60, 12 S.Ct. 336 and *Fong Yue Ting*, 149 U.S. at 713–14, 13 S.Ct. 1016). Thus, with its holding in *Knauff*, the Court effectively “reinvigorated the judicial deference prong of the plenary power doctrine.” Weisselberg, *supra*, at 956.

Similar to *Knauff*, *Mezei* involved an alien detained on Ellis Island who was denied entry for undisclosed national security reasons. Unlike *Knauff*, however, *Mezei* had previously lived in the United States for many years before leaving the country for a period of approximately nineteen months, “apparently to visit his dying mother in Rumania [*sic*].” 345 U.S. at 208, 73 S.Ct. 625. And unlike *Knauff*, *Mezei* had no choice but to remain in custody indefinitely on Ellis Island, as no other country would admit him either. *Id.* at 208–09, 73

S.Ct. 625. In these conditions, *Mezei* brought a habeas petition to challenge his exclusion (and attendant indefinite detention). *Id.* at 209, 73 S.Ct. 625. Nevertheless, the Court again upheld the Executive’s decision, essentially for the same reasons articulated in *Knauff*. “It is true,” the Court explained, “that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.” *Id.* at 212, 73 S.Ct. 625 (citing, *inter alia*, *Yamataya*, 189 U.S. at 100–01, 23 S.Ct. 611). In contrast, aliens “on the threshold of initial entry stand on different footing: ‘Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.’”<sup>22</sup> *Id.* (quoting *Knauff*, 338 U.S. at 544, 70 S.Ct. 309).

Thus, *Knauff* and *Mezei* essentially restored the political branches’ plenary power over aliens at the border seeking initial admission. And since these decisions, the Court has continued to signal its commitment to the full breadth of the plenary power doctrine, at least as to aliens at the border seeking initial admission to the country.<sup>23</sup> See *Fiallo*, 430 U.S. at 792, 97

22. Although *Mezei* (like *Knauff*) was indisputably on United States soil when he was ordered excluded and when he filed his habeas petition, the Court “assimilated” *Mezei*’s status “for constitutional purposes” to that of an alien stopped at the border. See *id.* at 214, 73 S.Ct. 625 (internal quotation marks and citation omitted). This analytical maneuver is often referred to as the “entry fiction” or the “entry doctrine.” See, e.g., *Jean v. Nelson*, 727 F.2d 957, 969 (11th Cir. 1984) (en banc), *aff’d*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985). As explained below, the entry fiction plays an important, albeit indirect, role in our analysis of Petitioners’ Suspension Clause challenge.

23. The Court has departed from its reasoning in *Knauff* and *Mezei* in other respects, includ-

ing for lawful permanent residents seeking reentry at the border, see *Landon v. Plasencia*, 459 U.S. 21, 32–33, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982) (holding that such aliens are entitled to protections of Due Process Clause in exclusion proceedings), as well as for resident aliens facing indefinite detention incident to an order of deportation following conviction of a deportable offense, compare *Zadvydas v. Davis*, 533 U.S. 678, 692–95, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001) (concluding that resident aliens ordered deported have liberty interest under Fifth Amendment in avoiding indefinite detention incident to deportation, and distinguishing *Mezei* on grounds that petitioners had already entered U.S. before ordered deported), with *id.* at 702–05, 121 S.Ct. 2491 (Scalia, J., dissenting) (arguing that

S.Ct. 1473 (“This Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens. Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” (internal quotation marks and citations omitted)); *Landon v. Plasencia*, 459 U.S. 21, 32, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982) (“This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.” (citing *Knauff*, 338 U.S. at 542, 70 S.Ct. 309; *Nishimura Ekiu*, 142 U.S. at 659–60, 12 S.Ct. 336)).

### 3. Application to Petitioners and the Expedited Removal Regime

Having introduced the prevailing understandings of the Suspension Clause and of the political branches’ plenary power over immigration, we now consider the relationship between these two areas of legal doctrine and how they apply to Petitioners’ claim that the jurisdiction-stripping provi-

sions of § 1252 violate the Suspension Clause.

Petitioners argue that under the Supreme Court’s Suspension Clause jurisprudence—especially *St. Cyr* and the finality-era cases—courts must, at a minimum, be able to review the legal conclusions underlying the Executive’s negative credible fear determinations, including the Executive’s interpretation and application of a statute to undisputed facts.<sup>24</sup> And because § 1252(e)(2) does not provide for at least this level of review, Petitioners claim that it constitutes an inadequate substitute for habeas, in violation of the Suspension Clause.

The government, on the other hand, claims that the plenary power doctrine operates to foreclose Petitioners’ Suspension Clause challenge. In the government’s view, Petitioners should be treated no differently from aliens “on the threshold of initial entry” who clearly lack constitutional due process protections concerning their application for admission. *Mezei*, 345 U.S. at 212, 73 S.Ct. 625. And because Petitioners “have no underlying procedural due process rights to vindicate in habeas,” Respondents’ Br. 49, the government argues that “the scope of habeas review is [] irrelevant.” *Id.*

*Mezei* controlled question whether aliens ordered deported had liberty interest to remain in United States such that they are entitled to due process in decision to hold them indefinitely, and stating that such aliens have no right to release into the United States).

24. Petitioners at times claim that they should also be entitled to raise *factual* challenges due to the “truncated” nature of the credible fear determination process. Notwithstanding *Boumediene*’s holding that habeas review of factual findings may be required in some circumstances, we think Petitioners’ argument is readily disposed of based solely on some of the very cases they cite to argue that § 1252 violates the Suspension Clause. *See, e.g., St.*

*Cyr*, 533 U.S. at 306, 121 S.Ct. 2271 (noting that in finality-era habeas challenges to deportation orders “the courts generally did not review factual determinations made by the Executive”); *Heikkila*, 345 U.S. at 236, 73 S.Ct. 603 (noting that “the scope of inquiry on habeas corpus” “has always been limited to the enforcement of due process requirements,” and not to reviewing the record to determine “whether there is substantial evidence to support administrative findings of fact”); *Gegiow*, 239 U.S. at 9, 36 S.Ct. 2 (“The conclusiveness of the decisions of immigration officers under [the finality provision of the Immigration Act of 1907] is conclusiveness upon matters of fact.”).

Petitioners raise three principal arguments in response to the government's contentions above. First, they claim that to deny them due process rights despite their having indisputably entered the country prior to being apprehended would run contrary to numerous Supreme Court precedents recognizing the constitutional rights of all "persons" within the territorial jurisdiction of the United States. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976) (explaining that the Fifth Amendment applies to all aliens "within the jurisdiction of the United States," including those "whose presence in this country is unlawful, involuntary, or transitory"). Second, they argue that even if the Constitution does not impose any independent procedural minimums that the Executive must satisfy before removing Petitioners, the Executive must at least fairly administer those procedures that Congress has actually prescribed in the expedited removal statute. *Cf. Dia v. Ashcroft*, 353 F.3d 228, 238–39 (3d Cir. 2003) (en banc) (holding that Fifth Amendment entitles aliens to due process in deportation proceedings, and explaining that these rights "ste[m] from those statutory rights granted by Congress and the principle that '[m]inimum due process rights attach to statutory rights.'" (quoting *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996))). Third, Petitioners claim that, regardless of the extent of their constitutional or statutory due process rights, habeas corpus stands as a constitutional check against illegal detention by the Executive that is separate and apart from the

protections afforded by the Due Process Clause.

[8] We agree with the government that Petitioners' Suspension Clause challenge to § 1252 must fail, though we do so for reasons that are somewhat different than those urged by the government. As explained in Part III.B.1 above, *Boumediene* contemplates a two-step inquiry whereby courts must first determine whether a given habeas petitioner is prohibited from invoking the Suspension Clause due to some attribute of the petitioner or to the circumstances surrounding his arrest or detention. *Cf. Boumediene*, 553 U.S. at 739, 128 S.Ct. 2229. Only after confirming that the petitioner is not so prohibited may courts then turn to the question whether the substitute for habeas is adequate and effective to test the legality of the petitioner's detention (or removal). As we explain below, we conclude that Petitioners cannot clear *Boumediene*'s first hurdle—that of proving their entitlement *vel non* to the protections of the Suspension Clause.<sup>25</sup>

[9] The reason Petitioners' Suspension Clause claim falls at step one is because the Supreme Court has unequivocally concluded that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Landon*, 459 U.S. at 32, 103 S.Ct. 321. Petitioners were each apprehended within hours of surreptitiously entering the United States, so we think it appropriate to treat them as "alien[s] seeking initial admission to the United States." *Id.* And since the issues that Petitioners seek to challenge

25. In evaluating Petitioners' rights under the Suspension Clause, we find *Boumediene*'s multi-factor test, referenced earlier in this opinion, to provide little guidance. As we explain above, the Court derived the factors from its extraterritoriality jurisprudence in order to assess the reach of the Suspension Clause to a territory where the United States

is not sovereign. *See* 553 U.S. at 766, 128 S.Ct. 2229. In our case, of course, there is no question that Petitioners were apprehended within the sovereign territory of the United States; thus, the *Boumediene* factors are of limited utility in determining Petitioners' entitlement to the protections of the Suspension Clause.



all stem from the Executive's decision to remove them from the country, they cannot invoke the Constitution, including the Suspension Clause, in an effort to force judicial review beyond what Congress has already granted them. As such, we need not reach the second question under the *Boumediene* framework, i.e., whether the limited scope of review of expedited removal orders under § 1252 is an adequate substitute for traditional habeas review.<sup>26</sup>

Petitioners claim that *St. Cyr* and the finality-era cases firmly establish their right to invoke the Suspension Clause to challenge their removal orders.<sup>27</sup> For two main reasons we think Petitioners' reliance on these cases is flawed. First, *St. Cyr* involved a lawful permanent resident, a category of aliens (unlike recent clandestine entrants) whose entitlement to broad constitutional protections is undisputed. *Cf. Landon*, 459 U.S. at 32, 103 S.Ct. 321. Second, as stated earlier, *St. Cyr* discussed the Suspension Clause (and therefore the finality-era cases) only to explain what the Clause "might possibly protect," Neuman,

*supra*, at 539 & n.8, not what the Clause most certainly protects—and even in this hypothetical posture the opinion was non-committal when discussing the significance of the finality-era cases to the Suspension Clause analysis. *See* 533 U.S. at 304, 121 S.Ct. 2271 ("St. Cyr's constitutional position finds *some* support in our prior immigration cases . . . . [T]he ambiguities in the scope of the exercise of the writ at common law . . . , and the *suggestions* in this Court's prior decisions as to the extent to which habeas review could be limited consistent with the Constitution, convince us that the Suspension Clause questions that would be presented by the INS' reading of the immigration statutes before us are difficult and significant." (emphases added; citing *Heikkila*, 345 U.S. at 234–35, 73 S.Ct. 603)). Indeed, the Court had good reason to tread carefully when it came to the meaning of the finality-era cases; after all, none of them even mentions the Suspension Clause, let alone identifies it as the constitutional provision establishing the minimum measure of judicial review required in removal cases.<sup>28</sup> We therefore

26. And because we hold that Petitioners cannot even invoke the Suspension Clause to challenge issues related to their admission or removal from the country, we have no occasion to consider what constitutional or statutory due process rights, if any, Petitioners may have.

27. Petitioners also rely on this Court's decision in *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999), which is factually and analytically very similar to *St. Cyr*. Because *St. Cyr* essentially subsumes *Sandoval*, however, our reasons for rejecting *St. Cyr*'s significance in our case apply equally to *Sandoval*.

28. It was largely for this reason that the District Court below declined to assign much weight to the finality-era cases in its analysis of Petitioners' Suspension Clause argument. Petitioners and *amici* contend that the Suspension Clause was the only "logical" constitutional provision that the Court in *Heikkila* could have relied upon when explaining that

"the Constitution" required a certain level of judicial review of immigration decisions. *See* Brief for Scholars of Habeas Corpus Law, Federal Courts, and Constitutional Law as *Amicus Curiae* 12. Given the tentative and hypothetical nature of the Court's Suspension Clause analysis in *St. Cyr*, we too are hesitant to extract too much Suspension Clause-related guidance from a series of cases whose precise relationship (if any) to the Suspension Clause is far from clear. This is especially so in light of Justice Scalia's dissent in *St. Cyr* in which he forcefully critiqued the majority's reliance on the finality-era cases generally and *Heikkila* specifically:

The Court cites many cases which it says establish that it is a "serious and difficult constitutional issue" whether the Suspension Clause prohibits the elimination of habeas jurisdiction effected by IIRIRA. Every one of those cases, however, pertains not to the meaning of the Suspension Clause, but to the content of the habeas corpus provision of the United States Code, which is

conclude that *St. Cyr* and the finality-era cases are not controlling here.

Another potential criticism of our position—and particularly of our decision to treat Petitioners as “alien[s] seeking initial admission to the United States” who are prohibited from invoking the Suspension Clause—is that it appears to ignore the Supreme Court’s precedents suggesting that an alien’s physical presence in the country alone flips the switch on constitutional protections that are otherwise dormant as to aliens outside our borders. See *Mathews*, 426 U.S. at 77, 96 S.Ct. 1883 (“Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to th[e] constitutional protection [of the Due Process Clause].”); *Zadvydas*, 533 U.S. at 693, 121 S.Ct. 2491 (“It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful,

temporary, or permanent.” (citations omitted)); see also *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Yamataya*, 189 U.S. at 100–01, 23 S.Ct. 611; *Mezei*, 345 U.S. at 212, 73 S.Ct. 625; *Leng May Ma v. Barber*, 357 U.S. 185, 187, 78 S.Ct. 1072, 2 L.Ed.2d 1246 (1958); *Plyler v. Doe*, 457 U.S. 202, 210, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). Again, this criticism is misplaced for two principal reasons.

First, and perhaps most fundamentally, most of the cases cited above did not involve aliens who were seeking initial entry to the country or who were apprehended immediately after entry. See, e.g., *Yick Wo*, 118 U.S. at 358, 6 S.Ct. 1064 (long-time resident alien); *Mathews*, 426 U.S. at 69, 96 S.Ct. 1883 (lawfully admitted resident aliens); *Plyler*, 457 U.S. at 206, 102 S.Ct. 2382 (undocumented resident aliens); *Zadvydas*, 533 U.S. at 684–85, 121 S.Ct. 2491 (long-time resident aliens). And as for the cases that *did* involve arriving aliens, the Court rejected the aliens’ efforts to invoke additional protections based merely on their presence in the territorial jurisdiction of the United States.<sup>29</sup> See *Mezei*, 345 U.S.

quite a different matter. The closest the Court can come is a statement in one of those cases to the effect that the Immigration Act of 1917 “had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution,” *Heikkila*, 345 U.S. at 234–35, 73 S.Ct. 603. That statement (1) was pure dictum, since the Court went on to hold that the judicial review of petitioner’s deportation order was unavailable; (2) does not specify to what extent judicial review was “required by the Constitution,” which could (as far as the Court’s holding was concerned) be zero; and, most important of all, (3) does not refer to the Suspension Clause, so could well have had in mind the due process limitations upon the procedures for determining deportability that our later cases establish.

533 U.S. at 339, 121 S.Ct. 2271 (Scalia, J., dissenting) (some citations omitted).

Nevertheless, we need not resolve this issue in our case, for even if *St. Cyr* definitively established the import of the finality-era cases to the Suspension Clause, we still think the distinction between a lawful permanent resident and a very recent surreptitious entrant makes all the difference in this case. More on this below.

29. Petitioners make much of the fact that the Court extended constitutional due process protections to the alien in *Yamataya* despite her short stint in the United States. See 189 U.S. at 87, 100–01, 23 S.Ct. 611. Petitioners’ reliance on this case ignores other language in the opinion clearly distinguishing *Yamataya*—an alien who was initially admitted to the country and who “ha[d] become . . . a part of its population” before being ordered deported, *id.* at 101, 23 S.Ct. 611—from very recent clandestine entrants like Petitioners, see *id.* at 100, 23 S.Ct. 611. Thus, while *Yamataya*

at 207, 73 S.Ct. 625 (former resident alien held on Ellis Island seeking readmission after extended absence); *Leng May Ma*, 357 U.S. at 186, 78 S.Ct. 1072 (arriving alien allowed into the country on parole pending admission determination). Thus, Petitioners can draw little support from these latter cases.

Second, the Supreme Court has suggested in several other opinions that recent clandestine entrants like Petitioners do not qualify for constitutional protections based merely on their physical presence alone. See *Yamataya*, 189 U.S. at 100-01, 23 S.Ct. 611 (withholding judgment on question “whether an alien can rightfully invoke the due process clause of the Constitution who has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population, before his right to remain is disputed”); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-50, 70 S.Ct. 445, 94 L.Ed. 616 (1950) (“It was under compulsion of the Constitution that this Court long ago held [in *Yamataya*] that an antecedent deportation statute must provide a hearing *at least for aliens who had not entered clandestinely and who had been here some time even if illegally*.” (emphasis added)); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5, 73 S.Ct. 472, 97 L.Ed. 576 (1953) (“The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien *lawfully enters and resides in this country* he becomes invested with the rights guaranteed by the Constitution to all people within

our borders.” (emphasis added)); *Landon*, 459 U.S. at 32, 103 S.Ct. 321 (1982) (“[O]nce an alien gains admission to our country *and begins to develop the ties that go with permanent residence* his constitutional status changes accordingly.” (emphasis added)); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) (stating in dicta that “aliens receive constitutional protections when they have come within the territory of the United States *and developed substantial connections with this country*” (emphasis added)). At a minimum, we conclude that all of these cases call into serious question the proposition that even the slightest entrance into this country triggers constitutional protections that are otherwise unavailable to the alien outside its borders. Such a proposition is further weakened by the Court’s adoption of the “entry fiction” to deny due process rights to aliens even though they are unquestionably within the territorial jurisdiction of the United States. In other words, if entitlement to constitutional protections turned entirely on an alien’s position relative to such a rigid conception as a line on a map, then the Court’s entry-fiction cases such as *Mezei* would run just as contrary to this principle as our holding in this case does.<sup>30</sup>

We thus conclude that, as recent surreptitious entrants deemed to be “alien[s] seeking initial admission to the United States,” Petitioners are unable to invoke the Suspension Clause, despite their having effected a brief entrance into the coun-

might apply in some future case where the alien ordered removed has been in the country for a period of time sufficient “to have become, in [some] real sense, a part of our population,” *id.* that simply is not this case.

mination of his rights under the Constitution. Indeed, we think physical presence is a factor courts should consider; we simply leave it to courts in the future to evaluate the Suspension Clause rights of an alien whose presence in the United States goes meaningfully beyond that of Petitioners here.

**30.** This is not to say that an alien’s location relative to the border is *irrelevant* to a deter-

try prior to being apprehended for removal.<sup>31</sup>

\* \* \*

Our holding rejecting Petitioners' Suspension Clause claims is true to the arc traced by the Supreme Court's plenary power cases in recent decades. It is also consistent with the Court's analytical framework for evaluating Suspension Clause challenges. Even if Petitioners would be entitled to constitutional habeas under the finality-era cases, those cases, as explained above, no longer represent the

prevailing view of the plenary power doctrine, at least when it comes to aliens seeking initial admission. Instead, we must look to *Knauff*, *Mezei*, and other cases reaffirming those sea-changing precedents, all of which point to the conclusion that aliens seeking initial admission to the country—as well as those rightfully assimilated to that status on account of their very recent surreptitious entry—are prohibited from invoking the protections of the Suspension Clause in order to challenge issues relating to their application for admission.<sup>32</sup>

31. In addition to the above, it is worth noting that when the Court in *Landon* stated that certain aliens lack constitutional rights regarding their application for admission, it did not categorize aliens based on whether they have entered the country or not; rather, the Court focused (as IIRIRA and the expedited removal regime focus) on whether the aliens are “seeking initial admission to the United States.” *Landon*, 459 U.S. at 32, 103 S.Ct. 321 (emphasis added); see also, e.g., 8 U.S.C. § 1225(b)(1) (conditioning aliens’ eligibility for expedited removal, in part, on inadmissibility, even if aliens are physically present in the United States). Arguably, this suggests that, at least in some circumstances, an alien’s mere physical presence in the country is of little constitutional significance unless that alien has previously applied for and been granted admission. See David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 Va. J. Int’l L. 673, 689 n.55 (2000) (arguing that “by emphasizing admission over entry, [*Landon*] may give more weight to” the constitutional significance of IIRIRA’s focus on aliens’ admissibility rather than physical location). Then again, *Landon* relied on *Knauff* to support its statement that “an alien seeking initial admission . . . has no constitutional rights regarding his application.” See *Landon*, 459 U.S. at 32, 103 S.Ct. 321 (citing, *inter alia*, *Knauff*, 338 U.S. at 542, 70 S.Ct. 309). And since *Knauff* focused on whether the alien had “entered” the country, “initial admission” in *Landon* may simply be synonymous with “initial entry.” At all events, our opinion should not be read to place tremendous weight on this possible distinction.

32. Of course, as we recognized above, this is not to say that the political branches’ power over immigration is limitless in all respects. We doubt, for example, that Congress could authorize, or that the Executive could engage in, the indefinite, hearingless detention of an alien simply because the alien was apprehended shortly after clandestine entrance. Cf. *Zadvydas*, 533 U.S. at 695, 121 S.Ct. 2491 (noting that the question before the Court—“whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States”—does not implicate questions regarding “the political branches’ authority to control entry into the United States”). And we are certain that this “plenary power” does not mean Congress or the Executive can subject recent clandestine entrants or other arriving aliens to inhumane treatment. Cf. *Wong Wing v. United States*, 163 U.S. 228, 237, 16 S.Ct. 977, 41 L.Ed. 140 (1896) (noting that “[n]o limits can be put by the courts upon the power of congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land, and unlawfully remain therein,” but distinguishing such valid exercises of power from a law allowing the Executive to subject deportable aliens to hard labor without a jury trial); *Zadvydas*, 533 U.S. at 704, 121 S.Ct. 2491 (Scalia, J., dissenting) (noting the difference between the rights of aliens not to be tortured or “subjected to the punishment of hard labor without a judicial trial” and the right to remain in the country after being deemed deportable); *Lynch v. Can-*

#### IV. CONCLUSION

We are sympathetic to the plight of Petitioners and other aliens who have come to this country seeking protection and repose from dangers that they sincerely believe their own governments are unable or unwilling to address. Nevertheless, Congress has unambiguously limited the scope of judicial review, and in so doing has foreclosed review of Petitioners' claims. And in light of the undisputed facts surrounding Petitioners' surreptitious entry into this country, and considering Congress' and the Executive's plenary power over decisions regarding the admission or exclusion of aliens, we cannot say that this limited scope of review is unconstitutional under the Suspension Clause, at least as to Petitioners and other aliens similarly situated. We will therefore affirm the District Court's order dismissing Petitioners' habeas petitions for lack of subject matter jurisdiction. *Rosa Elida Castro et al. v. U.S. Department of Homeland Security*, No. 16-1339.

HARDIMAN, Circuit Judge, concurring dubitante.

I join Judge Smith's excellent opinion in full, but I write separately to express my

doubt that the expression of the plenary power doctrine in *Landon v. Plasencia* completely resolves step one of the Suspension Clause analysis under *Boumediene*. Although *Landon* appears to preclude "alien[s] seeking initial admission to the United States" from invoking any constitutional protections "regarding [their] application[s]," the question of what constitutional rights such aliens are afforded was not squarely before the Supreme Court in that case because the petitioner was a returning permanent resident. 459 U.S. 21, 23, 32, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982). Nor did the Court in *Landon* purport to resolve a jurisdictional question raising the possibility of an unconstitutional suspension of the writ of habeas corpus.<sup>1</sup>

Despite my uncertainty about *Landon*'s dispositive application here, I am convinced that we would reach the same result under step two of *Boumediene*'s framework. Unlike the petitioners in *Boumediene*—who sought their release in the face of indefinite detention—Petitioners here seek to alter their status in the United States in the hope of *avoiding* release to their homelands. That prayer for

*natella*, 810 F.2d 1363, 1373 (5th Cir. 1987) ("The 'entry fiction' that excludable aliens are to be treated as if detained at the border despite their physical presence in the United States determines the aliens' rights with regard to immigration and deportation proceedings. It does not limit the right of excludable aliens detained within United States territory to humane treatment." (footnote omitted)). But to say that the political branches' power over immigration is subject to important limits in some contexts by no means requires that the exercise of that power must be subject to judicial review in all contexts.

1. *Landon* may also be at odds with the proposition that "the Suspension Clause protects the writ 'as it existed in 1789.'" *INS v. St. Cyr*, 533 U.S. 289, 301, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64, 116 S.Ct. 2333, 135

L.Ed.2d 827 (1996)); see also *Boumediene v. Bush*, 553 U.S. 723, 746, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008). See generally Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Context, and American Implications*, 94 Va. L. Rev. 575, 675-76 (2008) ("A sample of newspapers from the 1780s provides four instances of the use of the writ by slaves in Connecticut, New Jersey, Pennsylvania, and Maryland. These suggest that the use of the writ was not confined to native-born British-American citizens of European ancestry, and that American usage was paralleling that in England and its colonies. Indeed, it is difficult to imagine that Americans were not aware of reports of the decision in *Somerset's Case* of 1772, in which Chief Justice Mansfield ruled that a slave in England could not be held in custody.").

relief, in my view, dooms the merits of their Suspension Clause argument that 8 U.S.C. § 1252(e) provides an “inadequate or ineffective” habeas substitute. *United States v. Hayman*, 342 U.S. 205, 223, 72 S.Ct. 263, 96 L.Ed. 232 (1952).



UNITED STATES of America,  
Plaintiff–Appellee,

v.

Michael T. RAND, Defendant–  
Appellant.

No. 15–4322

United States Court of Appeals,  
Fourth Circuit.

Argued: May 12, 2016

Decided: August 26, 2016

**Background:** Defendant was convicted, in the United States District Court for the Western District of North Carolina, Robert J. Conrad, Jr., J., of conspiracy, wire fraud conspiracy, and three counts of obstruction of justice, relating to earnings mismanagement and improper accounting transactions while acting as chief accounting officer at corporation, and deletion of e-mail messages after grand jury subpoena. Defendant appealed.

**Holdings:** The Court of Appeals, Gregory, Chief Judge, held that:

- (1) exclusion of evidence surrounding government’s false accusations of defendant’s earlier deletions of e-mail messages did not violate defendant’s due process right to present a defense with respect to circumstances of his confession;

- (2) denial of defendant’s request for third-party document subpoena was not an abuse of discretion;
- (3) prosecutor’s improper comment on defendant’s wealth was harmless error;
- (4) prosecutor’s rebuttal closing argument did not comment on defendant’s silence; and
- (5) as a matter of first impression, loss-causation principles applicable to civil securities fraud cases do not apply, at sentencing in criminal cases, to determination of loss attributable to fraud scheme involving securities.

Affirmed.

### 1. Criminal Law ⇨1139

The court of appeals reviews evidentiary rulings implicating constitutional claims de novo.

### 2. Criminal Law ⇨1139

Defendant’s claim that trial court’s exclusion of evidence surrounding government’s false accusations that he had deleted e-mail messages during six-day period following grand jury subpoena hampered his due process right to present a defense, with respect to circumstances of his confession, would be reviewed de novo, in prosecution for obstruction of justice, relating to defendant’s subsequent deletion of other e-mail messages. U.S. Const. Amend. 5.

### 3. Criminal Law ⇨338(1), 661

A criminal defendant’s constitutional right to present a defense is not absolute, and defendants do not have a right to present evidence that the district court, in its discretion, deems irrelevant or immaterial.

### 4. Criminal Law ⇨1153.1

Defendant’s appellate claims, that trial court’s exclusion of evidence surrounding

## Presidential Documents

Executive Order 13767 of January 25, 2017

### Border Security and Immigration Enforcement Improvements

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (8 U.S.C. 1101 *et seq.*) (INA), the Secure Fence Act of 2006 (Public Law 109–367) (Secure Fence Act), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104–208 Div. C) (IIRIRA), and in order to ensure the safety and territorial integrity of the United States as well as to ensure that the Nation's immigration laws are faithfully executed, I hereby order as follows:

**Section 1. Purpose.** Border security is critically important to the national security of the United States. Aliens who illegally enter the United States without inspection or admission present a significant threat to national security and public safety. Such aliens have not been identified or inspected by Federal immigration officers to determine their admissibility to the United States. The recent surge of illegal immigration at the southern border with Mexico has placed a significant strain on Federal resources and overwhelmed agencies charged with border security and immigration enforcement, as well as the local communities into which many of the aliens are placed.

Transnational criminal organizations operate sophisticated drug- and human-trafficking networks and smuggling operations on both sides of the southern border, contributing to a significant increase in violent crime and United States deaths from dangerous drugs. Among those who illegally enter are those who seek to harm Americans through acts of terror or criminal conduct. Continued illegal immigration presents a clear and present danger to the interests of the United States.

Federal immigration law both imposes the responsibility and provides the means for the Federal Government, in cooperation with border States, to secure the Nation's southern border. Although Federal immigration law provides a robust framework for Federal-State partnership in enforcing our immigration laws—and the Congress has authorized and provided appropriations to secure our borders—the Federal Government has failed to discharge this basic sovereign responsibility. The purpose of this order is to direct executive departments and agencies (agencies) to deploy all lawful means to secure the Nation's southern border, to prevent further illegal immigration into the United States, and to repatriate illegal aliens swiftly, consistently, and humanely.

**Sec. 2. Policy.** It is the policy of the executive branch to:

(a) secure the southern border of the United States through the immediate construction of a physical wall on the southern border, monitored and supported by adequate personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism;

(b) detain individuals apprehended on suspicion of violating Federal or State law, including Federal immigration law, pending further proceedings regarding those violations;

(c) expedite determinations of apprehended individuals' claims of eligibility to remain in the United States;

(d) remove promptly those individuals whose legal claims to remain in the United States have been lawfully rejected, after any appropriate civil or criminal sanctions have been imposed; and

(e) cooperate fully with States and local law enforcement in enacting Federal-State partnerships to enforce Federal immigration priorities, as well as State monitoring and detention programs that are consistent with Federal law and do not undermine Federal immigration priorities.

**Sec. 3. Definitions.** (a) “Asylum officer” has the meaning given the term in section 235(b)(1)(E) of the INA (8 U.S.C. 1225(b)(1)).

(b) “Southern border” shall mean the contiguous land border between the United States and Mexico, including all points of entry.

(c) “Border States” shall mean the States of the United States immediately adjacent to the contiguous land border between the United States and Mexico.

(d) Except as otherwise noted, “the Secretary” shall refer to the Secretary of Homeland Security.

(e) “Wall” shall mean a contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier.

(f) “Executive department” shall have the meaning given in section 101 of title 5, United States Code.

(g) “Regulations” shall mean any and all Federal rules, regulations, and directives lawfully promulgated by agencies.

(h) “Operational control” shall mean the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.

**Sec. 4. Physical Security of the Southern Border of the United States.** The Secretary shall immediately take the following steps to obtain complete operational control, as determined by the Secretary, of the southern border:

(a) In accordance with existing law, including the Secure Fence Act and IIRIRA, take all appropriate steps to immediately plan, design, and construct a physical wall along the southern border, using appropriate materials and technology to most effectively achieve complete operational control of the southern border;

(b) Identify and, to the extent permitted by law, allocate all sources of Federal funds for the planning, designing, and constructing of a physical wall along the southern border;

(c) Project and develop long-term funding requirements for the wall, including preparing Congressional budget requests for the current and upcoming fiscal years; and

(d) Produce a comprehensive study of the security of the southern border, to be completed within 180 days of this order, that shall include the current state of southern border security, all geophysical and topographical aspects of the southern border, the availability of Federal and State resources necessary to achieve complete operational control of the southern border, and a strategy to obtain and maintain complete operational control of the southern border.

**Sec. 5. Detention Facilities.** (a) The Secretary shall take all appropriate action and allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico.

(b) The Secretary shall take all appropriate action and allocate all legally available resources to immediately assign asylum officers to immigration detention facilities for the purpose of accepting asylum referrals and conducting credible fear determinations pursuant to section 235(b)(1) of the INA (8 U.S.C. 1225(b)(1)) and applicable regulations and reasonable fear determinations pursuant to applicable regulations.

(c) The Attorney General shall take all appropriate action and allocate all legally available resources to immediately assign immigration judges to immigration detention facilities operated or controlled by the Secretary, or operated or controlled pursuant to contract by the Secretary, for the



purpose of conducting proceedings authorized under title 8, chapter 12, subchapter II, United States Code.

**Sec. 6. *Detention for Illegal Entry.*** The Secretary shall immediately take all appropriate actions to ensure the detention of aliens apprehended for violations of immigration law pending the outcome of their removal proceedings or their removal from the country to the extent permitted by law. The Secretary shall issue new policy guidance to all Department of Homeland Security personnel regarding the appropriate and consistent use of lawful detention authority under the INA, including the termination of the practice commonly known as “catch and release,” whereby aliens are routinely released in the United States shortly after their apprehension for violations of immigration law.

**Sec. 7. *Return to Territory.*** The Secretary shall take appropriate action, consistent with the requirements of section 1232 of title 8, United States Code, to ensure that aliens described in section 235(b)(2)(C) of the INA (8 U.S.C. 1225(b)(2)(C)) are returned to the territory from which they came pending a formal removal proceeding.

**Sec. 8. *Additional Border Patrol Agents.*** Subject to available appropriations, the Secretary, through the Commissioner of U.S. Customs and Border Protection, shall take all appropriate action to hire 5,000 additional Border Patrol agents, and all appropriate action to ensure that such agents enter on duty and are assigned to duty stations as soon as is practicable.

**Sec. 9. *Foreign Aid Reporting Requirements.*** The head of each executive department and agency shall identify and quantify all sources of direct and indirect Federal aid or assistance to the Government of Mexico on an annual basis over the past five years, including all bilateral and multilateral development aid, economic assistance, humanitarian aid, and military aid. Within 30 days of the date of this order, the head of each executive department and agency shall submit this information to the Secretary of State. Within 60 days of the date of this order, the Secretary shall submit to the President a consolidated report reflecting the levels of such aid and assistance that has been provided annually, over each of the past five years.

**Sec. 10. *Federal-State Agreements.*** It is the policy of the executive branch to empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law.

(a) In furtherance of this policy, the Secretary shall immediately take appropriate action to engage with the Governors of the States, as well as local officials, for the purpose of preparing to enter into agreements under section 287(g) of the INA (8 U.S.C. 1357(g)).

(b) To the extent permitted by law, and with the consent of State or local officials, as appropriate, the Secretary shall take appropriate action, through agreements under section 287(g) of the INA, or otherwise, to authorize State and local law enforcement officials, as the Secretary determines are qualified and appropriate, to perform the functions of immigration officers in relation to the investigation, apprehension, or detention of aliens in the United States under the direction and the supervision of the Secretary. Such authorization shall be in addition to, rather than in place of, Federal performance of these duties.

(c) To the extent permitted by law, the Secretary may structure each agreement under section 287(g) of the INA in the manner that provides the most effective model for enforcing Federal immigration laws and obtaining operational control over the border for that jurisdiction.

**Sec. 11. *Parole, Asylum, and Removal.*** It is the policy of the executive branch to end the abuse of parole and asylum provisions currently used to prevent the lawful removal of removable aliens.

(a) The Secretary shall immediately take all appropriate action to ensure that the parole and asylum provisions of Federal immigration law are not illegally exploited to prevent the removal of otherwise removable aliens.

(b) The Secretary shall take all appropriate action, including by promulgating any appropriate regulations, to ensure that asylum referrals and credible fear determinations pursuant to section 235(b)(1) of the INA (8 U.S.C. 1125(b)(1)) and 8 CFR 208.30, and reasonable fear determinations pursuant to 8 CFR 208.31, are conducted in a manner consistent with the plain language of those provisions.

(c) Pursuant to section 235(b)(1)(A)(iii)(I) of the INA, the Secretary shall take appropriate action to apply, in his sole and unreviewable discretion, the provisions of section 235(b)(1)(A)(i) and (ii) of the INA to the aliens designated under section 235(b)(1)(A)(iii)(II).

(d) The Secretary shall take appropriate action to ensure that parole authority under section 212(d)(5) of the INA (8 U.S.C. 1182(d)(5)) is exercised only on a case-by-case basis in accordance with the plain language of the statute, and in all circumstances only when an individual demonstrates urgent humanitarian reasons or a significant public benefit derived from such parole.

(e) The Secretary shall take appropriate action to require that all Department of Homeland Security personnel are properly trained on the proper application of section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (8 U.S.C. 1232) and section 462(g)(2) of the Homeland Security Act of 2002 (6 U.S.C. 279(g)(2)), to ensure that unaccompanied alien children are properly processed, receive appropriate care and placement while in the custody of the Department of Homeland Security, and, when appropriate, are safely repatriated in accordance with law.

**Sec. 12. *Authorization to Enter Federal Lands.*** The Secretary, in conjunction with the Secretary of the Interior and any other heads of agencies as necessary, shall take all appropriate action to:

(a) permit all officers and employees of the United States, as well as all State and local officers as authorized by the Secretary, to have access to all Federal lands as necessary and appropriate to implement this order; and

(b) enable those officers and employees of the United States, as well as all State and local officers as authorized by the Secretary, to perform such actions on Federal lands as the Secretary deems necessary and appropriate to implement this order.

**Sec. 13. *Priority Enforcement.*** The Attorney General shall take all appropriate steps to establish prosecution guidelines and allocate appropriate resources to ensure that Federal prosecutors accord a high priority to prosecutions of offenses having a nexus to the southern border.

**Sec. 14. *Government Transparency.*** The Secretary shall, on a monthly basis and in a publicly available way, report statistical data on aliens apprehended at or near the southern border using a uniform method of reporting by all Department of Homeland Security components, in a format that is easily understandable by the public.

**Sec. 15. *Reporting.*** Except as otherwise provided in this order, the Secretary, within 90 days of the date of this order, and the Attorney General, within 180 days, shall each submit to the President a report on the progress of the directives contained in this order.

**Sec. 16. *Hiring.*** The Office of Personnel Management shall take appropriate action as may be necessary to facilitate hiring personnel to implement this order.

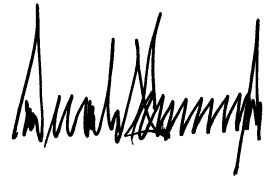
**Sec. 17. *General Provisions.*** (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,  
*January 25, 2017.*

## Presidential Documents

Executive Order 13768 of January 25, 2017

### Enhancing Public Safety in the Interior of the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA) (8 U.S.C. 1101 *et seq.*), and in order to ensure the public safety of the American people in communities across the United States as well as to ensure that our Nation's immigration laws are faithfully executed, I hereby declare the policy of the executive branch to be, and order, as follows:

**Section 1. Purpose.** Interior enforcement of our Nation's immigration laws is critically important to the national security and public safety of the United States. Many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety. This is particularly so for aliens who engage in criminal conduct in the United States.

Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic.

Tens of thousands of removable aliens have been released into communities across the country, solely because their home countries refuse to accept their repatriation. Many of these aliens are criminals who have served time in our Federal, State, and local jails. The presence of such individuals in the United States, and the practices of foreign nations that refuse the repatriation of their nationals, are contrary to the national interest.

Although Federal immigration law provides a framework for Federal-State partnerships in enforcing our immigration laws to ensure the removal of aliens who have no right to be in the United States, the Federal Government has failed to discharge this basic sovereign responsibility. We cannot faithfully execute the immigration laws of the United States if we exempt classes or categories of removable aliens from potential enforcement. The purpose of this order is to direct executive departments and agencies (agencies) to employ all lawful means to enforce the immigration laws of the United States.

**Sec. 2. Policy.** It is the policy of the executive branch to:

(a) Ensure the faithful execution of the immigration laws of the United States, including the INA, against all removable aliens, consistent with Article II, Section 3 of the United States Constitution and section 3331 of title 5, United States Code;

(b) Make use of all available systems and resources to ensure the efficient and faithful execution of the immigration laws of the United States;

(c) Ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law;

(d) Ensure that aliens ordered removed from the United States are promptly removed; and

(e) Support victims, and the families of victims, of crimes committed by removable aliens.

**Sec. 3. Definitions.** The terms of this order, where applicable, shall have the meaning provided by section 1101 of title 8, United States Code.

**Sec. 4. *Enforcement of the Immigration Laws in the Interior of the United States.*** In furtherance of the policy described in section 2 of this order, I hereby direct agencies to employ all lawful means to ensure the faithful execution of the immigration laws of the United States against all removable aliens.

**Sec. 5. *Enforcement Priorities.*** In executing faithfully the immigration laws of the United States, the Secretary of Homeland Security (Secretary) shall prioritize for removal those aliens described by the Congress in sections 212(a)(2), (a)(3), and (a)(6)(C), 235, and 237(a)(2) and (4) of the INA (8 U.S.C. 1182(a)(2), (a)(3), and (a)(6)(C), 1225, and 1227(a)(2) and (4)), as well as removable aliens who:

- (a) Have been convicted of any criminal offense;
- (b) Have been charged with any criminal offense, where such charge has not been resolved;
- (c) Have committed acts that constitute a chargeable criminal offense;
- (d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;
- (e) Have abused any program related to receipt of public benefits;
- (f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or
- (g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

**Sec. 6. *Civil Fines and Penalties.*** As soon as practicable, and by no later than one year after the date of this order, the Secretary shall issue guidance and promulgate regulations, where required by law, to ensure the assessment and collection of all fines and penalties that the Secretary is authorized under the law to assess and collect from aliens unlawfully present in the United States and from those who facilitate their presence in the United States.

**Sec. 7. *Additional Enforcement and Removal Officers.*** The Secretary, through the Director of U.S. Immigration and Customs Enforcement, shall, to the extent permitted by law and subject to the availability of appropriations, take all appropriate action to hire 10,000 additional immigration officers, who shall complete relevant training and be authorized to perform the law enforcement functions described in section 287 of the INA (8 U.S.C. 1357).

**Sec. 8. *Federal-State Agreements.*** It is the policy of the executive branch to empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law.

(a) In furtherance of this policy, the Secretary shall immediately take appropriate action to engage with the Governors of the States, as well as local officials, for the purpose of preparing to enter into agreements under section 287(g) of the INA (8 U.S.C. 1357(g)).

(b) To the extent permitted by law and with the consent of State or local officials, as appropriate, the Secretary shall take appropriate action, through agreements under section 287(g) of the INA, or otherwise, to authorize State and local law enforcement officials, as the Secretary determines are qualified and appropriate, to perform the functions of immigration officers in relation to the investigation, apprehension, or detention of aliens in the United States under the direction and the supervision of the Secretary. Such authorization shall be in addition to, rather than in place of, Federal performance of these duties.

(c) To the extent permitted by law, the Secretary may structure each agreement under section 287(g) of the INA in a manner that provides the most effective model for enforcing Federal immigration laws for that jurisdiction.

**Sec. 9. *Sanctuary Jurisdictions.*** It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373.

(a) In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.

(b) To better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the Secretary shall utilize the Declined Detainer Outcome Report or its equivalent and, on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.

(c) The Director of the Office of Management and Budget is directed to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction.

**Sec. 10. *Review of Previous Immigration Actions and Policies.*** (a) The Secretary shall immediately take all appropriate action to terminate the Priority Enforcement Program (PEP) described in the memorandum issued by the Secretary on November 20, 2014, and to reinstitute the immigration program known as “Secure Communities” referenced in that memorandum.

(b) The Secretary shall review agency regulations, policies, and procedures for consistency with this order and, if required, publish for notice and comment proposed regulations rescinding or revising any regulations inconsistent with this order and shall consider whether to withdraw or modify any inconsistent policies and procedures, as appropriate and consistent with the law.

(c) To protect our communities and better facilitate the identification, detention, and removal of criminal aliens within constitutional and statutory parameters, the Secretary shall consolidate and revise any applicable forms to more effectively communicate with recipient law enforcement agencies.

**Sec. 11. *Department of Justice Prosecutions of Immigration Violators.*** The Attorney General and the Secretary shall work together to develop and implement a program that ensures that adequate resources are devoted to the prosecution of criminal immigration offenses in the United States, and to develop cooperative strategies to reduce violent crime and the reach of transnational criminal organizations into the United States.

**Sec. 12. *Recalcitrant Countries.*** The Secretary of Homeland Security and the Secretary of State shall cooperate to effectively implement the sanctions provided by section 243(d) of the INA (8 U.S.C. 1253(d)), as appropriate. The Secretary of State shall, to the maximum extent permitted by law, ensure that diplomatic efforts and negotiations with foreign states include as a condition precedent the acceptance by those foreign states of their nationals who are subject to removal from the United States.

**Sec. 13. *Office for Victims of Crimes Committed by Removable Aliens.*** The Secretary shall direct the Director of U.S. Immigration and Customs Enforcement to take all appropriate and lawful action to establish within U.S. Immigration and Customs Enforcement an office to provide proactive, timely, adequate, and professional services to victims of crimes committed by removable aliens and the family members of such victims. This office shall provide quarterly reports studying the effects of the victimization by criminal aliens present in the United States.

**Sec. 14. *Privacy Act.*** Agencies shall, to the extent consistent with applicable law, ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information.

**Sec. 15. *Reporting.*** Except as otherwise provided in this order, the Secretary and the Attorney General shall each submit to the President a report on the progress of the directives contained in this order within 90 days of the date of this order and again within 180 days of the date of this order.

**Sec. 16. *Transparency.*** To promote the transparency and situational awareness of criminal aliens in the United States, the Secretary and the Attorney General are hereby directed to collect relevant data and provide quarterly reports on the following:

(a) the immigration status of all aliens incarcerated under the supervision of the Federal Bureau of Prisons;

(b) the immigration status of all aliens incarcerated as Federal pretrial detainees under the supervision of the United States Marshals Service; and

(c) the immigration status of all convicted aliens incarcerated in State prisons and local detention centers throughout the United States.

**Sec. 17. *Personnel Actions.*** The Office of Personnel Management shall take appropriate and lawful action to facilitate hiring personnel to implement this order.

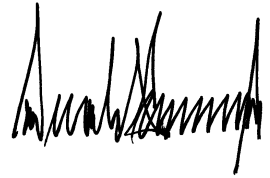
**Sec. 18. *General Provisions.*** (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

A handwritten signature in black ink, appearing to be "Donald Trump", located in the upper right quadrant of the page.

THE WHITE HOUSE,  
*January 25, 2017.*



# Presidential Documents

**Title 3—****Executive Order 13780 of March 6, 2017****The President****Protecting the Nation From Foreign Terrorist Entry Into the United States**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and section 301 of title 3, United States Code, and to protect the Nation from terrorist activities by foreign nationals admitted to the United States, it is hereby ordered as follows:

**Section 1. Policy and Purpose.** (a) It is the policy of the United States to protect its citizens from terrorist attacks, including those committed by foreign nationals. The screening and vetting protocols and procedures associated with the visa-issuance process and the United States Refugee Admissions Program (USRAP) play a crucial role in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States. It is therefore the policy of the United States to improve the screening and vetting protocols and procedures associated with the visa-issuance process and the USRAP.

(b) On January 27, 2017, to implement this policy, I issued Executive Order 13769 (Protecting the Nation from Foreign Terrorist Entry into the United States).

(i) Among other actions, Executive Order 13769 suspended for 90 days the entry of certain aliens from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. These are countries that had already been identified as presenting heightened concerns about terrorism and travel to the United States. Specifically, the suspension applied to countries referred to in, or designated under, section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), in which Congress restricted use of the Visa Waiver Program for nationals of, and aliens recently present in, (A) Iraq or Syria, (B) any country designated by the Secretary of State as a state sponsor of terrorism (currently Iran, Syria, and Sudan), and (C) any other country designated as a country of concern by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence. In 2016, the Secretary of Homeland Security designated Libya, Somalia, and Yemen as additional countries of concern for travel purposes, based on consideration of three statutory factors related to terrorism and national security: “(I) whether the presence of an alien in the country or area increases the likelihood that the alien is a credible threat to the national security of the United States; (II) whether a foreign terrorist organization has a significant presence in the country or area; and (III) whether the country or area is a safe haven for terrorists.” 8 U.S.C. 1187(a)(12)(D)(ii). Additionally, Members of Congress have expressed concerns about screening and vetting procedures following recent terrorist attacks in this country and in Europe.

(ii) In ordering the temporary suspension of entry described in subsection (b)(i) of this section, I exercised my authority under Article II of the Constitution and under section 212(f) of the INA, which provides in relevant part: “Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.”

8 U.S.C. 1182(f). Under these authorities, I determined that, for a brief period of 90 days, while existing screening and vetting procedures were under review, the entry into the United States of certain aliens from the seven identified countries—each afflicted by terrorism in a manner that compromised the ability of the United States to rely on normal decision-making procedures about travel to the United States—would be detrimental to the interests of the United States. Nonetheless, I permitted the Secretary of State and the Secretary of Homeland Security to grant case-by-case waivers when they determined that it was in the national interest to do so.

(iii) Executive Order 13769 also suspended the USRAP for 120 days. Terrorist groups have sought to infiltrate several nations through refugee programs. Accordingly, I temporarily suspended the USRAP pending a review of our procedures for screening and vetting refugees. Nonetheless, I permitted the Secretary of State and the Secretary of Homeland Security to jointly grant case-by-case waivers when they determined that it was in the national interest to do so.

(iv) Executive Order 13769 did not provide a basis for discriminating for or against members of any particular religion. While that order allowed for prioritization of refugee claims from members of persecuted religious minority groups, that priority applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion. That order was not motivated by animus toward any religion, but was instead intended to protect the ability of religious minorities—whoever they are and wherever they reside—to avail themselves of the USRAP in light of their particular challenges and circumstances.

(c) The implementation of Executive Order 13769 has been delayed by litigation. Most significantly, enforcement of critical provisions of that order has been temporarily halted by court orders that apply nationwide and extend even to foreign nationals with no prior or substantial connection to the United States. On February 9, 2017, the United States Court of Appeals for the Ninth Circuit declined to stay or narrow one such order pending the outcome of further judicial proceedings, while noting that the “political branches are far better equipped to make appropriate distinctions” about who should be covered by a suspension of entry or of refugee admissions.

(d) Nationals from the countries previously identified under section 217(a)(12) of the INA warrant additional scrutiny in connection with our immigration policies because the conditions in these countries present heightened threats. Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government’s willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States. Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents.

(e) The following are brief descriptions, taken in part from the Department of State’s *Country Reports on Terrorism 2015* (June 2016), of some of the conditions in six of the previously designated countries that demonstrate why their nationals continue to present heightened risks to the security of the United States:

(i) *Iran*. Iran has been designated as a state sponsor of terrorism since 1984 and continues to support various terrorist groups, including Hizballah, Hamas, and terrorist groups in Iraq. Iran has also been linked to support

for al-Qa'ida and has permitted al-Qa'ida to transport funds and fighters through Iran to Syria and South Asia. Iran does not cooperate with the United States in counterterrorism efforts.

(ii) *Libya*. Libya is an active combat zone, with hostilities between the internationally recognized government and its rivals. In many parts of the country, security and law enforcement functions are provided by armed militias rather than state institutions. Violent extremist groups, including the Islamic State of Iraq and Syria (ISIS), have exploited these conditions to expand their presence in the country. The Libyan government provides some cooperation with the United States' counterterrorism efforts, but it is unable to secure thousands of miles of its land and maritime borders, enabling the illicit flow of weapons, migrants, and foreign terrorist fighters. The United States Embassy in Libya suspended its operations in 2014.

(iii) *Somalia*. Portions of Somalia have been terrorist safe havens. Al-Shabaab, an al-Qa'ida-affiliated terrorist group, has operated in the country for years and continues to plan and mount operations within Somalia and in neighboring countries. Somalia has porous borders, and most countries do not recognize Somali identity documents. The Somali government cooperates with the United States in some counterterrorism operations but does not have the capacity to sustain military pressure on or to investigate suspected terrorists.

(iv) *Sudan*. Sudan has been designated as a state sponsor of terrorism since 1993 because of its support for international terrorist groups, including Hizballah and Hamas. Historically, Sudan provided safe havens for al-Qa'ida and other terrorist groups to meet and train. Although Sudan's support to al-Qa'ida has ceased and it provides some cooperation with the United States' counterterrorism efforts, elements of core al-Qa'ida and ISIS-linked terrorist groups remain active in the country.

(v) *Syria*. Syria has been designated as a state sponsor of terrorism since 1979. The Syrian government is engaged in an ongoing military conflict against ISIS and others for control of portions of the country. At the same time, Syria continues to support other terrorist groups. It has allowed or encouraged extremists to pass through its territory to enter Iraq. ISIS continues to attract foreign fighters to Syria and to use its base in Syria to plot or encourage attacks around the globe, including in the United States. The United States Embassy in Syria suspended its operations in 2012. Syria does not cooperate with the United States' counterterrorism efforts.

(vi) *Yemen*. Yemen is the site of an ongoing conflict between the incumbent government and the Houthi-led opposition. Both ISIS and a second group, al-Qa'ida in the Arabian Peninsula (AQAP), have exploited this conflict to expand their presence in Yemen and to carry out hundreds of attacks. Weapons and other materials smuggled across Yemen's porous borders are used to finance AQAP and other terrorist activities. In 2015, the United States Embassy in Yemen suspended its operations, and embassy staff were relocated out of the country. Yemen has been supportive of, but has not been able to cooperate fully with, the United States in counterterrorism efforts.

(f) In light of the conditions in these six countries, until the assessment of current screening and vetting procedures required by section 2 of this order is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high. Accordingly, while that assessment is ongoing, I am imposing a temporary pause on the entry of nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen, subject to categorical exceptions and case-by-case waivers, as described in section 3 of this order.

(g) Iraq presents a special case. Portions of Iraq remain active combat zones. Since 2014, ISIS has had dominant influence over significant territory in northern and central Iraq. Although that influence has been significantly

reduced due to the efforts and sacrifices of the Iraqi government and armed forces, working along with a United States-led coalition, the ongoing conflict has impacted the Iraqi government's capacity to secure its borders and to identify fraudulent travel documents. Nevertheless, the close cooperative relationship between the United States and the democratically elected Iraqi government, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combat ISIS justify different treatment for Iraq. In particular, those Iraqi government forces that have fought to regain more than half of the territory previously dominated by ISIS have shown steadfast determination and earned enduring respect as they battle an armed group that is the common enemy of Iraq and the United States. In addition, since Executive Order 13769 was issued, the Iraqi government has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal. Decisions about issuance of visas or granting admission to Iraqi nationals should be subjected to additional scrutiny to determine if applicants have connections with ISIS or other terrorist organizations, or otherwise pose a risk to either national security or public safety.

(h) Recent history shows that some of those who have entered the United States through our immigration system have proved to be threats to our national security. Since 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States. They have included not just persons who came here legally on visas but also individuals who first entered the country as refugees. For example, in January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses. And in October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon. The Attorney General has reported to me that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation.

(i) Given the foregoing, the entry into the United States of foreign nationals who may commit, aid, or support acts of terrorism remains a matter of grave concern. In light of the Ninth Circuit's observation that the political branches are better suited to determine the appropriate scope of any suspensions than are the courts, and in order to avoid spending additional time pursuing litigation, I am revoking Executive Order 13769 and replacing it with this order, which expressly excludes from the suspensions categories of aliens that have prompted judicial concerns and which clarifies or refines the approach to certain other issues or categories of affected aliens.

**Sec. 2. *Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period.*** (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat. The Secretary of Homeland Security may conclude that certain information is needed from particular countries even if it is not needed from every country.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the worldwide review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed from each country for adjudications and a list of countries that do not provide adequate information, within 20 days of the effective date of this order. The Secretary of Homeland Security

shall provide a copy of the report to the Secretary of State, the Attorney General, and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

(d) Upon submission of the report described in subsection (b) of this section regarding the information needed from each country for adjudications, the Secretary of State shall request that all foreign governments that do not supply such information regarding their nationals begin providing it within 50 days of notification.

(e) After the period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, shall submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means. The Secretary of State, the Attorney General, or the Secretary of Homeland Security may also submit to the President the names of additional countries for which any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States.

(f) At any point after the submission of the list described in subsection (e) of this section, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, may submit to the President the names of any additional countries recommended for similar treatment, as well as the names of any countries that they recommend should be removed from the scope of a proclamation described in subsection (e) of this section.

(g) The Secretary of State and the Secretary of Homeland Security shall submit to the President a joint report on the progress in implementing this order within 60 days of the effective date of this order, a second report within 90 days of the effective date of this order, a third report within 120 days of the effective date of this order, and a fourth report within 150 days of the effective date of this order.

**Sec. 3. Scope and Implementation of Suspension.**

(a) *Scope.* Subject to the exceptions set forth in subsection (b) of this section and any waiver under subsection (c) of this section, the suspension of entry pursuant to section 2 of this order shall apply only to foreign nationals of the designated countries who:

(i) are outside the United States on the effective date of this order;

(ii) did not have a valid visa at 5:00 p.m., eastern standard time on January 27, 2017; and

(iii) do not have a valid visa on the effective date of this order.

(b) *Exceptions.* The suspension of entry pursuant to section 2 of this order shall not apply to:

(i) any lawful permanent resident of the United States;

(ii) any foreign national who is admitted to or paroled into the United States on or after the effective date of this order;

(iii) any foreign national who has a document other than a visa, valid on the effective date of this order or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission, such as an advance parole document;

(iv) any dual national of a country designated under section 2 of this order when the individual is traveling on a passport issued by a non-designated country;

(v) any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa; or

(vi) any foreign national who has been granted asylum; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

(c) *Waivers.* Notwithstanding the suspension of entry pursuant to section 2 of this order, a consular officer, or, as appropriate, the Commissioner, U.S. Customs and Border Protection (CBP), or the Commissioner's delegatee, may, in the consular officer's or the CBP official's discretion, decide on a case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest. Unless otherwise specified by the Secretary of Homeland Security, any waiver issued by a consular officer as part of the visa issuance process will be effective both for the issuance of a visa and any subsequent entry on that visa, but will leave all other requirements for admission or entry unchanged. Case-by-case waivers could be appropriate in circumstances such as the following:

(i) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the effective date of this order, seeks to reenter the United States to resume that activity, and the denial of reentry during the suspension period would impair that activity;

(ii) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of this order for work, study, or other lawful activity;

(iii) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;

(iv) the foreign national seeks to enter the United States to visit or reside with a close family member (e.g., a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship;

(v) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

(vi) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government;

(vii) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 *et seq.*, traveling for purposes of conducting meetings or business with the United States Government, or traveling

to conduct business on behalf of an international organization not designated under the IOIA;

(viii) the foreign national is a landed Canadian immigrant who applies for a visa at a location within Canada; or

(ix) the foreign national is traveling as a United States Government-sponsored exchange visitor.

**Sec. 4. *Additional Inquiries Related to Nationals of Iraq.*** An application by any Iraqi national for a visa, admission, or other immigration benefit should be subjected to thorough review, including, as appropriate, consultation with a designee of the Secretary of Defense and use of the additional information that has been obtained in the context of the close U.S.-Iraqi security partnership, since Executive Order 13769 was issued, concerning individuals suspected of ties to ISIS or other terrorist organizations and individuals coming from territories controlled or formerly controlled by ISIS. Such review shall include consideration of whether the applicant has connections with ISIS or other terrorist organizations or with territory that is or has been under the dominant influence of ISIS, as well as any other information bearing on whether the applicant may be a threat to commit acts of terrorism or otherwise threaten the national security or public safety of the United States.

**Sec. 5. *Implementing Uniform Screening and Vetting Standards for All Immigration Programs.*** (a) The Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence shall implement a program, as part of the process for adjudications, to identify individuals who seek to enter the United States on a fraudulent basis, who support terrorism, violent extremism, acts of violence toward any group or class of people within the United States, or who present a risk of causing harm subsequent to their entry. This program shall include the development of a uniform baseline for screening and vetting standards and procedures, such as in-person interviews; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that applicants are who they claim to be; a mechanism to assess whether applicants may commit, aid, or support any kind of violent, criminal, or terrorist acts after entering the United States; and any other appropriate means for ensuring the proper collection of all information necessary for a rigorous evaluation of all grounds of inadmissibility or grounds for the denial of other immigration benefits.

(b) The Secretary of Homeland Security, in conjunction with the Secretary of State, the Attorney General, and the Director of National Intelligence, shall submit to the President an initial report on the progress of the program described in subsection (a) of this section within 60 days of the effective date of this order, a second report within 100 days of the effective date of this order, and a third report within 200 days of the effective date of this order.

**Sec. 6. *Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017.*** (a) The Secretary of State shall suspend travel of refugees into the United States under the USRAP, and the Secretary of Homeland Security shall suspend decisions on applications for refugee status, for 120 days after the effective date of this order, subject to waivers pursuant to subsection (c) of this section. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication processes to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. The suspension described in this subsection shall not apply to refugee applicants who, before the effective date of this order, have been formally scheduled for transit by the Department of State. The Secretary of State shall resume travel of refugees into the

United States under the USRAP 120 days after the effective date of this order, and the Secretary of Homeland Security shall resume making decisions on applications for refugee status only for stateless persons and nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that the additional procedures implemented pursuant to this subsection are adequate to ensure the security and welfare of the United States.

(b) Pursuant to section 212(f) of the INA, I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any entries in excess of that number until such time as I determine that additional entries would be in the national interest.

(c) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretary of State and the Secretary of Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the entry of such individuals as refugees is in the national interest and does not pose a threat to the security or welfare of the United States, including in circumstances such as the following: the individual's entry would enable the United States to conform its conduct to a preexisting international agreement or arrangement, or the denial of entry would cause undue hardship.

(d) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of State shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

**Sec. 7. *Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility.*** The Secretary of State and the Secretary of Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority permitted by section 212(d)(3)(B) of the INA, 8 U.S.C. 1182(d)(3)(B), relating to the terrorism grounds of inadmissibility, as well as any related implementing directives or guidance.

**Sec. 8. *Expedited Completion of the Biometric Entry-Exit Tracking System.***

(a) The Secretary of Homeland Security shall expedite the completion and implementation of a biometric entry-exit tracking system for in-scope travelers to the United States, as recommended by the National Commission on Terrorist Attacks Upon the United States.

(b) The Secretary of Homeland Security shall submit to the President periodic reports on the progress of the directive set forth in subsection (a) of this section. The initial report shall be submitted within 100 days of the effective date of this order, a second report shall be submitted within 200 days of the effective date of this order, and a third report shall be submitted within 365 days of the effective date of this order. The Secretary of Homeland Security shall submit further reports every 180 days thereafter until the system is fully deployed and operational.

**Sec. 9. *Visa Interview Security.*** (a) The Secretary of State shall immediately suspend the Visa Interview Waiver Program and ensure compliance with section 222 of the INA, 8 U.S.C. 1202, which requires that all individuals seeking a nonimmigrant visa undergo an in-person interview, subject to specific statutory exceptions. This suspension shall not apply to any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa; traveling for purposes related to an international organization designated under the IOIA; or traveling for purposes of conducting meetings or business with the United States Government.



(b) To the extent permitted by law and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program, including by substantially increasing the number of Fellows, lengthening or making permanent the period of service, and making language training at the Foreign Service Institute available to Fellows for assignment to posts outside of their area of core linguistic ability, to ensure that nonimmigrant visa-interview wait times are not unduly affected.

**Sec. 10. *Visa Validity Reciprocity.*** The Secretary of State shall review all nonimmigrant visa reciprocity agreements and arrangements to ensure that they are, with respect to each visa classification, truly reciprocal insofar as practicable with respect to validity period and fees, as required by sections 221(c) and 281 of the INA, 8 U.S.C. 1201(c) and 1351, and other treatment. If another country does not treat United States nationals seeking nonimmigrant visas in a truly reciprocal manner, the Secretary of State shall adjust the visa validity period, fee schedule, or other treatment to match the treatment of United States nationals by that foreign country, to the extent practicable.

**Sec. 11. *Transparency and Data Collection.*** (a) To be more transparent with the American people and to implement more effectively policies and practices that serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General, shall, consistent with applicable law and national security, collect and make publicly available the following information:

(i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation with or provision of material support to a terrorism-related organization, or any other national-security-related reasons;

(ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and who have engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States;

(iii) information regarding the number and types of acts of gender-based violence against women, including so-called “honor killings,” in the United States by foreign nationals; and

(iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security or the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

(b) The Secretary of Homeland Security shall release the initial report under subsection (a) of this section within 180 days of the effective date of this order and shall include information for the period from September 11, 2001, until the date of the initial report. Subsequent reports shall be issued every 180 days thereafter and reflect the period since the previous report.

**Sec. 12. *Enforcement.*** (a) The Secretary of State and the Secretary of Homeland Security shall consult with appropriate domestic and international partners, including countries and organizations, to ensure efficient, effective, and appropriate implementation of the actions directed in this order.

(b) In implementing this order, the Secretary of State and the Secretary of Homeland Security shall comply with all applicable laws and regulations, including, as appropriate, those providing an opportunity for individuals to claim a fear of persecution or torture, such as the credible fear determination for aliens covered by section 235(b)(1)(A) of the INA, 8 U.S.C. 1225(b)(1)(A).

(c) No immigrant or nonimmigrant visa issued before the effective date of this order shall be revoked pursuant to this order.

(d) Any individual whose visa was marked revoked or marked canceled as a result of Executive Order 13769 shall be entitled to a travel document confirming that the individual is permitted to travel to the United States and seek entry. Any prior cancellation or revocation of a visa that was solely pursuant to Executive Order 13769 shall not be the basis of inadmissibility for any future determination about entry or admissibility.

(e) This order shall not apply to an individual who has been granted asylum, to a refugee who has already been admitted to the United States, or to an individual granted withholding of removal or protection under the Convention Against Torture. Nothing in this order shall be construed to limit the ability of an individual to seek asylum, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States.

**Sec. 13. *Revocation.*** Executive Order 13769 of January 27, 2017, is revoked as of the effective date of this order.

**Sec. 14. *Effective Date.*** This order is effective at 12:01 a.m., eastern daylight time on March 16, 2017.

**Sec. 15. *Severability.*** (a) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its other provisions to any other persons or circumstances shall not be affected thereby.

(b) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid because of the lack of certain procedural requirements, the relevant executive branch officials shall implement those procedural requirements.

**Sec. 16. *General Provisions.*** (a) Nothing in this order shall be construed to impair or otherwise affect:

- (i) the authority granted by law to an executive department or agency, or the head thereof; or
- (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

A handwritten signature in black ink, appearing to be "Donald Trump", located in the upper right quadrant of the page.

THE WHITE HOUSE,  
*March 6, 2017.*

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

LINDA SARSOUR, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Civil Action No. 1:17cv00120 (AJT/IDD)
DONALD J. TRUMP, <i>et al.</i> ,	)	
	)	
Defendants.	)	
_____	)	

**MEMORANDUM OPINION**

Presently pending before the Court is Plaintiffs’ “Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction” [Doc. No. 13] (the “Motion”). The Court held a hearing on the Motion on March 21, 2017, following which it took the Motion under advisement. Upon consideration of the Motion, the memoranda in support thereof and in opposition thereto, the arguments of counsel at the hearing held on March 21, 2017, and for the reasons set forth below, the Motion is DENIED.<sup>1</sup>

**I. BACKGROUND**

The Plaintiffs seek an emergency order enjoining the enforcement of Executive Order 13,780 (“EO-2” or the “Order”), issued by President Donald J. Trump (“President Trump” or the “President”) on March 6, 2017 and scheduled to go into effect on March 16, 2017. Subject to a number of enumerated limitations, exemptions, and waivers, the Order suspends entry into the United States by nationals of six countries for 90 days and by all refugees for 120 days. EO-2

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<sup>1</sup> Both parties have urged the Court to decide the Motion on the merits. In particular, the Plaintiffs claim that given the nature of their Establishment Clause injuries, the harm inflicted by EO-2 is not confined to any particular provision and persists so long as any of its provisions continue to operate. Given the nature of Plaintiffs’ claims, the temporary and limited nature of the injunctions already issued, and the facts that appear to be particular to these Plaintiffs, the Court concludes that there remains a justiciable controversy ripe for adjudication and will therefore decide the Motion on its merits.

explicitly rescinds Executive Order 13,769 (“EO-1”), which similarly temporarily barred nationals from certain countries from obtaining visas or entering the United States but did not contain the exemptions and waivers now in EO-2 and also included certain religious preferences no longer in EO-2.

The ultimate issue in this action is whether the President exceeded his authority, either as delegated to him by Congress or as provided by the Constitution. But because Plaintiffs seek at the beginning of this case the relief they would ultimately obtain at the end of the case should they prove successful, Plaintiffs must show not only that (1) they are likely to succeed on the merits of their claim that EO-2 exceeded the President’s authority, but also that (2) without immediate injunctive relief, Plaintiffs face imminent irreparable harm; (3) the balance of equities, including the balance of hardships, weigh in their favor; and (4) issuance of the requested injunction on an emergency basis is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

## **A. Factual History**

### **1. Executive Order No. 1**

On January 27, 2017, President Trump issued Executive Order 13,769, titled “Protecting the Nation from Foreign Terrorist Entry into the United States,” 82 Fed. Reg. 8977 (Jan. 27, 2017). EO-1 immediately suspended immigrant and nonimmigrant entry into the United States for 90 days to aliens from Iraq, Iran, Libya, Sudan, Somalia, Syria, and Yemen. EO-1 also suspended the U.S. Refugee Admissions Program (“USRAP”) for 120 days, *id.* § 5(a), and suspended the entry of all refugees from Syria indefinitely, *id.* § 5(c). Furthermore, in screening refugees, government bodies were directed “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.” *Id.* § 5(b). The order provided for “case-by-case” exceptions to the 120-day refugee suspension. *Id.* § 5(f).

A group of plaintiffs including the State of Washington and the State of Minnesota challenged EO-1 on both constitutional and statutory grounds in the United States District Court for the Western District of Washington. *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). On February 3, 2017, the district court issued a nationwide injunction halting enforcement of the operative portions of that order, although it did not provide a specific basis for finding that the plaintiffs were likely to succeed on the merits. *Id.* On February 9, 2017, the United States Court of Appeals for the Ninth Circuit denied the defendants' emergency appeal to stay the district court's order, which it construed as a preliminary injunction. *Washington v. Trump*, 847 F.3d 1151, 1165-66 (9th Cir. 2017). The Ninth Circuit found that the defendants had not demonstrated a likelihood of success on the merits as to the plaintiffs' procedural due process claim, but it reserved judgment on the plaintiffs' Establishment Clause and Equal Protection Clause claims, noting that they “raise[d] serious allegations and present[ed] significant constitutional questions.” *Id.* at 1168.

Separately, on February 13, 2017, this Court enjoined the enforcement of section 3(c) only as to Virginia residents and students enrolled in state educational institutions located in the State of Virginia. *Aziz v. Trump*, No. 1:17-cv-116, --- F. Supp. 3d ---, 2017 WL 580855 (E.D. Va. Feb. 13, 2017) (Brinkema, J.). This Court ruled that the plaintiffs had clearly demonstrated a likelihood of success on the merits of their Establishment Clause claim, but it did not address their other claims. That injunction has not been appealed.

## 2. Executive Order No. 2

Responding to the successful legal challenges to EO-1, on March 6, 2017, President Trump issued EO-2. EO-2 explicitly rescinds EO-1 and was scheduled to go into effect on March 16, 2017 at 12:01 a.m. EDT. EO-2 has the same title as EO-1 and has many of the same stated policies and purposes. It also has substantial differences, as discussed in detail below. Briefly summarized, EO-2 removes Iraq from the list of designated countries whose nationals are covered by the Order, eliminates the indefinite suspension of all refugees from Syria, exempts otherwise covered persons who are located in the United States or who had appropriate travel documents as of the date on which EO-1 was issued, provides a list of categories where otherwise covered persons qualify for consideration of a waiver, and removes any religious-based preferences for waivers. The Order also contains substantially more justification for its national security concerns and the need for the Order, including why each particular designated country poses specific dangers.

Before the Order's effective date, the State of Hawaii and a United States citizen challenged the Order in the United States District Court for the District of Hawaii. On March 15, 2017, the Hawaii court issued a nationwide temporary restraining order ("TRO") enjoining the enforcement of sections 2 and 6 of EO-2. *Hawai'i v. Trump*, No. 1:17-cv-00050, 2017 WL 1011673 (D. Haw. Mar. 15, 2017). At the hearing in this action before this Court on March 21, 2017, Defendants represented that they expected the District of Hawaii court to extend the TRO, with their consent, until that court decides the pending motion for a preliminary injunction, a hearing on which has been scheduled for March 29, 2017.<sup>2</sup> The TRO has not been appealed.

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<sup>2</sup> The TRO did not have an expiration date, but it will expire on March 29, 2017, unless extended. *See* Fed. R. Civ. P. 65(b)(2) ("The order expires at the time after entry—not to exceed 14 days—that the court sets . . ."). Where the court has not set a specific time of expiration, the order simply expires fourteen days after entry.

A separate group of six individuals and three organizations challenged EO-2 in the United States District Court for the District of Maryland, alleging that it inflicted stigmatizing injuries as well as various other more particularized forms of harm. In an order signed on March 15, 2017 but entered on March 16, 2017, the Maryland court issued a nationwide preliminary injunction enjoining the enforcement of section 2(c) of EO-2. *Int'l Refugee Assist. Proj. v. Trump*, No. 8:17-cv-00361-TDC, --- F. Supp. 3d ---, 2017 WL 1018235 (D. Md. Mar. 16, 2017).

Litigation in the Western District of Washington also continues. In that case, Plaintiffs filed an emergency motion to enforce the court's February 3, 2017 preliminary injunction of EO-1. The district court rejected that motion, finding that EO-2 did not violate the court's prior preliminary injunction because EO-2 is substantively different from EO-1. Order Denying Washington's Emergency Motion to Enforce the Preliminary Injunction, *Washington v. Trump*, No. C17-0141JLR (W.D. Wash. Mar. 16, 2017), ECF No. 163.

By way of summary, at this point, the District of Hawaii court's TRO remains in effect as to sections 2 and 6 of the Order until March 29, 2017, and the District of Maryland court's preliminary injunction remains in effect as to section 2(c) of the Order. All other sections of EO-2 are in force at this time. Plaintiffs in this litigation ask this Court to enjoin the enforcement of EO-2 in its entirety.

#### **B. Plaintiffs Who Move for Emergency Relief**

All Plaintiffs are Muslims who are presently residing in various locations across the country and claim that they have been harmed by the issuance of EO-2 in a variety of ways. Among the injuries they allege is the harm created by a stigma against Muslims living in the United States. Specifically, they claim that as a result of Defendants' conduct, beginning with the initial announcement of the "Muslim Ban," Defendants have promoted views that (1)



disfavor and condemn their religion of Islam; (2) marginalize and exclude Muslims, including themselves, based on the claim that Muslims are disposed to commit acts of terrorism; (3) endorse other religions and nonreligion over Islam; (4) Muslims are outsiders, dangerous, and not full members of the political community; and (5) all non-adherents of Islam are insiders and therefore favored. Amended Complaint [Doc. No. 11] (“AC”) ¶¶ 20-38. In addition, Plaintiffs allege a range of other injuries based on each’s particular status in the United States and each’s relationships with persons outside of the United States. The following eight Plaintiffs have joined in the Motion.<sup>3</sup>

Plaintiffs Basim Elkarra, Hussam Ayloush, and Adam Soltani are United States citizens who allegedly “are no longer able to bring their family members from Syria and Iran to visit them in the United States as a direct result of the Revised Muslim Ban [EO-2] as they otherwise would.” Plaintiffs’ Motion (“Pls.’ Mot.”) 6. They further allege that, as “prominent civil rights and grassroots activists,” they “have had to change their conduct adversely in that they have been required to assist and advocate on behalf of Muslims targeted or stigmatized by the First Muslim Ban [EO-1], push back against the anti-Muslim sentiment fomented and legitimized by Defendants, and defend their religion as a religion of peace on national media outlets and through grassroots efforts.” *Id.*

Plaintiff John Doe No. 6 is also a United States citizen. He recently filed a marriage petition for his Sudanese wife currently residing outside of the United States, which he claimed would be “subjected to a more onerous application process that will require her to make heightened showings to obtain a waiver from the Revised Muslim Ban [EO-2], pursuant to Sec. 3(c)(iv) of the Revised Muslim ban, based solely on her Sudanese national origin.” *Id.* 6-7. That

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<sup>3</sup> Plaintiffs John Doe No. 5 is a Sudanese national and lawful permanent resident of the United States who initially joined in the presently pending Motion; however, on March 21, 2017, he withdrew his Motion. [Doc. No. 31.]

petition was approved while this Motion was pending, however, [*see* Doc. No. 31], and her visa application is now pending.

Plaintiffs John Doe Nos. 7 and 8 are lawful permanent residents of the United States. John Doe No. 7 is a Syrian national, and John Doe No. 8 is a Sudanese national. John Doe No. 7 filed a marriage petition for his wife, which is currently pending. John Doe No. 8 also filed a marriage petition for his wife, which was approved, but her visa application remains pending. These three Plaintiffs allege that under EO-2, “their wives’ visa applications will be subject to a more onerous application process that will require [them] to make heightened showings to obtain a waiver from the Revised Muslim Ban.” *Id.* 7.

Plaintiffs John Doe Nos. 2 and 3 are students of Somali and Yemeni national origin who were issued single-entry F-1 student visas which expire upon completion of their studies. They allege that they intended to travel outside of the United States but that, if they do so now, they “will be subjected to a more onerous application process that will require them to make heightened showings to obtain a waiver.” *Id.* They claim that this inability to travel imposes a hardship because they are additionally deprived of the opportunity to see their families, and they may not be able to stay in student housing during school breaks. *Id.* 7-8.

### **C. Procedural History**

President Trump issued EO-1 on January 27, 2017. Three days later, on January 30, 2017, Plaintiffs filed their Complaint for Injunctive and Declaratory Relief [Doc. No.1] against President Trump, Secretary of the Department of Homeland Security John F. Kelly, the U.S. Department of State, and the Director of National Intelligence.<sup>4</sup> Then, on March 13, 2017,<sup>5</sup> after

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<sup>4</sup> On February 3, 2017 and February 27, 2017, three separate motions to intervene were filed by *pro se* movants Janice Wolk Grenadier [Doc. No. 2], Raquel Okyay [Doc. No. 4], and Vincent A. Molino [Doc. No. 8]. The Court denied each of these motions. [Doc. Nos. 5, 10.]

President Trump's March 6, 2017 issuance of EO-2, which explicitly rescinded EO-1, Plaintiffs filed their Amended Complaint for Injunctive and Declaratory Relief [Doc. No. 11] as well as their presently pending "Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction" [Doc. No. 13].

## II. LEGAL STANDARD

Federal Rule of Civil Procedure 65 authorizes federal courts to issue temporary restraining orders and preliminary injunctions. "The standard for granting either a TRO or a preliminary injunction is the same." *Moore v. Kempthorne*, 464 F. Supp. 2d 519, 525 (E.D. Va. 2006) (citation omitted) (internal quotation marks omitted). Both are "extraordinary remedies involving the exercise of a very far-reaching power to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola*, 245 F.3d 335, 339 (4th Cir. 2001). The movants bear the burden to establish that (1) they are likely to succeed on the merits of their case; (2) they are likely to suffer irreparable harm in the absence of injunctive relief; (3) the balance of the equities tips in their favor; and (4) an injunction would be in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *Manning v. Hunt*, 119 F.3d 254, 263 (4th Cir. 1997); *see also Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013).

## III. ANALYSIS

### A. Standing

In order to obtain the requested injunction, Plaintiffs must first demonstrate that they have standing to challenge EO-2. Defendants dispute that any of the Plaintiffs have standing. "Standing doctrine functions to ensure, among other things, that the scarce resources of the

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<sup>5</sup> In their Motion, Plaintiffs incorrectly claim that they filed their Amended Complaint on March 10, 2017. *See* Def.'s Mot. 8. The Amended Complaint is dated "March 13, 2017," *see* AC 53, and the Court's CM/ECF electronic case filing system also indicates that the document was electronically filed on March 13, 2017.

federal courts are devoted to those disputes in which the parties have a concrete stake.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191. To establish standing, a plaintiff must set forth specific facts to demonstrate that (1) he has “suffered an ‘injury in fact’ . . . which is (a) concrete and particularized . . . and (b) ‘actual or imminent, not conjectural or hypothetical’”; (2) there exists “a causal connection between the injury and the conduct complained of”; and (3) “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). Plaintiffs must demonstrate standing for every claim, but a claim is justiciable if even only one Plaintiff has standing to raise it. *Bostic v. Schaefer*, 760 F.3d 352, 370-71 (4th Cir. 2014).

Because of the nature of Plaintiffs’ statutory and constitutional claims, their showing of standing may be based on subjective, non-economic, or intangible injuries. *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997) (“[R]ules of standing recognize that noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable.”); *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 605 (4th Cir. 2012) (“[P]laintiffs have been found to possess standing when they are ‘spiritual[ly] affront[ed]’ as a result of ‘direct’ and ‘unwelcome’ contact with an alleged religious establishment within their community.” (quoting *Suhre*, 131 F.3d at 1086-87)); *Bostic*, 760 F.3d at 372 (Equal Protection Clause challenges, like Establishment Clause challenges, can be premised on “stigmatic injury stemming from discriminatory treatment.”). However, the allegation of injury in the form of a stigma alone is insufficient to support standing; there must also be a “cognizable injury caused by personal contact [with the offensive conduct].” *Suhre*, 131 F.3d at 1090; *see also Moss*, 683 F.3d at 607 (finding standing where plaintiffs alleged “outsider” status after having received a letter from

their school district promoting a “course of religious education [with] Christian content” and “prayers and other Christian references [at] school events”).

In this case, all Plaintiffs claim that in addition to the stigma that the Order has imposed on them as Muslims, they have suffered “cognizable injury caused by personal contact” because EO-2 prevents or impermissibly burdens their ability to (1) reunite with their foreign national spouses or other relatives; (2) travel internationally without fear of forfeiting their own visas; (3) renew their visas without being subjected to a heightened standard of review; and (4) attend other life activities without the need to combat the pernicious effects of EO-2 through religious advocacy and outreach. Based on these alleged injuries and the facts that have been presented, the Court finds for the purposes of the Motion that Plaintiffs have made a sufficient showing that they have standing to challenge EO-2.

#### **B. Plaintiffs’ Likelihood of Success on the Merits**

Section 2(c) of EO-2 suspends the entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen for 90 days, subject to the limitations, exemptions, and waivers in sections 3 and 12. Section 6 of EO-2 suspends decisions on applications for refugee status worldwide for 120 days, subject to waivers issued under section 6(c). Plaintiffs seek to enjoin EO-2 in its entirety on the grounds that all or parts of the Order exceed the President’s statutory or constitutional authority and that, in any event, the Order, as a whole, has the unconstitutional effect of imposing upon them a stigma based on their status as Muslims.

“[A] party seeking a preliminary injunction . . . must clearly show that it is likely to succeed on the merits.”<sup>6</sup> *Dewhurst v. Century Alum. Co.*, 649 F.3d 287, 290 (4th Cir. 2011).

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<sup>6</sup> Plaintiffs claim that “a showing of likelihood of success on the merits is required ‘only if there is no imbalance of hardships in favor of the plaintiff.’” Pls.’ Mot. 12 (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 808 (4th Cir. 1991)). After the Supreme Court’s decision in *Winter* in 2008, the Fourth Circuit concluded that “[o]ur . . . standard in several respects [as stated in *Direx Israel, Ltd.*] now stands in fatal tension with the Supreme

The “requirement . . . is far stricter than . . . [a] requirement that the plaintiff demonstrate only a grave or serious *question* for litigation.” *Real Truth About Obama, Inc. v. F.E.C.*, 575 F.3d 342, 346-47 (4th Cir. 2009), *judgment vacated on other grounds*, 559 U.S. 1089 (2010), and *adhered to in relevant part*, 607 F.3d 355 (4th Cir. 2010).<sup>7</sup> In determining whether the Plaintiffs have made the required showing, the issue is not whether EO-2 is wise, necessary, under- or over-inclusive, or even fair. It is not whether EO-2 could have been more usefully directed to populations living in particular geographical areas presenting even greater threats to national security or even whether it is politically motivated. Rather, the core substantive issue of law, as to which Plaintiffs must establish a clear likelihood of success, is whether EO-2 falls within the bounds of the President’s statutory authority or whether the President has exercised that authority in violation of constitutional restraints.

**1. Plaintiffs’ Claim that EO-2 Violates the Immigration and Nationality Act (Count IV)<sup>8</sup>**

Plaintiffs claim that section 2(c) of EO-2 bars entry into the United States based on nationality and therefore violates the Immigration and Nationality Act of 1952 (“INA”), Pub. L. No. 82-414, 66 Stat. 163, 8 U.S.C. §§ 1101-1537 (2012). Plaintiffs argue that 8 U.S.C. § 1152(a)(1)(A) (“Section 1152”) bars EO-2. Defendants claim that the President’s broad

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Court’s 2008 decision in *Winter*. . . [T]he . . . balance-of-hardship test may no longer be applied in granting or denying preliminary injunctions in the Fourth Circuit.” *Real Truth About Obama, Inc. v. F.E.C.*, 575 F.3d 342, 346-47 (4th Cir. 2009), *judgment vacated on other grounds*, 559 U.S. 1089 (2010).

<sup>7</sup> The Supreme Court vacated the Fourth Circuit’s opinion in *Real Truth About Obama, Inc.* following its opinion in *Citizens United v. F.E.C.*, 558 U.S. 310 (2010), and remanded to the Fourth Circuit “for ‘further consideration in light of *Citizens United* and the Solicitor General’s suggestion of mootness.’” *Real Truth About Obama, Inc. v. F.E.C.*, 607 F.3d 355 (4th Cir. 2010) (quoting *Real Truth About Obama, Inc. v. F.E.C.*, 559 U.S. 1089 (2010)). In a published order issued per curiam, the Fourth Circuit reissued Parts I and II of its earlier opinion, “stating the facts and articulating the standard for the issuance of preliminary injunctions,” and remanded the case to the district court for further consideration in accordance with the Supreme Court’s directive.

<sup>8</sup> Plaintiffs’ labelling of this claim as “Count V” in their Amended Complaint appears to be a typo, as there is no Count IV. *See* AC 50.

authority under 8 U.S.C. § 1182(f) (“Section 1182(f)”) to bar entry of “any aliens or class of aliens” is not restricted by Section 1152.<sup>9</sup>

Congress has the exclusive constitutional authority to create immigration policies. *See Galvan v. Press*, 347 U.S. 522, 531 (1954).<sup>10</sup> In exercising that authority, Congress has enacted (and repealed) a wide variety of immigration statutes over the years, with a wide variety of restrictions and authorizations. As a result, the current version of the INA, a comprehensive statute governing immigration and the treatment of aliens originally passed in 1952, is a legislative rabbit warren that is not easily navigated.

Section 1182(a)(3)(B) identifies those aliens seeking to enter the United States who are “inadmissible” because of certain identified activities related to terrorism. These aliens include, with certain exceptions, aliens who have engaged in “terrorist activities,” are reasonably believed to be engaged or “likely to engage after entry in any terrorist activities,” are representatives of a terrorist organization, endorse or espouses terrorist activities or persuade others to do so, have received military-type training from a terrorist organization, or are the spouses or children of an alien who is inadmissible. 8 U.S.C. § 1182(a)(3)(B)(i). “Terrorist activity” is defined broadly. *See id.* § 1182(a)(3)(B)(iii).

In addition to the specific criteria for inadmissibility set forth in Section 1182(a)(3)(B), Section 1182(f), which was also passed in 1952, delegates broad authority to the President to bar entry into the United States of “any aliens or class of aliens.” More specifically, Section 1182(f) provides that:

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<sup>9</sup> The Court will first assess Plaintiffs’ statutory claims pursuant to its obligation to avoid constitutional rulings whenever possible. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”).

<sup>10</sup> Defendants contend that the President has Article II authority, as well as statutory authority, to issue EO-2. Given the Court’s ruling, there is no need to consider the merits of Defendants’ Article II contentions.

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

*Id.* § 1182(f). 8 U.S.C. § 1185(a) (“Section 1185(a)”), passed in 1978, further delegates authority to the President:

Unless otherwise ordered by the President, it shall be unlawful for an alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.

*Id.* § 1185(a)(1). President Trump relies explicitly on his authority under Section 1182(f) and Section 1185(a) to suspend the entry of all nationals from the six designated countries for 90 days as well as to suspend the entry of all refugees under the United States Refugee Admissions Program for 120 days. EO-2 §§ 2(c), 6.

In 1965, Congress amended the INA to prohibit certain types of discrimination in connection with the issuance of immigrant visas. Section 1152 provides:

No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence.

8 U.S.C. § 1152(a)(1)(A). Plaintiffs rely centrally on this provision to argue that the President’s exercise of his authority under Sections 1182(f) and 1185(a) is limited and restricted by the non-discrimination provision in Section 1152.

8 U.S.C. § 1201(h) (“Section 1201(h)”) is also relevant. In pertinent part, it provides:

Nothing in [the INA] shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted the United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this chapter, or any other provision of law.



*Id.* § 1201(h). So as to leave no doubt as to the scope of entitlement granted by the issuance of an immigrant visa, Congress mandated that the text of this provision “appear upon every visa application.” *Id.*

Plaintiffs urge this Court to conclude that section 2(c) of EO-2 discriminates on the basis of nationality and is therefore prohibited by Section 1152. Plaintiffs argue in this regard that because this non-discrimination section was added after Section 1182(f), Congress intended that it supersede Section 1182(f) to the extent the two sections conflict. Plaintiffs argue in support of this position that, historically, presidents have used Section 1182(f) only to prohibit the issuance of visas to classes of applicants that are not subject to Section 1152. *See* Pls.’ Mot. 27-28. Plaintiffs also contend that because, when applicable, Section 1152(a) applies to any assessment of the terrorism related grounds for inadmissibility under Section 1182(a)(3)(B), Section 1152(a)’s non-discrimination restrictions must also be read to apply to the President’s exercise of authority under Section 1182(f) and 1185(a), at least in so far as that authority is exercised to bar entry based on terrorism concerns. For all these reasons, Plaintiffs claim that Congress foreclosed the President’s ability to make national security determinations on the basis of criteria prohibited under Section 1152.

In response to Plaintiffs’ position, Defendants see presidential authority and authorizations in Sections 1182(f) and 1185(a) unaffected by Section 1152 and contend that the President’s authority under those sections “comfortably encompass the Order’s temporary suspension of entry of aliens from six countries.” Defendant’s Memorandum in Opposition to Plaintiffs’ Motion [Doc. No. 22] (“Defs.’ Mem. Opp’n”) 17. They contend, in this regard, that Section 1185(a) was enacted after Section 1152 and that, in any event, Section 1152 prohibits discrimination only in the issuance of an *immigration* – not a *non-immigration* – visa “in the

ordinary process of visas and admissions.” *Id.* 18. Section 1152 “does not purport to, and has never been interpreted to restrict, the President’s longstanding authority [under Sections 1182(f) or 1185(a)].” *Id.* Defendants further contend that since most of the aliens that Plaintiffs claim will be affected by EO-2 – students, employees, tourists, refugees, and family – would seek to obtain *non*-immigrant visas, any limitations imposed by Section 1152 would not extend to the President’s authority to bar entry of that class of aliens seeking non-immigration visas.

In construing the proper scope of the President’s statutory authority, the Court has reviewed the text and structure of the INA as a whole and, specifically, the practical, operational relationship each of the above referenced provisions has with the others. Based on that analysis, the Court concludes, at a minimum, that Section 1152’s non-discrimination restrictions, which apply in connection with the issuance of immigrant visas, do not apply to the issuance or denial of non-immigrant visas or entry under Section 1182(f).<sup>12</sup>

The Court also has substantial doubts that Section 1152 can be reasonably read to impose any restrictions on the President’s exercise of his authority under Sections 1182(f) or 1185(a). Under those sections, the President has unqualified authority to bar physical entry to the United States at the border. Sections 1182(f) and 1152(a) deal with different aspects of the immigration process, and Section 1201(h) makes clear that while clearly related, the process of issuing a visa, and the rules and regulations related thereto, involves an aspect of the immigration process that is separate and distinct from the process of actually permitting entry into the country. There is nothing in the legislative scheme to suggest that Congress intended Section 1152 to restrict the exercise of the President’s unqualified authority under Section 1182(f) with respect to a

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<sup>12</sup> The District of Maryland court attempted to reconcile these seemingly contradictory provisions of the INA in *International Refugee Assistance Project*. There, the court concluded that Section 1152 bars the President from discriminating on the basis of nationality in the issuance of immigrant visas only. *Int’l Refugee Assist. Proj.*, 2017 WL 1018235, at \*10.

completely distinct aspect of the immigration process. To do so would appear to make Section 1201(h) all but meaningless. Likewise, the Court sees little merit to Plaintiffs' argument that because there are specific grounds for inadmissibility in Section 1182(a)(3)(B) based on terrorist activities, the President is foreclosed from barring entry of "aliens or classes of aliens" under Section 1182(f) based on national security concerns related to terrorism. Nothing in the text of Section 1182(a)(3)(B) or any other provision of the INA suggests that an alien may be barred from entering the United States on terrorism grounds only through the regular visa application process. This provision simply provides grounds that establish *per se* ineligibility to receive a visa or to be admitted into the country. It also shows that Congress knows how to make a provision applicable to both the visa decision and the entry decision when it so intends and that the two aspects of immigration are distinct. *See* 8 U.S.C. § 1182(a) ("Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States . . .").

For the above reasons, the Court cannot say at this point in the litigation that Plaintiffs have clearly shown that the President's authority under Section 1182(f) and 1185(a) is limited by Section 1152 with respect to either immigrant or non-immigrant visas. Plaintiffs have therefore not demonstrated that they are likely to succeed on the merits of their INA statutory claim even if EO-2 discriminates on the basis of nationality (Count IV).

## **2. Plaintiffs' Claim that EO-2 Constitutes Unlawful Agency Action Under the Administrative Procedures Act (Count III)**

Plaintiffs claim that the issuance of EO-2 violates the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706 (2012). Although the APA defines an "agency" broadly to include "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," 5 U.S.C. § 701, this definition is not broad enough to

include the Office of the President. The Supreme Court has explicitly found that “the President’s actions [a]re not reviewable under the APA, because the President is not an ‘agency’ within the meaning of the APA.” *Dalton v. Specter*, 511 U.S. 462, 469 (1994); *see also Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) (“Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA.”). Accordingly, because President Trump’s issuance of EO-2 is not reviewable under the APA, Plaintiffs have not demonstrated that they are likely to succeed on the merits as to their unlawful agency action claim (Count III).

### **3. Plaintiffs’ Claim that EO-2 Violates the Establishment Clause (Count I)**

Plaintiffs also allege that EO-2 violates the Establishment Clause because it disfavors the religion of Islam.<sup>13</sup> The First Amendment prohibits any “law respecting an establishment of religion,” U.S. Const. amend. I, and “mandates governmental neutrality between religion and religion, and between religion and nonreligion.” *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). If an act is discriminatory on its face, then it will be subject to strict scrutiny. *Larson v. Valente*, 456 U.S. 228, 246, 255 (1982). If it is not discriminatory on its face, then courts typically apply a three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) to determine whether the act violates the Establishment Clause.<sup>14</sup>

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<sup>13</sup> As a threshold matter, there remain open issues concerning to what extent recognized Establishment Clause principles and prohibitions developed over time with respect to domestic government conduct transfer seamlessly in application to restrict government conduct touching upon national security matters, including immigration and the treatment of aliens with no claim to citizenship or other immigration benefits. Nevertheless, for the purpose of this Motion, and because the Plaintiffs invoke the Establishment Clause based on their personal status as U.S. citizens or as lawful residents of the United States, the Court assumes, without deciding, that the President’s exercise of his authority to issue EO-2 is circumscribed by settled Establishment Clause principles.

<sup>14</sup> There is one additional test to find a violation of the Establishment Clause, which has only once been invoked and is not relevant to this litigation. Regardless of whether a government action is facially neutral, that action will be found constitutional where there is “unambiguous and unbroken history” that unequivocally demonstrates the Framers’ intent that the Establishment Clause not prohibit the government action. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (finding the opening of congressional session with a prayer constitutional).

The text of EO-2, unlike that of EO-1, makes no mention of religion as a criterion for benefits or burdens. Nevertheless, Plaintiffs maintained at the hearing that EO-2, section 1(f), which articulates President Trump's rationale behind the Order, is nevertheless discriminatory on its face because the national security risk referenced to justify EO-2 in that section is demonstrably false and EO-2's plain language therefore betrays the Order's discriminatory intent.

As an initial matter, and as Plaintiffs concede in their brief, the language of EO-2 is facially neutral. *See* Pls' Mot. 5 (“[EO-2] creates a framework that although neutral on its face, carries through the same invidious intent insofar it essentially seeks to preserve a portion of the First Muslim Ban [EO-1].”). To be facially neutral simply means that there is no discrimination in “that which is shown by the mere language employed, without any explanation, modification, or addition from extrinsic facts or evidence.” *Face, Black's Law Dictionary* (10th ed. 2014). Discrimination based on religion cannot be inferred from the language EO-2 employs. EO-2 draws no “explicit and deliberate distinctions” based on religion. *See Larson v. Valente*, 456 U.S. 228, 262 (1982). Moreover, the Court sees no basis for the claim that EO-2's stated and referenced justifications are “demonstrably false,” and no inference of religious discrimination can be reasonably inferred from those justifications. EO-2 is therefore “facially neutral,” and the Court applies the *Lemon* test to assess its constitutional validity under the Establishment Clause of the First Amendment.

Under the *Lemon* test, to withstand an Establishment Clause challenge, the government action (1) “must have a secular legislative purpose,” (2) “its principal or primary effect must be one that neither advances nor inhibits religion,” and (3) “the statute must not foster ‘an excessive government entanglement with religion.’” *Lemon*, 403 U.S. at 612-13 (quoting *Walz v. Tax*

*Comm’n of City of N.Y.*, 397 U.S. 664, 668 (1970) (internal citation omitted). Plaintiffs do not contend that EO-2 fails to satisfy the second or third prongs of the *Lemon* test, and the Court only needs to consider whether EO-2 has a secular purpose.

EO-2 clearly has a stated secular purpose: the “protect[ion of United States] citizens from terrorist attacks, including those committed by foreign nationals.” EO-2 § 1(a). It also details the overall policy and purpose for the Order. *See id.* (“The screening and vetting protocols and procedures associated with the visa-issuance process and the United States Refugee Admissions Program (USRAP) play a crucial role in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States. It is therefore the policy of the United States to improve the screening and vetting protocols and procedures associated the visa-issuance process and the USRAP.”); *id.* § 2(c) (explaining that the suspensions are needed “[t]o temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order”). The Court must therefore first determine to what extent and on what basis it will look behind the Order’s stated secular purpose and justification to determine whether EO-2 constitutes a subterfuge or pretext for a true purpose of religious discrimination. The Plaintiffs contend in that regard that the Court must consider what they claim is a long and unbroken stream of anti-Muslim statements made by both candidate Trump and President Trump, as well as his close advisors, which, taken together, makes clear that EO-1 and EO-2 are nothing more than subterfuges for religious discrimination against Muslims. Defendants contend that given the

clearly articulated secular purpose and national security related justifications in EO-2, the Court should not consider any such statements and end its inquiry at the text of EO-2.

In determining how to proceed, the Court is cast upon cross jurisprudential currents. On the one hand, this prong of the *Lemon* analysis “contemplates an inquiry into the subjective intentions of the government.” *Mellen v. Bunting*, 327 F.3d 355, 372 (4th Cir. 2003). On the other hand, the Supreme Court has repeatedly cautioned that in the immigration context, a court should not “look behind the exercise of [Executive Branch] discretion” when exercised “on the basis of a facially legitimate and bona fide reason.” *Kliendienst v. Mandel*, 408 U.S. 753, 770 (1972). In *Mandel*, the Supreme Court recognized that First Amendment rights were implicated in the government’s denial of a visa to an invited foreign lecturer. Nevertheless, and even though the government did not attempt to justify that denial on national security grounds, the Supreme Court concluded that where the government has provided a facially legitimate and bona fide reason, “the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who [claim they are injured by the visa denial].” *Id.*; see also *Fiallo v. Bell*, 430 U.S. 787, 795 (1977) (confirming that a broad “policy choice” is to be reviewed under the same “standard . . . applied in[]*Mandel*”). As reflected in these rulings, a court must extend substantial deference to the government’s facially legitimate and non-discriminatory stated purposes. See, e.g., *Appiah v. U.S. I.N.S.*, 202 F.3d 704, 710 (4th Cir. 2000) (“The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the president in the area of immigration and naturalization.” (quoting *Matthews v. Diaz*, 426 U.S. 67, 81-82 (1976))).

Since *Mandel* and *Fiallo*, the Supreme Court has counseled that the focus of a district court's inquiry should be on whether the stated purpose "was an apparent sham, or the secular purpose secondary." *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 865 (2005) (While courts "often . . . accept governmental statements of purpose, in keeping with the respect owed in the first instance to such official claims, . . . in those unusual cases where the claim was an apparent sham, or the secular purpose secondary, the unsurprising results have been findings of no adequate secular object."). It also directs that a court must develop an "an understanding of official objective . . . from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." *Id.* at 862. Based on these principles, the Court rejects the Defendants' position that since President Trump has offered a legitimate, rational, and non-discriminatory purpose stated in EO-2, this Court must confine its analysis of the constitutional validity of EO-2 to the four corners of the Order. The Court has therefore carefully assessed President Trump's facially legitimate national security basis for EO-2 against the backdrop of all of the statements the President and his closest advisors have made.<sup>15</sup>

When this Court reviewed and enjoined EO-1, "the question [wa]s whether the [order] was animated by national security concerns at all." *Aziz*, 2017 WL 580855, at \*10 (Brinkema, J.). President Trump and his advisors made statements that allowed the inference that the President's purpose in exercising his authority under Section 1182(f) to issue EO-1 was to impose burdens wholesale on people who subscribe to the Islamic faith, *viz.*, a "Muslim Ban." That possible purpose was also reflected in the text and structure of EO-1, which contained language that, when considered in connection with public statements, suggested that Christians

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<sup>15</sup> These statements are recounted in detail in Plaintiffs' briefs and the opinions of those courts that have enjoined the enforcement of EO-1 and EO-2. See *Hawai'i v. Trump*, No. 1:17-cv-00050, 2017 WL 1011673, at \*13-15 (D. Haw. Mar. 15, 2017); *Int'l Refugee Assist. Proj. v. Trump*, No. 8:17-cv-00361-TDC, --- F. Supp. 3d ---, 2017 WL 1018235, at \*3-4 (D. Md. Mar. 16, 2017); *Aziz v. Trump*, --- F. Supp. 3d ---, No. 1:17-cv-116, 2017 WL 580855, at \*3-5 (E.D. Va. Feb. 13, 2017).



would be given a benefit not available to Muslims. EO-2 is materially different in structure, text, and effect from EO-1 and has addressed the concerns raised not only by this Court but also by other courts that reviewed and enjoined EO-1. EO-2 was not rushed into immediate effect but, rather, was issued ten days before its effective date, permitting government bodies to better prepare for its effective implementation. It does not indefinitely suspend the entry of refugees from Syria, and it applies to all refugees, no matter where they are located. It does not direct that preference be given to any particular religion or group of religion over any other.

EO-2 also effectively excludes large categories of otherwise covered nationals from the relatively short suspension of any right to enter the United States. For example, section 3(a) limits the scope of section 2(c) to aliens who were not in the United States on the Order's effective date and who did not have a valid visa on that date or on the effective date of EO-1.<sup>16</sup> Under section 3(b), all of the Plaintiffs involved in this litigation are exempted from the reach of the Order. Similarly, under section 12(c) and (d), all immigrant and non-immigrant visas issued before the issuance of EO-2, including those marked revoked or cancelled pursuant to EO-1, are valid and reinstated. EO-2 also contains multiple circumstances and categories under which consular officials are permitted to grant case-specific waivers to coverage under section 2(c) or section 6(a).<sup>17</sup> EO-2 §§ 3(c), 6(c). Iraq is eliminated from the list of suspended countries because “the Iraqi government has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal” since

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<sup>16</sup> Other groups of aliens whose inclusion in the scope of EO-1 concerned the Ninth Circuit are similarly excluded from the scope of EO-2, including legal permanent residence, foreign nationals admitted to or paroled into the United States, foreign nationals granted asylum, refugees already admitted to the United States, and people granted particular forms of protection from removal. EO-2 § 3(b).

<sup>17</sup> This list includes, *inter alia*, foreign nationals previously “admitted to the United States for a continuous period of work, study, or other long-term activity” but who currently reside outside of the United States and seek to re-enter; those who seek entry for “significant business or professional obligations and the denial of entry would impair those obligations”; and those who seek entry “to visit or reside with a close family member (e.g., a spouse, child, or parent) who is a [U.S.] citizen, legal permanent resident, or alien lawfully admitted on a valid nonimmigrant visa.” EO-2 § 3(c).

President Trump issued EO-1. *Id.* § 4. Finally, a “Policy and Purpose” section has been added which provides an extensive justification for the Order on the basis of national security, including information specific to each of the six countries referenced in EO-2.<sup>18</sup> *Id.* § 1. And as stated above, EO-2 was also explicitly revised in response to judicial decisions that identified problematic aspects of EO-1 and invited revisions.<sup>19</sup>

Given the revisions in EO-2, the question is now whether the President’s past statements continue to fatally infect what is facially a lawful exercise of presidential authority. In that regard, the Supreme Court has held that “past actions [do not] forever taint any effort on [the government’s] part to deal with the subject matter. . . . District courts are fully capable of adjusting preliminary relief to take account of genuine changes in constitutionally significant conditions.” *McCreary*, 545 U.S. at 848. This Court is no longer faced with a facially discriminatory order coupled with contemporaneous statements suggesting discriminatory intent. And while the President and his advisors have continued to make statements following the issuance of EO-1 that have characterized or anticipated the nature of EO-2,<sup>20</sup> the Court cannot conclude for the purposes of the Motion that these statements, together with the President’s past statements, have effectively disqualified him from exercising his lawful presidential authority

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<sup>18</sup> When it issued its stay of the district court’s TRO of EO-1, the Ninth Circuit indicated it had invited President Trump to make the sorts of changes that he has now made in his reissuance of the Order. *See Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) (“Despite the district court’s and our own repeated invitations to explain the urgent need for the Executive Order to be placed immediately into effect, the Government submitted no evidence . . .”).

<sup>19</sup> As President Trump states in the Order, “I am revoking Executive Order 13769 and replacing it with this order, which expressly excludes from the suspensions categories of aliens that have prompted judicial concerns and which clarifies or refines the approach to certain other issues or categories of affected aliens.” EO-2 § 1(i); *cf.* Order Denying Washington’s Emergency Motion to Enforce the Preliminary Injunction, *Washington v. Trump*, No. C17-0141JLR, at 5-6 (W.D. Wash. Mar. 16, 2017), ECF No. 163. (noting significant differences between EO-1 and EO-2 in denying the plaintiffs’ emergency motion to enforce the court’s preliminary injunction of EO-1 against EO-2 on the grounds that EO-2 constituted the same conduct previously enjoined).

<sup>20</sup> Among these are the President’s reference to EO-2 as a “watered-down version” of EO-1, [*see* Doc. No. 28]; and Presidential Advisor Stephen Miller’s statement that a revised executive order was “going to have the same basic policy outcome for the country” and that it would be issued “with mostly minor technical differences.” Pls’ Mot., Ex. Y.

under Section 1182(f). In other words, the substantive revisions reflected in EO-2 have reduced the probative value of the President's statements to the point that it is no longer likely that Plaintiffs can succeed on their claim that the predominate purpose of EO-2 is to discriminate against Muslims based on their religion and that EO-2 is a pretext or a sham for that purpose. To proceed otherwise would thrust this Court into the realm of "'look[ing] behind' the president's national security judgments . . . result[ing] in a trial *de novo* of the president's national security determinations," *Aziz*, 2017 WL 580855, at \*8, and would require "a psychoanalysis of a drafter's heart of hearts," all within the context of extending Establishment Clause jurisprudence to national security judgments in an unprecedented way.

For the above reasons, Plaintiffs have not made a clear showing that they are likely to succeed on the merits as to their Establishment Clause claim (Count I).

#### **4. Plaintiffs' Claim that EO-2 Violates the Equal Protection Clause (Count II)**

Plaintiffs also contend that EO-2 violates the Equal Protection Clause of the First Amendment by targeting Muslims for distinctive treatment. The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.<sup>21</sup> It is undisputed that EO-2 has a differential impact on Muslims. According to Plaintiffs, "there are approximately 166 million people in these six countries, all of whom will be affected by the [Order], and 97 percent of whom are Muslim." Pls.' Mot. 23. Defendants do not dispute that the countries affected are overwhelmingly Muslim.

"[A] law, neutral on its face and serving ends otherwise within the power of government to pursue, is not invalid under the Equal Protection Clause simply because it may affect a greater

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<sup>21</sup> Although the Clause only applies to state and local governments according to its text, the Supreme Court has held that it also applies to the federal government through the Due Process Clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

proportion of one race than of another.” *Washington v. Davis*, 426 U.S. 229, 242 (1976). This precept is particularly applicable in the area of immigration measures related to national security concerns. Relying on Supreme Court precedent, the Fourth Circuit has emphasized that where a particular immigration measure is facially neutral and has a rational national security basis that is “facially legitimate and bona fide,” such a measure will survive an Equal Protection Clause challenge. *Rajah v. Mukasy*, 544 F.3d 427, 438 (4th Cir. 2008) (quoting *Romero v. INS*, 399 F.3d 109, 111 (2d Cir. 2005)). “Distinctions on the basis of nationality may be drawn in the immigration field by Congress or the Executive . . . [and must be upheld] [s]o long as [they] are not wholly irrational . . .” *Id.* (quoting *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979)).

In *Rajah*, the Fourth Circuit rejected an Equal Protection Clause challenge to a program that required all non-permanent resident males over the age of sixteen from a group of countries that were, except for North Korea, predominantly Muslim to appear personally at government facilities for registration and fingerprinting and to present immigration related documents (“the Program”). Individuals who did not appear risked potential arrest. *Id.* at 433. The Fourth Circuit concluded that there was a rational national security basis for the special registration requirements because (1) the terrorist attacks of September 11, 2001 “were facilitated by the lax enforcement of immigration laws”; (2) “[t]he Program was designed to monitor more closely aliens from certain countries selected on the basis of national security criteria”; and (3) the “Program was a plainly rational attempt to enhance national security.” *Id.* at 438-39. Rejecting the plaintiffs’ Equal Protection Clause challenge, the Fourth Circuit observed:

To be sure, the Program did select countries that were, with the exception of North Korea, predominantly Muslim. Petitioners argue, without evidence other than that fact, that the Program was motivated by an improper animus toward Muslims. However, one major threat of terrorist attacks comes from radical Islamic groups. The Program was clearly tailored to those facts. It excluded males under 16 and females on the grounds that military age men are a greater

security risk. Muslims from non-specified countries were not subject to registration. Aliens from the designated countries who were qualified to be permanent residents in the United States were exempted whether or not they were Muslims. The Program did not target only Muslims; non-Muslims from the designated countries were subject to registration. There is therefore no basis for petitioner's claim.

*Id.* at 439. Plaintiffs argue that EO-2 is suspect because it does not extend to other countries that pose greater terrorist threats, considering that there is no evidence that individuals who committed acts of terrorism in the United States have actually come from the designated countries. But the Fourth Circuit dispatched those sorts of arguments as well:

Petitioners also challenge the Program based on their perception of its effectiveness and wisdom. They argue, among other things, that it has not succeeded in catching a terrorist. However, we have no way of knowing whether the Program's enhanced monitoring of aliens has disrupted or deterred attacks. In any event, such a consideration is irrelevant because an *ex ante* rather than an *ex post* assessment of the Program is required under the rational basis test.

*Id.* at 439.

EO-2 identified a broad range of conditions, circumstances, and conditions that raise “facially legitimate and bona fide” national security bases for the Order, including that each of the designated countries (1) has conditions that present “heightened risks”; (2) is a state sponsor of terrorism; (3) has been actively compromised by terrorist organizations; or (4) contains active combat zones. EO-2 § 2(d). The President sees in these circumstances conditions that “diminish[] the foreign government’s willingness or ability to share or validate important information about individuals seeking travel to the United States,” and “the significant presence in each of these countries of terrorist organizations, members, and others exposed to these organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States.” *Id.* § 1(d). Moreover, “once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delayed issuing, or refuse to issue, travel documents.”

*Id.* EO-2 also identifies specific conditions in each designated country “that demonstrate why their nationals continue to present heightened risks to the security of the United States.” *Id.*

§ 1(e). The President has concluded that “[i]n light of the conditions in these six countries, until the assessment of current screening and vetting procedures required by section 2 of this order is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harming national security of the United States is unacceptably high.” *Id.* § 1(f). These are judgments committed to the political branches – not to the courts.

Moreover, as with the Program at issue in *Rajah*, EO-2 is similarly tailored to limit the scope of the temporary suspension. EO-2 contains limitations, exemptions, and waivers that undercut any inference that the purpose of the Order was to discriminate against Muslims because of their religion or nationality rather than national security concerns. Also as in *Rajah*, while the Order pertains to predominantly Muslim countries, it applies to any particular person equally, whether Muslim or non-Muslim. Overall, EO-2 identifies a rational security basis for its issuance at least as strong and explicit as that found sufficient in *Rajah*. Plaintiffs again argue that the stated justifications and revisions reflected in EO-2 cannot overcome the President’s statements, including that EO-2 is a “watered-down” version of EO-1. But those statements do not eliminate the real substantive differences between the two orders, and for the reasons previously discussed within the context of Plaintiffs’ Establishment Clause challenge, those statements are insufficient for the Court to conclude that the Plaintiffs have clearly shown that they will likely succeed on their Equal Protection Clause challenge in Count III.

### **C. Irreparable Harm in the Absence of Preliminary Relief**

The Fourth Circuit has held that, as a matter of law, “loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 520-21 (4th Cir. 2002) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Aziz v. Trump*, No. 1:17-cv-116 (LMB/TCB), 2017 WL 580855, at \*10 (E.D. Va. Feb. 13, 2017). These Plaintiffs allege violations of the Establishment Clause of the First Amendment of the United States Constitution in Count I, *see* AC ¶¶ 87-97, as well as various other forms of irreparable harm including (1) inability to arrange visits from foreign relatives, (2) more stringent review of spousal marriage petitions, and (3) more stringent review of a visa application. Without ruling specifically on these claims of irreparable harm, the Court finds it sufficient that Plaintiffs’ First Amendment rights are implicated in EO-2; and Plaintiffs should therefore not be denied injunctive relief based on the lack of irreparable harm.

### **D. Balance of Equities**

In order to obtain the requested injunction, plaintiffs must establish, separately from any showing of irreparable harm, that the “balance of equities” weighs in their favor. In determining whether plaintiffs have made that showing, “[i]n each case, courts ‘must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.’” *Winter*, 555 U.S. at 24 (quoting *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 542 (1987)).

Plaintiffs argue that EO-2 has inflicted five different categories of harm on them: it (1) may prevent them from reuniting with their foreign national spouses due to EO-2’s heightened standard of review of marriage applications and visas; (2) may prevent them from renewing their own visas because those visas will be subject to a heightened standard of review; (3) may

prevent them from traveling internationally out of their fear that they may somehow forfeit their own visas by doing so; (4) has imposed a stigma on the American Muslim community of which they are a part; and (5) has required them to devote their time and attention to publicly advocating on behalf of the American Muslim community.

All of these alleged harms are either speculative or were already experienced before or independently of EO-1 or EO-2. For example, with respect to the harms alleged in category 1, Plaintiffs claim that their marriage petitions filed on behalf of their spouses or their relatives' visas will either be delayed in processing or subject to new, never before imposed, heightened standards of scrutiny. In support of that claim, they point to section 3(c) of EO-2, which provides consular officials with the discretion to issue individual waivers "if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest," as well as section 4, which subjects nationals of Iraq to "thorough review," and section 5, which directs various agencies within the executive branch to implement a uniform screening and vetting procedure for screening all individuals who seek to enter the United States. Yet, as reflected in a State Department Alert issued on March 6, 2017, visa application appointments continue to be held. *See* Defs.' Mem. Opp'n 12. Defendants have further represented that currently, while the enforcement of EO-2 has been enjoined by other Courts, applications are being reviewed in substantially the same way as before the issuance of either EO-1 or EO-2. In fact, on March 21, 2017, Plaintiff John Doe No. 6 "advise[d] the Court that his marriage petition that he filed for his wife was approved, and her visa application is currently pending." [Doc. No. 31.] In short, there is no evidence that relevant visa applications



have been processed, delayed, or denied in any meaningfully different way than before the issuance of EO-1 and EO-2.

Similarly speculative are the harms claimed in categories 2 and 3, based on certain of the Plaintiffs' currently held visas and their immigration status. For example, Plaintiffs John Doe Nos. 2 and 3, who have valid F-1 student visas, allege that EO-2's interferes with their ability to travel. But these Plaintiffs are in a category expressly exempted from the temporary ban of the Order. In that regard, section 3(a) provides that "the suspension of entry . . . shall apply only to foreign nationals of the designated countries who: (i) are outside the United States on the effective date of this order; (ii) did not have a valid visa at 5:00 p.m., eastern standard time on January 27, 2017; and (iii) do not have a valid visa on the effective date of this order." EO-2 § 3(a). Plaintiffs John Doe Nos. 2 and 3 were inside the United States on the effective date of the Order and had valid F-1 visas both as of January 27, 2017 and as of March 16, 2017, the effective date of the Order. They are therefore exempt from EO-2's temporary suspension of entry, and it is completely speculative whether these Plaintiffs would experience any harm as a result of EO-2 were they to travel within the United States or internationally.

Finally, with respect to the harms included in categories 4 and 5, certain Plaintiffs claim that they are being harmed by EO-2 because they are "prominent civil rights activists . . . [who have been forced] to spend a significant amount of their time . . . assisting and advocating on behalf of Muslims targeted by th[e] order and pushing back against the anti-Muslim sentiment that Defendants have fomented and legitimized through their actions."<sup>22</sup> These individuals have engaged in these activities in connection with their chosen calling and careers and were engaged in similar civil rights activities before and independently of the issuance of EO-2. Likewise, the stigma Plaintiffs have felt, judging by their description, emanated before either executive order

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<sup>22</sup> Def.'s Mot. 15.

issued; and while those feelings of stigma are undoubtedly legally cognizable injuries and may have been deepened with the issuance of the executive orders, they were primarily experienced separate and apart from the issuance of the orders and will not be cured if the Court were to grant the Motion. Therefore, any stigma that was in fact caused by the orders cannot be materially undone or redressed at this point beyond what has already been effected through the injunctions already issued by other district courts.

In contrast to the speculative and abstract hardships that Plaintiffs may experience in the absence of immediate relief, “the Government’s interest in combating terrorism is an urgent objective of the highest order.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). In EO-1, the President did “little more than reiterate that fact” and “submitted no evidence” to demonstrate the need for immediate action. *Washington v. Trump*, 847 F.3d 1151, 1165-66 (9th Cir. 2017). However, in EO-2, the President has provided a detailed justification for the Order based on national security needs, and enjoining the operation of EO-2 would interfere with the President’s unique constitutional responsibilities to conduct international relations, provide for the national defense, and secure the nation. On balance, Plaintiffs have not established that the equities tip in their favor.

#### **E. Public Interest**

Plaintiffs must also establish that the issuance of an injunction is in the public interest. “In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winter*, 555 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)) (internal quotation marks omitted). Based on the record now before the Court, the parties’ respective interests described above, the subject matter of EO-2, and the protections to the public that EO-2 is intended to


provide, Plaintiffs have not established that the public interest favors issuance of immediate relief in this action.

## V. CONCLUSION

For the above reasons, Plaintiffs have not established that (1) they are likely to succeed on the merits of their case, (2) the balance of hardships tips in their favor, or (3) immediate relief would be in the public interest. Accordingly, they have not established that they are entitled to obtain the extraordinary remedy of an injunction enjoining the enforcement of EO-2. Plaintiffs' Motion is therefore denied.

The Court will issue an appropriate order.

Alexandria, Virginia  
March 24, 2017



/s/  
Anthony J. Trenga  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

FILED IN THE  
UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII  
12:32 pm, Mar 15, 2017  
SUE BEITIA, CLERK

STATE OF HAWAII and ISMAIL  
ELSHIKH,

Plaintiffs,

vs.

DONALD J. TRUMP, *et al.*,

Defendants.

CV. NO. 17-00050 DKW-KSC

**ORDER GRANTING MOTION  
FOR TEMPORARY  
RESTRAINING ORDER**

**INTRODUCTION**

On January 27, 2017, the President of the United States issued Executive Order No. 13,769 entitled, “Protecting the Nation from Foreign Terrorist Entry into the United States.” *See* 82 Fed. Reg. 8977 (Jan. 27, 2017). On March 6, 2017, the President issued another Executive Order, No. 13,780, identically entitled, “Protecting the Nation from Foreign Terrorist Entry into the United States.” (the “Executive Order”). *See* 82 Fed. Reg. 13209 (Mar. 6, 2017). The Executive Order

revokes Executive Order No. 13,769 upon taking effect.<sup>1</sup> Exec. Order §§ 13, 14.

Like its predecessor, the Executive Order restricts the entry of foreign nationals from specified countries and suspends entrants from the United States refugee program for specified periods of time.

Plaintiffs State of Hawai‘i (“State”) and Ismail Elshikh, Ph.D. seek a nationwide temporary restraining order that would prohibit the Federal Defendants<sup>2</sup> from “enforcing or implementing Sections 2 and 6 of the Executive Order” before it takes effect. Pls.’ Mot. for TRO 4, Mar. 8, 2017, ECF No. 65.<sup>3</sup> Upon evaluation of the parties’ submissions, and following a hearing on March 15, 2017, the Court concludes that, on the record before it, Plaintiffs have met their burden of establishing a strong likelihood of success on the merits of their Establishment Clause claim, that irreparable injury is likely if the requested relief is not issued, and that the balance of the equities and public interest counsel in favor of granting the requested relief. Accordingly, Plaintiffs’ Motion for TRO (ECF. No. 65) is granted for the reasons detailed below.

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<sup>1</sup>By its terms, the Executive Order becomes effective as of March 16, 2017 at 12:01 a.m., Eastern Daylight Time—*i.e.*, March 15, 2017 at 6:01 p.m. Hawaii Time. Exec. Order § 14.

<sup>2</sup>Defendants in the instant action are: Donald J. Trump, in his official capacity as President of the United States; the U.S. Department of Homeland Security (“DHS”); John F. Kelly, in his official capacity as Secretary of DHS; the U.S. Department of State; Rex Tillerson, in his official capacity as Secretary of State; and the United States of America.

<sup>3</sup>Plaintiffs filed a Second Amended Complaint for Declaratory and Injunctive Relief (“SAC”) on March 8, 2017 simultaneous with their Motion for TRO. SAC, ECF. No. 64.

## **BACKGROUND**

### **I. The President's Executive Orders**

#### **A. Executive Order No. 13,769**

Executive Order No. 13,769 became effective upon signing on January 27, 2017. *See* 82 Fed. Reg. 8977. It inspired several lawsuits across the nation in the days that followed.<sup>4</sup> Among those lawsuits was this one: On February 3, 2017, the State filed its complaint and an initial motion for TRO, which sought to enjoin, nationwide, Sections 3(c), 5(a)–(c), and 5(e) of Executive Order No. 13,769. Pls.' Mot. for TRO, Feb. 3, 2017, ECF No. 2.

This Court did not rule on the State's initial TRO motion because later that same day, the United States District Court for the Western District of Washington entered a nationwide preliminary injunction enjoining the Government from enforcing the same provisions of Executive Order No. 13,769 targeted by the State here. *See Washington v. Trump*, 2017 WL 462040. As such, the Court stayed this case, effective February 7, 2017, specifying that the stay would continue "as long as

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<sup>4</sup>*See, e.g., Mohammed v. United States*, No. 2:17-cv-00786-AB-PLA (C.D. Cal. Jan. 31, 2017); *City & Cty. of San Francisco v. Trump*, No. 3:17-cv-00485-WHO (N.D. Cal. Jan. 31, 2017); *Louhghalam v. Trump*, Civil Action No. 17-cv-10154, 2017 WL 386550 (D. Mass. Jan. 29, 2017); *Int'l Refugee Assistance Project v. Trump*, No. 8:17-0361-TDC (D. Md. filed Feb. 7, 2017); *Darweesh v. Trump*, 17 Civ. 480 (AMD), 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017); *Aziz v. Trump*, --- F. Supp. 3d ---, 2017 WL 580855 (E.D. Va. Feb. 13, 2017); *Washington v. Trump*, Case No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *emergency stay denied*, 847 F.3d 1151 (9th Cir. 2017). This list is not exhaustive.

the February 3, 2017 injunction entered in *Washington v. Trump* remain[ed] in full force and effect, or until further order of this Court.” ECF Nos. 27 & 32.

On February 4, 2017, the Government filed an emergency motion in the Ninth Circuit Court of Appeals seeking a stay of the *Washington* TRO, pending appeal.<sup>5</sup> *See Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 4, 2017). The Ninth Circuit heard oral argument on February 7, after which it denied the emergency motion via written Order dated February 9, 2017. *See* Case No. 17-35105, ECF Nos. 125 (Tr. of Hr’g), 134 (Filed Order for Publication at 847 F.3d 1151).

On March 8, 2017, the Ninth Circuit granted the Government’s unopposed motion to voluntarily dismiss the appeal. *See* Order, No. 17-35105 (9th Cir. Mar. 8, 2017), ECF No. 187. As a result, the same sections of Executive Order No. 13,769 initially challenged by the State in the instant action remain enjoined as of the date of this Order.

**B. The New Executive Order**

Section 2 of the new Executive Order suspends from “entry into the United States” for a period of 90 days, certain nationals of six countries referred to in Section 217(a)(12) of the Immigration and Nationality Act (“INA”), 8 U.S.C.

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<sup>5</sup>The Government also requested “an immediate administrative stay pending full consideration of the emergency motion for a stay pending appeal” on February 4, 2017 (Emergency Mot. to Stay, No. 17-35105 (9th Cir.), ECF No. 14), which the Ninth Circuit panel swiftly denied (Order, No. 17-35105 (9th Cir.), ECF No. 15).

§ 1101 *et seq.*: Iran, Libya, Somalia, Sudan, Syria, and Yemen.<sup>6</sup> 8 U.S.C.

§ 1187(a)(12); Exec. Order § 2(c). The suspension of entry applies to nationals of these six countries who (1) are outside the United States on the new Executive Order's effective date of March 16, 2017; (2) do not have a valid visa on that date, and (3) did not have a valid visa as of 5:00 p.m. Eastern Standard Time on January 27, 2017 (the date of the prior Executive Order, No. 13,769). Exec. Order § 3(a).

The 90-day suspension does not apply to: (1) lawful permanent residents; (2) any foreign national admitted to or paroled into the United States on or after the Executive Order's effective date (March 16, 2017); (3) any individual who has a document other than a visa, valid on the effective date of the Executive Order or issued anytime thereafter, that permits travel to the United States, such as an advance parole document; (4) any dual national traveling on a passport not issued by one of the six listed countries; (5) any foreign national traveling on a diplomatic-type or other specified visa; and (6) any foreign national who has been granted asylum, any refugee already admitted to the United States, or any individual granted withholding of removal, advance parole, or protection under the Convention Against Torture.

*See* Exec. Order § 3(b).

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<sup>6</sup>Because of the "close cooperative relationship" between the United States and the Iraqi government, the Executive Order declares that Iraq no longer merits inclusion in this list of countries, as it was in Executive Order No. 13,769. Iraq "presents a special case." Exec. Order § 1(g).



Under Section 3(c)'s waiver provision, foreign nationals of the six countries who are subject to the suspension of entry may nonetheless seek entry on a case-by-case basis. The Executive Order includes the following list of circumstances when such waivers "could be appropriate:"

(i) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other longterm activity, is outside the United States on the effective date of the Order, seeks to reenter the United States to resume that activity, and denial of reentry during the suspension period would impair that activity;

(ii) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of the Order for work, study, or other lawful activity;

(iii) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;

(iv) the foreign national seeks to enter the United States to visit a close family member (e.g., a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship;

(v) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

(vi) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of

such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government;

(vii) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. § 288 et seq., traveling for purposes of conducting meetings or business with the United States Government, or traveling to conduct business on behalf of an international organization not designated under IOIA;

(viii) the foreign national is a landed Canadian immigrant who applies for admission at a land border port of entry or a preclearance location located in Canada; or

(ix) the foreign national is traveling as a United States Government sponsored exchange visitor.

Exec. Order § 3(c).

Section 6 of the Executive Order suspends the U.S. Refugee Admissions Program for 120 days. The suspension applies both to travel into the United States and to decisions on applications for refugee status for the same period. *See* Exec. Order § 6(a). It excludes refugee applicants who were formally scheduled for transit by the Department of State before the March 16, 2017 effective date. Like the 90-day suspension, the 120-day suspension includes a waiver provision that allows the Secretaries of State and DHS to admit refugee applicants on a case-by-case basis. *See* Exec. Order § 6(c). The Executive Order identifies examples of circumstances in which waivers may be warranted, including: where

the admission of the individual would allow the United States to conform its conduct to a pre-existing international agreement or denying admission would cause undue hardship. Exec. Order § 6(c). Unlike Executive Order No. 13,769, the new Executive Order does not expressly refer to an individual's status as a "religious minority" or refer to any particular religion, and it does not include a Syria-specific ban on refugees.

Section 1 states that the purpose of the Executive Order is to "protect [United States] citizens from terrorist attacks, including those committed by foreign nationals." Section 1(h) identifies two examples of terrorism-related crimes committed in the United States by persons entering the country either "legally on visas" or "as refugees":

- [1] In January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses.
- [2] [I]n October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction[.]

Exec. Order § 1(h).

By its terms, the Executive Order also represents a response to the Ninth Circuit's decision in *Washington v. Trump*. See 847 F.3d 1151. According to the Government, it "clarifies and narrows the scope of Executive action regarding

immigration, extinguishes the need for emergent consideration, and eliminates the potential constitutional concerns identified by the Ninth Circuit.” See Notice of Filing of Executive Order 4–5, ECF No. 56.

It is with this backdrop that we turn to consideration of Plaintiffs’ restraining order application.

## **II. Plaintiffs’ Motion For TRO**

Plaintiffs’ Second Amended Complaint (ECF No. 64) and Motion for TRO (ECF No. 65) contend that portions of the new Executive Order suffer from the same infirmities as those provisions of Executive Order No. 13,769 enjoined in *Washington*, 847 F.3d 1151. Once more, the State asserts that the Executive Order inflicts constitutional and statutory injuries upon its residents, employers, and educational institutions, while Dr. Elshikh alleges injuries on behalf of himself, his family, and members of his Mosque. SAC ¶ 1.

Plaintiffs allege that the Executive Order subjects portions of the State’s population, including Dr. Elshikh and his family, to discrimination in violation of both the Constitution and the INA, denying them their right, among other things, to associate with family members overseas on the basis of their religion and national origin. The State purports that the Executive Order has injured its institutions,

economy, and sovereign interest in maintaining the separation between church and state. SAC ¶¶ 4–5.

According to Plaintiffs, the Executive order also results in “their having to live in a country and in a State where there is the perception that the Government has established a disfavored religion.” SAC ¶ 5. Plaintiffs assert that by singling out nationals from the six predominantly Muslim countries, the Executive Order causes harm by stigmatizing not only immigrants and refugees, but also Muslim citizens of the United States. Plaintiffs point to public statements by the President and his advisors regarding the implementation of a “Muslim ban,” which Plaintiffs contend is the tacit and illegitimate motivation underlying the Executive Order. *See* SAC ¶¶ 35–51. For example, Plaintiffs point to the following statements made contemporaneously with the implementation of Executive Order No. 13,769 and in its immediate aftermath:

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

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

50. The first Executive Order [No. 13,769] was issued without a notice and comment period and without interagency review. Moreover, the first Executive Order was issued with little explanation of how it could further its stated objective.

51. When signing the first Executive Order [No. 13,769], President Trump read the title, looked up, and said: “We all know what that means.” 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.”

....

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

59. The day after signing the first Executive Order [No. 13,769], President Trump’s advisor, Rudolph Giuliani, explained on television how the Executive Order came to be. He said: “When [Mr. Trump] first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’”

60. The President and his spokespersons defended the rushed nature of their issuance of the first Executive Order [No. 13,769] on January 27, 2017, by saying that their urgency was imperative to stop the inflow of dangerous persons to the United States. On January 30, 2017, President Trump tweeted: “If the ban were

announced with a one week notice, the ‘bad’ would rush into our country during that week.” In a forum on January 30, 2017 at George Washington University, White House spokesman Sean Spicer said: “At the end of the day, what was the other option? To rush it out quickly, telegraph it five days so that people could rush into this country and undermine the safety of our nation?” On February 9, 2017, President Trump claimed he had sought a one-month delay between signing and implementation, but was told by his advisors that “you can’t do that because then people are gonna pour in before the toughness.”

SAC ¶¶ 48–51, 58–60 (footnotes and citations omitted).

Plaintiffs also highlight statements by members of the Administration prior to the signing of the new Executive Order, seeking to tie its content to Executive Order No. 13,769 enjoined by the *Washington* TRO. In particular, they note that:

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

SAC ¶ 74(a) (citing *Miller: New order will be responsive to the judicial ruling; Rep.*

*Ron DeSantis: Congress has gotten off to a slow start, The First 100 Days* (Fox

News television broadcast Feb. 21, 2017), transcript *available at*

<https://goo.gl/wcHvHH> (rush transcript)). Plaintiffs argue that, in light of these and

similar statements “where the President himself has repeatedly and publicly

espoused an improper motive for his actions, the President's action must be invalidated." Pls.' Mem. in Supp. of Mot. for TRO 2, ECF No. 65-1.

In addition to these accounts, Plaintiffs describe a draft report from the DHS, which they contend undermines the purported national security rationale for the Executive Order. *See* SAC ¶ 61 (citing SAC, Ex. 10, ECF No. 64-10). The February 24, 2017 draft report states that citizenship is an "unlikely indicator" of terrorism threats against the United States and that very few individuals from the seven countries included in Executive Order No. 13,769 had carried out or attempted to carry out terrorism activities in the United States. SAC ¶ 61 (citing SAC, Ex. 10, ECF No. 64-10). According to Plaintiffs, this and other evidence demonstrates the Administration's pretextual justification for the Executive Order.

Plaintiffs assert the following causes of action: (1) violation of the Establishment Clause of the First Amendment (Count I); (2) violation of the equal protection guarantees of the Fifth Amendment's Due Process Clause on the basis of religion, national origin, nationality, or alienage (Count II); (3) violation of the Due Process Clause of the Fifth Amendment based upon substantive due process rights (Count III); (4) violation of the procedural due process guarantees of the Fifth Amendment (Count IV); (5) violation of the INA due to discrimination on the basis of nationality, and exceeding the President's authority under Sections 1182(f) and



1185(a) (Count V); (6) substantially burdening the exercise of religion in violation of the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 200bb-1(a) (Count VI); (7) substantive violation of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706 (2)(A)–(C), through violations of the Constitution, INA, and RFRA (Count VII); and (8) procedural violation of the APA, 5 U.S.C. § 706 (2)(D) (Count VIII).

Plaintiffs contend that these alleged violations of law have caused and continue to cause them irreparable injury. To that end, through their Motion for TRO, Plaintiffs seek to temporarily enjoin Defendants from enforcing and implementing Sections 2 and 6 of the Executive Order. Mot. for TRO 4, ECF No. 65. They argue that “both of these sections are unlawful in all of their applications.” Section 2 discriminates on the basis of nationality, Sections 2 and 6 exceed the President’s authority under 8 U.S.C. §§ 1182(f) and 1185(a), and both provisions are motivated by anti-Muslim animus. TRO Mem. 50, Dkt. No. 65-1. Moreover, Plaintiffs assert that both sections infringe “on the ‘due process rights’ of numerous U.S. citizens and institutions by barring the entry of non-citizens with whom they have close relationships.” TRO Mem. 50 (quoting *Washington*, 847 F.3d at 1166).

Defendants oppose the Motion for TRO. The Court held a hearing on the matter on March 15, 2017, before the Executive Order was scheduled to take effect.

## **DISCUSSION**

### **I. Plaintiffs Have Demonstrated Standing At This Preliminary Phase**

#### **A. Article III Standing**

Article III, Section 2 of the Constitution permits federal courts to consider only “cases” and “controversies.” *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). “Those two words confine ‘the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.’” *Id.* (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). “[T]o satisfy Article III’s standing requirements, a plaintiff must show (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

“At bottom, ‘the gist of the question of standing’ is whether petitioners have ‘such a personal stake in the outcome of the controversy as to assure that concrete

adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.” *Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d 1043, 1048 (9th Cir. 2010) (en banc) (quoting *Massachusetts*, 549 U.S. at 517)).

“At this very preliminary stage of the litigation, the [Plaintiffs] may rely on the allegations in their Complaint and whatever other evidence they submitted in support of their TRO motion to meet their burden.” *Washington*, 847 F.3d at 1159 (citing *Lujan*, 504 U.S. at 561). “With these allegations and evidence, the [Plaintiffs] must make a ‘clear showing of each element of standing.’” *Id.* (quoting *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 907 (2014)). At this preliminary stage of the proceedings, on the record presented, Plaintiffs meet the threshold Article III standing requirements.

## **B. The State Has Standing**

The State alleges standing based both upon injuries to its proprietary interests and to its quasi-sovereign interests, *i.e.*, in its role as *parens patriae*.<sup>7</sup> Just as the

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<sup>7</sup>The State’s *parens patriae* theory focuses on the Executive Order

subject[ing] citizens of Hawai‘i like Dr. Elshikh to discrimination and marginalization while denying all residents of the State the benefits of a pluralistic and inclusive society. Hawai‘i has a quasi-sovereign interest in ‘securing [its] residents from the harmful effects of discrimination.’ *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 609 (1982). The [Executive]

Ninth Circuit panel in *Washington* concluded on a similar record that the alleged harms to the states' proprietary interests as operators of their public universities were sufficient to support standing, the Court concludes likewise here. The Court does not reach the State's alternative standing theory based on the protection of the interests of its citizens as *parens patriae*. *See Washington*, 847 F.3d at 1168 n.5 (“The States have asserted other proprietary interests and also presented an alternative standing theory based on their ability to advance the interests of their citizens as *parens patriae*. Because we conclude that the States' proprietary interests as operators of their public universities are sufficient to support standing, we need not reach those arguments.”).

Hawaii primarily asserts two proprietary injuries stemming from the Executive Order. First, the State alleges the impacts that the Executive Order will have on the University of Hawaii system, both financial and intangible. The University is an arm of the State. *See* Haw. Const. art. 10, §§ 5, 6; Haw. Rev. Stat. (“HRS”) § 304A-103. The University recruits students, permanent faculty, and visiting faculty from the targeted countries. *See, e.g.*, Suppl. Decl. of Risa E. Dickson ¶¶ 6–8, Mot. for TRO, Ex. D-1, ECF No. 66-6. Students or faculty

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Order also harms Hawai'i by debasing its culture and tradition of ethnic diversity and inclusion.

TRO Mem. 48, ECF No. 65-1.

suspended from entry are deterred from studying or teaching at the University, now and in the future, irrevocably damaging their personal and professional lives and harming the educational institutions themselves. *See id.*

There is also evidence of a financial impact from the Executive Order on the University system. The University recruits from the six affected countries. It currently has twenty-three graduate students, several permanent faculty members, and twenty-nine visiting faculty members from the six countries listed. Suppl. Dickson Decl. ¶ 7. The State contends that any prospective recruits who are without visas as of March 16, 2017 will not be able to travel to Hawaii to attend the University. As a result, the University will not be able to collect the tuition that those students would have paid. Suppl. Dickson Decl. ¶ 8 (“Individuals who are neither legal permanent residents nor current visa holders will be entirely precluded from considering our institution.”). These individuals’ spouses, parents, and children likewise would be unable to join them in the United States. The State asserts that the Executive Order also risks “dissuad[ing] some of [the University’s] current professors or scholars from continuing their scholarship in the United States and at [the University].” Suppl. Dickson Decl. ¶ 9.

The State argues that the University will also suffer non-monetary losses, including damage to the collaborative exchange of ideas among people of different

religions and national backgrounds on which the State’s educational institutions depend. Suppl. Dickson Decl. ¶¶ 9–10, ECF no. 66-6; *see also* Original Dickson Decl. ¶ 13, Mot. for TRO, Ex. D-2, ECF, 66-7; SAC ¶ 94. This will impair the University’s ability to recruit and accept the most qualified students and faculty, undermine its commitment to being “one of the most diverse institutions of higher education” in the world, Suppl. Dickson Decl. ¶ 11, and grind to a halt certain academic programs, including the University’s Persian Language and Culture program, *id.* ¶ 8. *Cf. Washington*, 847 F.3d at 1160 (“[The universities] have a mission of ‘global engagement’ and rely on such visiting students, scholars, and faculty to advance their educational goals.”).

These types of injuries are nearly indistinguishable from those found to support standing in the Ninth Circuit’s decision in *Washington*. *See* 847 F.3d at 1161 (“The necessary connection can be drawn in at most two logical steps: (1) the Executive Order prevents nationals of seven countries from entering Washington and Minnesota; (2) as a result, some of these people will not enter state universities, some will not join those universities as faculty, some will be prevented from performing research, and some will not be permitted to return if they leave. And we have no difficulty concluding that the States’ injuries would be redressed if they

could obtain the relief they ask for: a declaration that the Executive Order violates the Constitution and an injunction barring its enforcement.”).

The second proprietary injury alleged Hawaii alleges is to the State’s main economic driver: tourism. The State contends that the Executive Order will “have the effect of depressing international travel to and tourism in Hawai‘i,” which “directly harms Hawaii’s businesses and, in turn, the State’s revenue.” SAC ¶ 100, ECF No. 64. *See also* Suppl. Decl. of Luis P. Salaveria ¶¶ 6–10, Mot. for TRO, Ex. C-1, ECF No. 66-4 (“I expect, given the uncertainty the new executive order and its predecessor have caused to international travel generally, that these changing policies may depress tourism, business travel, and financial investments in Hawaii.”). The State points to preliminary data from the Hawaii Tourism Authority, which suggests that during the interval of time that the first Executive Order was in place, the number of visitors to Hawai‘i from the Middle East dropped (data including visitors from Iran, Iraq, Syria and Yemen). *See* Suppl. Decl. of George Szigeti, ¶¶ 5–8, Mot. for TRO, Ex. B-1, ECF No. 66-2; *see also* SAC ¶ 100 (identifying 278 visitors in January 2017, compared to 348 visitors from that same region in January 2016).<sup>8</sup> Tourism accounted for \$15 billion in spending in 2015,

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<sup>8</sup>This data relates to the prior Executive Order No. 13,769. At this preliminary stage, the Court looks to the earlier order’s effect on tourism in order to gauge the economic impact of the new Executive Order, while understanding that the provisions of the two differ. Because the new

and a decline in tourism has a direct effect on the State's revenue. *See* SAC ¶ 18.

Because there is preliminary evidence that losses of current and future revenue are traceable to the Executive Order, this injury to the State's proprietary interest also appears sufficient to confer standing. *Cf. Texas v. United States*, 809 F.3d 134, 155–56 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (holding that the “financial loss[es]” that Texas would bear, due to having to grant drivers licenses, constituted a concrete and immediate injury for standing purposes).

For purposes of the instant Motion for TRO, the State has preliminarily demonstrated that: (1) its universities will suffer monetary damages and intangible harms; (2) the State's economy is likely to suffer a loss of revenue due to a decline in tourism; (3) such harms can be sufficiently linked to the Executive Order; and (4) the State would not suffer the harms to its proprietary interests in the absence of implementation of the Executive Order. Accordingly, at this early stage of the litigation, the State has satisfied the requirements of Article III standing.<sup>9</sup>

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Executive Order has yet to take effect, its precise economic impact cannot presently be determined.

<sup>9</sup>To the extent the Government argues that the State does not have standing to bring an Establishment Clause violation on its own behalf, the Court does not reach this argument. *Cf. Washington*, 847 F.3d at 1160 n.4 (“The Government argues that the States may not bring Establishment Clause claims because they lack Establishment Clause rights. Even if we assume that States lack such rights, an issue we need not decide, that is irrelevant in this case because the States are asserting the rights of their students and professors. Male doctors do not have personal rights in abortion and yet any physician may assert those rights on behalf of his female patients.” (citing *Singleton v. Wulff*, 428 U.S. 106, 118 (1976))). Unlike in *Washington* where there was no



**C. Dr. Elshikh Has Standing**

Dr. Elshikh is an American citizen of Egyptian descent and has been a resident of Hawai'i for over a decade. Declaration of Ismail Elshikh ¶ 1, Mot. for TRO, Ex. A, ECF No. 66-1. He is the Imam of the Muslim Association of Hawai'i and a leader within Hawaii's Islamic community. Elshikh Decl. ¶ 2. Dr. Elshikh's wife is of Syrian descent, and their young children are American citizens. Dr. Elshikh and his family are Muslim. Elshikh Decl. ¶¶ 1, 3. His mother-in-law, also Muslim, is a Syrian national without a visa, who last visited the family in Hawaii in 2005. Elshikh Decl. ¶¶ 4–5.

In September 2015, Dr. Elshikh's wife filed an I-130 Petition for Alien Relative on behalf of her mother. On January 31, 2017, Dr. Elshikh called the National Visa Center and learned that his mother-in-law's visa application had been put on hold and would not proceed to the next stage of the process because of the implementation of Executive Order No. 13,769. Elshikh Decl. ¶ 4. Thereafter, on March 2, 2017, during the pendency of the nationwide injunction imposed by *Washington*, Dr. Elshikh received an email from the National Visa Center advising that his mother-in-law's visa application had progressed to the next stage and that her interview would be scheduled at an embassy overseas. Although no date was

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individual plaintiff, Dr. Elshikh has standing to assert an Establishment Clause violation, as discussed herein.

given, the communication stated that most interviews occur within three months.

Elshikh Decl. ¶ 4. Dr. Elshikh fears that although she has made progress toward obtaining a visa, his mother-in-law will be unable to enter the country if the new Executive Order is implemented. Elshikh Decl. ¶ 4. According to Plaintiffs, despite her pending visa application, Dr. Elshikh's mother-in-law would be barred in the short-term from entering the United States under the terms of Section 2(c) of the Executive Order, unless she is granted a waiver, because she is not a current visa holder.

Dr. Elshikh has standing to assert his claims, including an Establishment Clause violation. Courts observe that the injury-in-fact prerequisite can be “particularly elusive” in Establishment Clause cases because plaintiffs do not typically allege an invasion of a physical or economic interest. Despite that, a plaintiff may nonetheless show an injury that is sufficiently concrete, particularized, and actual to confer standing. *See Catholic League*, 624 F.3d at 1048–49; *Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1250 (9th Cir. 2007) (“The concept of a ‘concrete’ injury is particularly elusive in the Establishment Clause context.”). “The standing question, in plain English, is whether adherents to a religion have standing to challenge an official condemnation by their government of their religious views[.] Their ‘personal stake’ assures the ‘concrete adverseness’

required.” *Catholic League*, 624 F.3d at 1048–49. In Establishment Clause cases—

[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.” Plaintiffs aver that not only does the resolution make them feel like second-class citizens, but that their participation in the political community will be chilled by the [government’s] hostility to their church and their religion.

*Id.* at 1048–49 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)). Dr. Elshikh attests that he and his family suffer just such injuries here. He declares that the effects of the Executive Order are “devastating to me, my wife and children.” Elshikh Decl. ¶ 6, ECF No. 66-1.

Like his children, Dr. Elshikh is “deeply saddened by the message that [both Executive Orders] convey—that a broad travel-ban is ‘needed’ to prevent people from certain Muslim countries from entering the United States.” Elshikh Decl. ¶ 1 (“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 now-six Muslim majority countries from entering the United States.”); *id.* ¶ 3 ([“My children] 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.”).

“Muslims in the Hawai‘i Islamic community feel that the new Executive Order targets Muslim citizens because of their religious views and national origin. Dr. Elshikh believes that, as a result of the new Executive Order, he and members of the Mosque will not be able to associate as freely with those of other faiths.” SAC ¶ 90. These injuries are sufficiently personal, concrete, particularized, and actual to confer standing in the Establishment Clause context.

The final two aspects of Article III standing—causation and redressability—are also satisfied. Dr. Elshikh’s injuries are traceable to the new Executive Order and, if Plaintiffs prevail, a decision enjoining portions of the Executive Order would redress that injury. *See Catholic League*, 624 F.3d at 1053. At this preliminary stage of the litigation, Dr. Elshikh has accordingly carried his burden to establish standing under Article III.

## **II. Ripeness**

“While standing is primarily concerned with who is a proper party to litigate a particular matter, ripeness addresses when litigation may occur.” *Lee v. Oregon*, 107 F.3d 1382, 1387 (9th Cir. 1997). “[I]n many cases, ripeness coincides squarely with standing’s injury in fact prong.” *Thomas v. Anchorage Equal Rights Comm’n*,

220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). In fact, the ripeness inquiry is often “characterized as standing on a timeline.” *Id.* “A claim is not ripe for adjudication if it rests upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’” *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)).

The Government argues that “the only concrete injury Elshikh alleges is that the Order ‘will prevent [his] mother-in-law’—a Syrian national who lacks a visa—from visiting Elshikh and his family in Hawaii.” These claims are not ripe, according to the Government, because there is a visa waiver process that Elshikh’s mother-in-law has yet to even initiate. Govt. Mem. in Opp’n to Mot. for TRO (citing SAC ¶ 85), ECF No. 145.

The Government’s premise is not true. Dr. Elshikh alleges direct, concrete injuries to both himself and his immediate family that are independent of his mother-in-law’s visa status. *See, e.g.*, SAC ¶¶ 88–90; Elshikh Decl. ¶¶ 1, 3.<sup>10</sup> These alleged injuries have already occurred and will continue to occur once the

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<sup>10</sup>There is no dispute that Dr. Elshikh’s mother-in-law does not currently possess a valid visa, would be barred from entering as a Syrian national by Section 2(c) of the Executive Order, and has not yet applied for a waiver under Section 3(c) of the Executive Order. Since the Executive Order is not yet effective, it is difficult to see how she could. None of these propositions, however, alter the Court’s finding that Dr. Elshikh has sufficiently established, at this preliminary stage, that he has suffered an injury-in-fact separate and apart from his mother-in-law that is sufficiently concrete, particularized, and actual to confer standing.

Executive Order is implemented and enforced—the injuries are not contingent ones. *Cf. 281 Care Comm. v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011) (“Plaintiffs’ alleged injury is not based on speculation about a particular future prosecution or the defeat of a particular ballot question. . . . Here, the issue presented requires no further factual development, is largely a legal question, and chills allegedly protected First Amendment expression.”); *see also Arizona Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) (“[W]hen the threatened enforcement effort implicates First Amendment [free speech] rights, the inquiry tilts dramatically toward a finding of standing.”).

The Court turns to the merits of Plaintiffs’ Motion for TRO.

### **III. Legal Standard: Preliminary Injunctive Relief**

The underlying purpose of a TRO is to preserve the status quo and prevent irreparable harm before a preliminary injunction hearing is held. *Granny Goose Foods*, 415 U.S. 423, 439 (1974); *see also Reno Air Racing Ass’n v. McCord*, 452 F.3d 1126, 1130–31 (9th Cir. 2006).

The standard for issuing a temporary restraining order is substantially identical to the standard for issuing a preliminary injunction. *See Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A “plaintiff seeking a preliminary injunction must establish that he is likely to succeed

on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citation omitted).

“[I]f a plaintiff can only show that there are ‘serious questions going to the merits’—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the ‘balance of hardships tips *sharply* in the plaintiff’s favor,’ and the other two *Winter* factors are satisfied.” *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (emphasis by *Shell Offshore*)).

For the reasons that follow, Plaintiffs have met this burden here.

#### **IV. Analysis of TRO Factors: Likelihood of Success on the Merits**

The Court turns to whether Plaintiffs sufficiently establish a likelihood of success on the merits of their Count I claim that the Executive Order violates the Establishment Clause of the First Amendment. Because a reasonable, objective observer—enlightened by the specific historical context, contemporaneous public statements, and specific sequence of events leading to its issuance—would conclude that the Executive Order was issued with a purpose to disfavor a particular religion,

in spite of its stated, religiously-neutral purpose, the Court finds that Plaintiffs, and Dr. Elshikh in particular, are likely to succeed on the merits of their Establishment Clause claim.<sup>11</sup>

**A. 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 the Executive Order runs afoul of that command, the Court is guided by the three-part test for Establishment Clause claims set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). According to *Lemon*, government action (1) must have a primary secular purpose, (2) may not have the principal effect of advancing or inhibiting religion, and (3) may not foster excessive entanglement with religion. *Id.* “Failure to satisfy any one of the three prongs of the *Lemon* test is sufficient to invalidate the challenged law or practice.” *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1076–77 (9th Cir. 2010). Because the Executive Order at issue here cannot survive the secular purpose prong, the Court does not reach the balance of the criteria. *See id.* (noting that it is unnecessary to reach the second or third *Lemon* criteria if the challenged law or practice fails the first test).

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<sup>11</sup>The Court expresses no views on Plaintiffs’ due-process or INA-based statutory claims.



**B. The Executive Order's Primary Purpose**

It is undisputed that the Executive Order does not facially discriminate for or against any particular religion, or for or against religion versus non-religion. There is no express reference, for instance, to any religion nor does the Executive Order—unlike its predecessor—contain any term or phrase that can be reasonably characterized as having a religious origin or connotation.

Indeed, the Government defends the Executive Order principally because of its religiously neutral text — “[i]t applies to six countries that Congress and the prior Administration determined posed special risks of terrorism. [The Executive Order] applies to *all* individuals in those countries, regardless of their religion.” Gov’t. Mem. in Opp’n 40. The Government does not stop there. By its reading, the Executive Order could not have been religiously motivated because “the six countries represent only a small fraction of the world’s 50 Muslim-majority nations, and are home to less than 9% of the global Muslim population . . . [T]he suspension covers *every* national of those countries, including millions of non-Muslim individuals[.]” Gov’t. Mem. in Opp’n 42.

The illogic of the Government’s contentions is palpable. The notion that one can demonstrate animus toward any group of people only by targeting all of them at once is fundamentally flawed. The Court declines to relegate its Establishment

Clause analysis to a purely mathematical exercise. *See Aziz*, 2017 WL 580855, at \*9 (rejecting the argument that “the Court cannot infer an anti-Muslim animus because [Executive Order No. 13,769] does not affect all, or even most, Muslims,” because “the Supreme Court has never reduced its Establishment Clause jurisprudence to a mathematical exercise. It is a discriminatory purpose that matters, no matter how inefficient the execution” (citation omitted)). Equally flawed is the notion that the Executive Order cannot be found to have targeted Islam because it applies to *all individuals* in the six referenced countries. It is undisputed, using the primary source upon which the Government itself relies, that these six countries have overwhelmingly Muslim populations that range from 90.7% to 99.8%.<sup>12</sup> It would therefore be no paradigmatic leap to conclude that targeting these countries likewise targets Islam. Certainly, it would be inappropriate to conclude, as the Government does, that it does not.

The Government compounds these shortcomings by suggesting that the Executive Order’s neutral text is what this Court must rely on to evaluate purpose. Govt. Mem. in Opp’n at 42–43 (“[C]ourts may not ‘look behind the exercise of [Executive] discretion’ taken ‘on the basis of a facially legitimate and bona fide

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<sup>12</sup>*See* Pew-Templeton Global Religious Futures Project, Muslim Population by Country (2010), available at <http://www.globalreligiousfutures.org/religions/muslims>.

reason.’’). Only a few weeks ago, the Ninth Circuit commanded otherwise: “It is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims.” *Washington*, 847 F.3d at 1167–68 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (“Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.”); *Larson*, 456 U.S. at 254–55 (holding that a facially neutral statute violated the Establishment Clause in light of legislative history demonstrating an intent to apply regulations only to minority religions); and *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977) (explaining that circumstantial evidence of intent, including the historical background of the decision and statements by decisionmakers, may be considered in evaluating whether a governmental action was motivated by a discriminatory purpose)). The Supreme Court has been even more emphatic: courts may not “turn a blind eye to the context in which [a] policy arose.” *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005) (citation and quotation signals omitted).<sup>13</sup> “[H]istorical context and ‘the specific sequence of events leading up

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<sup>13</sup>In *McCreary*, the Supreme Court examined whether the posting of successive Ten Commandments displays at two county courthouses violated the Establishment Clause. 545 U.S. at 850–82.

to” the adoption of a challenged policy are relevant considerations. *Id.* at 862; *see also Aziz*, 2017 WL 580855, at \*7.

A review of the historical background here makes plain why the Government wishes to focus on the Executive Order’s text, rather than its context. The record before this Court is unique. It includes significant and unrebutted evidence of religious animus driving the promulgation of the Executive Order and its related predecessor. For example—

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.”

SAC ¶ 41 (citing *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>)). In that same interview, Mr. Trump stated: “But there’s a tremendous hatred. And we have to be very vigilant. We have to be very careful. And we can’t allow people coming into this country who have this hatred of the United States. . . [a]nd of people that are not Muslim.”

Plaintiffs allege that “[l]ater, as the presumptive Republican nominee, Mr. Trump began using facially neutral language, at times, to describe the Muslim ban.” SAC ¶ 42. For example, they point to a July 24, 2016 interview:

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.”

SAC ¶ 44; Ex. 7 (*Meet the Press* (NBC television broadcast July 24, 2016), transcript *available at* <https://goo.gl/jHc6aU>). And during an October 9, 2016 televised presidential debate, Mr. Trump was asked:

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

SAC ¶ 45 (citing The American Presidency Project, *Presidential Debates: Presidential Debate at Washington University in St. Louis, Missouri* (Oct. 9, 2016), *available at* <https://goo.gl/ilzf0A>)).

The Government appropriately cautions that, in determining purpose, courts should not look into the “veiled psyche” and “secret motives” of government decisionmakers and may not undertake a “judicial psychoanalysis of a drafter’s heart of hearts.” Govt. Opp’n at 40 (citing *McCreary*, 545 U.S. at 862). The Government need not fear. The remarkable facts at issue here require no such

impermissible inquiry. For instance, there is nothing “*veiled*” about this press release: “Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States.[.]” SAC ¶ 38, Ex. 6 (Press Release, Donald J. Trump for President, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), *available at* <https://goo.gl/D3OdJJ>)). Nor is there anything “*secret*” about the Executive’s motive specific to the issuance of the Executive Order:

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.’”

SAC ¶ 59, Ex. 8. On February 21, 2017, commenting on the then-upcoming revision to the Executive Order, the President’s Senior Adviser, Stephen Miller, stated, “Fundamentally, [despite “technical” revisions meant to address the Ninth Circuit’s concerns in *Washington*,] you’re still going to have the same basic policy outcome [as the first].” SAC ¶ 74.

These plainly-worded statements,<sup>14</sup> made in the months leading up to and contemporaneous with the signing of the Executive Order, and, in many cases, made

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<sup>14</sup>There are many more. *See, e.g.*, Br. of The Roderick and Solange MacArthur Justice Center as Amicus Curiae in Supp. of Pls.’ Mot. for TRO, ECF No. 204, at 19-20 (“It’s not unconstitutional keeping people out, frankly, and until we get a hold of what’s going on. And then if you look at Franklin Roosevelt, a respected president, highly respected. Take a look at Presidential proclamations back a long time ago, 2525, 2526, and 2527 what he was doing with Germans, Italians, and Japanese because he had to do it. Because look we are at war with radical Islam.”)

by the Executive himself, betray the Executive Order's stated secular purpose. Any reasonable, objective observer would conclude, as does the Court for purposes of the instant Motion for TRO, that the stated secular purpose of the Executive Order is, at the very least, "secondary to a religious objective" of temporarily suspending the entry of Muslims. *See McCreary*, 545 U.S. at 864.<sup>15</sup>

To emphasize these points, Plaintiffs assert that the stated national security reasons for the Executive Order are pretextual. Two examples of such pretext include the security rationales set forth in Section 1(h):

"[I]n January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses." [Exec. Order] § 1(h). "And in October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was

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(quoting Michael Barbaro and Alan Rappeport, *In Testy Exchange, Donald Trump Interrupts and 'Morning Joe' Cuts to Commercial*, New York Times (Dec. 8, 2015), *available at* <https://www.nytimes.com/politics/first-draft/2015/12/08/in-testy-exchange-donaldtrump-interrupts-and-morning-joe-cuts-to-commercial/>); Br. of Muslim Advocates et al. as Amici Curiae in Supp. of Pls.' Mot. for TRO, ECF No. 198, at 10-11 ("On June 13, 2016, after the attack on a nightclub in Orlando, Florida, Mr. Trump said in a speech: 'I called for a ban after San Bernardino, and was met with great scorn and anger, but now many are saying I was right to do so.' Mr. Trump then specified that the Muslim ban would be 'temporary,' 'and apply to certain 'areas of the world when [sic] there is a proven history of terrorism against the United States, Europe or our allies, until we understand how to end these threats.'") (quoting Transcript: Donald Trump's national security speech, *available at* <http://www.politico.com/story/2016/06/transcript-donald-trump-national-security-speech-22427>).

<sup>15</sup>This Court is not the first to examine these issues. In *Aziz v. Trump*, United States District Court Judge Leonie Brinkema determined that plaintiffs were likely to succeed on the merits of their Establishment Clause claim as it related to Executive Order No. 13,769. Accordingly, Judge Brinkema granted the Commonwealth of Virginia's motion for preliminary injunction. *Aziz v. Trump*, \_\_\_ F. Supp. 3d \_\_\_, 2017 WL 580855, at \*7-\*10 (E.D. Va. Feb. 13, 2017).

sentenced to 30 years in prison for attempting to use a weapon of mass destruction[.]” *Id.* Iraq is no longer included in the ambit of the travel ban, *id.*, and the Order states that a waiver could be granted for a foreign national that is a “young child.” *Id.* § 3(c)(v).

TRO Mem. 13. Other indicia of pretext asserted by Plaintiffs include the delayed timing of the Executive Order, which detracts from the national security urgency claimed by the Administration, and the Executive Order’s focus on nationality, which could have the paradoxical effect of “bar[ring] entry by a Syrian national who has lived in Switzerland for decades, but not a Swiss national who has immigrated to Syria during its civil war,” revealing a “gross mismatch between the [Executive] Order’s ostensible purpose and its implementation and effects.” Pls.’ Reply 20 (citation omitted).

While these additional assertions certainly call the motivations behind the Executive Order into greater question,<sup>16</sup> they are not necessary to the Court’s Establishment Clause determination. *See Aziz*, 2017 WL 580855, at \*8 (the Establishment Clause concerns addressed by the district court’s order “do not involve an assessment of the merits of the president’s national security judgment. Instead, the question is whether [Executive Order No. 13,769] was animated by

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<sup>16</sup>*See also* Br. of T.A., a U.S. Resident of Yemeni Descent, as Amicus Curiae in Supp. of Pls.’ Mot. for TRO, ECF No. 200, at 15-25 (detailing evidence contrary to the Executive Order’s national security justifications).



national security concerns at all, as opposed to the impermissible notion of, in the context of entry, disfavoring one religious group, and in the context of refugees, favoring another religious group”).

Nor does the Court’s preliminary determination foreclose future Executive action. As the Supreme Court noted in *McCreary*, in preliminarily enjoining the third iteration of a Ten Commandments display, “we do not decide that the [government’s] past actions forever taint any effort on their part to deal with the subject matter.” *McCreary*, 545 U.S. at 873–74; *see also Felix v. City of Bloomfield*, 841 F.3d 848, 863 (10th Cir. 2016) (“In other words, it is possible that a government may begin with an impermissible purpose, or create an unconstitutional effect, but later take affirmative actions to neutralize the endorsement message so that “adherence to a religion [is not] relevant in any way to a person’s standing in the political community.” (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring))). Here, it is not the case that the Administration’s past conduct must forever taint any effort by it to address the security concerns of the nation. Based upon the current record available, however, the Court cannot find the actions taken during the interval between revoked Executive Order No. 13,769 and the new Executive Order to be “genuine changes in constitutionally significant

conditions.” *McCreary*, 545 U.S. at 874.<sup>17</sup> The Court recognizes that “purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense.” *Id.* Yet, context may change during the course of litigation, and the Court is prepared to respond accordingly.

Last, the Court emphasizes that its preliminary assessment rests on the peculiar circumstances and specific historical record present here. *Cf. Aziz*, 2017 WL 580855, at \*9 (“The Court’s conclusion rests on the highly particular ‘sequence of events’ leading to this specific [Executive Order No. 13,769] and the dearth of evidence indicating a national security purpose. The evidence in this record focuses on the president’s statements about a ‘Muslim ban’ and the link Giuliani

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<sup>17</sup>The Tenth Circuit asked: “What would be enough to meet this standard?”

The case law does not yield a ready answer. But from the above principles we conclude that a government cure should be (1) purposeful, (2) public, and (3) at least as persuasive as the initial endorsement of religion. It should be purposeful enough for an objective observer to know, unequivocally, that the government does not endorse religion. It should be public enough so that people need not burrow into a difficult-to-access legislative record for evidence to assure themselves that the government is not endorsing a religious view. And it should be persuasive enough to countermand the preexisting message of religious endorsement.

*Felix*, 841 F.3d 863–64.

established between those statements and the [Executive Order].”) (citing *McCreary*, 545 U.S. at 862).

**V. Analysis of TRO Factors: Irreparable Harm**

Dr. Elshikh has made a preliminary showing of direct, concrete injuries to the exercise of his Establishment Clause rights. *See, e.g.*, SAC ¶¶ 88–90; Elshikh Decl. ¶¶ 1, 3. These alleged injuries have already occurred and likely will continue to occur upon implementation of the Executive Order.

Indeed, irreparable harm may be *presumed* with the finding of a violation of the First Amendment. *See Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Washington*, 847 F.3d at 1169 (citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (“It is well established that the deprivation of constitutional rights ‘unquestionably constitutes irreparable injury.’”)) (additional citations omitted). Because Dr. Elshikh is likely to succeed on the merits of his Establishment Clause claim, the Court finds that the second factor of the *Winter* test is satisfied—that Dr. Elshikh is likely to suffer irreparable injury in the absence of a TRO.

**VI. Analysis of TRO Factors: The Balance of Equities and Public Interest Weigh in Favor of Granting Emergency Relief**

The final step in determining whether to grant the Plaintiffs' Motion for TRO is to assess the balance of equities and examine the general public interests that will be affected. Here, the substantial controversy surrounding this Executive Order, like its predecessor, illustrates that important public interests are implicated by each party's positions. *See Washington*, 847 F.3d at 1169. For example, the Government insists that the Executive Order is intended "to protect the Nation from terrorist activities by foreign nationals admitted to the United States[.]" Exec. Order, preamble. National security is unquestionably important to the public at large. Plaintiffs and the public, on the other hand, have a vested interest in the "free flow of travel, in avoiding separation of families, and in freedom from discrimination." *Washington*, 847 F.3d at 1169–70.

As discussed above, Plaintiffs have shown a strong likelihood of succeeding on their claim that the Executive Order violates First Amendment rights under the Constitution. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002 (emphasis added) (citing *Elrod*, 427 U.S. at 373); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[E]nforcement of an unconstitutional law is always contrary to the public

interest.” (citing *Lamprecht v. FCC*, 958 F.2d 382, 390 (D.C. Cir. 1992); *G & V Lounge v. Mich. Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

When considered alongside the constitutional injuries and harms discussed above, and the questionable evidence supporting the Government’s national security motivations, the balance of equities and public interests justify granting the Plaintiffs’ TRO. *See Aziz*, 2017 WL 580855, at \* 10. Nationwide relief is appropriate in light of the likelihood of success on the Establishment Clause claim.

### **CONCLUSION**

Based on the foregoing, Plaintiffs’ Motion for TRO is hereby GRANTED.

### **TEMPORARY RESTRAINING ORDER**

It is hereby ADJUDGED, ORDERED, and DECREED that:

Defendants and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them, are hereby enjoined from enforcing or implementing Sections 2 and 6 of the Executive Order across the Nation. Enforcement of these provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

No security bond is required under Federal Rule of Civil Procedure 65(c).


The Court declines to stay this ruling or hold it in abeyance should an emergency appeal of this order be filed.

Pursuant to Federal Rule of Civil Procedure 65(b)(2), the Court intends to set an expedited hearing to determine whether this Temporary Restraining Order should be extended. The parties shall submit a stipulated briefing and hearing schedule for the Court's approval forthwith.

IT IS SO ORDERED.

Dated: March 15, 2017 at Honolulu, Hawai'i.



  
Derrick K. Watson  
United States District Judge

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*State of Hawaii, et al. v. Trump, et al.*; CV 17-00050 DKW-KSC; **ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER**