THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEWISH FAMILY SERVICE OF SEATTLE, *et al*.,

Plaintiffs,

v.

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

Defendants.

Case No. 2:17-cv-01707-RSM

MOTION FOR PRELIMINARY INJUNCTION

ORAL ARGUMENT REQUESTED

NOTED FOR DECEMBER 8, 2017

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

INTRODUCTION

For the third time since taking office, the Trump Administration has suspended large portions of the U.S. Refugee Admissions Program ("USRAP") without authority. This time it has done so in a way that, more obviously than ever, achieves one of the central promises of this Administration: banning Muslim refugees from the United States. It has suspended refugee admissions from nine Muslim-majority countries that account for *80 percent* of the Muslim refugees entering the United States. It plans to reallocate resources for processing refugee applications from these countries to processing applications from countries whose refugees have been *70 percent* Christian. The Administration has also indefinitely suspended a family reunification program on which many refugees rely to bring their family members to safety.

The harms to Plaintiffs and others like them have been swift, irreparable, and will only intensify. Families who survived harrowing trauma and are on the verge of reunification have been left separated. Refugees fleeing persecution and conflict remain imperiled abroad. The message to Muslims in this country and around the world is clear: You are not welcome here.

This motion seeks a nationwide preliminary injunction of the suspensions of the USRAP imposed by Executive Order No. 13,815 § 3(a), 82 Fed. Reg. 50,055, 50,057 (Oct. 27, 2017) and its accompanying memorandum (together, "Refugee Ban 3.0").[1] The evidence supporting a preliminary injunction is vast, and includes (1) the evidence and findings as to the prior actions struck down by this and other courts; (2) the opinions of national security experts attesting to the lack of national security or foreign policy purpose for the ban;[2] (3) data analysis showing the ban's direct impact on Muslim refugees;[3] (4) the voluminous record of anti-Muslim statements made by President Trump and others in his Administration;[4] and (5) declarations from each of

[1] Executive Order No. 13,815 and its accompanying memorandum, with the addendum, are attached as exhibits A and B to the Declaration of David Burman ("Burman Decl."), respectively.
[2] Joint Decl. of Former National Security Officials, Nov. 9, 2017 ("Nat'l Sec. Decl."); Decl. of Alex Nowrasteh, Nov. 13, 2017 ("Nowrasteh Decl.").
[3] Decl. of Casey Smith, Nov. 9, 2017 ("Smith Decl.").
[4] Burman Decl.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

the eleven Plaintiffs describing how Refugee Ban 3.0 has imperiled their lives and those of their loved ones and harmed organizations dedicated to helping resettle refugees.[5]

BACKGROUND

I. ABANDONING THE U.S.'S HUMANITARIAN COMMITMENT, PRESIDENT TRUMP CAMPAIGNED ON A PROMISE TO BAN MUSLIM REFUGEES.

Declaring that "it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands," Congress passed the Refugee Act of 1980 to provide a "permanent and systematic procedure" for refugee admissions. Refugee Act of 1980, Pub. L. No. 96-212 § 101, 94 Stat. 102. The Refugee Act created the modern-day USRAP, through which refugees are interviewed, thoroughly vetted by multiple government agencies, and matched to resettlement agencies that help them resettle in the United States. *See* U.S. Refugee Admissions Program, U.S. Dep't of State (the "USRAP") (Burman Decl. Ex. C).

In recent years, the USRAP has served as a lifeline for a record number of Muslim refugees, mostly from Syria, Somalia, and Iraq. *See* Phillip Connor, *U.S. Admits Record Number of Muslim Refugees in 2016*, Pew Research Center (Oct. 5, 2016) (Burman Decl. Ex. NN). Donald Trump, however, responded to this influx with virulent Islamophobia and campaigned on a promise to ban refugees, Muslims, and particularly Muslim refugees.[6]

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[5] Decl. of Afkab Mohamed Hussein, Nov. 7, 2017 ("Hussein Decl."); Decl. of Allen R. Vaught, Nov. 13, 2017 ("Vaught Decl."); Decl. of John Doe 1, Nov. 10, 2017 ("Doe 1 Decl."); Decl. of John Doe 2, Nov. 8, 2017 ("Doe 2 Decl."); Decl. of John Doe 3, Nov. 8, 2017 ("Doe 3 Decl."); Decl. of Jane Doe 4, Nov. 11, 2017 ("Doe 4 Decl."); Decl. of Jane Doe 5, Nov. 9, 2017 ("Doe 5 Decl."); Decl. of Jane Doe 6, Nov. 12, 2017 ("Doe 6 Decl."); Decl. of John Doe 7, Nov. 10, 2017 ("Doe 7 Decl."); Decl. of Jewish Family Service of Seattle, Nov. 13, 2017 ("JFS-S Decl."); Jewish Family Services of Silicon Valley, Nov. 13, 2017 ("JFS-SV Decl."); *see also* Decl. of Lara Finkbeiner, Nov. 14, 2017 (describing relationship between International Refugee Assistance Project and Doe 1, Doe 2, Doe 4, and Doe 5).

[6] Members of the Trump Administration have openly espoused similar views. Then-Governor Pence attempted in 2015 to block Syrian refugees from resettling in his state—an attempt that the Seventh Circuit found to be discriminatory and based on nothing other than "nightmare speculation" of refugees posing as ISIS terrorists. *See Exodus Refugee Immigration, Inc. v. Pence*, 838 F.3d 902, 903-04 (7th Cir. 2016). Then-Senator Jeff Sessions blamed refugees in September 2016 for "honor killings"—"a well-worn tactic for stigmatizing and demeaning Islam and painting the religion, and its men, as violent and barbaric." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 596 n.17 (4th Cir. 2017), *cert. granted*, 137 S. Ct. 2080, *and vacated as moot*, No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017). *See* Adam Serwer, *Jeff Sessions's Fear of Muslim Immigrants*, The Atlantic (Feb. 8, 2017) (Burman Decl. Ex. F). When a State Department official responded that there was no evidence of honor killings

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Indeed, as early as September 2015, candidate Trump responded to increased resettlement of Syrian refugees by claiming that the refugees "could be ISIS" or even a terrorist army in hiding, and that if he was elected, "they're going back." Jenna Johnson, *Donald Trump: Syrian Refugees Might Be a Terrorist Army in Disguise*, Wash. Post, Sept. 30, 2015 (Burman Decl. Ex. F). Throughout the campaign, candidate Trump frequently vilified refugees, baselessly equating them with "radical Islamic terrorism" and attacking them for rejecting "our values" and threatening the "tolerant" American way of life.[7] He denigrated Muslims generally, asserting that "Islam hates us" and that "[w]e can't allow people coming into this country who have this hatred," Theodore Schleifer, *Donald Trump: 'I think Islam hates us,'* CNN (Mar. 10, 2016) (Burman Decl. Ex. Y), and claiming that "we're having problems with the Muslims, and we're having problems with Muslims coming into the country," Heather Saul, *Donald Trump claims 'we're having problems with Muslims' after Brussels and calls for mosques to be studied*, Independent, Mar. 22, 2016 (Burman Decl. Ex. OO).

Candidate Trump's proposed ban on Muslim refugees formed a core component of his more sweeping promise of "a total and complete shutdown of Muslims entering the United States." Press Release (Dec. 7, 2015) (Burman Decl. Ex. D). In a joint interview with Trump and now-Vice President Pence in July 2016, Pence confirmed that he agreed with the Muslim ban, using as evidence his own attempt to suspend the Syrian refugee program in Indiana; Trump jumped in to agree that "[w]e're gonna not let people come in from Syria that nobody knows

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among the refugee population, Sessions retorted: "[I]t's from the same cultural background." *Id.* Finally, Frank Wuco, who role-played a terrorist using Islamophobic tropes, has been serving as the White House senior adviser at DHS, advising on the department's Executive Order Task Force. Noah Lanard, *A Fake Jihadist Has Landed a Top Job at Homeland Security*, Mother Jones, Nov. 1, 2017 (Burman Decl. Ex. LLL).

[7] *See, e.g.*, Donald J. Trump (@realDonaldTrump), Twitter (Mar. 24, 2016, 11:15 AM) (Burman Decl. Ex. H) ("Europe and the US. must immediately stop taking in people from Syria. This will be the destruction of civilization as we know it! So sad!"); Press Release, June 13, 2016 (Burman Decl. Ex. CC) (criticizing his opponent for her refugee policy, asking why she "want[s] to bring people here—in vast numbers—who reject our values?"); Press Release, Oct. 27, 2016 (Burman Decl. Ex. II) (opposing increase in Syrian Refugees on the basis that "[w]e don't want ISIS in our country" and that he "only want[s] to admit people who will support this country and love of its people"). Additional evidence of Trump's anti-Muslim statements is attached as exhibits W, EE-FF, and WW-ZZ of the Burman Declaration.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

who they are." Lesley Stahl, *The Republican Ticket: Trump & Pence*, CBS (July 15, 2016) (Burman Decl. Ex. QQ). In fall 2016, Trump again responded to a question about his proposed Muslim ban by referring to Muslim refugees, explaining: "It's called extreme vetting. We are going to areas like Syria where they're coming in by the tens of thousands because of Barack Obama." *Presidential Debate at Washington University in St. Louis, Missouri*, The Am. Presidency Project (Oct. 9, 2016) (Burman Decl. Ex. J). He promised that on his first day in office he would "[s]uspend immigration from regions compromised by Radical Islamic terrorism, including the suspension of the Syrian Refugee Program." Press Release, Donald J. Trump for President, Inc. (Oct. 25, 2016) (Burman Decl. Ex. HH). And he promised to "stop the massive inflow of refugees and keep Radical Islamic Terrorist out of our country." *Remarks at the Phoenix Convention Ctr. in Phoenix, Az.*, The Am. Presidency Project (Oct. 29, 2016) (Burman Decl. Ex. JJ).

II. THE FIRST AND SECOND ATTEMPTS TO BAN MUSLIM REFUGEES.

President Trump held true to his word. One week after his inauguration, he issued his first attempt to ban Muslim refugees, Exec. Order No. 13,769 ("EO-1"), 82 Fed. Reg. 8,977 (Feb. 1, 2017). EO-1 suspended the USRAP for 120 days and banned Syrian refugees indefinitely. *Id.* §§ 5(a), (c). During the 120-day suspension, EO-1 directed the Secretaries of the Department of State ("DOS") and Department of Homeland Security ("DHS"), and the Director of National Intelligence ("DNI") to conduct a security review of the USRAP. *Id.* § 5(a). During this period refugees could be admitted only on a case-by-case basis if their admission was "in the national interest"—defined to include when a person is "a religious minority in his country of nationality facing religious persecution." *Id.* § 5(e). EO-1 further directed that when the USRAP resumed, DOS was "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). On the day he signed EO-1, President Trump expressly confirmed that EO-1 was intended to prioritize Christian refugees over Muslim

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

refugees.[8] Within a week, this Court issued a temporary restraining order enjoining EO-1, including the suspension of refugee admissions—an order that the Ninth Circuit declined to stay pending appeal. *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2-3 (W.D. Wash. Feb. 3, 2017), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir. 2017), *cert. denied*, No. 17-5424, 2017 WL 3224674 (U.S. Nov. 13, 2017).

Abandoning his effort to defend EO-1, on March 6, 2017, President Trump issued Executive Order No. 13,780 ("EO-2"), 82 Fed. Reg. 13,209 (Mar. 9, 2017), which his Senior Advisor stated was intended to have "the same basic policy outcome" as its predecessor. *Trump adviser says new travel ban will have 'same basic policy outcome*,' FoxNews.com, Feb. 21, 2017 (Burman Decl. Ex. RR). And indeed, EO-2 was practically identical to EO-1 except that it omitted the explicit preference for religious minorities and the indefinite suspension of Syrian refugees. Notably, it directed yet another review of the USRAP and restarted the 120-day suspension of the USRAP during the review period, subject to case-by-case waivers. EO-2 §§ 6(a), (c).

Before EO-2 could take effect, a Hawai'i district court issued a temporary restraining order, holding that EO-2 likely violates the Establishment Clause given "[t]he record" of "significant and unrebutted evidence of religious animus driving the promulgation of the Executive Order and its related predecessor." *Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1136 (D. Haw. 2017) ("*Hawai'i I*"). The Ninth Circuit upheld the decision on the ground that the President failed to invoke the proper authority to suspend refugee admissions, *see Hawai'i v. Trump*, 859 F.3d 741, 776 (9th Cir. 2017) ("*Hawai'i II*) (per curiam), *vacated as moot*, No. 16-1540, 2017 WL 4782860 (U.S. Oct. 24, 2017). In parallel litigation in the District of Maryland, both the district court and the Fourth Circuit concluded that EO-2 likely violates the Establishment Clause. *See Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 565

[8] David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees*, CBN News (Jan. 27, 2017) ("Brody Report") (Burman Decl. Ex. TT).

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

(D. Md. 2017) ("*IRAP I*"), *aff'd in part, vacated in part, en banc*, 857 F.3d 554, 595 (4th Cir. 2017), *vacated as moot*, No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 594 (4th Cir. 2017) ("*IRAP II*") (en banc), *vacated as moot*, No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017). Pending appeal from both cases, the Supreme Court allowed the Administration to enforce EO-2 with respect to refugees who lacked a "credible claim of a bona fide relationship with a person or entity in the United States." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (per curiam).

With Supreme Court review pending, President Trump replaced portions of EO-2 with a Proclamation dated September 24, 2017, which indefinitely banned travel for many nationals of six Muslim-majority countries ("EO-3"). *See* Proclamation No. 9,645, 82 Fed. Reg. 45,161 (Sept. 27, 2017). EO-3 did not affect refugees, as EO-2's refugee ban was still in effect at the time it was issued. Judges in both the District of Hawai'i and the District of Maryland enjoined EO-3 before it fully took effect, the latter again holding that it likely violates the Establishment Clause. *See Int'l Refugee Assistance Project v. Trump*, No. TDC-17-0361, 2017 WL 4674314, at *27-37 (D. Md. Oct. 17, 2017) ("*IRAP III*"), *appeal docketed*, No. 17-2231 (4th Cir. Oct. 20, 2017), *and appeal docketed*, No. 17-2240 (4th Cir. Oct. 23, 2017); *see also Hawai'i v. Trump*, No. 17-00050 DKW-KSC, 2017 WL 4639560 (D. Haw. Oct. 17, 2017) ("*Hawai'i III*"), *appeal docketed*, No. 17168 (9th Cir. Oct. 24, 2017).

III. THE CURRENT ATTEMPT TO BAN MUSLIM REFUGEES.

On October 24, 2017—the day that EO-2's refugee ban expired—President Trump issued Executive Order No. 13,815, 82 Fed. Reg. 50,055 (Oct. 27, 2017) ("EO-4"), his fourth order on Muslim migration and his third attempt to ban refugees in particular. While EO-4 stated that suspension of refugee admissions was not necessary, EO-4 § 3(a), and that the Administration had improved the USRAP vetting process so that it was "generally adequate to ensure the security and welfare of the United States," EO-4 § 2(a), the order directed a continuing risk assessment as to "[c]ertain [c]ategories of [r]efugees." *Id.* §§ 3(a)(i)-(ii).

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

These categories were outlined in a Memorandum to the President from DOS, DHS, and the DNI ("Memorandum"), which was released on October 24 but dated October 23.[9] *See* Memorandum from Rex W. Tillerson, Sec'y, Dep't of State, et al., to the President, *Resuming the United States Refugee Admissions Program With Enhanced Vetting Capabilities* (Oct. 23, 2017) (Burman Decl. Ex. B). In practice, the Memorandum disproportionately affects Muslims through many of the same features found in EO-1, EO-2, and EO-3:

1. SAO Countries: The Memorandum suspends for at least 90 days refugee admissions of nationals from (and stateless persons who last resided in) 11 countries on the Security Advisory Opinion ("SAO") list. The Memorandum itself does not identify those countries, but they are reportedly nine countries that are at least 87 percent Muslim (Egypt, Iran, Iraq, Libya, Mali, Somalia, Sudan, Syria, and Yemen), plus North Korea and South Sudan.[10] The nationals of countries on the list already receive a heightened biographic security check called an SAO. United States Citizenship and Immigration Services ("USCIS"), Refugee Processing and Security Screening (Burman Decl. Ex. SS). Nonetheless, the Memorandum claims that the agencies must "conduct a review and analysis" of the USRAP for people from SAO countries for an additional 90 days—notwithstanding the 158-day review of the USRAP already undertaken pursuant to EO-1 and EO-2. Mem. at 2. Echoing the waiver procedure of its predecessors, EO-4 and the Memorandum suspend refugee admissions from SAO countries unless on a "case-by-case basis" resettlement "would fulfill critical foreign policy interests, without compromising national security and the welfare of the United States." *Id.*

The Memorandum also reallocates resources away from processing refugee applicants from the SAO countries and shifts them to non-SAO countries, on the circular reasoning that the

[9] An undated addendum was also released on October 24, and provided the same information. Collectively, the Memorandum and addendum are referred to as "Memorandum" or "Mem."

[10] *See, e.g.*, Yeganeh Torbati & Mica Rosenberg, *Under Trump Plan, Refugees from 11 Countries Face Additional U.S. Barriers*, Reuters, Oct. 24, 2017 (Burman Decl. Ex. U); Sabrina Siddiqui, *Trump Ends Refugee Ban With Order to Review Program For 11 Countries*, The Guardian (Oct. 24, 2017) (Burman Decl. Ex. V); Ted Hesson, *Trump Targets 11 Nations in Refugee Order*, Politico (Oct. 24, 2017) (Burman Decl. Ex. W); *see also* Smith Decl. ¶ 5.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

agencies should not be allocating resources to the more resource-intensive procedures for SAO countries. *See id.* The Memorandum acknowledges that the effect of this reallocation would be to further slow down admissions from these countries, "likely" beyond the 90-day review and "further into the fiscal year." *See id.* add. at 4.

These changes will suspend nearly half of the refugees currently admitted under the USRAP in a way that implements a Muslim ban. Over 40 percent of all refugees resettled to the United States in the last two fiscal years came from one of the SAO countries. Smith Decl. ¶ 15. Of that group, 99 percent came from one of the nine Muslim-majority countries. Smith Decl. ¶ 15, and over 80 percent identified as Muslim, *id.* ¶¶ 15, 17. By comparison, 70 percent of refugees who came from non-SAO countries during the same time period—those refugees who will now be prioritized through the re-allocation of resources—were Christian. *Id.* ¶ 19.

Even if this suspension is lifted after the 90-day period (of which there is no guarantee), the effect of this Muslim ban will likely reverberate for far longer. Refugees have "only a narrow window of time to complete their travel, as certain security and medical checks expire and must then be re-initiated." *Hawai'i v. Trump*, 871 F.3d 646, 664 (9th Cir. 2017), *stay granted in part by* No. 17A275, 2017 WL 3975174 (U.S. Sept. 11, 2017). Because these medical and security checks can take months or longer to re-complete, "even short delays [in travel] may prolong a refugee's admittance." *Id.*; *see also* Alex Altman, *This is How the Syrian Refugee Screening Process Works*, Time (Nov. 17, 2015) (Burman Decl. Ex. PP) (screening process for Syrian refugees takes an average of 18 to 24 months). The suspension is therefore likely to have a long-term effect on the religious composition of refugees admitted to the United States. *See* Phillip Connor et al., *In First Months of Trump Presidency, Christians Account for Growing Share of U.S. Refugee Arrivals*, Pew Research Center (July 12, 2017) (Burman Decl. Ex. P) ("One important factor that influences the religious composition of refugee arrivals is country of origin.").

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

2. Follow-to-join Process. The Memorandum also indefinitely suspends the follow-to-join ("FTJ") process for refugees. The FTJ process is the means by which approximately 2,500 refugees in the United States reunite with their spouses and minor children annually. Mem. at 3. This suspension will also have a direct effect on Muslims as the FTJ process is generally available only to refugees admitted in the last two years, 8 C.F.R. § 207.7(d)—the period of time when admissions of Muslim refugees reached a record high. *See* Burman Decl. Ex. NN. The nationalities most represented in the FTJ process in recent years were Iraqi, Somali, Burmese, Congolese, Ethiopian, and Eritrean. Mem. add. at 4. In fiscal years 2016 and 2017, 62 percent of the arriving refugees from those countries in the USRAP generally were Muslim, Smith Decl. ¶ 21. *See also* Dahlia Lithwick & Jeremy Stahl, *Sneak Attack: Trump is Trying to Secretly Push Through Another Muslim Ban*, Slate (Nov. 10, 2017) (Burman Decl. Ex. T).

ANALYSIS

The Court should grant Plaintiffs' motion because Plaintiffs satisfy either of two alternative Ninth Circuit tests for preliminary relief. *See Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017). As this and other district courts have consistently held as to Refugee Ban 3.0's predecessors, Plaintiffs (1) are "likely to succeed on the merits," (2) are "likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in [their] favor," and (4) "an injunction is in the public interest." *Winter v. Natural Res. Def. Council Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs likewise succeed under the alternative "sliding scale test" because there are "serious questions going to the merits," the "balance of hardships tips sharply" in their favor, "there is a likelihood of irreparable injury," and "the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). Because Plaintiffs necessarily meet *Cottrell* if they pass the more stringent *Winter* test, this brief focuses on *Winter*.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

I. PLAINTIFFS ARE IRREPARABLY HARMED BY REFUGEE BAN 3.0 AND HAVE STANDING TO CHALLENGE IT.

A. Individual Plaintiffs Are Irreparably Harmed and Have Standing.

Each individual Plaintiff in this case has standing to challenge Refugee Ban 3.0 and each is irreparably harmed by it. These Plaintiffs are:

- Mr. Hussein, a Somali refugee with an approved follow-to-join petition for his wife and baby son, whom Mr. Hussein has never met because he was born after Mr. Hussein left his refugee camp for the United States, Hussein Decl. ¶¶ 6, 16;
- Doe 1, an Iraqi former interpreter for the U.S. military who lives in danger every day because of his work for the United States, Doe 1 Decl. ¶¶ 9-11; and Allen Vaught, Doe 1's former supervisor, an Army veteran who has expended funds to prepare for Doe 1's arrival and who lies awake at night worrying for his former employee's safety, Vaught Decl. ¶¶ 10-11, 15-19;
- Doe 2, who earned his PhD, bought a house, and began a life for his wife and five children in the United States, but is now stuck in Iraq, where his former work as an interpreter for the U.S. military puts him at risk, Doe 2 Decl. ¶¶ 5-6, 10; and Doe 3, his son-in-law in Pennsylvania who waits for his return and an end to his family's heartache, Doe 3 Decl. ¶ 4;
- Doe 4, a transgender Egyptian woman who receives death threats and has suffered multiple attempted rapes, and lives in hiding rather than risk detention and torture by the Egyptian government, Doe 4 Decl. ¶¶ 3-4;
- Doe 5, who is stuck in Iraq after she was kidnapped and raped by militants who warned her to stop working for Americans, Doe 5 Decl. ¶ 4; and Doe 6, her sister, who lives in Texas and worries for her sister's safety, Doe 6 Decl. ¶¶ 6-7; and
- Doe 7, a legal permanent resident with a follow-to-join petition for his son whom he has not seen in six years, Doe 7 Decl. ¶¶ 1-2, 6.

These individual Plaintiffs have standing because they have been injured in a way that is traceable to Refugee Ban 3.0 and that will be redressed by an injunction against it. *Lujan v. Defs.*

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

of Wildlife, 504 U.S. 555, 560 (1992).[11] As a result of Refugee Ban 3.0, many of them are injured by prolonged separation from their loved ones. *See* Hussein Decl. ¶¶ 6, 18; Doe 2 Decl. ¶¶ 5, 10; Doe 3 Decl., ¶ 4; Doe 5 Decl. ¶ 8; Doe 6 Decl. ¶¶ 6-7; Doe 7 Decl. ¶¶ 5-7.[12] Mr. Vaught is additionally harmed by loss of funds spent on planning to welcome his friend, Doe 1, to the country. Vaught Decl. ¶¶ 15-20.[13] Those Plaintiffs who are stranded abroad are injured by their inability to travel to the safety of the United States. *See* Doe 1 Decl. ¶¶ 3-11; Doe 2 Decl. ¶¶ 5-10; Doe 4 Decl. ¶ 7; Doe 5 Decl. ¶ 9.[14] And the Muslim Plaintiffs present in the United States are injured by the stigmatization and condemnation that flow from Refugee Ban 3.0's targeting of Muslims. *See* Hussein Decl. ¶ 21; Doe 3 Decl. ¶ 6; Doe 6 Decl. ¶ 7; Doe 7 Decl. ¶¶ 11-14.[15]

These harms represent paradigmatic irreparable injury. Prolonged separation from one's family is irreparable injury. *See Hawai'i II*, 859 F.3d at 782-83; *Leiva-Perez v. Holder*, 640 F.3d 962, 969-70 (9th Cir. 2011) (recognizing that "important [irreparable harm] factors include separation from family members" (internal quotation marks omitted)). So too is the risk of physical harm to those abroad resulting from their inability to travel to the United States. *Cf. id.* at 969 (holding that likelihood of physical danger if asylum-seeker is returned to his or her home country is part of irreparable harm inquiry). And so is unconstitutional condemnation of one's

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[11] However, one party with standing is sufficient to establish Article III's case-or-controversy requirement. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

[12] *See also Hawai'i II*, 859 F.3d at 762-63 (prolonged family separation as a result of EO-2's travel ban was sufficient to confer Article III standing); *IRAP II*, 857 F.3d at 584 (same). Appellate opinions that have been vacated for mootness remain persuasive authority. *See Orhorhaghe v. INS*, 38 F.3d 488, 493 n.4 (9th Cir. 1994).

[13] *See Young v. City of Simi Valley*, 216 F.3d 807, 815 (9th Cir. 2000) (holding that economic loss is a "cognizable injury and is sufficient to satisfy the Article III standing requirement" where plaintiff expended his own money try to obtain a zoning permit "only to be denied at the last minute").

[14] *See also Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998) (holding that "lost opportunity [to enter the United States] represents a concrete injury . . . that is traceable to the [government's] conduct and remediable by a favorable decision"), *superseded by statute on other grounds as rec'd in Brown v. Holder*, 763 F.3d 1141 (9th Cir. 2014).

[15] *See also Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012) ("Feelings of marginalization and exclusion are cognizable forms of injury . . . in the Establishment Clause context. . . ."); *Catholic League for Religious and Civil Rights v. City and Cty. of San Francisco*, 624 F.3d 1043, 1048 (9th Cir. 2010) (plaintiffs had standing to challenge city's resolution based on its allegedly anti-Catholic message).

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

religion in violation of the First Amendment. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). The need for preliminary relief here cannot be more acute.

B. Organizational Plaintiffs Are Irreparably Harmed and Have Standing.

Refugee Ban 3.0 likewise inflicts irreparable harm on organizational Plaintiffs Jewish Family Service of Seattle ("JFS-S") and Jewish Family Services of Silicon Valley ("JFS-SV"), which supports their standing to seek preliminary relief from this Court. Both organizations resettle, reunite, and serve refugees to answer the moral, religious, and cultural commands of their religion. JFS-S Decl. ¶¶ 2-7, 15-16; JFS-SV Decl. ¶¶ 11-18. Refugee Ban 3.0, like its predecessors, forces these organizations to divert significant resources away from this core mission. JFS-S Decl. ¶¶ 30, 34; JFS-SV Decl. ¶¶ 37-38; *see Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) (organization has direct standing to sue where it can "show[] a drain on its resources from both a diversion of its resources and frustration of its mission" (internal quotation marks omitted)); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (diversion of resources confers Article III standing). That diversion is compounded by the potential loss of federal funding flowing from the organizations' inability to resettle dozens of their clients due to Refugee Ban 3.0; together, the drain on these Plaintiffs' resources will frustrate their missions to provide services to refugees and their families. JFS-S Decl. ¶¶ 22, 25-33; JFS-SV Decl. ¶¶ 25-34.

These harms, moreover, are irreparable. As a direct result of Refugee Ban 3.0, the organizational Plaintiffs face substantial financial losses that will result in staff lay-offs, a similar reduction in their volunteers, the loss of institutional knowledge and goodwill with community partners, and a corresponding decline in the quality of services provided and a frustration of their mission and religious calling. JFS-S Decl. ¶¶ 29-33; JFS-SV Decl. ¶¶ 25-34; *see Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001) ("Evidence of threatened loss of . . . goodwill certainly supports a finding of the possibility of irreparable harm").

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

JFS-S and JFS-SV also have standing to vindicate the rights of their clients because, in addition to having suffered injury-in-fact themselves, JFS-S and JFS-SV have a close relation to the individuals whose claims they raise—their clients—and these individuals are unable to protect their interests on their own. *See Powers v. Ohio*, 499 U.S. 400, 410-11 (1991). Refugee Ban 3.0 imposes a significant, if not insurmountable, barrier to the reunification of JFS-S and JFS-SV clients with family members who are nationals of an SAO country or beneficiaries of pending FTJ petitions. This is a cognizable injury. *See Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 471 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996) (holding U.S. residents petitioning for family members abroad to enter country demonstrated irreparable harm based on prolonged separation). Many of these clients, moreover, are refugees themselves, and face daunting obstacles to protecting their own interests, ranging from language barriers to unfamiliarity with U.S. laws and customs to a legitimate fear of government retaliation if they pursue their rights in the courts. JFS-S Decl. ¶¶ 36-37; JFS-SV Decl. ¶ 43. Accordingly, JFS-S and JFS-SV have standing to assert their clients' rights in this case, and in balancing the equities, the Court may consider the irreparable injury that would befall those clients in considering Plaintiffs' preliminary injunction request. *See, e.g.*, *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 738-39 (S.D. Ind.) (considering irreparable harm to refugee clients for whom resettlement organization had third-party standing), *aff'd*, 838 F.3d 902 (7th Cir. 2016).

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

A. Refugee Ban 3.0 Violates the Establishment Clause.

Refugee Ban 3.0—both the suspension of admission from SAO countries and the FTJ suspension—disfavors Muslims and favors Christians in purpose, effect, and message. The ban could not be crafted more precisely to do so, and as such, is but the latest—and, arguably, the most devastating—attempt to follow through on President Trump's oft repeated promise to ban

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Muslims from this country. It therefore violates "[t]he clearest command of the Establishment Clause"—"that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

Like its predecessors, Refugee Ban 3.0 violates all of the tests imposed by the Establishment Clause. First, Refugee Ban 3.0 fails the purpose test under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which requires government action to have a "secular purpose," rather than the "purpose [of] favor[ing] one faith over another," *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005). As stated above, the ample indicia of intent—the President's repeated promises to ban Muslims; the President's continuing characterization of Islam as injurious to American values; the targeting of primarily majority-Muslim countries, despite there being no national or public safety justification for such a nationality-based suspension; the numerous ways in which the Ban's provisions do not rationally advance their stated objectives; and the dogged duplication of the same structure and categorical approach of prior orders—all make plain that the purpose of Refugee Ban 3.0, like its predecessors, is to disadvantage Muslims. *See supra* Background §§ I-III;[16] Nat'l Sec. Decl. ¶¶ 4-6, 14-15 ("Refugee Ban 3.0 would undermine the national security of the United States, rather than making us safer."); Nowrasteh Decl. ¶¶ 12-19 ("[T]he stated national security justifications for EO-4 are not supported by evidence."); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeh*, 508 U.S. 520, 535-38 (1993) (considering context, operation of the law, and the lack of fit between government conduct and stated ends in finding evidence of improper purpose).

[16] Courts have found that the prior orders likely violate the Establishment Clause. *See, e.g., IRAP II*, 857 F.3d at 588-601 (EO-2); *IRAP III*, 2017 WL 4674314 at *27 - *37 (EO-3); *IRAP I*, 241 F. Supp. 3d at 556-64 (EO-2); *Hawai'i I*, 241 F. Supp. 3d at 1134-39 (EO-2); *Aziz v. Trump*, 234 F. Supp. 3d 724, 734-36 (E.D. Va. 2017) (EO-1). Although some of these courts first analyzed whether, under *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the order was "facially legitimate and bona fide," *IRAP II*,857 F.3d at 588-93, in this circuit *Mandel* is limited to challenges to "the application of a specifically enumerated congressional policy to the particular facts presented in an individual visa application," *Washington v. Trump*, 847 F.3d 1151, 1162 (9th Cir. 2017). It does not apply to challenges like this one to the executive's "*promulgation* of sweeping immigration policy." *Id.* (emphasis in original).

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Moreover, not only has the Administration done nothing to "cast off" its intent to ban Muslim refugees, *McCreary*, 545 U.S. at 871-72, it has instead doubled down. *Cf. IRAP III*, 2017 WL 4674314, at *36 (enjoining EO-3 and characterizing it as "the inextricable re-animation of the twice-enjoined Muslim ban . . . convey[ing] the message that the third iteration of the ban—no longer temporary—will be the 'enhanced expression' of the earlier ones" (quoting *McCreary*, 545 U.S. at 872)). Indeed more starkly than before, this latest ban directly targets Muslim refugees while privileging Christian refugees. *See supra* Background § III. And Refugee Ban 3.0's effect aligns perfectly with the Administration's continuing statements that it would favor Christian refugees. After confirming on the day he signed EO-1 that he would change the USRAP to prioritize Christians, *see* Brody Report, (Burman Decl. Ex. TT), President Trump declared after issuing EO-2 that he was "going to be helping the Christians big league," Charlie Spiering, *Donald Trump Invites Conservative Media to White House for Exclusive Briefing*, Breitbart, Apr. 24, 2017 (Burman Decl. Ex. U). Courts struck down both EO-1 and EO-2, the latter specifically due to its violation of the Establishment Clause, but the Administration tried again. On the day after the issuance of EO-4, Vice President Pence promised specific help to those of Christian faith in the Middle East, calling out the "radical Islamic terrorists" who have perpetrated "vile acts of persecution animated by hatred for Christians and the Gospel of Christ." Vice President Mike Pence, Remarks by the Vice President at In Defense of Christians Solidarity Dinner (Oct. 25, 2017) (Burman Decl. Ex. V). The same day, the DOS Acting Assistant Secretary testified at a congressional hearing that the USRAP will "demonstrate America's commitment to assisting victims of ISIS in northern Iraq and throughout the Middle East" and pledged aid to "Yezidi, Christian, and members of other religious minorities," without any mention of the Muslim refugees in need of help in the region. Hearing on Oversight of the USRAP, Before the H. Comm. on the Judiciary, 115th Cong. (Oct. 26, 2017) (Burman Decl. Ex. UU). Such statements only confirm the Administration's long-held intent to ban Muslims and prioritize aid to Christian refugees.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Second, although the Court could end its Establishment Clause inquiry by finding an invidious purpose, Refugee Ban 3.0 also fails *Lemon's* "effects" test because it is eminently "objectively reasonable" for Refugee Ban 3.0 to be construed as "sending primarily a message of either endorsement or disapproval of religion." *Trunk v. City of San Diego*, 629 F.3d 1099, 1109 (9th Cir. 2011) (internal quotation marks omitted); *see id.* at 1110-25 (holding that a war memorial with a Latin cross, viewed in context, conveys a message of government endorsement of religion); *Lemon*, 403 U.S. at 612 (holding that a government action's "principal or primary effect must be one that neither advances nor inhibits religion"). In applying this test, the Court must determine whether an objective observer, "acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of a religion or state-sponsored disapproval of religion." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (internal quotation marks omitted).

Here, an objective and informed reasonable observer—aware of the context in which Refugee Ban 3.0 was conceived and issued—would perceive it as conveying a message of hostility and condemnation toward Muslims and a message of favoritism toward Christians. The numbers alone are telling: reversing the trend from recent years, the Trump Administration has admitted significantly more Christian refugees than Muslim and Refugee Ban 3.0 would only intensify this trend. *See* Burman Decl. Ex. P ("In February, Trump's first full month in office, Muslims accounted for 50% of the . . . refugees who entered the U.S., and Christians made up 41% of arrivals. By June, Christians (57%) made up a larger share of arrivals than Muslims (31%)"); *see also* Background § III. In the context of these figures and the numerous statements by the President and his Administration disparaging Islam and pledging to prioritize Christian refugees, Refugee Ban 3.0 sends a "stigmatic message" of disapproval to Muslims that they are "outsiders, not full members of the political community," and an accompanying message to Christians "that they are insiders, favored members." *Trunk*, 629 F.3d at 1109 (citation omitted); *see also* Doe 3 Decl. ¶ 6 (opining that Refugee Ban 3.0 "is based on bigoted, ignorant belief that

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

all Muslims pose a national security threat"); Doe 6 Decl. ¶ 7 ("The anti-Muslim statements and views behind suspending refugee admissions . . . perpetuate the view that Islam is associated with terrorists, but terrorists do not represent Islam."); Hussein Decl. ¶ 21 (noting that the refugee restrictions "make [him] feel targeted for [his] religious beliefs").

Finally, the Memorandum violates the Establishment Clause under the additional theory that it engages in prohibited preferentialism, including a preference for "one religion over another." *Larson*, 456 U.S. at 246 (internal quotation marks omitted). Because by intent and design, Refugee Ban 3.0 gives preferential treatment to Christians and disfavors Muslims, *see supra*, it is unconstitutional unless it is "justified by a compelling governmental interest" and "closely fitted to further that interest." *Larson*, 456 U.S. at 246-47. The government cannot meet this standard. The government has not articulated any particular or concrete concern regarding nationals on the SAO countries, or any particular reason to suspend the USRAP during its review. *See supra* Background § III. DHS and numerous national security experts have concluded that the categorical, nation-based bans the government has sought to impose, including those of Refugee Ban 3.0, do not advance national security interests, and in fact, may harm the very interests the government claims to protect. Nat'l Sec. Decl. ¶¶ 5-15. [17]

B. Suspension of Admission from SAO Countries Violates the APA Because It Is Arbitrary and Capricious.

For the same reasons the government cannot meet *Larson's* exacting standard, the Memorandum should also be set aside under the Administrative Procedures Act ("APA") because it is "'arbitrary, capricious, [or] an abuse of discretion.'" *Organized Vill. of Kake v. U.S. Dep't. of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (en banc) (quoting 5 U.S.C. § 706(2)(A)). When taking final agency action, agencies are required to "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choices made." *Greater*

[17] For the same reasons, Refugee Ban 3.0 also violates the equal protection component of the Due Process Clause. Just as the Establishment Clause prohibits preferentialism, Equal Protection "likewise prohibits the Government from impermissibly discriminating among persons based on religion." *Washington*, 847 F.3d at 1167.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Yellowstone Coal., Inc. v. Servheen, 665 F.3d 1015, 1023 (9th Cir. 2011) (citation omitted). An agency "must show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Here, the Memorandum fails to provide *any* reason why the suspension of refugees from SAO countries is necessary during the review it orders, which is not only fatal under the APA, but also telling. It does not claim that the existing screening and vetting procedures are inadequate in the interim—nor could it, given that refugees in the USRAP, especially those subject to SAO, are already the most rigorously vetted group of people entering the United States, and given that nationality-based bans are an ineffective national security measure. *See* Nat'l Sec. Decl. ¶¶ 6, 8-11 (describing the stringent vetting process required of refugees and ineffectiveness of nationality-based bans). The Memorandum also does not claim that these refugees present a specific threat—because it cannot, as history does not bear out this claim. *See id.* ¶ 12; Nowrasteh Decl. ¶¶ 12-14, 16-19. Indeed, the Memorandum only states that another 90-day "review" period is necessary because nationals of the SAO countries raise unspecified "concerns," Mem. at 2—but this is a slim reed on which to rest the suspension of nearly half the USRAP, given that the agencies have already reviewed the USRAP for *five months*,[18] *see* EO-1 § 5(a); EO-2 § 6(a), and adjustments to the USRAP can and have been made without a complete suspension, *see* Nat'l Sec. Decl. ¶ 9.

In short, the Memorandum offers no rational connection between the SAO suspension—which affects tens of thousands of vulnerable refugees annually—and the facts and justifications purportedly underlying it. This failure to provide a reasoned support for such a drastic change of policy is arbitrary and capricious and should be set aside.

[18] Indeed, the Memorandum itself suggests that no further review is necessary because the standard it imposes for case-by-case waivers of refugees from SAO countries is already present in Section 1182(a)'s inadmissibility grounds. The only difference is the Memorandum's vague requirement that refugees "fulfill critical foreign policy interests," although there are no standards explaining how to determine which refugees satisfy that condition.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

C. The Suspension of Admission from SAO Countries Violates the INA and APA Because It Is *Ultra Vires* and Violates the APA's Procedural Requirements.

The Court should set aside the Memorandum as to the SAO suspension because it violates the well-established principle that agencies can exercise their statutorily-delegated authority *only* pursuant to the scheme that Congress enacted. *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (administrative agencies "literally ha[ve] no power to act . . . unless and until Congress confers powers" to do so); 5 U.S.C. § 706(2)(c) (reviewing court shall "hold unlawful and set aside agency action . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"). The Memorandum fails to cite *any* statutory authority for suspending the USRAP for SAO countries, listing authority only for the uncontroverted proposition that the agencies may "conduct a detailed threat analysis and review" of the USRAP. Mem. at 2 (citing 8 U.S.C. § 1157(c), 8 U.S.C. § 1182(a), and 6 U.S.C. § 202(4)). That the relevant agencies are empowered to *review* the USRAP does not demonstrate that they have authority to *suspend* nearly half of USRAP admissions during the review. *Cf. Hawai'i II*, 859 F.3d at 774-75 (rejecting as insufficient to justify 120-day *suspension* of the USRAP the statement that it is the policy of the United States to improve screening and vetting procedures associated with the USRAP).

The agencies may be implicitly relying on 8 U.S.C. § 1157(c) and 6 U.S.C. § 202(4) for the DHS Secretary's authority to suspend the USRAP, but these statutory sections do not bear such weight. Section 1157(c) gives the Secretary authority to "admit any refugee" under certain conditions only in "[her] discretion *and pursuant to such regulations* as [she] may prescribe."[19] *Id.* (emphasis added). Section 202(4) gives authority to the Secretary of DHS to "[e]stablish[] and administer[] rules . . . governing . . . permission . . . to enter the United States." But no rules

[19] It appears that the statutory reference to the Attorney General in Section 1157(c) is now deemed to refer to the Secretary of Homeland Security. 6 U.S.C. § 557; *see Durable Mfg. Co. v. U.S. Dep't of Labor*, 578 F.3d 497, 499 n.1 (7th Cir. 2009) ("Under 6 U.S.C. § 557, references in federal law to any agency or officer whose functions have been transferred to DHS shall be deemed to refer to the Secretary of DHS or other official or component to which the functions were transferred.").

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

and regulations were properly promulgated here, and in any event any such rules and regulations cannot conflict with the statute. *See La. Pub. Serv. Comm'n*, 476 U.S. at 374.

As an initial matter, the Memorandum substantively alters the rights of thousands of refugees from the SAO countries: without it, there is no legislative or regulatory basis for the agencies to suspend half of refugee admissions under the USRAP. Accordingly, the Memorandum amounts to a legislative rule that "effect[s] a change in existing law," *Erringer v. Thompson*, 371 F.3d 625, 630 (9th Cir. 2004) (internal quotation marks omitted), and necessarily should have been promulgated through notice-and-comment rulemaking. Agencies routinely engage in or are required to engage in notice-and-comment procedures when setting out policy changes with substantive consequences for refugees and other immigrants, and there is no justification for failure to do so here. *See e.g.*, *Texas v. United States*, 809 F.3d 134, 171-78 (5th Cir. 2015) (as revised), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (plaintiffs likely to succeed on merits of APA claim that notice and comment rulemaking required for immigration policy granting deferred action status to certain undocumented immigrants); *Zhang v. Slattery*, 55 F.3d 732, 744-47 (2d Cir. 1995), *superseded by statute on other grounds*, by 8 U.S.C. § 1101(a)(42) (notice and comment rulemaking required for Attorney General's interim rule recognizing fear of coercive family planning practices as basis for refugee status); *Jean v. Nelson*, 711 F.2d 1455, 1476-77 (11th Cir. 1983), *vacated and rev'd on other grounds*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985) (notice and comment rulemaking required for policy change directing detention of undocumented Haitians detained at port of entry). In fact, 8 C.F.R. part 207, the regulations implementing the Refugee Act of 1980, and subsequent amendments outlining procedures for the FTJ program, were subject to notice and comment before they were codified. Aliens and Nationality; Refugee and Asylum Procedures, 46 Fed. Reg. 45,116 (Sept. 10, 1981) (to be codified at 8 C.F.R. pt. 207); Procedures for Filing a Derivative Petition (Form I-730) for a Spouse and Unmarried Children of a Refugee/Asylee, 63 Fed. Reg. 3792 (Jan. 27, 1998) (to be codified at 8 C.F.R. § 207.7).

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

But even if the Memorandum were somehow considered to be properly promulgated, or were otherwise exempt from notice-and-comment rulemaking,[20] at bottom it must still be set aside as *ultra vires* because it fundamentally conflicts with the Refugee Act in two key ways. *See La. Pub. Serv. Comm'n*, 476 U.S. at 374. First, the Memorandum runs roughshod over the Refugee Act's explicit definition of a "refugee," *see* 8 U.S.C. § 1101(a)(42), through which Congress legislatively set forth the specific statutory elements individuals must satisfy to be admitted as a refugee. *Id*. By grafting on the additional requirement that individuals from SAO countries must "fulfill critical foreign policy interests" before admission, the Memorandum impermissibly redefines the term—a term whose definition, in fact, Congress adopted in part to meet obligations the United States owes under international treaties. *See* Pub. L. No. 96-212, § 201, 94 Stat. 102, 102-103 (1980) (codified or amended at 8 U.S.C. § 1101(a)(42)) (enacting a universal, nondiscriminatory definition of "refugee" closely paralleling that of the 1951 United Nations Convention Relating to the Status of Refugees[21]). The Memorandum points to no authority allowing the Secretary to ignore and, in fact, rewrite Congress's considered judgment as to who should qualify as a "refugee."

Second, the categorical, nation-based ban of the SAO suspension impermissibly alters admissibility standards that Congress has set. Under these standards, set out in 8 U.S.C. § 1182(a), any individual refugee may enter the United States only if she is not subject to one of the inadmissibility bars, which include a long list of "criminal," "security," "terrorist," and "foreign policy" grounds.[22] The inadmissibility grounds of section 1182(a) do not permit the

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[20] Exceptions to the notice and comment requirements must be "narrowly construed and only reluctantly countenanced." *San Diego Air Sports Ctr., Inc. v. FAA*, 887 F.2d 966, 969 (9th Cir. 1989) (citation omitted).

[21] United Nations High Commissioner on Refugees, Convention and Protocol Relating to the Status of Refugees, http://www.unhcr.org/en-us/3b66c2aa10.

[22] Whatever power the Secretary may have to "admit any refugee" under 8 U.S.C. § 1157(c), the Refugee Act makes clear that such power is subject to the inadmissibility criteria in section 1182(a), with certain waivers specific to refugees. *See id.* (Secretary may "admit any refugee . . . *except as otherwise provided* under [8 U.S.C. § 1157(c)(3), the waiver provision granting the Secretary authority to waive for refugees some, but not all, of Section 1182(a)'s inadmissibility grounds "for humanitarian purposes, to ensure family unity, or when it is otherwise in the public interest"]).

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

executive to engage in invidious religious or nationality discrimination, categorically barring entire groups, without any evidence that any specific individual posed a particular threat. *See Abourezk v. Reagan*, 785 F.2d 1043, 1051 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987). Agencies, moreover, cannot "nullif[y]" the contours of existing inadmissibility grounds or "evade the limitations [of] Congress," *id.* at 1057, by creating a new and separate inadmissibility ground that does not exist in the INA. But this is exactly what the Memorandum purports to do by effectively banning refugees from SAO countries who do not "fulfill critical foreign policy interests."[23]

Finally, whatever authority the Secretary enjoys under the Refugee Act is limited by the Act's stated purpose: to design a "systematic procedure" for refugee admissions embodying the American commitment to refugee admissions as a matter of *humanitarian* (as opposed to ideological, political, or other) concern.[24] The Memorandum is at odds with this purpose.

D. The FTJ Suspension Violates the APA, INA, and Due Process Clause.

Finally, with respect to Plaintiffs' challenge to the FTJ suspension based on the APA, Immigration and Nationality Act ("INA"), and the Due Process Clause, Plaintiffs have sought permission from the parties in the related case, *Doe v. Trump*, No. 17-00178 (W.D. Wash. Nov.

[23] Reliance on 8 U.S.C. § 1182(a) is similarly misplaced as that statute does not authorize the actions taken here, but rather *constrains* the Secretary's authority. Section 1182(a) sets forth Congress's considered judgment about the categories of persons who are inadmissible. The executive branch is simply not permitted to override Congress's judgment except as directed in limited circumstances not applicable here. *See Abourezk*, 785 F.2d at 1051 ("[T]he Immigration Act emphatically did not commit the decision to exclude an alien to standardless agency discretion; the statute lists thirty-three distinctly delineated categories that conspicuously provide standards to guide the Executive in its exercise of the exclusion power.").

[24] *See, e.g.*, Pub. L. No. 96-212, § 101, 94 Stat. 102, 102 (1980) (codified or amended at 8 U.S.C. § 1521 note (declaration of purpose); H.R. Rep. No. 96-608, at 13 (1979) (explaining that by using the statutory phrase "special humanitarian concern" in what became § 1157(a), the House committee "intends to emphasize that the plight of the refugees themselves, as opposed to national origins or political considerations, should be paramount in determining which refugees are to be admitted to the United States"); *see generally* Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 12-42 (1981) (explaining that before 1980, refugees were admitted through a series of temporary, ad hoc legislative and executive measures designed to assist a limited number of people, usually of specific geographic or ideological concern, such as those who were fleeing persecution in communist countries or the Middle East).

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

6, 2017), to join the Doe plaintiffs' preliminary injunction motion on the same claims.[25] *Id.* (ECF No. 45). The government, however, declined to consent to this arrangement. Because these claims are already addressed in *Doe* and because Plaintiffs believe that the relief sought in *Doe*, if granted, would apply to them, Plaintiffs do not include here overlapping briefing on a preliminary injunction on these claims. By the Court's leave, Plaintiffs seek to preserve their right to seek relief should the *Doe* defendants' arguments make that advisable or necessary to protect Plaintiffs or Plaintiffs' class.

IV. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST SUPPORT A NATIONWIDE PRELIMINARY INJUNCTION.

The Court should enjoin Refugee Ban 3.0 nationwide, as courts have done with EO-1, EO-2, and EO-3. *See, e.g.*, *Hawai'i III*, ___ F. Supp. 3d ___, 2017 WL 4639560, at *14 (issuing nationwide injunction); *Hawai'i I,* 241 F. Supp. 3d at 1140 (same); *Washington*, 2017 WL 462040, at *2-3 (same). Although injunctions of EO-2 and EO-3 have been limited pending appeal to those with "a credible claim of a bona fide relationship with a person or entity in the United States" (a "BFR"),[26] that limitation should not apply here to the USRAP, where the balance of equities and public interest are qualitatively different. As the Refugee Act itself reflects, refugees are *per se* defined by the trauma they are fleeing, not by the ties to the country in which they can ultimately seek refuge: "The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their

[25] As the *Doe* plaintiffs explain, the FTJ statute creates a non-discretionary entitlement to admission for beneficiaries who have met the eligibility requirements and who are not subject to any applicable inadmissibility grounds. *See* 8 U.S.C. § 1157(c)(2)(A) ("A spouse or child . . . of any refugee who qualifies for admission . . . *shall* … *be entitled to the same admission status as such refugee if . . . following to join, such refugee* and if the spouse or child is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this Act.") (emphasis added). But Refugee Ban 3.0 cites no specific authority for the FTJ suspension—because it cannot. The FTJ suspension directly conflicts with the plain terms of the INA and violates the APA because it is "not in accordance with law," *see* 5 U.S.C. § 706(2), fails to observe proper procedure, *see* 5 U.S.C. §§ 553, 706(2)(D), and violates the agencies' own regulations, *see Accardi v. Shaughnessy*, 347 U.S. 260 (1954); 8 C.F.R. § 207.7. It likewise violates the Due Process Clause for the same reasons.

[26] *IRAP*, 137 S. Ct. at 2088; Order, *Hawai'i v. Trump*, No. 17-17168 (9th Cir. Nov. 13, 2017); *IRAP III*, 2017 WL 4674314, at *38.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

homelands." § 101(b), 94 Stat. 102. Limiting an injunction of Refugee Ban 3.0 to only individuals with BFRs, moreover, is inconsistent with the principle that unlawful agency actions should be set aside entirely. *See Nat'l. Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (holding that "the ordinary result" of a finding that agency action is unlawful "is that the rules are vacated—not that their application to the individual petitioners is proscribed" (citation omitted)).

For these reasons, a nationwide injunction is necessary—not only to address the irreparable harm that Refugee Ban 3.0 inflicts on U.S. organizations who serve refugees and on their clients and other individuals here in the U.S. who are prevented from reuniting with their loved ones because of invidious anti-Muslim animus, but also to address the irreparable harm inflicted on all USRAP refugees who, but for this latest attempt at a Muslim ban, would be able to escape dangerous and life-threatening situations abroad and finally seek refuge here in the United States.[27]

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court issue a preliminary injunction blocking the enforcement of the suspension of the USRAP from the SAO countries and the indefinite suspension of the Follow-to-Join refugee process.

[27] To the extent the Court adopts the BFR standard here, it should clarify that all the individual plaintiffs and clients of the organizational plaintiffs meet the BFR standard—specifically, with U.S. family members, *see* Doe 2 Decl. ¶¶ 5, 10; Doe 5 Decl. ¶ 8, or with organizations representing them in their refugee applications or otherwise assisting them, *see* Finkbeiner Decl. ¶¶ 9-14; JFS-S Decl. ¶¶ 12-17, 26-27; JFS-SV Decl. ¶¶ 18-22, 33-36. As the record reflects, the plaintiffs here have bona fide client relationships with U.S. entities that go *beyond* a relationship between a refugee and a resettlement agency providing assurances, which the Ninth Circuit previously determined to be a BFR. *See Hawai'i v. Trump*, 871 F.3d 646, 659-664 (9th Cir. 2017) (stayed pending appeal, *Trump v. Hawaii*, No. 17A275, 2017 WL 3975174, at *1 (U.S. Sept. 11, 2017)); *see also Hawai'i v. Trump*, No. 17-00050, 2017 WL 2989048, *8 (D. Haw. 2017) (agreeing with government that BFRs with legal services providers must be assessed depending on the nature of the relationship).

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Respectfully submitted,

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/s/ David Burman

David Burman, WSBA No. 10611
Lauren Watts Staniar, WSBA No. 48741
Tyler Roberts, WSBA No. 52688
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000
dburman@perkinscoie.com
lstaniar@perkinscoie.com
troberts@perkinscoie.com

Mariko Hirose, *Pro Hac Vice*
Deepa Alagesan, *Pro Hac Vice*
Linda Evarts, *Pro Hac Vice*
Kathryn C. Meyer, *Pro Hac Vice*
International Refugee Assistance Project
40 Rector Street, 9th Floor
New York, NY 10006
Tel: (646) 459-3044
mhirose@refugeerights.org
dalagesan@refugeerights.org
levarts@refugeerights.org
kmeyer@refugeerights.org

Elizabeth Sweet, *Pro Hac Vice*
Mark Hetfield, *Pro Hac Vice*
HIAS, Inc.
1300 Spring Street, Suite 500
Silver Spring, MD 20910
Tel: 301-844-7300
liz.sweet@hias.org
mark.hetfield@hias.org

Justin B. Cox, *Pro Hac Vice*
National Immigration Law Center
PO Box 170208
Atlanta, GA 30317
Tel: (678) 279-5441
Fax: (213) 639-3911
cox@nilc.org

Karen C. Tumlin, *Pro Hac Vice*
Melissa S. Keaney, *Pro Hac Vice*
Esther H. Sung, *Pro Hac Vice*
National Immigration Law Center
3450 Wilshire Blvd, #108-62
Los Angeles, CA 90010
Tel: (213) 639-3900
Fax: (213) 639-3911
tumlin@nilc.org
keaney@nilc.org
sung@nilc.org

Lauren E. Aguiar, Esq., *Pro Hac Vice*
Mollie M. Kornreich, Esq., *Pro Hac Vice*
Abigail E. Davis, Esq., *Pro Hac Vice*
Four Times Square
New York, NY 10036
Tel: (212) 735-3000
Fax: (213) 735-2000
lauren.aguiar@probonolaw.com
mollie.kornreich@probonolaw.com
abigail.sheehan@probonolaw.com

Counsel for Plaintiffs.