THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| JOHN DOES, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>DONALD TRUMP, et al.,<br><br>Defendants. | CASE NO. C17-0178JLR<br><br>**JEWISH FAMILY SERVICE PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**<br><br>(RELATING TO CASE NO. C17-1707JLR) |
| JEWISH FAMILY SERVICE, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>DONALD TRUMP, et al.,<br><br>Defendants. | CASE NO. C17-1707JLR |



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Defendants' response to Plaintiffs' motion obfuscates a key fact: the Memorandum orders a ***suspension*** of nearly half of the USRAP—a suspension just like those ordered under the first and second Executive Orders banning refugees ("EO-1" and "EO-2"), but now undeniably targeting Muslims. This is not merely a change of procedure; it prevents the resettlement of the vast majority of Muslim refugees to the United States, while favoring and prioritizing Christian refugees—just as the Administration has promised on multiple occasions. *See* Pls.' Mot. for Prelim. Inj., ECF 42, at 1-4 ("PI"). While Defendants seek to minimize the suspension's irreparable harm to Plaintiffs by characterizing it as a temporary pause, such attempts are belied by the Memorandum and its context—that this is but the latest attempt in what has amounted to nearly a year-long suspension of refugee resettlement to the United States. The consequences for Plaintiffs are perilously severe.[1]

Defendants do not dispute several notable issues. They do not dispute that their ban on refugees subject to the Security Advisory Opinion ("SAO") list targets people from 11 countries, 9 of which are Muslim-majority, accounting for 80 percent of Muslim refugee admissions to the United States. *See* PI at 8-9. Nor do they dispute that the ban on follow-to-join ("FTJ") beneficiaries primarily affects Muslims. *See id*. Finally, Defendants have not submitted any evidence to counter Plaintiffs' affidavits, including two expert affidavits, that demonstrate that the bans inflict irreparable harms on Plaintiffs and lack national security or other valid justification.

[1] In their latest filing, Defendants seek to delay resolution of this motion based on the Supreme Court's stay orders and on vague assertions, couched in terms of "might" and "almost" about progress of the reviews under the Memorandum. Defs' Supp. Br., ECF 78, at 2. But the Supreme Court stay orders do not justify staying this motion as Plaintiffs have explained, ECF 73 & 76, and Defendants have not met their burden of showing that it is "absolutely clear" that the alleged wrongful behavior could not reasonably be expected to recur, as is required of a defendant claiming mootness by voluntary cessation. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 92 (2013) (describing the defendants burden as "formidable"); *see Washington v. Trump*, 847 F.3d 1151, 1165-66 (9th Cir. 2017) (rejecting argument that challenge to EO-1 by lawful permanent residents is moot because of White House counsel's guidance published after the order), *cert. denied sub nom.*, *Golden v. Washington*, No. 17-5424, 2017 WL 3224674 (U.S. Nov. 13, 2017). Defendants' assertion that Plaintiffs' claims are moot should be rejected. Given the ongoing irreparable harm to the Plaintiffs, *see infra*, Plaintiffs ask the Court to resolve this motion as soon as practicable.



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## I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE

### A. The Plaintiffs Have Standing

Ignoring overwhelming evidence of harm to individual Plaintiffs and clients of organizational Plaintiffs, PI at 10-12, Defendants argue that any harm to Plaintiffs is merely "speculative" because banned refugees may be eligible for a case-by-case waiver, and because "it is doubtful that these applicants are on the brink of travel such that the 90-day SAO review period will have any concrete impact on them." Defs. Opp. Br., ECF 77, at 6-8 ("Br.").[2] Defendants' argument that the discretionary waiver undermines ripeness, however, has been resoundingly rejected by courts reviewing prior Executive Orders ("EOs"). *See Hawai'i v. Trump* (*Hawai'i II*), 859 F.3d 741, 768 (9th Cir. 2017) (holding that plaintiffs "will face substantial hardship if we were to first require that they try to obtain a waiver before we will consider their case"), *vacated as moot*, No. 16-1540, 2017 WL 4782860 (U.S. Oct. 24, 2017); *IRAP v. Trump* (*IRAP III*), Nos. TDC-17-0361, et al., 2017 WL 4674314, at *16 (D. Md. Oct. 17, 2017) (same). The Ninth Circuit also held that a plaintiff had standing to challenge EO-2's 90-day suspension of travel where EO-2 stalled the visa process for his family member, without considering whether the family member was on the brink of travel during the suspension period. *See Hawai'i II*, 859 F.3d at 762-63; *see also IRAP v Trump (IRAP II)*, 857 F.3d 554, 583 (4th Cir. 2017) (holding that condemnation injury, along with prolonged separation from family members, constitutes imminent injury where "[a] ninety-day pause on issuing visas would seem to necessarily inject at least some delay into any pending application's timeline"), *vacated*, No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017).[3] Here, Defendants have not articulated a clear end to the suspension period. *See supra* n.1.

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[2] Defendants do not otherwise challenge the showing of harm to individual Plaintiffs. Moreover, for the individual Plaintiffs who are here in the United States, the condemnation harm to them flowing from the Establishment Clause violation exists now and is ripe. *See Catholic League for Religious & Civil Rights v. City & Cty. of S.F.*, 624 F.3d 1043, 1053 (9th Cir. 2010) (en banc) (holding that a finding of unconstitutionality of a government act would redress injury from condemnation of religion).

[3] *See also Aquavella v. Richardson*, 437 F.2d 397, 403-05 (2d Cir. 1971) (holding that APA and due process challenges to agency's temporary suspension of payments pending an audit was ripe for review where



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In addition, contrary to Defendants' unsupported assertions, a number of individual Plaintiffs and clients of organizational Plaintiffs ***are*** on the brink of travel. The State Department confirmed in October that Doe #1 would be scheduled for travel, for example, but the SAO ban came down while he was arranging his paperwork and now the International Organization for Migration ("IOM")—which works with the U.S. government to arrange refugee travel— has told him that it would not assist him with his paperwork since he cannot travel because of the ban. *See* Doe 1 Supp. Decl. ¶ 10; Poellot Decl. ¶ 3 (State Department confirmed in October that Doe 1 would be scheduled for travel); Burman Supp. Decl. Exs. S, T (IOM handles the final stage for refugees prior to travel). A number of clients assured by JFS-S and JFS-SV are similarly at the stage of arranging travel but have had their travel suspended because of the ban. *See* JFS-S Supp. Decl. ¶ 10; JFS-SV Supp. Decl. ¶¶ 5-6.[4] Such delays are particularly harmful to refugees because their security and medical checks expire and must be redone, all while they remain in perilous circumstances. JFS-S Supp. Decl. ¶ 8; *see also Hawai'i v. Trump (Hawai'i III)*, 871 F.3d 646, 664 (9th Cir. 2017) ("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. Even short delays may prolong a refugee's admittance.").

Defendants also attempt to dismiss evidence of the harms to organizational Plaintiffs—including diversion of resources, hampering of their operations, and frustration of their core missions, *see* PI at 12-13—by claiming, without any evidence, that JFS-S and JFS-SV may continue to fulfill their missions "by representing such clients who are unaffected by the challenged provisions." Br. at 9. But neither organization expects to make up the deficits in refugee arrivals caused by the SAO ban by receiving "unaffected refugees," Br. at 9, and the current figures do not bear Defendants' claim out. Burman Supp. Decl. ¶ 14; JFS-S Supp. Decl.

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appellant presented legal questions and "[w]ithout judicial intervention at this stage, appellant [was] at the mercy of the [agency which] [could] insulate the allegedly illegal suspension from review").

[4] Doe 4's case was expedited because of her dire situation, which means the possibility of travel as soon as six months from referral to the USRAP—or, in Doe 4's case, now. Doe 4 Decl. ¶ 5 (stating that she was referred to the USRAP in June 2017); Norland Decl. ¶ 4.



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¶ 3; JFS-SV Supp. Decl. ¶ 2. Each organization, moreover, has devoted resources specifically to serving Muslim and Arabic-speaking refugees because those refugees represent a large percentage of their clients. JFS-S Supp. Decl. ¶¶ 5-7; JFS-SV Supp. Decl. ¶¶ 3-4. Such resources are squandered even if the organizational Plaintiffs are able to meet their projected resettlement numbers only by assisting favored refugees. JFS-S Supp. Decl. ¶¶ 6-7; JFS-SV Supp. Decl. ¶ 4. The harms to the organizational Plaintiffs are concrete, irreparable, and directly traceable to the refugee ban.[5]

**B. This Court Has Jurisdiction To Review Plaintiffs' Claims**

Defendants argue that the Memorandum is immune from judicial review, Br. at 10-14, but every court of appeals to consider this plea for unlimited deference has emphatically rejected it. *See Hawai'i II*, 859 F.3d at 768-69; *IRAP II*, 857 F.3d at 587-88; *see also Washington v. Trump*, 847 F.3d 1151, 1161-64 (9th Cir. 2017), *cert. denied sub nom.*, *Golden v. Washington*, No. 17-5424, 2017 WL 3224674 (U.S. Nov. 13, 2017). This is because challenges to generalized immigration policies—like those at issue here—are, unlike many challenges to individual decisions on admissions, subject to review. *See, e.g., Sale v. Haitian Ctrs. Council, Inc.* 509 U.S. 155 (1993) (reviewing on the merits a statutory claim challenging an EO that blocked entry of Haitians, over the government's insistence that consular nonreviewability barred review); *id.*, U.S. Br. 13-18 (No. 92-344); Oral Arg. Tr., 1993 WL 754941, at *16-22 (arguing that the doctrine barred review);[6] *see also Hawai'i II*, 859 F.3d at 768-69 (holding that consular nonreviewability does not bar statutory and constitutional review of EO-2); *Patel v. Reno*, 134 F.3d 929, 931-32 (9th Cir. 1997) (holding that consular nonreviewability does not apply to a consular officer's decision to suspend visa applications). Defendants do not cite a single case that

[5] Defendants' only challenge to third-party standing for the organizational Plaintiffs' clients is its assertion that the clients have suffered no injury. Br. at 9 n.7. This is wrong, *see supra* § I.A., and, therefore, JFS-S and JFS-SV have standing to represent both their own interests as well as the third-party interests of their clients.

[6] For this reason, Defendant's reliance on *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498 (11th Cir. 1992) is misplaced. Br. at 10-11. Though *Haitian Refugee Center* applied the doctrine of consular nonreviewability to an immigration policy, the Court in *Sale* addressed a successor EO on the merits. *Sale*, 509 U.S. at 187-89.



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endorses their novel and sweeping "principle" of nonreviewability, Br. at 10, and rely only on cases addressing ***individual*** visa denials by consular officials abroad. Br. at 10-11. Indeed, the case on which Defendants rely most heavily, *Saavedra Bruno v. Albright*, repeatedly characterizes the doctrine as applying only to "***a consular official's decision*** to issue or withhold a visa." 197 F.3d 1153, 1159 (D.C. Cir. 1999) (emphasis added); *see id.* at 1160, 1162.

## II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

### A. The Memorandum Violates the Administrative Procedure Act and the Immigration and Nationality Act

Defendants repeatedly misconstrue Plaintiffs' statutory claims. Plaintiffs are not arguing that they (or their family members or clients) are "entitled" to admission as refugees. *Cf.* Br. at 16. Plaintiffs are therefore not seeking review of a decision committed to agency discretion. *See Patel*, 134 F.3d at 931-32 (holding that challenges to suspension of visa processing are justiciable even where challenges to decisions to grant or deny a visa are not). Rather, Plaintiffs challenge as unlawful the government's categorical ***suspension*** of processing and admission for individuals from SAO countries and through the FTJ process without justifying why such a suspension is necessary.[7] Though Defendants urge this Court to abdicate its review of these statutory violations, such questions of law are reviewable and the Administrative Procedures Act ("APA") erects a barrier to such runaway agency action.[8]

1. As a preliminary matter, the Memorandum constitutes final agency action. Defendants concede the first requirement for finality, Br. at 15, and dispute only that the SAO suspension determines "rights or obligations" or results in "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citation omitted); *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992)

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[7] Plaintiffs' statutory claims are not limited to the Memorandum's SAO provisions, *see* PI at 22-23, notwithstanding Defendants' repeated statements to the contrary, *see, e.g.*, Br. at 10.

[8] Defendants argue that Plaintiffs "have identified no statute that authorizes judicial review," Br. at 10, but that is wrong. It is "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent" that "courts [should] restrict access to judicial review" under the APA. *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Defendants have not identified any reason to restrict judicial review here other than consular nonreviewability, which as explained, does not apply.



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(explaining that "the core question is whether…the result of that [challenged agency] process is one that will directly affect the parties"). Here, Plaintiffs are directly affected. *See* § III. Plaintiffs' imminent, cognizable harms have a "direct and immediate effect on the day-to-day operation[]" of their lives. *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (citations omitted) (finding final agency action where agency expected immediate compliance with its terms). Defendants' attempt to characterize the SAO suspension as a mere "processing delay," Br. at 15, grossly misrepresents reality. JFS-S Supp. Decl. ¶ 8 (explaining cascading effects of even a short delay in processing); *Hawai'i III*, 871 F.3d at 664 (same).[9]

2. The SAO suspension is *ultra vires* and Defendants still have not pointed to ***any*** authority that permits the agencies to suspend nearly half of this congressionally enacted refugee resettlement program. Defendants' baldly assert that "[t]he discretion to decide who 'may' be admitted logically includes" the ability to suspend admission of all nationals of SAO countries, Br. at 17, relying exclusively on 8 U.S.C. §1157(c)(1). But the clear terms of § 1157(c)(1) grant authority to "admit any refugee" only in "[the Secretary's] discretion ***and pursuant to such regulations*** as [she] may prescribe." The SAO ban was not imposed pursuant to new or existing regulation, which, as the Plaintiffs explain, is reason alone to enjoin it. *See infra* § II.A.4.[10]

Defendants' observation that the "Government routinely grants *preferences* on the basis of nationality" under the Refugee Act, Br. at 17, supports rather than undermines Plaintiffs' argument. Such preferences are granted either pursuant to a Presidential determination required

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[9] Defendants cite *International Brotherhood of Teamsters v. U.S. Department of Transportation* to support this argument, but the SAO suspension is a far cry from a mere "report detailing [an agency's] findings" found not to be final agency action in that case. 861 F.3d 944, 949 (9th Cir. 2017). Unlike the *Teamsters* report, the Memorandum "commands immediate implementation," *Oregon v. Ashcroft*, 368 F.3d 1118, 1147 (9th Cir. 2004), *aff'd sub nom.*, *Gonzales v. Oregon*, 546 U.S. 243 (2006), and is final agency action.

[10] In any event, even if it were, the SAO suspension would conflict with the text and purpose of the Refugee Act. *See* PI at 21-22. Defendants do not cite any authority in support of their argument that the Refugee Act simply sets "the *minimum* required to gain entry as a refugee," thus permitting the Executive to layer atop whatever additional requirements it deems proper in its sole and unreviewable discretion. Br. at 22. Such a position is untenable and if accepted, would permit, for example, the Executive to ***expressly*** exclude Muslims and favor Christians. *See also Abourezk v. Reagan*, 785 F.2d 1043, 1051 (D.C. Cir. 1986) (Secretary of State did not have unfettered discretion to exclude people given explicit inadmissibility criteria in INA), *aff'd*, 484 U.S. 1 (1987).



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by the Refugee Act, 8 U.S.C. § 1157(a)(3) (requiring the President to allocate refugee admissions after appropriate consultation with Congress), as is the case with the Priority 2 designations—including the Central American Minors program—and Priority 3 designations,[11] or pursuant to a duly issued regulation that permits the Secretary to prioritize certain refugee admissions based on appropriate criteria, including "reuniting families, close association with the United States, compelling humanitarian concerns, and public interest factors," 8 C.F.R. § 207.5 (2017). While § 207.5 may permit the agency to preference certain admissions ***based on these criteria***, this authority—on which Defendants did ***not*** base their actions—does not encompass the categorical suspension at issue here.

3. The SAO suspension is also arbitrary and capricious because it rests entirely on the circular assertions that the Secretaries have unspecified "concerns" about nationals from SAO countries because they are already subject to heightened vetting. Mem. at 2; *see, e.g.*, *Or. Wild v. Bureau of Land Mgmt.*, 2015 WL 1190131, *12 (D. Or. 2015) (finding agency's "circular reasoning" was arbitrary and capricious). Contrary to Defendants' repeated recitation of "national security" concerns in opposing Plaintiffs' motion, the Memorandum itself never asserts that the "concerns" relate to national security; nor for that matter, does it claim that the existing procedures for SAO countries are inadequate or that new procedures are necessary.[12] This Court cannot even consider such a *post hoc* justification, even setting aside its lack of support. *See Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1109 (9th Cir. 2011) ("[W]e can neither 'accept appellate counsel's post hoc rationalizations for agency action' nor 'supply a reasoned basis for the agency's action that the agency itself has not given.' Instead our review is limited to '[t]he grounds upon which . . . the record discloses that [the agency's] action was based.'") (second and third alterations in original) (citations omitted). The SAO ban is arbitrary and capricious because Defendants failed to provide an explanation as to why, after reviewing the USRAP procedures

[11] *See* U.S. Dep't of State, Proposed Refugee Admissions for FY 2018, at 7 (Oct. 4, 2017) (report to Congress), (noting that § 207(a)(3) of the INA grants authority to determine the USRAP priority system).

[12] Indeed, such a claim would be belied by the availability of case-by-case waivers.



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since January 27, 2017, a drastic shift from the pre-existing SAO process to a categorical suspension of admission of refugees from these countries is justified. *See* PI at 18; *see also Arrington v. Daniels,* 516 F.3d 1106, 1114 (9th Cir. 2008) (finding agency action arbitrary and capricious where "agency fail[ed] to provide an explanation for its actions"); *Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997) ("[T]he FCC's *ipse dixit* conclusion . . . epitomizes arbitrary and capricious decisionmaking.").

4. Finally, the Memorandum violates the APA's procedural requirements because it did not go through notice-and-comment rulemaking. The SAO suspension is a legislative (or "substantive") rule: it alters the substantive rights of refugees from SAO countries, and without it, the agencies would have no basis for categorically suspending refugee admissions. *See Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087-88 (9th Cir. 2003) (in assessing whether a rule is legislative, courts look to whether the agency would have the authority for undertaking the challenged action in the absence of the policy); *see also Agric. Retailers Ass'n v. U.S. Dep't of Labor*, 837 F.3d 60, 65 (D.C. Cir. 2016) (considering the "practical effect" of agency action to determine whether it is substantive or procedural).[13] Defendants' argue that the SAO suspension is a procedural rule because "[i]t does not change the substantive criteria for determining" admission. Br. at 19. But that disregards that nationals of SAO countries who would otherwise meet the INA's definition of "refugee" are now barred unless they can meet an additional, agency-created requirement showing their admission would "fulfill critical foreign policy interests," Mem. at 2—a consideration that Congress deliberately excluded from the INA's definition. *See* PI at 22.

Defendants' arguments conflate the agencies' suspension of refugee processing with the procedural changes purportedly under review. *See* Br. at 19. But courts have found that the

[13] That the Memorandum references the possibility of "case-by-case" admission of SAO-country refugees does not exempt it from notice-and-comment rulemaking: even if a rule does not mechanically dictate the result in each case, it is still substantive if it "focus[es] attention on specific factors to the implicit exclusion of others." *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1322 (D.C. Cir. 1988) (citation omitted).



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suspension of a regulatory program without notice and comment violates the APA. *See Envtl. Def. Fund v. Gorsuch*, 713 F.2d 802, 804, 814-17 (D.C. Cir. 1983) (rejecting agency's characterization of suspension as "statement of agency policy" in holding that it was subject to notice and comment).[14]

Defendants' claim that the foreign affairs exception to rulemaking applies rests entirely on *Rajah v. Mukasey*, Br. at 19-20, but *Rajah* is inapposite. 544 F.3d 427 (2d Cir. 2008). Here, Plaintiffs are not seeking rulemaking on whether particular countries should be on the SAO list, and so *Rajah* and Defendants' concerns about "relations with other countries [being] impaired," Br. at 20 (internal citations omitted), are misplaced. Rather, the rulemaking would concern whether and how the USRAP should be suspended while the agencies conduct a review. It is far from evident that such routine rulemaking would "provoke definitely undesirable international consequences," *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980), and Defendants proffered no basis or evidence to believe it would. *Cf. id.* at 1360-61 (applying exception after examining affidavits of the Attorney General and Deputy Secretary of State establishing directive's relationship to the Iran hostage crisis); *see also Jean v. Nelson*, 711 F.2d 1455, 1477 (11th Cir. 1983) (holding that a rule directing detention of Haitians at the border was not within the exception given lack of evidence of consequences), *aff'd*, 472 U.S. 846 (1985).

**B. Plaintiffs Are Likely To Succeed on Their Establishment Clause Claim**

In opposing the Establishment Clause claim, Defendants do not dispute Plaintiffs' evidence that the Administration has suspended refugee admissions from countries that account for 80 percent of the Muslim refugees entering the country and from the FTJ process, which primarily affects Muslims, *see* PI at 8-9; that it is instead processing applications from countries

[14] The cases that Defendants cite are readily distinguishable. In both, the courts focused on the fact that the delay caused by a suspension did not itself undermine the interests at stake, and in both, the delay itself was related to the agencies' ongoing efforts to promulgate rules subject to notice-and-comment rulemaking. *See Waste Mgmt., Inc. v. EPA*, 669 F. Supp. 536, 539-40 (D.D.C. 1987); *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 636-38 (D.C. Cir. 1984). And unlike the challengers in *Waste Management* and *Neighborhood TV*, Plaintiffs' interest—to flee perilous situations and find refuge in the United States—are clearly undermined by any delay. *See* § III.



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whose refugees have been 70 percent Christian, *id.* at 8; and that the President promised precisely this Muslim ban, *id.* at 2-4. Nor do Defendants contest Plaintiffs' evidence that there is no national security justification for banning this thoroughly vetted population. *See* Nat. Sec. Decl., ECF 46; Nowrasteh Decl., ECF 47. Instead, Defendants argue that this Court cannot review the claim, Br. at 12-14; that even if it could, its review is limited, *id.* at 24-25; and that, regardless of the level of review, it should turn a blind eye to the mounting evidence of this Administration's anti-Muslim bias, which the agencies have faithfully implemented in various iterations of the EOs, Br. at 25-27. Each of these arguments fails.[15]

First, U.S.-based Plaintiffs have standing to raise their own Establishment Clause claims due to the personal economic and separation injuries, as well as stigma, resulting from the refugee ban. PI at 10-13; *see also IRAP III*, 2017 WL 4674314, at *14-16 (finding standing to assert Establishment Clause claim based on marginalization and separation from relatives due to EO-3). Defendants' reliance on *McGowan v. Maryland*, 366 U.S. 420 (1961) misreads that case: although the Court held that Free Exercise claims cannot be brought by plaintiffs whose own religious liberty is not affected, it held that the same plaintiffs ***could*** bring an Establishment Clause claim based on concrete injury—in that case, economic—caused by government action establishing religion. *Id.* at 430-31. *McGowan* supports Plaintiffs' standing here.

Second, based on *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), this Court should not apply the limited "facially legitimate and bona fide" standard of review from *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) to this case. Although the *Washington* Court did not reach the Establishment Clause claim, in deciding the Due Process claim, it unequivocally rejected the applicability of *Mandel* to challenges to executive policy like this. *See Washington*, 847 F.3d at 1162-63. Defendants cannot relitigate that holding before this Court.

[15] Defendants' argument that the Supreme Court's stay orders in *IRAP* and *Hawaii* precludes this claim, Br. at 23, is astonishing given that the Court said nothing about the basis of its decision and that stay applicants do not need to show that they are more likely than not to prevail on the merits. *See Leiva-Perez v. Holder*, 640 F.3d 962, 966-68 (9th Cir. 2011).



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Finally, regardless of whether the *Mandel* standard applies, Plaintiffs prevail on their Establishment Clause claim when the refugee ban is reviewed in its full context and reality. *See* PI at 13-17, n.16 (listing courts that have held EO-1 and EO-2 invalid even under *Mandel* due to bad faith). Defendants dismiss the relevance of "past judicial determinations regarding previous Executive Orders" and "campaign-trail statements" and argue that "[p]ast actions cannot 'forever taint' future government efforts." Br. at 26, 27 n.15. But the anti-Muslim animus driving the refugee ban is not limited to the past. Since inauguration and even after Plaintiffs filed their motion, the President has repeatedly made his discriminatory intent against Muslims (particularly Muslim immigrants) clear.[16] That the most recent refugee ban was issued by Executive agencies instead of the President does not cure this taint because these agencies are not independent; they serve the President's policy agenda. *See* Art. II, § 1; *Free Enters. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010) (explaining that Article II provides for executive officers to assist the President in discharging his duties and that the President has the authority to remove those officers unless they belong to independent agencies specially created by Congress).[17] Indeed the agencies have faithfully done so throughout the year by implementing the EOs.[18] In light of the overwhelming and unrebutted evidence of animus and its disparate impact on Muslims, the facial neutrality of the refugee ban does not save it from unconstitutionality. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (holding that a facially neutral law violates the Free Exercise Clause, drawing on

[16] *See* Burman Supp. Decl. Exs. A-I (re-tweeting a leader of a British anti-Islam political party, including a video captioned "Muslim migrant beats up Dutch boys on crutches!" even though the person depicted is neither Muslim nor an immigrant); *id.* Exs. Q-S (advocating shooting Muslims with pig's blood); *id.* Ex. N (claiming that assimilation has been "very hard" for Muslims); *id.* Exs. O-P (calling for a travel ban that is not "politically correct"). The President's tweets are official statements according to the government. *Id.* Ex. J.

[17] The involvement of President's advisors in the work of the agencies confirms this. *See, e.g.*, Burman Supp. Decl. Exs. K-L (describing Presidents' advisors' anti-Muslim views and their involvement in agency decision-making); Burman Decl. Ex. VV, ECF 43-5 (describing the anti-Muslim views of the White House senior advisor at DHS who was appointed to implement EOs).

[18] *See* Burman Supp. Decl. Exs. B, E (Deputy Press Secretary stating that President has addressed his perceived threats from Muslims through EOs).



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Establishment Clause and Equal Protection Clause principles that "extend[] beyond facial discrimination").[19]

## III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST WEIGH IN FAVOR OF A NATIONWIDE INJUNCTION

Multiple district and appellate courts have rejected the idea that abstract harm to the government can outweigh the concrete, irreparable harms that Plaintiffs face, instead finding that enjoining an unconstitutional and illegal executive action would promote the public interest. *See e.g.*, *Hawai'i II*, 859 F.3d at 784 ("The public interest is served by 'curtailing unlawful executive action.'") (citation omitted). As this Court and others have done for prior EOs, this Court should issue a nationwide injunction that sets aside the unlawful agency action in its entirety. *See IRAP II*, 857 F.3d at 605 (affirming nationwide injunction because Plaintiffs are dispersed across the United States, immigration laws should be enforced uniformly, and a limited injunction would not cure the Establishment Clause injury); *Hawai'i II*, 859 F.3d at 788 (affirming nationwide injunction because it is appropriate in the immigration context); *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3 2017) (entering nationwide temporary restraining order), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir.), *amended and superseded by*, 858 F.3d 1151 (9th Cir.), *cert. denied sub nom., Golden v. Washington*, No. 17-5424, 2017 WL 3224674 (U.S. Nov. 13, 2017).[20]

## CONCLUSION

For the above reasons and those set forth in Plaintiffs' opening brief, the Court should enter a preliminary injunction blocking the enforcement of the suspension of USRAP for nationals (and stateless persons) of SAO countries and the suspension of the FTJ process.

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[19] Defendants' argument that the District of Maryland declined to enjoin the refugee provision of EO-2, Br. at 27 (citing *IRAP v. Trump*, 241 F. Supp. 3d 539, 565 (D. Md. 2017)), misses the mark. The Court held only that the record was insufficiently developed. Also, EO-2 suspended the entire USRAP, whereas this refugee ban targets Muslim refugees. Defendants also fail to mention that the District of Hawaii ***did*** enjoin the refugee provision of EO-2 based on the Establishment Clause. *Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1140 (D. Haw. 2017).

[20] To the extent the Court adopts a bona fide relationship standard from a prior Supreme Court stay, Plaintiffs request that the Court clarify that all Plaintiffs here would have bona fide relationships based on their ties with family or organizations in the United States providing them with client services. *See* PI at 24 n.27.



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Respectfully submitted,

DATED: December 13, 2017

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 13, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all of the registered CM/ECF users for this case.

I hereby declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED this 13th day of December, 2017.

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